IRA M. LEFF
AND ASSOCIATES

ATTORNEYS AT LAW

1722 PINETREE CIRCLE, N.E.
ATLANTA, GEORGIA 30329

WWW.IRALEFF.COM

IRALEFF@IRALEFF.COM

IRA M. LEFF

TELEPHONE: (404) 633-1801
FACSIMILE: (404) 633-1830

September 29, 2009

ELDER LAW MINUTE

One of the most controversial Estate Recovery provision is the rule that says that real property which passes by right of survivorship, life estate or trust is considered part of the decedent's estate for recovery purposes. DCH Rules § 111-3-8.02(6).

Several attorneys have consulted with me about the issue of a life estate owned by the Medicaid recipient being included in his estate for recovery purposes after his death. After all, the decedent's estate has no interest in the property from which the Estate Recovery department is seeking to recover.

What if a *bona fide* purchaser bought the remainder interest in real property from a Medicaid recipient in an arm's-length transaction during the recipient's lifetime. Upon the recipient's death title passes to the remainderman. Yet the Estate Recovery department asserts that it can put a lien on this property to collect monies owed by the decedent.

Craig Bonnell of Rincon, Georgia, has a case of a Medicaid recipient who died recently having owned a life estate in real property. She was 85 at the time of death. According to MEDICAID MANUAL § 2322, the life estate interest was worth 35.359 percent of the value of the fee simple prior to her death. Mr. Bonnell compared the Medicaid actuarial assumptions to those used by the IRS and found that Medicaid's were about 2½ times those used by the IRS. See IRS Table S.

He was considering challenging the Georgia regulations which include life estates in the recoverable Estate. I pointed out to him that the rule on including property which passes by survivorship, life estate or trust comes directly from 42 U.S.C. § 1396p(b)(4)(B), so he would have to challenge the constitutionality of the federal law. Instead, I suggested that he might be able to effectively challenge the actuarial assumptions which underlie Medicaid's life estate table.

If any of you have challenged these Estate Recovery rules or have an opinion on the actuarial assumptions, please let me know.

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