

LIFE ESTATES, A PROPERTY INTEREST OR AN INTEREST IN TRUST

Prepared by:

Leo J. Cushing, Esq., CPA, LL.M.
Thomas J. McIntyre, Esq.
Cushing & Dolan, P.C.
375 Totten Pond Road, Suite 200
Waltham, MA 02451
Phone: 617-523-1555
Fax: 617-523-5653

lcushing@cushingdolan.com
www.cushingdolan.com

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In a recent Superior Court decision, *Daley v. Sudders*, Worcester Superior Court Civil Action Number 15 CV 0188D (“*Daley*”), the Court determined that a life estate was essentially an interest in a trust and, as a result, trust assets were considered available for purposes of MassHealth eligibility. The facts of the case are quite simple and common but the result is troubling.

In *Daley*, an individual who owned a condominium transferred her interest in the condominium to an irrevocable trust and retained a life estate in the property in a quitclaim deed and continued to live there for approximately six years until, for health reasons, the life tenant was admitted to a nursing home. The individual applied for long term care and the application was denied.. The Superior Court upheld the denial for two reasons. First, the Court found that the assets of the trust (*i.e.*, the condominium) were countable because the applicant had retained a life estate in the property. Specifically, the Court stated:

“Property held in an irrevocable trust is a countable asset where it is ‘available according to the terms of the trust[.]’ 130 Code of Massachusetts Regulations section 520.023(C)(1)(d). If a Medicaid applicant can use and occupy her home as a life tenant, then her home is ‘available,’ *See Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439, 441 (2009) (home was available because applicant retained the right to reside there during her lifetime).[¹]

“This court concludes that Mr. and Mrs. Daley’s condominium was available to them because they retained life estates under the deed, and continued to use and live in it after establishing the Trust. It is undisputed that they lived together at the condominium for about six years after they established the Trust until Mr. Daley was required to be admitted into the nursing facility. It is also undisputed that Mrs. Daley continues to live in the property.”

The Court also found that as a result of certain other provisions contained in the trust, the trust assets also nevertheless would be considered countable.

On April 15, 2016, the Appeals Court issued its decision in *Heyn v. Director of the Office of Medicaid*, 89 Mass. App. Ct. 312 (2016). In a footnote, the Heyn Court stated as follows:

“The defendant [Office of Medicaid] makes no argument that the life estate retained by Roche might itself have a value that could affect her eligibility for benefits, stating in its brief that it is “a correct statement of the law under *Cohen* [v. *Commissioner of the Div. of Med. Assistance*, 423 Mass. 399 (1996), cert. denied sub nom. *Kokoska*, by *Kokoska v. Bullen*, 519 U.S. 1057 (1997),] and its progeny” that retention of a life estate does not render an individual ineligible for benefits. We do not consider the question.”

This article focuses only on the Court’s reasoning regarding retention of the life estate and makes no conclusion about the correctness of the other provisions of the trust that caused the assets to be countable. Since life estates are so commonly used and perhaps mistakenly understood, a summary of the benefits and burdens of life estates would seem to be appropriate.

¹ *Doherty* did not involve a retained life estate; rather, in *Doherty* the applicant deeded the entire fee into trust, which contained a provision that allowed the applicant to reside in the home. *Doherty*, 74 Mass. App. Ct. at 441.

The Daley Case in Context of Medicaid Planning.

A popular long term care planning technique is for an individual to transfer their property to an irrevocable trust and retain a life estate in the deed. Under MassHealth Regulations, the assets in the trust would not be considered countable for purposes of MassHealth eligibility except as follows:

“Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.”

130 Code Mass. Regs. § 520.023(C)(1).

In its ruling, the *Daley* Court correctly cites the *Doherty* case for the proposition that, if there are any circumstances pursuant to which the property is available according to the terms of the trust, the trust assets would be countable. *Doherty*, however, did not involve a life estate retained in the deed. In *Doherty*, the Court found that, according to the terms of the trust, the home was available because the applicant retained the right to reside there during lifetime through a provision in the trust, as well as a provision to direct or veto any sale of the property. See *Doherty*, 74 Mass. App. Ct. at 441.

