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wanted to share this information with you.

LIFE ESTATE INTERESTS

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Life estate - an interest whereby the person possessing the life estate interest may use, reside in, and benefit from a piece of real estate – such as receiving rent from the property (whether a residence, commercial property, or vacant land) for a specific person’s lifetime (usually the same person’s lifetime)

Life estate pur autre vie - where the life tenant’s interest is not based on his/her life (but based on the lifetime of another person)

Life tenant - the person who has the life estate interest

Remainderman - the person(s) (or charities) who will be 100% owner(s) of the property after the life estate interest ends (normally when the life tenant dies)

1. How is a life estate interest created?

A life estate can be created by...

- (a) a deed
 - (b) a will
 - (c) a trust
 - (d) a specific state statute
 - (e) a settlement agreement in a divorce case (or a court order)
- i. A person might create a life estate interest for him/herself, reserving such interest when **signing a deed** to transfer property to one or more other persons.
 - ii. A person might state in his/her **will or trust** that one or more persons are to be “given” a life estate interest at the testator’s/trustor’s death.
 - iii. A person might “**purchase**” a **life estate interest** in a piece of real estate.
 - iv. A life estate interest might be created by a **state’s statute** under specific circumstances. (For example, Rhode Island allows a surviving spouse to waive the

bequests designated for the surviving spouse and claim a life estate interest in the decedent's real estate. See G.L. 1056 § 33-25-2)

- v. A ex-wife (or ex-husband) might be “given” a life estate interest in the family home (or a vacation home) in a divorce settlement agreement.

2. Why is a life estate used?

The benefits of keeping a life estate interest for oneself are...

- (a) to be able to reside in the property (if it is residential property)
- (b) to be able to collect the rent money (if the property is rented out)
- (c) to be able to farm the land (if it is farmland), or collect a fee (or percentage of crops) if the life tenant allows another person to farm the land
- (d) to be able to receive the real estate tax benefits that a homeowner of residential real estate qualifies for when residing in the property as one's principal residence (general homestead exemption, senior citizen homestead exemption, senior citizen freeze)
- (e) to be able to receive some of the sales proceeds if the property is sold during the life tenant's lifetime (and to qualify for the exemption under federal law to exclude up to \$250,000 of gain) – this can be a detriment if the home is sold and the grantor later enters a nursing home and goes on Medicaid
- (f) to know that the home will pass at death not subject to one's debts (**except** that in some states, the states may make a claim against the property if the grantor had received Medicaid benefits) unless the transfer is a fraudulent conveyance

A person might grant a life estate interest to another person so that the life tenant can reside in the property...

- (a) and allow the owner granting the life estate to ultimately pass the property onto others (after the life tenant's death)

Example: Dad remarries after mom's death. He wants to allow his new wife Gail to reside in the home after his death, but have the house ultimately pass to his children from his first marriage.

- (b) so that the property is not fully subject to the life tenant's debts (lawsuits, nursing home expenses, etc.)
- (c) so that the property passes without being subject to probate (and without having a title company charge a bond in lieu of probate fee)
- (d) as compared to an outright transfer by quit claim deed or warranty deed, the grantor might provide the remaindermen with a stepped-up basis for capital gains tax purposes {except that IRC section 1022 (d)(1)(A) has stopped the stepped-up basis, at least while such IRS section is in effect in 2010}
- (e) because the life tenant wants to purchase a life estate (and the grantor agrees) **for Medicaid planning purposes** (e.g., Mom purchases a life estate interest in daughter's home and Mom resides in the home with daughter)
- (f) because the life tenant wants a life estate interest in return for using his/her money to add an addition to the property, improve the property, make repairs, or pay back taxes

A will or trust might grant various possible benefits to a person...

- a life estate interest,
- a “right to occupy” property for a specific period of time (months or years),

the “right to occupy” property for one’s lifetime (without such interest being a life estate),

the right to receive rent from a property (without such interest being a life estate).

3. In Wisconsin, does a person lose any benefits by transferring property and keeping a life estate for himself?

(a) You lose the senior citizens tax deferral benefit

(b) You must normally get the agreement of others to sell the property (and you won’t receive all of the sales proceeds, only part of the sales proceeds based on your age at the time of the sale)

(c) You won’t be able to easily take a mortgage out on the property (you need the remaindermen to sign also)

4. What responsibilities/duties does a life tenant have?

(a) The life tenant should protect and maintain the property (and keep insurance on the property as to his/her interest)

(b) The life tenant should pay the real estate taxes on the property (unless otherwise specified by the document granting the life estate interest)

(c) The life tenant should pay association dues, utilities, and make necessary repairs (unless otherwise specified by the document granting the life estate interest)

(d) The life tenant should pay the interest on any mortgages (unless specified otherwise specified by the document granting the life estate interest)

5. What words in a will or trust could create a life estate interest?

Some possible language could be...

(a) Example: I grant **a life estate interest** to my daughter Susan Jones in the following property: 36 Lewis Lane, Grayslake, IL.

(b) Example: I give my son Samuel Smith **a life estate** in my principal residence (142 Main Street, Harrisville, IL).

(c) Example: I give my wife Wilma Rockstone the right to **occupy, use and benefit** from my principal residence (48 Grass Road, Bestville, IL) for the duration of her lifetime. If the words “right to occupy” are used with the word “use”, then there is a good chance the interest given will be considered a life estate interest.

(d) 1934 Massachusetts case of Thayer v. Shorey: grantor reserved “*to herself the right to occupy, rent, or improve the granted premises during her life*”

(e) 1950 Massachusetts case of Langlois v. Langlois: a testamentary bequest “*to hold and use [the property] as she see[s] fit during her lifetime*”

(f) 1966 Massachusetts case of Breare v. Assessors of Peabody: grantor reserved “*the right to occupy the premises with the grantee during the term of [the grantor’s] natural life*”

(g) 1986 Massachusetts case of Kernat v Kivior: testamentary bequest whereby “*Said premises are conveyed subject to the rights of Helen V. Kivior to occupy the granted premises for the rest of her life.*”

6. What is a “qualified life estate interest”?

What I call “**a qualified life estate**” could last for the beneficiary’s lifetime, or it could end early for a stated reason, such as...

(a) if the beneficiary (a surviving wife) remarries or cohabits with a member of the opposite sex (who isn’t a blood relative of the wife, such as a son or brother; or married to a relative of the wife, such as a son-in-law or brother-in-law)

(b) if the beneficiary stops using the property as his/her principal residence for a specific period of time (such as 180 days in a calendar year) – the beneficiary might want to spend winter months in a warmer state (so the client should probably allow for her to be out of the home for some time during the year)

(c) if the beneficiary enters an assisted living facility or nursing home (and is there for a specific period of time, or the beneficiary’s doctor states in writing that s/he cannot live alone in the home anymore)

(d) if the beneficiary does not fulfill some specific duty (such as paying the real estate taxes)

7. What is some sample language for a qualified life estate?

Upon my death, if Sam Jones (my father) survives me, then I give Sam Jones a “**qualified life estate**” in the property known as 1236 Sailor Drive, Greatville, IL. Sam shall be entitled to use the property until the first of the following events occurs, at which time the “qualified life estate” shall terminate:

(a) Sam’s death,

(b) When Sam has been residing for one hundred twenty (120) consecutive days in a nursing home (after Sam has entered a nursing home, then also counting any days during which time where Sam is in an assisted living facility or a hospital as being days in the nursing home).

(c) When Sam has been residing for one hundred twenty (120) consecutive days in an assisted living facility (after having entered such facility, then also counting any days during which time where Sam is in a hospital or nursing home as being days in the assisted living facility).

(d) if the real estate taxes are sold and need to be redeemed

During the time period when Sam enjoys the “qualified life estate”, the following expenses related to the real estate shall be paid by Sam in a timely manner:

(a) homeowner’s insurance,

(b) real estate taxes,

(c) general assessments and special assessments (if any),

(d) homeowner’s association fees (if any),

(e) minor repairs (repairs costing up to \$1,000).

Major repairs (repairs costing more than \$1,000) shall be paid first by the \$10,000 that I have designated be held in trust for such purpose, and then one-half (1/2) by Sam and one-half (1/2) equally among the remaindermen (and if any such persons fail to pay their fair share within 60 days of being notified in writing, then such person’s interest shall be void and terminate.)

