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## ***Life Estate Interests Are Now Recoverable By New York State***

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*January 8, 2012* — On September 8, 2011, Emergency Regulations went into effect by the NYS Department of Health to expand the definition of estates beyond assets passing under the terms of a valid will or by intestacy.

A Medicaid recoverable “estate” is an estate where assets can be recovered to repay NYS for Medicaid funds paid on behalf of an individual.

The definition of a Medicaid recoverable “estate” used to be limited to a Medicaid recipient's probate estate, meaning the real and personal property passing under the terms of the deceased's will or by the laws of intestacy, if he or she does not have a will. As a result, life estates in real property, property in certain trusts, as well as assets passing in joint accounts were not recoverable by the agency. However, this has now been changed to include some assets which pass outside the probate estate.

The cause of concern is the expansion of the definition to include recovery of interest in life estates in real property. The regulation states “A life interest that was created by a recipient or the recipients spouse, in property in which the recipient or spouse held interest at the time of life estate was created, or a life estate interest that was created for the benefit of a recipient or the recipients spouse in a property in which the recipient or the spouse held any interest within (5) years prior to the creation of the life estate is subject to recovery.” 11 ADM-8. So, if someone transferred their home ten years ago and reserved a life estate, although the five year look back period has expired for Medicaid eligibility, the value of the life estate retained is now subject to recovery.

For example, an individual dies August 2011 at the age of 85 while retaining a life estate interest in real property with a fair market value of \$200,000, as of the date of death. Even if the property was transferred prior to the five-year look-back period, the retained life estate ownership in the property is now available for an estate recovery equal to the value of the ownership interest. Thus, using the appropriate IRS tables under the new regulations, Medicaid would be entitled to a recovery against the estate of the life tenant of approximately \$24,498.00.

There are still be some planning options available for those who have reserved a life estate as well as a number of other techniques that can be utilized to preserve your assets. Please contact Michael McConville at [mmcconville@mccmlaw.com](mailto:mmcconville@mccmlaw.com) or 585-512-3517, or Rita Nischal at [rnischal@mccmlaw.com](mailto:rnischal@mccmlaw.com) or 585-512-3511 if you would like to further discuss assets preservation planning.