From a planning perspective, to avoid the adverse ramifications of *Doherty*, it had become common practice to transfer real estate to an irrevocable trust in which the grantor/property owner has no interest, yet reserve the life estate to the grantor in the deed. Thus the question: Is a life estate retained in the deed a “property interest” or an “interest in trust” to which the MassHealth Regulations apply?

What is a Life Estate?

Prior to the *Daley* decision, there appeared to be no question that a life estate is a property interest rather than an interest in trust. This is consistent with common law as well as applicable Medicaid Regulations.

The Massachusetts Medicaid Regulations specifically define a life estate as follows:

“[A] life estate is established when all of the remainder legal interest in a property is transferred to another, while the legal interest for life rights to use, occupy, or obtain income or profits from the property is retained.”

130 Code Mass. Regs. § 515.001.

There are no fiduciary obligations created in connection with a life estate. See *Alford v. Thibault*, 83 Mass. App. Ct. 822, 824–825 (2013). To the contrary, the Regulations also define a trust, and in the definition make extensive comment regarding fiduciary obligations::

“[A] legal device satisfying the requirements of state law that places the legal control of property or funds with a trustee. It also includes, but is not limited to, any legal instrument, device, or arrangement that is similar to a trust, including transfers of property by a grantor to an individual or a legal entity with fiduciary obligations so that the property is held, managed, or administered for the benefit of the grantor or others. Such arrangements include, but are not limited to, escrow accounts, pension funds, and similar devices as managed by an individual or entity with fiduciary obligations.”

Id.

Based on this definition, in the absence of a fiduciary obligation, no trust is created.

The Regulations also define a “trustee” as “any individual or legal entity that holds or manages a trust.” *Id.*

Thus, a life estate is a “property interest” as much as tenancies in common, joint tenancies, and tenancies by the entirety are property interests. The life tenant has a present possessory interest in the property and the remaindermen have no obligation and certainly no fiduciary relationship with respect to the life tenant. The life estate is an alienable property interest, and the life tenant may convey his estate to a third party, mortgage the life estate, or lease it. See *Hershman-Tcherepnin v. Tcherepnin*, 452 Mass. 77, 88 & n.20 (2008); *Kent v. Morrison*, 153 Mass. 137, 140 (1891). Discussing life estates generally, the Court in *Hershman-Tcherepnin* noted that “[t]he owner of a possessory life estate, i.e., the life tenant, has a right to the exclusive possession of the land,” 452 Mass. at 88 n.20, citing *Tinkham v. Wind*, 319 Mass. 158, 160 (1946), and that “during the existence of the life estate the remainderman is not entitled to possession until the death of the life tenant.” *Id.*, citing *Daley v. Daley*, 308 Mass. 293 (1941).

The Office of Medicaid has provided additional clarification on this issue in an Eligibility Operations Memorandum 07-18 (December 1, 2007) regarding the calculation of the value of a life estate or remainder interest in real estate. The introduction provides:

“When a MassHealth applicant or member owns or transfers a life estate or remainder interest in real estate, MassHealth must calculate the value of the life estate or remainder interest in order to determine the applicant’s or member’s eligibility for MassHealth.”

The Regulation continues:

“Effective December 1, 2007, MassHealth has revised the procedure to be used to determine the life estate or remainder interest. This procedure applies to transfers subject to penalty periods, sales of a remainder interest or life estate, and the value of the interest for asset determinations.”

More specifically, the Office of Medicaid spells out precisely how to compute the value of the life estate and remainder interests²:

“MassHealth will be using the Internal Revenue Service (IRS) Table S, ‘Single Life Factors Based on Life Table 90 CM,’ in accordance with the interest rates under IRS code 7520 as of the date of the transfer or sale.”

The Operations Manual provides a step-by-step analysis as follows:

- “1. Determine the interest rate that is applicable for the month and year the real estate was transferred or sold. The interest rate can be found in Tiger Tables (an actuarial rate Web site) for IRS code 7520 at www.tigertables.com/7520.htm.
2. Once you have determined the interest rate, go to www.unclefed.com/IRS-Forms/2001/p1457.pdf. . . . Scroll through the introductory pages until you reach page 1, which is the beginning of Table S.
3. The heading on page 1 is “Table S (2.2).” The number in parentheses represents the interest rate. Scroll through the pages until you reach the page of Table S for the interest rate you determined in Step 1.
4. Once you are at the correct Table S page, find the applicant’s age at the time of transfer or sale. Look across for the factor for the life estate or remainder interest, depending upon what you are valuing.
5. When the applicant has transferred an interest in real estate, multiply the appropriate life estate or remainder interest factor by the fair market value as of the date of transfer. This is the figure to be used to determine the period of ineligibility.
6. When real estate in which the applicant or member holds a life estate is being sold, multiply the appropriate life estate factor by the sale price. This figure is the value of the applicant’s life estate, and the amount he or she should receive from the proceeds of the sale or the amount that will be attributed to the applicant or member.”