If an insurance claim is made, and less than half of the home has been destroyed (value wise -- not counting appliances, drapery/blinds, and personal possessions), then the insurance proceeds received shall be used to repair the home in a timely manner (and the remaindermen shall be promptly notified in writing that the building/s will be repaired, and what monies have been received) and destroyed appliances shall also be purchased with such funds.

If an insurance claim is made, and more than half of the home has been destroyed (value wise – not counting appliances, drapery/blinds, and personal possessions), then the insurance proceeds received shall first be used to completely tear down the home, and appropriately dispose of the waste material, in a manner that satisfies applicable laws, rules, and ordinances (but the life tenant need not rebuild the building/s if the life tenant chooses not to do so), and any remaining monies shall be considered 100% to the benefit of the life tenant.

Upon Sam's death, then the home shall be transferred to Alex Albert per stirpes, Beth Banks per stirpes, and Cora Carver per stirpes.

8. How does a “right to occupy” property differ from a “life estate” interest?

The person who has only the right to occupy property only has the right to live in the home. Such person doesn't have the right to rent the home out and receive the rent money, or to take any crops or timber from the land. However, the person who has the right to occupy the property doesn't have a duty to maintain the property.

9. What terms might create a “right to occupy” rather than a life estate?

- (a) the right to occupy the premises (1971 NY case: Bartholomew v. Horan)
- (b) the right to “make their home” on the premises (1953 NY case: Rizzo v. Mataranglo)
- (c) the right to “live in” premises (1959 NY case: In re O'Neil's Will)

10. What is a lady bird deed?

A lady bird deed (also called an enhanced life estate deed, or transfer on death deed) allows the grantor to sign and record a deed (keep a life estate interest for him/herself), have remaindermen listed on the deed to own the property at the grantor's death, but allow the grantor to sell or gift the property during his lifetime (and keep all the sales proceeds). This type of deed is named after former First Lady “Lady Bird Johnson”, since President Johnson apparently used such a deed to transfer property to his wife.

Some states that use lady bird deeds are: Florida, Texas, Vermont.

11. Can the life tenant take out any loans/mortgages against the property?

A lender would most likely want the life tenant and the remaindermen to all sign for a mortgage. A life tenant alone, should not be able to get a loan or mortgage against the property.

12. Can a person transfer property (reserving a life estate) if there are already loans against the property?

Yes, if it is the grantor's principal residence and the transfer is to one's spouse and/or to one's children. A 1982 federal law (the Garn/St. German Depository Institutions Act of 1982, 12 U.S.C. §1701j-3) prohibits the lender from calling the loan due if the property is transferred to one's spouse or to one's child (or into a trust for one's own benefit).

13. Who must pay for repairs to the property?

Normally, the life tenant needs to pay for repairs. However, a testator or trustor may decide to leave money or other assets to partially or fully pay for any repairs. It is an issue that should be discussed when a client wants to give someone a life estate interest by will or trust. Additionally, the testator/trustor could put the burden of paying for repairs on the remaindermen (see 1997 Washington case: In the Estate of Campbell).

14. What problems can occur between the life tenant and others?

Example: George owns a home in Grayslake. Upon his death, his will granted his wife Ellen a life estate, with the remainder to George's 2 children (from his first marriage). Ellen lived 18 years after George died. Ellen did not properly maintain the property. There were numerous problems with the home when Ellen died (as she did not keep up the home properly), and George's children filed a claim against Ellen's estate. Ellen had a home when she died (which she was not residing in), which was the main asset of her estate. (Had she transferred it to her children and retained a life estate, then George's children may not have gotten any money

for repairs, and they would have had to pay for the real estate taxes too.) How might George have come up with a better plan?

15. Can a life tenant or a remainderman force the sale of the property?

It depends on the state, but the normal answer would be no. However, there are some cases where courts have allowed the property to be sold over the objections of the remaindermen.

16. If there is a mortgage on the property, and the governing document (will or trust) does not address whether the life tenant needs to pay the mortgage (interest and principal), what are the life tenant's obligations as to the mortgage?

Generally, the life tenant would need to pay the interest on the mortgage, and the remaindermen would be responsible to pay the principal.

17. Does a gift tax return need to be filed with the IRS if the client makes a lifetime transfer of real estate and keeps a life estate interest?

Yes, the IRS expects a gift tax return to be filed by April 15th of the following year.

18. What happens if a life tenant has a federal tax lien against him/her?

The lien attaches against the life tenant's interest in the property. Upon the life tenant's death, the lien terminates against the property, and the property passes to the remaindermen without such lien.

19. If a property were destroyed, and insurance proceeds are paid, must the property be rebuilt with such money, or who can keep such money if the property is not rebuilt?

The answer can depend on what state the property is located in, but **the majority view** holds that the life tenant need not keep insurance on the property for the remainderman's benefit (unless an exception applies).

In the 2007 West Virginia case of **Opha L. Keith Estate v. Keith** (647 S.E.2d 731), the Supreme Court of Appeals decided that the remaindermen were not entitled to any of the insurance proceeds. The court stated, "...we determine that under well-established principles of contract law a remainderman has no interest in or entitlement to the insurance proceeds issued in connection with an insurance policy which was procured by and entirely paid for by a life estate tenant".

Emogene Keith died in 1992, and gave a life estate interest to her husband Opha L. Keith, with the remainder interest to David Keith (Opha's son). The home was destroyed by fire in January 2004. In February 2004, the insurance company issued a check in the amount of \$54,000 to Opha, Emogene (the insurance company had not been previously notified of her death), and David. The money was deposited with the clerk of the court until it could be resolved who was entitled to the money. The court stated that the majority view would allow the life tenant to keep all of the insurance proceeds, and adopted that view in ruling for the life tenant.

The appellate court stated, "*The insurance policy is a personal contract; both the life tenant and the remainderman have insurable interests in the property; if the life tenant procures the insurance for his personal indemnity, the remainderman, who did not procure the insurance, has no cause of complaint, even if the proceeds of the life tenant's insurance contract exceed the sum which would indemnify him or his personal loss; the proceeds are of the insurance contract, not of the property, and do not stand in the place of the property destroyed.*"

The court listed three exceptions to the majority rule that the life tenant is entitled to all of the insurance proceeds. The court stated, "*Those exceptions to the rule operate when (1) the instrument creating the estate expressly provides that the life tenant will insure the property for*

the benefit of the remainderman; (2) the life tenant and the remainderman agree to this requirement; or (3) if a fiduciary relationship exists between the life tenant and the remainderman.”

20. What are some cases which held the minority view, that the life tenant should insure the property for the remainderman’s benefit?

Crisp Co. Lumber Co. v. Bridges (200 S.E.777 – Ga. 1939)

Fitterling v Johnson Co. Mut. Fire Ins. Co. (112 S.W2d 347 – Mo. App. 1938)

21. What normal issues need to be addressed when a lawyer discusses a life estate (or “right to occupy”) with a client?

(a) how long shall the right exist

The beneficiary’s lifetime?

Until the beneficiary remarries, permanently leaves the property (possibly having moved into an assisted living facility or nursing home)?

(b) who will pay the real estate taxes, homeowner’s insurance (and what happens to any insurance proceeds received), association dues, general and specific assessments, minor repairs, major repairs?

(c) who will pay for any mortgages (interest? principal?)

(d) should there be a list of the types of repairs and upkeep that the life tenant is required to pay for (new roof, painting, blacktopping the driveway, water sealing if the basement leaks, replacement of a sump pump, new furnace, new central air conditioning equipment)?

(e) should anyone have the right to enter the property (once a year, twice a year) to check on the upkeep of the property? If yes, what prior notice should be given? What if the life tenant refuses to allow entry onto the property?

(f) should the life tenant be required to spend a minimum every year or every other year for the upkeep of the property? If yes, should the items that money could be spent on be itemized?

(g) how can a remainderman validly declare that a life tenant’s interest has ended because the life tenant did not fulfill his/her duties as a life tenant?

(i) if any of the property is taken by eminent domain, who should be entitled to receive the sales proceeds?

22. What if there are minerals, timber, gas, oil, coal, or other valuable items on the property that can be extracted for profit? Who should receive the money? Should there be any limitations on how much a life tenant can extract (or allow others to extract) from the property? Does it matter if a valuable asset were discovered on the property after the life tenant’s interest had begun (where the prior owner was not aware of such valuable asset)?