The Operations Memorandum provides two specific examples:

Example A

² The life table 90 CM has been updated to 2000 CM.

In June of 2005, an applicant transferred his real estate to his children and retained a life estate. The tax-assessed value of the property in June 2005 was \$250,000.00 and the applicant was 75 years old at that time.

The Tiger Tables Web site shows the interest rate in June 2005 was 4.8%, and Table S (4.8), on page 14, shows that the factor for a remainder interest for a 75-year-old person is .62575.

The calculation is as follows:

$$\begin{array}{r} \$250,000.00 \\ \times \quad .62575 \\ \hline \$156,437.50 \end{array}$$

\$156,437.50 is the value of the transferred real estate and the figure that should be used to calculate the period of ineligibility (penalty period).

Example B

A MassHealth member owns a life estate in real estate and, in August 2007, the real estate is sold for \$300,000.00. The member is 80 years old. The Tiger Tables Web site shows the interest rate in August 2007 was 6.2%. Table S (6.2), on page 21, shows the life estate factor for an 80-year-old person is .36418.

The calculation is as follows:

$$\begin{array}{r} \$300,000.00 \\ \times \quad .36418 \\ \hline \$109,254.00 \end{array}$$

\$109,254.00 is the portion of the sales proceeds to which the member is entitled.

Based upon the foregoing analysis in Example B, if the property subject to a life estate is sold, \$109,254.00 would be payable to the owner of the life estate in exchange for the life estate owner's interest and the balance would be paid to the remainderman.

Income Tax Consequences:

The portion of the sale proceeds paid to the life tenant would be eligible for the capital gain tax exclusion under I.R.C .§ 121. The amount paid to the remainderman would not be

eligible for the capital gain tax exclusion unless one or more of the remainderman actually lived in the property and could qualify having owned and used it as their home for two out of the last five years. See Rev. Rul. 71-122. In determining the amount of the gain, the taxpayer's basis in the property is allocated according to the Life Tables as well. Rev. Rul. 66-159; Rev. Rul. 85-45; I.R.S. Priv. Ltr. Rul. 91-180-017.

The Life Estate as the MassHealth Applicant's Home:

A home is a noncountable asset for purposes of MassHealth eligibility provided the owner's equity interest falls below \$828,000. The applicant's interest in the property as a life tenant is considered the applicant's home and therefore a noncountable asset as long as the value of the life estate falls below the threshold amount of \$828,000. Thus, one benefit for the use of a life estate is that the older the individual, the lower the value of the life interest.

If we assume the facts of Example B above (*i.e.*, the life estate portion is .36418), but change the value of the property to \$1,000,000, the value of the home would be considered \$364,118 instead of \$1,000,000 for purposes of MassHealth eligibility, and therefore the life estate/home would be considered noncountable.

MassHealth Estate Recovery:

At the life tenant's death, the life estate ends and the property vests in the remaindermen. A death certificate is all that is necessary to be recorded to evidence the termination of the life estate at which point the remaindermen become full owners of the property. If the MassHealth applicant was in a nursing home, the applicant would be liable to repay benefits paid upon death. Currently, the Division of Medical Assistance is permitted to recover from the estate of a decedent only against the "estate of a deceased member," which is limited to "all real and

personal property and other assets in the member's *probate estate*." 130 Code Mass. Regs. § 515.011(A)(2) (emphasis added). This rule may be changing and, as a result, life estates may become less effective in the Medicaid planning arena. But currently, assets outside the probate estate are protected.

Under federal law, which governs generally the extent to which states can implement applicable Medicaid eligibility regulations, a state is permitted to include as a matter of estate recovery assets outside the probate estate, such as interests in trusts, life estates, and joint interests.

The Governor's fiscal year 2017 budget includes just such a proposal to expand MassHealth estate recovery to include, among other nonprobate assets, life estates. This would include jointly owned property, accounts with beneficiary designations, certain assets and, of course, life estates and would apply for anyone who became eligible for medical assistance on or after July 1, 2016.

A question arises as to the extent and scope of the recovery: Would the recovery be limited to the value of the decedent's interest in the life estate as of the moment of death or would it include the full value of the property?

This proposal was previously enacted by the Massachusetts Legislature in July 2003, see St. 2003, c. 26, § 329,³ only to be repealed by the Legislature on July 23, 2004. See St. 2004,

³ This session law amended G.L. c. 118E, § 31, to provide the following definition:

"For purposes of this section, "estate" shall mean any interest in real and personal property and other assets in which the individual immediately prior to death had any legal title or interest, to the extent of such interest. This includes interests in real and personal property and other assets that would pass to a survivor, heir, or assignee of the decedent through joint tenancy, tenancy by the entirety, life estate, living trust, right of survivorship, beneficiary designation, or other arrangement."

c. 149, § 166.⁴ Other states have similarly dealt with this issue. New York passed an expanded estate recovery statute on April 4, 2011, see 2011 N.Y. Sess. Laws 263, 385, only to repeal it less than a year later on March 27, 2012. See 2012 N.Y. Sess. Laws 404, 430. New Hampshire has expanded the definition of estate recovery to include life estates, and this law has not been repealed. See N.H. Rev. Stat. § 167:14-a(VI)(a).⁵ Under New Hampshire law, the value of the life tenant's interest is to be determined as of the moment before death using actuarial tables based on the age of the decedent. *Id.*

In Massachusetts, not only was the legislation repealed, but the Commonwealth was required to refund any monies collected as a result of enforcing the lien against nonprobate assets. The expansion of estate recovery to nonprobate assets has been strongly opposed by Bar Associations and professional organizations such as Massachusetts chapter of the National Academy of Elder Law Attorneys (“NAELA”).

Gift Aspects of a Life Estate:

A gift of property with a retained life estate represents a gift of the remainder interest. The value of the gift is determined by reference to the so-called 7520 Tables. This is virtually identical to the analysis included in Eligibility Operations Memorandum 07-18 dated December

⁴ The session law struck the previous definition and inserted the following language: “For purposes of this section, “estate” shall mean all real and personal property and other assets includable in the decedent’s probate estate under the General Laws.”

⁵ N.H. Rev. Stat. § 167:14-a(VI)(a) provides:

“For purposes of recovering the costs of medical assistance, the estate of a recipient shall include all property, real or personal, which at the time of a recipient's death was held by the recipient in joint tenancy with rights of survivorship, or life estate for all such title or interest established on or after July 1, 2005. Recovery shall be limited to the value of the recipient's ownership interest and in no case shall such amount exceed the total amount of medical assistance provided to the deceased recipient, nor shall recovery extend to any interest in property, real or personal, for which a non-recipient owner paid fair market value at the time said ownership interest was acquired.”

1, 2007, wherein the value of the gift for gift tax purposes would be equal to the value of the transfer to determine the so-called period of ineligibility.

In *Example A* above, the value of the gift would be \$156,437.50. This would fall far below the current lifetime gift tax exemption of \$5,450,000 but certainly in excess of the annual exclusion amount of \$14,000 per year per donee. It is unclear as to whether the gift of the remainder interest would be eligible for the annual exclusion of \$14,000 per year per donee inasmuch as, to be eligible for the annual gift tax exclusion, the interest must be a gift of a present interest and not a future interest. This would need to be determined by state law and an argument can be made that, while the remainder interest is not a “possessory” interest, it is certainly a property interest which can be sold. There is no Massachusetts gift tax but the value of the gift would reduce the Massachusetts so-called “filing threshold.”

Estate Tax Rules:

Under the applicable estate tax rules, the life estate is essentially treated as an incomplete gift. Pursuant to I.R.C. § 2036, the entire value of the property in which the decedent retained a life estate is includible in the decedent’s estate for estate tax purposes no matter how long ago the property was transferred.⁶

For example, if, as of the date of the decedent’s death, the property in Example A was worth \$1,000,000, this amount would be includible in the decedent’s estate. Whether the property would give rise to an estate tax depends upon other assets includible in the estate and the so-called exclusion amounts.