There are several possible scenarios:

(a) the prior owner may have had minerals, timber, gas, oil, or coal being removed from the property (possibly with a signed lease whereby a company was taking out such materials), and the life tenant will be able to continue benefiting from such lease

(b) the prior owner may not have had any minerals, timber, gas, oil, or coal being removed (and no leases are in place to allow a company to take such materials from the land), and the life tenant won’t be able to benefit from minerals being taken from the land

(c) a state law may specify what percentage of any mineral withdrawals can benefit the life tenant, and what benefits the remaindermen (see Mississippi case of Hynson v. Jeffries)

(a) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interest in minerals, oil, gas or other natural resources in, on or under land, except timber, water, soil, sod, dirt, peat, turf or mosses, the receipts from taking the natural resources from the land shall be allocated as follows:

(1) if received as rent on a lease or extension payments on a lease, the receipts are income;

(2) if received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income;

(3) if received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals, oil, gas, or other natural resources, receipts not provided for in the preceding paragraphs of this Section shall be apportioned on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. The trustee shall allocate to principal as an allowance for depletion the greater of (i) that portion, if any, of the gross receipts that is allowed as a depletion deduction for federal income tax purposes and (ii) 10% of the gross receipts, except that that allocation shall not exceed 50% of the net receipts remaining after payment of all expenses, direct and indirect, computed without the allowance for depletion. The trustee shall allocate the balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, to income.

(b) If an item of depletable property of a type specified in this Section is held on the effective date of this Act, receipts from the property shall be allocated in the manner used before the effective date of this Act, but as to all depletable property acquired after the effective date of this Act by an existing or new trust, the method of allocation provided herein shall be used.

(c) If any part of the principal consists of timber, water, soil, sod, dirt, peat, turf, or mosses, the receipts from those resources shall be allocated in accordance with Section 3. (Source: P.A. 87-714.)

23. How does the IRS view a person retaining a life estate interest, as far as what as estate taxes?

Section 2036 of the Internal Revenue Code reads as follows:

“§ 2036. Transfers with retained life estate

(a) General rule

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money’s worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

(b) Voting rights

(1) In general

For purposes of subsection (a)(1), the retention of the right to vote (directly or indirectly) shares of stock of a controlled corporation shall be considered to be a retention of the enjoyment of transferred property.

(2) Controlled corporation

For purposes of paragraph (1), a corporation shall be treated as a controlled corporation if, at any time after the transfer of the property and during the 3-year period ending on the date of the decedent's death, the decedent owned (with the application of section [318](#)), or had the right (either alone or in conjunction with any person) to vote, stock possessing at least 20 percent of the total combined voting power of all classes of stock.

(3) Coordination with section 2035

For purposes of applying section [2035](#) with respect to paragraph (1), the relinquishment or cessation of voting rights shall be treated as a transfer of property made by the decedent.

(c) Limitation on application of general rule

This section shall not apply to a transfer made before March 4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 ([46 Stat. 1516](#))."

24. If a life estate is sold, how does the government determine what amount is due the life tenant?

There are 3 possible answers:

- (a) The IRS has its own method of valuing a life estate.**
- (b) A state agency handling Medicaid can have its method see Wag 25-03-11 (Worker's Action Guide) Illinois DHS website: <http://www.dhs.state.il.us/page.aspx?item=17355> see POMS SECTION SI 01140.120 Life Estate and Remainder Interest Tables**
- (c) Some states, like New York, have their own method.**

735 ILCS 5/17-120

Sec. 17-120. Life estate or homestead. In case of sale the court may, with the consent of the person entitled to an estate for life, or for years, or of homestead, to the whole or any part of the premises, who is a party in the action, sell such estate with the rest. Such consent shall be in writing, signed by such person, and filed in the court wherein the proceedings for partition are pending.

If such persons are incapable of giving consent, the court may determine, taking into consideration the interests of all parties, whether such estate ought to be excluded from the sale or sold.

When such interest is sold, the value thereof may be ascertained and paid over in gross, or the proper proportion of the funds invested, and the income paid over to the party entitled thereto, during the continuance of the estate.

(Source: P.A. 82-280.)

1. When the owner of a “life estate” interest sell his/her life estate, then the following is **how the IRS** views the distribution of proceeds between the **life estate owner** (the life tenant) and **the owners of the remainder interest** (the remaindermen).
2. The age of the life estate owner is a factor.
The ages of remaindermen aren’t factors.
3. According to the IRS, the value of the life estate interest and the remainder interest are determined under charts set by the United States Secretary of the Treasury {Internal Revenue Code section 7520(a)}.
4. Use section 7520(a) Interest Rate (see IRS’s website to check 7520(a) interest rate).

Stella’s Sale in Sept 2009 (1 life estate owner: parent, 2 remaindermen: 2children):

Age of life estate owner: **age 91**

Section 7520 Interest rate: 3.4%

See chart: Table S (Interest at 3.4% Percent)

Life interest: 12.571%

Remainder: 87.429%

Life estate owner entitled to receive 12.571% of the sales proceeds

Remaindermen entitled to split 87.429% of the sales proceeds

\$53,181.53 (total sales proceeds after expenses: survey, title policy, realtor’s commission, attorney’s fees, real estate tax credit, repair credit, transfer taxes, etc.)

\$6,685.45 (amount to life estate owner: Stella Smith)

\$46,496.08 to the 2 remaindermen (son and daughter)

IRS calculation: \$6,685.45 to Stella

$$\$53,181.53 \times .12571 = \$6,685.45$$

Medicaid calculation: \$14,335.08 to Stella

$$\$53,181.53 \times .26955 = \$14,335.08$$

.26955 is taken from POMS SECTION SI 01140.120 Life Estate and Remainder Interest Tables

25. How does the State of Wisconsin look at a person Medicaid applicant's life estate interest?

When a person signs a deed and makes a transfer/gift to one or more loved ones, under Medicaid rules/regulations that action can cause a **penalty period** (meaning a time period where the donor won't qualify for Medicaid benefits). Thus it's very important to understand how penalty periods are created, when a penalty period begins, and when a penalty period ends.

If a donor makes a transfer/gift, and more than five years (60 months) passes, then there won't be any applicable penalty period assessed. The penalty period starts when the deed is signed, not when the Recorder of Deeds Office actually records the deed and stamps it. (However, timely recording of the deed is important. Don't hold the deed for months before recording it.)

26. How is a penalty period calculated (for Medicaid eligibility purposes)?

The length of the penalty period (ineligibility period) is determined by the following calculation:

1. Take the fair market value of the home
2. Deduct any mortgages / home equity loans
3. Deduct additionally if the real estate taxes have been deferred under the tax deferral program
4. This leaves the equity in the home
5. Multiply by a percentage number from a government chart (taken from Transmittal 64) referencing the age of the person making the transfer/gift
6. This leaves the value of the gift (to the loved ones named on the deed)
7. Then divide the # 5 figure by the cost of 30 days at the nursing home (using the lowest priced room rate)
8. The result is the number of penalty months

Age = The age of the donor (the person making the gift) when the gift is made

Life Estate = The right of the donor to use the property for the remainder of his/her life. The percentage listed gives a value to the "life estate interest".

Remainder = The interest given to the recipient {the person(s) who the property is transferred to by deed}. The percentage listed gives a value to the "remainder interest".

POMS SECTION SI 01140.120 Life Estate and Remainder Interest Tables

<u>AGE</u>	<u>LIFE ESTATE</u>	<u>REMAINDER</u>	<u>AGE</u>	<u>LIFE ESTATE</u>	<u>REMAINDER</u>
56	.79006	.20994	83	.38642	.61358
57	.77931	.22069	84	.36998	.63002
58	.76822	.23178	85	.35359	.64641
59	.75675	.24325	86	.33764	.66236
60	.74491	.25509	87	.32262	.66738
61	.73267	.26733	88	.30859	.69141
62	.72002	.27998	89	.29526	.70474
63	.70696	.29304	90	.28221	.71779
64	.69352	.30648	91	.26955	.73045
65	.67970	.32030	92	.25771	.74229
66	.66551	.33449	93	.24692	.75308
67	.65098	.34902	94	.23728	.76272
68	.63610	.36390	95	.22887	.77113
69	.62086	.37914	96	.22181	.77819
70	.60522	.39478	97	.21550	.78450
71	.58914	.41086	98	.21000	.79000
72	.57261	.42739	99	.20486	.79514
73	.55571	.44429	100	.19975	.80025
74	.53862	.46138	101	.19532	.80468
75	.52149	.47851	102	.19054	.80946
76	.50441	.49559	103	.18437	.81563
77	.48742	.51258	104	.17856	.82144
78	.47049	.52951	105	.16962	.83038
79	.45357	.54643	106	.15488	.84512
80	.43659	.56341	107	.13409	.86591
81	.41967	.58033	108	.10068	.89932
82	.40295	.59705	109	.04545	.95455

Example A - Alice: Age of Donor/Alice: 75

Value of the property at the time of the gift: \$275,000 fair market value (no mortgages)
 $\$275,000 \times .47851 = \$131,590$

Value of the remainder interest: \$131,590 (gift to the children)

$\$131,590$ divided by $\$4,500$ (\$150 per day for a semi-private room x 30 days) = 29.2
 (rounded down to 29 months).