⁶ In *Glaser v. United States*, 306 F.2d 57, 60–61 (7th Cir. 1962), the Court held that where a husband and wife who owned property jointly, but reserved a life estate to themselves and to the survivor of them, one-half of the value of the property was to be included in the estate of each spouse upon his or her death.

For federal estate tax purposes, the inclusion of the property would not give rise to an estate tax unless the property, together with other assets, exceeded \$5,450,000. In Massachusetts, however, if and to the extent the property, together with other assets, exceeds the \$1,000,000 Massachusetts filing threshold, an estate tax payable to Massachusetts would be due. (The amount of the estate tax is approximately 10% of the excess over the \$1,000,000 exemption, although the calculation is more complicated.)

Taxpayer's Basis:

The includibility of the asset in the decedent's estate can have a positive impact and save the family money in the long run attributable to the so-called basis rules. In this regard, the remainderman would be receiving the property at a step-up in basis—*i.e.*, equal to the fair market value of the property on the date of death under I.R.C. § 1014(a). If, for example, the property is worth \$1,000,000 and the decedent's basis before death in the property was zero, the taxable gain to the remainderman when the property is sold after death would be zero, assuming the property was sold for \$1,000,000. If, on the other hand, the property had been gifted outright to the children with no retained life interest and the property was sold after death, the gain would be \$1,000,000, which would cause a capital gain tax of approximately \$250,000. See I.R.C. § 1015 (regarding carryover basis rules).

Legal Liability of the Remainderman:

Other issues regarding life estates have been addressed by various courts in numerous other contexts. One question dealing with liability is whether the remaindermen owe any duty of care to either life tenant or to the life tenant's invitees. Under state law, the life tenant is responsible for paying all expenses attributable to the property as though the life tenant was an

owner which would include property taxes, maintenance, upkeep, and the obligation to prevent “waste.” *Matteson v. Walsh*, 79 Mass. App. Ct. 402, 406 (2001). As a result, a remainderman owes no duty of care to the life tenant or to the life tenant’s invitees, absent a duty voluntarily assumed by the remainderman. *Delprete, Adm. v. Ferrante, et al.*, Lawyers Weekly No. 16-101, (King, J.), Suffolk No. 90-2152B. On the other hand, a life tenant owes a duty to the remaindermen to prevent waste on the property; in the event the life tenant does commit waste, the matter could result of a forfeiture of her life estate. See *Matteson, supra* at 411; G.L. c. 242, § 1. This is extremely important because the children-remaindermen would not want to be responsible for someone who is injured on the premises legally as a result of the negligence of the life tenant.

Homestead Exemptions:

The Massachusetts homestead statute was revised in 2010 with the new current version becoming effective on March 16, 2011. Prior to the 2010 revision, neither a life tenant nor a remainderman were permitted to declare a homestead with respect to their respective property interests.

In the 2010 revised homestead statute, the definition of “owner” was changed to include life tenants, but still did not include remaindermen. See G.L. c. 188, § 1, as amended by St. 2010, c. 395. “Owner” is now defined as follows:

“[a] natural person who is a sole owner, joint tenant, tenant by the entirety, tenant in common, life estate holder or holder of a beneficial interest in a trust.”

Id. In *In re Gordon*, the holder of a remainder interest in real property argued that she was an “owner” under the homestead statute. 487 B.R. 600, 601 (B.A.P. 1st Cir. 2013). The

Bankruptcy Panel rejected this argument under a plain reading of the statutory language, holding that a remainderman is not an “owner” under the homestead law as written. *Id.* at 603.

Currently, there is a bill pending in the legislature to clarify homesteads and amend the definition of “owner” under G.L. c. 188, § 1, to include remaindermen. The bill provides the following definition of owner:

“A natural person who is a sole owner, joint tenant, tenant by the entirety, tenant in common, life estate holder, remainderman, or holder of a beneficial interest in a trust, including any of the foregoing who is a lessee-shareholder of a residential cooperative housing unit.”

S.754, 189th Gen. Court (Mass. 2015). This is not yet law.

Petition to Partition:

A life tenant whose interest is a possessory interest has a right to petition to partition the property pursuant to G.L. c. 241, § 1, as against others with a present possessory interest.

However, a remainderman, whose interest is neither present nor possessory, does not have the right to petition the property for partition as against a life tenant with a present interest. *Bernat v. Kivior*, 22 Mass. App. Ct. 957 (1986).

Life Estates and Remainder Interests in Bankruptcy:

There seems to be no shortage of bankruptcy cases dealing with life estates and remainderman in the context of Chapter 7 and Chapter 11 filings, and in many of the cases the real question is whether the interest being addressed by the court is even a life estate or a remainder interest.

For example, in *Hajjar v. Bronstein*, Case No. 07-12068 JNF (Mass. B.R. 2008), the debtor, by quitclaim deed,

“For consideration paid and in full consideration of one dollar (\$1.00), granted to Joseph C. Hajjar, Barbara A. Niles, and Lorraine M. Carlson, as tenants in common, with quitclaim covenants, the land in that part of Quincy, Norfolk County, called Welling Park.”

Following the metes and bounds description of the property, the deed then provided:

“The grantor hereby grants to Barbara A. Niles the right to use and enjoyment of the above premises for and during her lifetime or as long as she so desires with the provision that said life tenant shall be responsible for the payment of taxes and maintenance of said premises during the period of said occupancy, specifically denying any right by the grantor to partition.”

The question arose as to whether a life estate had been created inasmuch as the deed seemed to give away the entire fee interest before trying to grant a life estate. See also *Bernat v. Kivior, supra*.⁷

The Bankruptcy Court found that, in this case, *Hajjar*, the debtor was at minimum a remainder-interest holder. The trustee in bankruptcy had commenced an adversary proceeding to conduct a sale of the entire property pursuant to 11 U.S.C. § 363(h), which provides as follows:

“Notwithstanding subsection (f) of this section, the trustee may sell both *the estate’s interest*, under subsection (b) or (c) of this section, *and the interest of any co-owner in property* in which the debtor had, at the time of the commencement of the case, an undivided interest as a *tenant in common, joint tenant, or tenant by the entirety*, only if—

- (1) partition in kind of such property among the estate and such co-owners is impracticable;

⁷ The deed in this case provided: “[S]aid premises are conveyed subject to the rights of Helen V. Kivior to occupy the granted premises for the rest of her life” but only after the metes and bounds description of the property. The Court noted the language and placement in the document, as inartistic. A grantor clause conveying to “Helen V. Kivior for life, remainder to Alice Frances and Ceelia, as joint tenants” would have been a clearer manifestation of intent. Nevertheless, the Court held a life estate had been created, despite its inartful placement.

- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(emphasis added). The Court ruled that, since the remainder interest was not among the listed interests, pursuant to which a trustee could sell the entire property and not just the debtor's interest, the trustee was unable to sell the entire fee, including the life tenant's interest. The bankruptcy trustee, however, will be entitled to sell the debtor's interest in the property (meaning the remainder interest) subject to the interests of the others.

Drafting Problems:

Typically, a conveyance "to B during his life" or "to B until his death" will create a life estate in B. See *Hershman-Tcherepnin v. Tcherepnin*, 52 Mass. 77, 87–88 (2008). In the *Hajjar* case, the court noted that the Will was not the work of "an accomplished conveyancer" and that the testator did not use "the classic formulation of a life estate." *Hajjar, supra*.

Mortgages and Due-On-Sale Clauses:

Reverse mortgages are popular among the elderly. At one time, a life estate interest in property was all that was necessary in order to obtain a reverse mortgage. This has changed.

Consider the following provision in regulations concerning reverse mortgages:

"(a) *Title*. A mortgage must be on real estate held in fee simple, or on a leasehold under a lease for not less than 99 years which is renewable, or under a lease having a remaining period of not less than 50 years beyond the date of the 100th birthday of the youngest mortgagor."

24 Code Fed. Regs. § 206.45(a). Despite this prohibition, a life tenant still may enter into a reverse mortgage if all the remaindermen also execute the mortgage (but need not execute the note or loan agreement). See HUD Mortgagee Letter 97-15 (“If an eligible mortgagor holds only a life estate when the mortgage is executed, all holders of any future interest in the property (remainder or reversion) will also be required to execute the mortgage to ensure that the mortgage is secured by a fee simple interest.”).