$\$135,000$ divided by $\$8,500 = 15.8$ (rounded down to 15 months under “present IL law”)

Example B - Bob:

Fair market value of the home: \$180,000

Mortgages: None

The real estate taxes are paid to date.

Equity in the home: \$150,000

Age of the donor (when deed signed): 78

Lowest price room at the nursing home where Bob resides: \$180 daily

Penalty period calculation:

$$\$180,000 \times .52951 = \$95,311.80$$

$$\$95,311.80 \text{ divided by } \$5,400 (\$180 \times 30 \text{ days}) = 17.6$$

Example C - Connie:

Fair market value of the home: \$200,000

Mortgages: \$42,000

The real estate taxes are paid to date.

Equity in the home: \$158,000

Age of the donor (when deed signed): 82

Lowest price room at the nursing home where Bob resides: \$180 daily

Penalty period calculation:

$$\$158,000 \times .59705 = \$94,333.90$$

$$\$94,333.90 \text{ divided by } \$5,550 (\$185 \times 30 \text{ days}) = 16.9$$

27. What happens if a person has a life estate interest and applies for Medicaid benefits?

If you are later in a nursing home or assisted living facility, and you are receiving Medicaid benefits, then...

(a) if the home is sold during your lifetime, then you are entitled to receive some of the sales proceeds (and you will have to repay the state for the Medicaid benefits you have received, and if there is any money remaining, then you will have to privately pay the nursing home until the money is gone)

(b) if the home is rented out, then the rent money can be used to pay the costs of maintaining the home (real estate taxes, homeowner's insurance), with any excess going to the nursing home as a partial payment towards your nursing home expenses

28. What are the disadvantages of transferring property and reserving a life estate interest?

No Right to Change Who Receives the Property

Once the deed is signed and recorded, you have no right to make any changes (although you could give your "life estate interest" to someone). If you transfer the property to one or more children, they could voluntarily transfer/gift the property back to you if they so choose. You can't sign a new deed to delete any of the persons listed on the life estate deed (or to add new persons as owners of the remainder interest).

Example # 1: Jo signs a life estate deed which is recorded. Jo transfers her home to her 3 sons (Al, Bob, Cal). Later Jo and Bob have a falling out, and Jo doesn't want to give any assets to Bob. Jo can't change the deed to remove Bob's name. Bob has an interest in the property when the deed is recorded. (Bob could transfer/gift back his interest in the home to Jo, if Bob so chose to do so, which is probably unlikely.)

Example # 2: Ned signs a life estate deed which is recorded. Ned transfers his home to his two children (Dee, Ben). Ben dies while Ned is alive. Ben leaves a wife but no kids. Ben's will says all his assets go to his wife Vera. Ned would prefer that Vera not own part of the home (and that 100% of the home pass to Dee upon Ned's death). However, Ben had an ownership interest in the home that he passed to Vera by his will. Ned can't change the fact that Vera is an owner of the home.

Example # 3: Mike signs a life estate deed which is then recorded. Mike transfers his condo to his three sons (Larry, Curly, Moe). Moe is sued because of a car accident. Moe didn't have any auto insurance. Mike can't sign a new deed (or do anything himself) to take Moe off as an owner of the condo. Regardless of the outcome of the lawsuit against Moe, Mike will be able to continue to live in the home. Mike's life estate in the home is not affected by Moe's lawsuit, but Moe's interest in the home could be lost if Moe loses a lawsuit and doesn't have other assets to cover any judgment against him.

29. Does a remainderman have the right to use or enjoy the property during the lifetime of the life tenant?

The remainderman (children or others) have no rights to use the property during the life tenant's lifetime. The life tenant may allow a child or someone to reside in the home if the life tenant so desires, but no child has the right to move into the property without such permission.

30. How are real estate taxes affected when a life tenant resides in the home?

If you have a life estate interest in your **principal residence**, and you continue to reside in the home as your main home, then...

(a) you can qualify for the homestead exemption

(b) you can qualify for the senior citizen homestead exemption (if you are age 65 or older during the assessment year)

(c) you can continue to qualify for the senior citizen freeze (if you meet the income requirements which counts the income of all persons residing with you in the home)

(d) you **won't** qualify to participate in the tax deferral program

31. What happens if the property is sold during the life tenant's lifetime?

If you have a **life estate interest** in your principal residence, and you have resided there at least 2 years in the prior 5 years before the closing date (or resided there 1 year if you have been residing in a nursing home), and the home is sold during your lifetime, you should qualify for the capital gains tax exclusion benefit (which allows you to exclude up to \$250,000 of profit from capital gains taxes) as to the part of the sales proceed which you get. Your children (or other loved ones who you have named on the life estate deed) may have to pay capital gains taxes to the IRS as to the sales proceeds that they receive (unless the property has also been such person's personal residence for at least 2 years).

If the property is sold during the life tenant's lifetime, the sales proceeds received will be partly given to the life tenant and partly to the remaindermen.

Here are some examples (as to what the life tenant is expected to receive – based on POMS SECTION SI 01140.120 Life Estate and Remainder Interest Tables):

Age 68: The life tenant receives 63.610% of the sales proceeds
Age 69: The life tenant receives 62.086% of the sales proceeds
Age 70: The life tenant receives 60.522% of the sales proceeds
Age 71: The life tenant receives 58.914% of the sales proceeds
Age 72: The life tenant receives 57.621% of the sales proceeds
Age 73: The life tenant receives 55.571% of the sales proceeds
Age 74: The life tenant receives 53.862% of the sales proceeds
Age 75: The life tenant receives 52.149% of the sales proceeds
Age 76: The life tenant receives 50.441% of the sales proceeds
Age 77: The life tenant receives 48.742% of the sales proceeds
Age 78: The life tenant receives 47.049% of the sales proceeds
Age 79: The life tenant receives 45.357% of the sales proceeds
Age 80: The life tenant receives 43.659% of the sales proceeds
Age 81: The life tenant receives 41.967% of the sales proceeds
Age 82: The life tenant receives 40.295% of the sales proceeds
Age 83: The life tenant receives 38.642% of the sales proceeds
Age 84: The life tenant receives 36.998% of the sales proceeds
Age 85: The life tenant receives 35.359% of the sales proceeds
Age 86: The life tenant receives 33.764% of the sales proceeds
Age 87: The life tenant receives 32.262% of the sales proceeds
Age 88: The life tenant receives 30.859% of the sales proceeds
Age 89: The life tenant receives 29.526% of the sales proceeds
Age 90: The life tenant receives 28.221% of the sales proceeds
Age 91: The life tenant receives 26.955% of the sales proceeds
Age 92: The life tenant receives 25.771% of the sales proceeds
Age 93: The life tenant receives 24.692% of the sales proceeds
Age 94: The life tenant receives 23.728% of the sales proceeds
Age 95: The life tenant receives 22.887% of the sales proceeds

32. Do the remaindermen receive a stepped-up basis?

Before the 2010 began, and the Economic Growth and Tax relief Reconciliation Act of 2001's provisions for this year took effect, the remaindermen would certainly have received a stepped-up basis in the property. While IRC section 1022(d)(1)(A) is in effect, there won't be any step up in basis as to the property a client transfers and retains a life estate interest.

33. What about Medicaid and a claim by the State of Illinois?

Illinois law (305 ILCS 5/5-13) does state that the State of Illinois can make a claim against a Medicaid recipient's "estate", and the law does state that a "life estate" is included in the definition of "estate". (However, Illinois has never done so, although it is possible Illinois might do so someday.) The most that the State of Illinois could possibly make a claim for is the value of the life estate just before the Medicaid applicant's death (based on the life estate chart used to calculate penalty periods and used to determine how much the life tenant is entitled to receive if the home is sold during his/her lifetime).

34. Some cases involving life estate interests:

In **Iowa**, a claim can be made against the life estate interest of a Medicaid recipient. In the 2005 case of **In re Estate of Laughead**, the Iowa Supreme Court ruled that Iowa could make a claim against the life estate interest of a person who received Medicaid.

Ruby Laughead owned a 338-acre farm in Iowa. On 2/27/1990, Ruby signed a deed to transfer the farmland to her son Charles, with the deed stating that Ruby kept a life estate interest. In 1995, Ruby began receiving Medicaid benefits to help pay for her nursing home care. During Ruby's lifetime, annual rental income, after payment for taxes and expenses to maintain the property, was paid to the nursing home. Ruby died on 7/29/2002. Her son Charles was appointed as administrator of her estate. Ruby had received over \$137,500 of Medicaid benefits. A claim was filed against Ruby's estate seeking reimbursement for the Medicaid benefits paid on Ruby's behalf. It was agreed by the parties that the farm had a value of \$405,000 at the time of Ruby's death, and that Ruby's life estate interest had a value of \$41,451.75. The trial court ruled in favor of the State. The Iowa Supreme agreed with the trial court. The Iowa Supreme Court pointed out that in April 2002 Iowa changed its Medicaid rules, so that "life estates" could be reached by the State. The Court determined that normally a life estate is not a part of a decedent's estate, and normally not subject to the decedent's debts. However, the Court stated, "[T]he general probate laws do not apply because there is a specific law that addresses the particular matter at issue." The Court further stated, "[T]he district court correctly ruled that section 249A.5(2)(c) required that Ruby's life estate be included in her probate estate for purposes of satisfying her debt to the department."

Escher v. Escher (Court of Appeals of Iowa)

In this 2010 Iowa case, Mary Louise Escher had signed a real estate contract in 2004 to sell her home to Mary Jo Escher (her sister-in-law), with Mary Louise keeping a life estate interest in the property. Mary Jo was to make payments over time. In May 2005, Mary Louise died. Her will stated that she gave her assets to Mary Jo. Mary Louise had received Medicaid benefits, and the HMSI (Iowa Health Management Systems Inc.) filed a claim against her estate for \$10,563.39 (plus interest). The district court and the appellate court agreed that Mary Louise's estate was liable for the claim by Iowa's Medicaid agency, and that her life estate interest was to be considered a part of her estate. The courts agreed that since Mary Jo had stopped making payments on the contract after May 2005, that the real estate was owned by the estate (and Mary Jo had lost her interest). The appellate court stated, "*Mary Louise retained a*

life estate in the property that was the subject of the real estate contract with Mary Jo. That life estate is included in the probate estate for purpose of satisfying the debt.”

Brown v. Seal (No. E2004-01499-COA-R3-CV)

In this 2005 Tennessee case, the issue was whether Tyler Seal owned property in fee simple, or whether he had a life estate interest. The issue concerned a piece of real estate deeded to Tyler in 1946. Tyler Seal was given an interest in 2 pieces of property. In 1941, Tyler received a life interest in ‘Property A’ by the will of Penn Seal. The will read in part, *“I give and bequeath [the land] to my son Tyler Seal for his life, and then to his heirs if he has any, if no heirs at his death, then to my heirs to share equally and alike...”*

In March 1946, Hop Seal transferred a piece of property (Property B) to Tyler Seal. The deed was recorded the same month. In addition to stating the legal description of the property, the deed had the following handwritten provision on it, *“Accorde to the will that Penn Seal and Mima Seal mad to Tyler C Seal that the Said Mrs Penn Seals is to hav her Suport from the Land willed to Tyler C Seal it is further agred that Said Tyler Seal has no hears this property Goes to the other hears at his Death”*.

In 1968, Tyler signed a deed to supposedly convey a fee simple interest in the property to Clint Seal. However, the deed was not recorded until 1991. Tyler died in March 1996, without a spouse or any children.

Penn Seal’s heirs sued Clint Seal (Tony & Patricia Seal who had received a deed to the land from Clint). The plaintiffs claimed that Tyler only had a life estate interest in the property. The defendants claimed that Tyler had a fee simple interest; and that Clint Seal had obtained the property by adverse possession if Tyler only had a life estate interest. The plaintiffs claimed that adverse possession could only start once Tyler died in 1996.

The court ruled that Tyler Seal only had a life estate interest, and that adverse possession could not begin under Tyler’s death (adverse possession cannot begin against the remaindermen until the life tenant’s death). The court quoted the 1952 case of *Hutchison v. Board*, *“[W]e think the overwhelming weight of authority sustains the complainants’ insistence that the statute of limitations of 7 years adverse possession does not run against remaindermen during the life of the life tenant.”*

In re Gullo (7/6/2009 NYLJ. 39)

Decedent’s will stated that his daughter was to have a “life estate” interest in a home, for as long as she wishes as long as it was her principal residence. The will stated he daughter had to pay the real estate taxes and maintenance on the property. Although the will used the term “life estate”, the court ruled the daughter was not given a life estate interest. The court decided that the daughter had a “right of occupancy”. The case arose because the daughter wanted to purchase the property, and she wanted to offset the price should would pay by the value of her “life estate”.

Treiber v. Elmer (1991 ND 130, 598 N.W.2d 96)

The issue before the North Dakota Supreme Court was **whether a life tenant could seek partition of the property.** The court ruled “No”, stating that *“partition under N.D.C.C. section 32-16-01 is available only when there are cotenants with current possessory interests in the property.”*

In 1975 Fred Treiber signed a deed transferring land to his 3 children, such deed also giving his wife Anne a life estate. In 1994, 2 of the children transferred their remainder interests to Anne. The other child transferred her remainder interest to Jack & Lori Elmer. Anne brought a partition action against the Elmers and various mortgage holder and lien holders.

In re Estate of Gary G. Alban, Sr. (C1-98-1659)

In this 1999 case, the Minnesota Court of Appeals had to decide whether the decedent's surviving wife (who had a life estate) could bring a partition action against the remaindermen. The court ruled that the life tenant could not seek a partition or sale of the property.

Gary Alban Sr. died intestate, with his wife Susan and 4 children (from a prior marriage) surviving him. The home had a value of \$62,000 (and the decedent's other assets totaled about \$6,800).

Minnesota law states that if the decedent had surviving descendants, then the homestead property passes "*to the spouse for the term of the spouse's natural life and the remainder in equal share to the decedent's descendants by representation.*" Additionally, Minnesota law states that a surviving spouse is also entitled to receive "*the first \$150,000, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent, or if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.*" Surviving wife Susan claimed that since the decedent's home and other assets totaled less than \$150,000, she should receive the home. The trial court and the appellate court disagreed with Susan. The appellate court held that **the life tenant could not partition the home**, following the 1927 Minnesota Supreme Court case *Rekovsky v. Gilszinski*.

Spirit v. Spirit (1209 A.D. 2d 688, 619 N.Y.S.2d 316)

The court had to decide whether the father should have a life estate interest in his daughter's home. Father and mother were residing with daughter in her home. Father gave daughter \$150,000 to build an addition onto the home. A memorandum contained in an application to the village's zoning board of appeals stated the intended use of the addition. Daughter later placed father and mother in a nursing home, and father sued the daughter, claiming that his daughter agreed to give him a life estate interest in the home. The court stated that normally the Statute of Frauds would require that there be a written instrument as to an agreement to transfer an interest in real estate. However, the court stated, "*the Statute of Frauds specifically provides an exception to the writing requirement where there is part performance that is "unequivocally referable" to an oral agreement....The plaintiff has stated sufficient facts to raise a triable issue as to whether his acts were unequivocally referable to an oral agreement to convey an interest in real property, and the memorandum, as well as plaintiff's payment of the \$150,000, are probative on the issue of the plaintiff's part performance.*"

In re Estate of Campbell (942 P.2d 1008 – Wash. 1997)

In this case, the father's will stated that his wife was to have a life estate interest in his home, with the remainder interest designated for his 6 children from a prior marriage. The wife was allowed to use the property exclusively, and she was required to pay the utilities. **The father's will stated that the remaindermen (his 6 children) had to pay the property expenses (taxes, insurance, and repairs), and that if a child did not pay his/her share of such expenses, that the other children could charge him/her interest at the legal rate.** The children claimed they could not be forced to pay the expenses of maintaining the property. The appellate court affirmed the trial court, agreeing that the father could impose those financial conditions on the gift of the remaindermen interest to the children.