A due-on-sale clause would not be triggered if property is transferred and the mortgagor retained a life estate. A typical clause in a reverse mortgage looks like this:

“Lender may require immediate payment in full of all outstanding principal and accrued interest if a Borrower conveys all of his or her title to the Property and no other Borrower retains title to the Property in fee simple or on a leasehold interest as set forth in 24 CFR 206.45(a). A deferral of due and payable status is not permitted when a Lender requires immediate payment under this paragraph.”

Legal malpractice for failure to record a life estate.

A failure to reserve a life estate could even create professional liability. In a recent rather unusual case, the Massachusetts Appeal Court upheld a jury verdict involving a legal malpractice claim where an elderly woman transferred property without the reservation of a life estate and concluded that the woman would be entitled to damages for professional malpractice despite the fact that there were no actual damages proved in court. In *Brissette v. Ryan*, 88 Mass. App. Ct. 606 (2015), the Court held that the jury could have found that the attorney’s advice was wrong both about eligibility for Medicaid and about the possibility of a Medicaid lien and the suggestion that a life estate was not necessary. *Id.* at 556. The Court determined that the mother was deprived of a property right—*i.e.*, a life estate—and that “the value of a property right lies in, among other things, the right it gives one to possession and the free alienation of the

property.” *Id.* at 557–558. The Court concluded that it was proper for a jury to determine that the individual was damaged by the loss even without proof that she had any current plan to exercise her right to alienation. *Id.* at 558.

Current Developments:

As a result of the Division’s aggressive posture towards MassHealth eligibility in income-only irrevocable trusts, practitioners have considered using life estates without any grant to the irrevocable trust. Two types of life estate deeds have been discussed. The first is so-called “Lady Bird Deed,” where the grantor retains a life estate together with the right to sell the property. For MassHealth purposes, since the grantor has the right to sell the property, MassHealth has equated these types of transfers to being transfers to revocable trusts and therefore have found them to be includible (we’ll call it “countable” for MassHealth eligibility purposes).

Specifically, 130 Code Mass. Regs. § 520.019(J)(1) provides:

“If the language of the document creating the life estate explicitly states that the owner of the life estate has the power to sell the entire property (not simply the life estate), then the creation of this type of life estate will be treated as a trust.”

This language, of course, further clarifies that a life estate is not an interest in trust, because MassHealth concludes that only if the life estate is coupled with the right to sell the entire property would it be considered a trust.

Another option that was popular and may become more popular would be a deed where the grantor retained a life estate and a limited power of appointment in the deed itself. Here, there is no MassHealth authority to suggest that the retention of such a limited power in the deed would cause the property to become a countable asset.

The estate and gift tax ramifications would seem to be quite straight forward. The gift would be an incomplete gift inasmuch as the grantor retained the right to designate the final beneficiary, and the property would be includible in the grantor's estate thereby providing the heirs with a step-up in basis equal to the fair market value on the date of death.

From a conveyancing point of view, however, the specific language in the deed retaining the limited power of appointment must be carefully tailored. For example, the deed should be precise as to how such power can be exercised (*i.e.*, by Will) and for how long (*i.e.*, within 90 days after the date of the grantor's death). An example of grant reserving a power of appointment would be as follows:

“Grantor hereby grants to his children, A, B, and C, as tenants in common, the following premises but the Grantor hereby reserves the power exercisable by an instrument recorded at the Registry of Deeds during his lifetime to appoint the premises, outright or upon trusts, conditions or limitations, to any one or more of one or more of his issue (or perhaps their then current or surviving spouses).”

In theory, the grantor would have the right to change the final owners of the property, but then the question arises whether the grantees received any real property interest which could be the subject of a homestead (if the statute is changed) or otherwise.

Note that in *Lucareli v. Lucareli*, 237 Wisc. 2d 487 (2000), the Wisconsin Supreme Court ruled that an attempt to reserve a limited power of appointment in a warranty deed was not permissible because warranty deeds, by statute, do not permit such a reservation. *Id.* at 492–493. This, of course, means that whether a retained power is permissible would need to be decided on a state-by-state basis.

Conclusion:

Based on the foregoing, it is clear that a life estate is a property interest and not an interest in trust as found by the *Daley* court. In fact, the basis of professional liability in *Brissette* was premised on the life estate as a property interest and the deprivation of rights incident thereto.