Skoog v. Cody (Texas,

Mom (Mrs. Cody) signed a deed in December 1991 which kept a life estate interest for herself, but transferred the remainder interest to her daughter Paula and her husband Ed Skogg,

and that month the Skoggs and their 2 sons moved into Mrs. Cody's home (in Nov. 1992, the Skoggs sold their own home). The deed signed by Mrs. Cody stated in part, that she "*shall have the full possession, use and benefit of said property, as well as the rents, revenues and profits thereof, for and during [her] natural life.*"

The parties agreed that there had been a verbal agreement about the Skoggs residing in the home during Cody's lifetime. The Skoggs argued that they had agreed with Cody to care for her in her home, and that they would then live there rent free. The Skoggs claimed that they spent \$49,000 of their own money to help improve the home, but that Cody also contributed financially to the improvements.

The Skoggs claim that in 1995, Mrs. Cody began to show signs of early dementia, and Cody's other children accused the Skoggs of stealing money from Cody. Cody became uncomfortable living in the home, and she took long vacations and stayed with other children overnight. Cody claimed that there was a lot of yelling and arguing, that the Skoggs got a large dog which scared her, that the Skoggs had exotic lizards and they kept live roaches and crickets in the home to feed the lizards. Cody testified that she was scared for her life after Paula twisted her arm and hit one of Cody's other relatives.

In June 1997, Paula wrote a letter to Cody and her other siblings, which stated in part, "*If I am aware that mother is in need of emergency care, I will be responsible for getting her emergency care. Immediately, I shall notify whoever one of you I can contact, and someone else will take over the arrangements for further care. I will not be responsible for obtaining medications, making medical or dental appointments or transportation. I will not be responsible for giving nursing care or making arrangements for it nor for providing her personal care in any capacity.*"

In July 1997, Cody moved out of the home, and the Skoggs changed the locks, and put Cody's belongings in garbage bags on the front porch. Cody sued to evict the Skoggs, and the court ordered them to move out.

The key issue was whether there was an oral agreement whereby Cody promised to allow the Skoggs to reside in the home rent free. A jury determined that there was no agreement which prohibited Cody from evicting the Skoggs. The jury believed Cody and her witnesses that the agreement was for the Skoggs to provide care to Cody in order to be able to reside in the home, and that Paula had shown by the letter she wrote in June 1997 that she was not willing to provide care to Cody. The appellate court stated, "*Therefore, we find that Appellants [the Skoggs] failed to establish, as a matter of law, that Mrs. Cody entered into an agreement that prevented her from evicting Appellants from the home.*"

Groce v. Director (Ark. App. 6/11/2003)

In December 1997, Berniece Groce signed a durable power of attorney naming her daughter Pat Monroe as her agent. In May 2001, daughter used mom's POA (and her money: \$43,951) to purchase a life estate interest in the daughter's home. Groce stayed at the home for short periods of time, but never resided there. In July 2000, Groce moved into a nursing home (before that she was in assisted living facility).

From May to June 2001, the daughter spent thousands of dollars of Groce's money on repairs and improvements to the home: landscaping, air conditioning upgrades, adding a patio and a fence. However, Groce had never made the property her residence, and she received no income from the property. In July 2001, Groce (through her daughter) applied for Medicaid to help pay her nursing home costs.

Groce's application for Medicaid was denied, because her "life estate" interest in the property was determined to be a countable asset. The trial court and the appellate court agreed with the Arkansas Department of Human Services. The appellate court stated, "*The federal and state regulations are consistent in requiring a house to be an individual's principal place of*

*residence before allowing [*9] it to be excluded as a homestead exemption. The fact that appellant signed an “intent to return” form does not negate this requirement – the house was never her principal place of residence to which she could “return.” The evidence supports the hearing officer’s finding that appellant’s life estate in the residence remained countable resource because the house was not her principal place of residence.”*

Stegall v. Stegall (Iowa Ct. App., 2008)

The life tenant (Mary Stegall) filed a petition for partition of real estate. Two of the 3 remaindermen objected to having the property sold. The trial court ruled that the property could be sold, but the appellate court reversed, stating that it was necessary for all the remaindermen to agree if the life tenant wanted to sell the property.

Bonta v. Burke (Cal. Ct. App., 3rd Dist, May 23, 2002)

In 1994, Lennie Smith had transferred real estate to her 2 daughters (and retained a life estate interest for herself, keeping the right to revoke the remainder interest). From September 1994 until she died in 1996, Smith received Medicaid benefits to help pay her nursing home costs. The state claimed that \$45,357.58 was owed. California law allows the Department of Health Services to make a “*claim against the estate of the decedent, or against any recipient of the property that decedent by distribution or survival...*” California law includes a “life estate” in its definition of estate.

The trial court ruled that the state could not make a claim against the property because the mother’s life estate ended at her death, and nothing passed to the 2 daughters “*by distribution or survival*”. However, the appellate court reversed, deciding that Smith had a significant interest in the property until her death. The appellate court stated “*As a consequence, the property had no value to [the daughters] until Smith died. Consistent with the legislative policy of reaching assets not irrevocably transferred to beneficiaries, Smith’s interest in the real property passed to her daughters at the time of her death, who took it by survival. The Department, therefore, is entitled to recover from the recipients of her property the cost of the medical services rendered to Smith.*”

Oregon v. Willingham (Court of Appeals, 2006)

In 1993, Jack Willingham transferred real estate to his son (keeping a life estate for himself). In 1995, Oregon changed its Medicaid statutes, so that the term “estate” includes “life estate” interests, and so that recovery for Medicaid benefits paid “*...may be recovered from the estate of the individual or from any recipient of property or other assets held by the individual at the time of death...*”

In 1997, Jack applied for and began receiving Medicaid benefits. He died in 2002. The state made a claim against the property that Jack had transferred to his son. The son claimed that the state could not make a claim against the property because the father had signed the deed in 1993 (before the statute was amended in 1995). The trial court ruled in the son’s favor, but the appellate court reversed.

Jerome v. Barrington (Rhode Island Supreme Court)

Lido Jerome died intestate in Massachusetts on July 4, 2000, survived by his wife, plus 2 sisters and 2 nieces. Lido left an office condo in Rhode Island. **Under Rhode Island law, when a person dies intestate, his surviving wife is entitled to a life estate in the real estate, and the remainder interest passes to his heirs at law** (in this case: 2 sisters and 2 nieces). Under RI law, a surviving spouse may seek court permission to set the value of the life estate and order a sale of the property, with payment from the sales proceeds going to the life tenant and the remaindermen.

In 2002, the life tenant and the remaindermen agreed to sell the property, and got court approval to sell the office condo for \$85,000. Previously one of the sisters had opposed selling the condo, and objected to the sales price. This caused the estate's legal fees to rise to about \$22,000. The court decided that the life tenant would be due 68.143% and 31.857% would go to the remaindermen.

Mrs. Jerome (as administrator of Lido's estate) charged all the court costs and attorney's fees to the remaindermen's interest, and thus a lawsuit ensued over who should be charged with such expenses. The trial court decided that the life tenant should be charged with 68% of the expenses of administration and the remaindermen should be charged with 32% of such expenses. The Rhode Island Supreme Court reversed, stating that RI law grants the surviving spouse a life estate in the intestate's real property, and that such statute read in part that "*...the life estate provided in this chapter...shall take precedence over any claims of creditors of the decedent or decedent's estate, except claims secured by lien or any form of encumbrance on the real estate.*" The RI Supreme Court decided that "*...it is clear that when a decedent dies intestate, his or her surviving spouse is entitled to a life estate in the decedent's real property, subject only to any encumbrance or secured lien on the property that existed at the time of death....There is no authority for the proposition that expenses of the administration of a probate estate constitute a lien or an encumbrance on real property...There can be no doubt that attorney's fees and out-of-pocket expenses incurred during the administration of Jerome's probate estate did not exist at the time of his death and should be paid from the remainder interest.*"

Usry v. Farr (274 Ga. 438, 553 S.E.2d 789)

The issue for the Georgia Supreme Court was whether remainderman (grandchildren) devisees had to survive the life tenants (their parents). Watson Usry's will stated that his land was given to his wife for life, and then to the "*children who may survive my wife*" for life, and then "*to my grandchildren*". The will also stated, "*Upon the death of my last surviving child title in fee simple...shall vest in my grandchildren, per stirpes and not per capita.*"

The majority saw the issue as when the remainder interest vested, either (a) upon the testator's death, or (b) upon the life tenant's death. The majority relied on a Georgia statute "*favoring vesting of title as of the time of the testator's death.*" There was a strong dissent, that interpreted the Georgia statute differently, stating that early vesting is preferred when there is doubt in a testator's will, but not when there is a manifest intention to the contrary. The dissenters also stated, "*the controlling terms of Watson's Usry's will leave no doubt of his clear intent that his grandchildren must survive their parents to inherit.*"

Robinson v. Hunter (254 Ga. App. 290, 562 S.E. 2d 178 – 2002)

The life tenant of a farm had pine timber cut and sold to a lumber company. The remainderman claimed that the sales proceeds should go to the remainderman. The trial court and the appellate court both ruled that the life tenant was entitled to the sales proceeds. The appellate court stated, "*good forestry practice dictated that the trees be cut and the area reforested to replace the harvested timber.*" The appellate court did state that a life tenant cannot cut and sell timber solely for profit, but that cutting timber could be necessary to preserve and protect the land. The courts decided that such actions were not "waste", and thus the life tenant should receive the sales proceeds.

White v. Brown (559 S.W.2d 938)

Jessie Lide wrote and signed her own will (holographic will). The will stated the date, and read, "*I, Jessie Lide, being in sound mind declare this to be my last will and testament. I appoint my niece Sandra White Perry to be the executrix of my estate. I wish Evelyn White to*

have my home to live in and not to be sold. I also leave my personal property to Sandra White. My house is not to be sold.”

Evelyn White claimed that she should have fee simple ownership, whereas a number of heirs (nieces & nephews) claimed that Evelyn should only have a life estate interest in the property. The two lower courts ruled that Evelyn was only entitled to a life estate interest. However, a majority of the Tennessee Supreme Court reversed, stating, “*The practical difficulty in this case, as in so many other cases involving wills drafted by lay persons, is that the words chosen by the testatrix are not specific enough to clearly state her intent. Thus, in our opinion, it is not clear whether Mrs. Lide intended to convey a life estate in the home to Mrs. White, leaving the remainder interest to descend by operation of law, or a fee interest with a restraint on alienation.*” The majority further stated, *In our opinion, testatrix’s apparent testamentary restraint on the alienation of the home devised to Mrs. White does not evidence such a clear intent to pass only a life estate as is sufficient to overcome the law’s strong presumption that a fee simple interest was conveyed.*”

In re Estate of Sauer (194 Misc. 2d 634, 753 N.Y.S.2d 818 – Sur Ct. 2002)

Arthur and Sally Sauer each owned one-half of a home together as tenants in common. Sally died and her will stated that Arthur was to have a life estate in her part of the home. The home was sold, and Arthur wanted to receive a lump sum payment representing his life estate interest. The executrix (Sally’s daughter from a prior marriage) objected, and wanted the sales proceeds to be invested, with Arthur only receiving the interest. The court granted Arthur’s request to receive a lump sum, stating a life tenant is entitled to the lump sum payment unless the remaindermen could show that a lump sum payment would “*defeat the intent of the testator, or where it appeared that the life tenant could only survive for a short period, and it would be manifestly unjust to the remaindermen.*” The court determined that the executrix had now shown unreasonable hardship. New York law (section 968 of the Real Property Actions and Proceedings Law) states in part, “*the power to determine whether the owner of a particular estate shall receive in satisfaction of his estate or interest, a sum in gross or shall receive the earnings, as they accrue, of a sum invested for his benefit in permanent securities at interest, rests in the discretion of the court.*”

Matter of Estate of Fischer (169 Misc. 2d 412, 645 N.Y.S.2d 1020 – N.Y.Sur. 1996)

Pauline Fisher died in 1992. Her will stated that Dorothy Stallings was entitled to a life estate interest in Pauline’s house, with the remainder goes to the Pilgrim Baptist Church. The life tenant and the remainderman both agreed to sell the house, but they disagreed as to how the sum paid to the life tenant was to be determined. The life tenant claimed that she should be paid based on her age when the decedent died. The remainderman argued that the life tenant should be paid based on the life tenant’s age at the time of the sale. The court ruled “*that the value of the life estate is based upon the life tenant’s age at the time of the sale of the property and not the date of the decedent’s death.*”

In re Estate of Strohe (7 Misc. 3d 853, 791 N.Y.S.2d 818 – Sur. Ct. 2005)

Katherine Strohe died in 2003. She gave Dr. Joseph Siegel (her companion) a life estate interest in her home. The remainderman was Patricia Kle. The life tenant had previously received court permission to sell the home, over the remainderman’s objections. The life tenant asked the court to approve a lump sum payment to him from the sales proceeds. The court granted his request, stating, “*The remainderman does not assert that she will suffer any hardship if the value of the life estate is paid*

in gross sum. Accordingly, pursuant to RPAPL 968, the value of the petitioner's life estate must be paid in gross sum." The court also had to determine how the value of the life tenant's interest should be determined. The court stated, "*While the court recognizes that the IRS actuarial tables and IRC § 7520 are the proper methods for valuing such interests for estate, gift and income taxes, the preferred method for allocating net proceeds of sale between a life tenant and a remainderman is the method set forth in RPAPL 403 and 406.*"

Thompson v. Dep't of Children and Families (835 So.2d 375 – 2003)

In this Florida case the purchase of a life estate in sister Josephine's condo caused a penalty period. Stella Thompson (age 71) was moved from a Virginia hospital to a nursing home in Florida. She suffered from a leg infection. Stella had a power of attorney naming Josephine as her agent. Josephine used the power of attorney, and \$18,250 of Stella's money, to purchase a life estate interest in Josephine's condo. Stella did not reside in the condo after such transaction. The DCF determined that Stella failed to show that the fair market of the life estate interest in the condo had a value near \$18,250. Josephine argued that she wanted to make sure Stella had a home to come back to (but there was no evidence presented that Stella might be able to leave the nursing home). The DFC decided that "*there was insufficient proof that the transfer occurred solely for a reason other than to become Medicaid eligible.*" The appellate court affirmed the DFC's decision, stating, "*We agree with DCF that the transfer of assets from medically disabled applicant to her sister in return for the right to a life estate in a condominium owned by and occupied by the sister was a sham to gain eligibility for ICP benefits in the absence of any competent evidence to support a reasonable purpose and a market value for the transfer.*"

Indiana Dept of State Revenue v. Parker (published March 24, 2010)

In this Indiana case, one issue was whether the estate of Doris Parker should include the full value of a farm that she and her husband had gifted to their 2 children. In May 1983, Doris and Roy Parker signed 4 deeds transferring their farm to their two children (Willa & Willis), with the parents reserving a life estate interest for themselves. Roy died in 1984. Doris died in 2006 at age 94. Both Willa and Willis survived their mother Doris. The Indiana Tax Court ruled that "*the entire fair market value of the family farm, as ascertained under Indiana Code § 6-4, 1-2-4, was subject to Indiana inheritance tax, not just the fair market value of Doris's life estate,,,*"

The other issue was whether the value of the improvements that Willa made to the property before Doris' death should be deducted from the value used to determine inheritance taxes due Indiana. The probate court had allowed a reduction of \$68,000; however, the Indiana Tax Court reversed, holding that the improvements made by Willa were made gratuitously, noting that Willa also resided on the property before her mother's death. The court stated, "*It is clear that Willa Dean lived on the family farm for several years before the death of her parents and voluntarily farmed and improved the property. Nevertheless, in Indiana the presumption is that in a family relationship where there is mutual benefit, such services are rendered gratuitously....Here, the Estate has presented no evidence to rebut that presumption; accordingly, it has not demonstrated that the improvements were made as consideration for the transfers.*"

Collier v. Kincheloe (2008 MT 1000)

In this Montana case, Elmer Collier's will gave a life estate interest to his son Leo Collier in 1966. The remaindermen were Elmer's grandchildren. Leo didn't pay the property taxes for the year 1968, and the property was sold to Rosebud County. In January 1972, a tax deed was issued to Rosebud County. In February 1972, Rosebud County sold the property to Leo and his wife, and a quit claimed deed was recorded. In 1977, Wendell Kincheloe bought the property.

Upon Wendell's death, title to the property passed to Violet Kincheloe. Leo died in 2003. In 2005, one of Elmer's grandsons filed a lawsuit to settle the title. The district court ruled that Kincheloe had acquired ownership of the property by adverse possession. The Montana Supreme Court ruled that Kincheloe had ownership (but not because of adverse possession). The court held that the life estate interest and the remaindermen interests were terminated by the tax deed to the county, and that the county receive fee simple ownership (and that the county could then transfer fee simple ownership). The court stated, "*Rosebud County's tax deed created a new title extinguishing all former titles and liens not expressly exempted from its operation, including both Leo's former life estate and the remainder interest. In turn, the quitclaim deed from Rosebud County in 1972 conveyed its fee simple title to Leo and his wife. Necessarily, then, when Wendell Kincheloe purchased the real property, he purchased fee simple title by acquiring "all the title, right, and interest" held by Leo and his wife.*"

Hynson v. Jeffries (697 S.2d 792, Court of Appeals of Mississippi, 1997)

The issue for the court was "whether the owner of a life estate in a trust that contains producing oil and gas properties will receive the entire royalties from those minerals, or whether the royalty must be invested and the life tenant receive only the interest on that investment".

Robert Hynson's will transferred to the trustees of his Marital Deduction Trust all interests he had in oil and gas of any kind. His widow was entitled to all income (after the payment of specific expenses). It was clear that the trust should qualify as a marital deduction trust under the law. The trust read in part, "*All of the income of the trust shall be paid to my said wife during her lifetime in periodic installments, the frequency of such payments to be determined by the Trustees, except that in no event shall such payments be made less frequently than annually.*" The court further stated, "*It is settled beyond controversy with reference to coal mines that a life tenant has no interest in or right to open and work new mines not in operation at the time he becomes vested with the estate*"

The court mentioned the open mines doctrine, referring to a common treatise on oil and gas law, "*The most important exception to the general rules limiting the power of a life tenant to sever and remove minerals with the concurrence of the owner of a future interest arises from the operation of the "open mine" doctrine. If a mine has been opened before the creation of the life estate and a future interest in land, the life tenant may be entitled to continue and operate the opened mine and retain the proceeds of such operation....The basis of the open mine doctrine appears to be that a life tenant given the beneficial enjoyment of land is entitled to enjoy the land in the same manner as it was enjoyed before the creation of the life estate.*"

The appellate court determined the open mines doctrine was not applicable because there were no leases authorizing drilling which were signed before the creation of the life estate. The court held that Mississippi law (§91-17-19 – disposition of receipts from taking natural resources from land) applied, which reads in part "*(c) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in the preceding paragraphs of this section shall be apportioned on a yearly basis in accordance with this paragraph, whether or not any natural resource was being taken from the land at the time the trust was established. Twenty-seven and one-half percent (27 1/2%) of the gross receipts (but not to exceed fifty percent (50%) of the net receipts remaining after payment of all expenses, direct and indirect, computed without allowance for depletion) shall be added to principal as an allowance for depletion. The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.*"

Nutter v. Stockton (626 P.2d 861, 1981 OK 30)

In this case a life tenant wanted to grant a new mineral lease, after a lease had expired. Beuna Gass signed a 2-year oil and gas lease in May 1973 as to her land. She died in September

1973. Her will gave Velma Nutter a life estate in the land, with the remainder interest to Virginia Stockton. No wells were drilled during the term of the lease, and the lease ended on May 1975. The trial court and the Oklahoma Supreme Court held that a life tenant does not have the right to enter into a new lease of minerals rights without the consent of the remaindermen. Citing a 1924 Oklahoma case (*Lawley v. Richardson*), the court stated, “...a life tenant takes the land in the condition in which it was when the estate vested to him, and that he is entitled to all of the rents and profits which may accrue from the lands by reason of minerals which may be produced from mines or wells existing at the time of the death of the testator, or which may be produced from mines or wells opened under authority of conveyances executed prior to the vesting of the life estate.”

Bernat v. Kivior (494 N.E.2d 425, 22 Mass.App.Ct. 957)

In May 1963, Walter Kivior signed a deed, conveying 207 acres and a dilapidated home to 4 of his daughters (Alice, Frances, Cecila, Mildred) as joint tenants. The deed also stated the following regarding Walter’s daughter Helen, “*Said premises are conveyed subject to the rights of Helen V. Kivior to occupy the granted premises for the rest of her life.*” The appellate court held that Helen had a life estate interest in the property, and that she could not seek to partition the property.

Hershman-Tcherepnin v. Techerepinin (873 N.E.2d 71, 70 Mass.App.Ct. 218)

Composer Ivan Tcherepnin created his own will with a computer software program. He died in 1998. He bequeathed 1/5th of his home to his recent bride Sue-Ellen, and 1/5th to each of his 4 children from a prior marriage. Sue-Ellen claimed that she had a life estate in the property, and was entitled to exclusive possession of the home during her lifetime. The stepchildren claimed that they had a right to reside in the property. The will stated in part that as to his wife, “*I give one fifth (1/5) ownership of the property at 96 Russell Avenue, Watertown, Ma., the right to remain there for as long as she desires, and her choice of furnishings...*” The appellate court reversed the trial court, deciding that “*The will provided the petitioner and each of the testator’s four children with a one-fifth present possessory interest in the property as tenants in common. The petitioner was not granted a life estate in the property.*”

Barrett v. Barrett (RI – Supreme Court)

Horace Barrett signed a quit claim deed to transfer his home to the Horace M. Barrett Trust, reserving a life estate interest for himself. The deed read in part, to himself “*for life with full power to sell, mortgage, convey, or otherwise encumber the life estate and remainder, with remainder to {MHB} and {KBM} as Trustees of the Horace M. Barrett Trust of February 22, 2000.*” Horace left a surviving wife (Jane, who he had married in 1998) who claimed that his deed should not defeat her right to a life estate interest in the home. Horace’s children from a prior marriage disagreed.

The Superior Court and the RI Supreme Court ruled that the surviving wife was not entitled to a life estate interest in the property, because Horace did not have any interest in the property when he died, and that the transfer by deed was no illusory. The RI Supreme Court stated, “*in order for a surviving spouse’s statutory share to be defeated by an inter vivos conveyance to a trust, the illusory transfer test, under Pezza, requires two elements: (1) the complete inter vivos transfer by conveyance that divests the spouse of all ownership in the property conveyed to the trust; and (2) proper donative intent to make an inter vivos gift or transfer of the real property...Unless both elements are satisfied, the surviving spouse’s right to a life estate in accordance with § 33-25-2(a) is not defeated.*”

Poruba v. Poruba (Illinois – 3rd District)

In this 2009 Illinois case, Dorothy Poruba signed a deed which transferred property in Streator, Illinois, to Frank Poruba (with Dorothy reserving a life estate). Later Dorothy sought to partition the property, and the trial court ruled that she could not do so. The appellate court affirmed, stating in part, “...a single life estate and a single remainder interest are two separate estates in land. There is nothing to partition. Plaintiff is the sole owner of the life estate. Defendant is the sole owner of the remainder. The deed that granted plaintiff the life estate and defendant the remainder has already partitioned their respective interests.”

Articles on Life Estates and Remainder Interests

“Tax Consequences of Retaining or Transferring a Parent’s Principal Residence”

By Robert A. Gorfinkle

“The ElderLaw Report” (February 2010)

“Gifting a Remainder Interest in a Home”

By Lauren Kosty

“The Tax Advisor” (November 2007)

The short article suggests a client may want to gift his/her home to a charitable organization, while retaining a life estate interest.

“Life Estates and Medicaid”

By Miriam R. Adelman

“Elder Law Advisory” (November 2005)

“A Life Estate – The Gift That Keeps on Giving”

By Hyman G. Darling

“Trusts & Estates” (May 2002)

“The Meaning of Life (Estates)”

By Alexander A. Bove, Jr.

“The ElderLaw Report” (October 2001)

“Those Who Plan Ahead Win. Those Who Don’t Plan Ahead Lose.”

This article is not intended as legal advice. It is basic information. I would recommend that you call Attorney Timothy P. Crawford for a free conference to discuss your situation in more detail. Attorney Timothy P. Crawford can be reached toll-free at 1-888-634-6675. When you call in, please mention the fact that you have read this article.

*Attorney Timothy P. Crawford is a Board Certified Elder Law Attorney(CELA). He has been Board Certified by the National Elder Law Foundation which has been approved as the Sole Certifying Organization for Elder Law Attorneys by the American Bar Association.

**Timothy P. Crawford was invited to join the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys (NAELA) in August of 2005. The Council of Advanced Practitioners (CAP) is a small group of premier elder law attorneys, all of whom have been members of NAELA for at least 10 years, are certified as elder law attorneys by the National

Elder Law Foundation, and are AV rated the top in the nation by Martindale Hubbell. A Service that provides an independent rating of the quality of attorneys.

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