

CALIFORNIA ADVOCATES FOR NURSING HOME REFORM

650 Harrison Street • 2nd Floor • San Francisco, CA 94107 • 415-974-5171 • 800-474-1116 • Fax 415-777-2904

March 15, 2006

Office of Regulations
Department of Health Services
MS 0015
P.O. Box 997413
Sacramento, CA 95899-7413
Sent by FAX to (916) 440-7714

Re: Comments on Estate Recovery Regulations, R-32-00

Dear Sir/Madam:

These comments are submitted on behalf of California Advocates for Nursing Home Reform. While we are pleased that the Department considered some of the revisions recommended by commentators, particularly regarding the exemption of IHSS payments and the prospective application of the life estate provisions, there are still a number of areas that invite confusion and potential litigation. Please note that our recommended changes to the draft regulations are underlined and bolded.

1. Section 50960.2 Annuities

The proposed definition of “annuity” does not expressly exclude life insurance, IRAs, and other tax-qualified retirement arrangements. Nor do the “estate claims” provisions in §50961(h). These failures are the source of continuing confusion and error. The definition of “estate” in proposed §50960.12 *does* expressly exclude all life insurance “policies” (presumably including “benefits”) and retirement “accounts” (presumably including all tax qualified arrangements) unless they are payable to the decedent’s estate.

We recommend clarifying that this article does not apply to IRAs and other work-related pension plans and annuities.

“Annuity” means an ~~policy or contract that is a private agreement or an investment contract, or an insurance policy or contract,~~ which gives a person or entity the right to receive periodic payments of a fixed or variable sum, either for life or for a term of years, and which also may include a lump sum payment or periodic payments upon the death of the decedent. **For the purposes of this article, “annuity” specifically excludes life**

insurance policies or retirement accounts, unless those policies or accounts name the estate as the beneficiary or reverts to the estate.

2. Section 50960.4 Applicant

The proposed definition of "applicant" is clearly limited to those who are applying for a hardship waiver. The regulations fail to include those who wish to contest the claim itself, the amount of the claim or the value of the estate. This person may or may not be an "applicant" for a hardship waiver, but may often be the executor or the attorney for the estate.

3. Section 50960.29 Life Estates

The statement of reasons states that the proposed revisions were made "*... in an effort to provide the affected public with a definition specific to estate recovery that is detailed, accurate, unambiguous and clearly grants a life estate tenant the right of occupancy **and** the right to receive income derived from the property.*" (Emphasis added) The statement further notes that Blacks Law Dictionary indicates that the life estate "beneficiary (i.e. life tenant) is entitled to the income from property."

Yet, the proposed definition defines a life estate as an "...interest in real property...that grants the life estate tenant the right of occupancy and **may** include the right to receive any income derived from the property."

Far from being clear and unambiguous, this definition is contrary to the Department's own reasoning and to any legal definition under law. In addition, an occupancy agreement does not entitle the beneficiary to such income, nor would there be any "fair market value" to such an interest, not during life, and certainly not at death.

4. Section 50960.36 Voluntary Post Death Lien

Proposed §50960.36 says that the claim must "be paid in full." This should be restated so that it is clear that "the original claim (or the claim as compromised by the Department)" must be paid in full. Otherwise, the Department will not be able to offer a voluntary post death lien on any claim that it compromises.

5. Section 50961(a)(1)

Proposed §50961(a)(1) conflicts with (c) which actually limits the recovery to substantially less than "all payments made by the Medi-Cal program." This subsection should be amended to read:

(a) All payments made by the Medi-Cal program on behalf of the decedent **as specified in**

Subsection (c).

6. Section 50961 (c)

This section does not clarify what Medi-Cal payments for “insurance premiums” will be recovered other than those for health care.

7. Section 50961 (a) (2)

This section does not conform with federal law or the previous regulations and should read:

(2) The decedent's equity interest in the property **at the time of death (to the extent of such interest).**

8. 50961 (h):

Proposed §50961(h) does not exclude annuities purchased and owned by third parties on the life of the decedent. Without such a limitation, the Department’s attempt at recovery will probably amount to an unconstitutional taking and resulting litigation.

Nor does this section expressly exclude life insurance policies and retirement accounts that do not revert to the estate or name the state as a beneficiary. This omission will lead to confusion and error and should be amended to specifically exclude these insurance and retirement arrangements.

9. 50961(i) Life Estates

This proposed regulation fails to recognize that life estates come in different sizes and values. Unless this is addressed it will undoubtedly lead to multiple lawsuits and a substantial amount of expense for everyone.

The regulations should make clear that the Department’s claims are limited to “*the decedent's equity interest at the time of death (to the extent of such interest).*” This limitation is imposed both by federal statute (42 USC §1396p(a)(4)(b)) and by the proposed regulation defining the “estate” from which recovery can be made (§50960.12). In other words, the Department may not recover from the successor in interest any more value than the decedent actually had to begin with.

However, the proposed regulations are written to ignore this limitation. The proposed regulations define “life estate” in §50960.29 without any reference to the “extent of the decedent’s interest.” Then the Department provides that *any* life estate must be “valued” according to the table referenced in §50961(i), no matter how small the decedent’s interest may be in the life estate.

Here is an illustration of the problem:

Deceased Medi-Cal beneficiary “A” died owning a full irrevocable common law life estate in a residence. His estate is required to reimburse the Department up to the value of the common law life estate, e.g., \$200,000.

Deceased Medi-Cal beneficiary “B” died owning a one-week *time-share* interest in similar property of the same value. His fractional interest is clearly only 1/52 of the common law interest, and worth no more than 1/52 of \$200,000, or \$3,846. The liability of his estate *should* be no more than 1/52 of the liability of the decedent who had a full common law life estate – but the Department’s proposed regulations treat his interest exactly the same. This is because his interest is within the definition of a “life estate,” and the Department values all life estates the same under §50961(i).

This inequity is made worse by the Department’s failure to use any of the “fair market value” and “equity interest” limitations provided in §50960.21 and §50960.9. In the example above, the 1/52 time-share interest will almost certainly have a fair market value of less than 1/52 of the full life estate interest (because of deep discounts on time-share interests). So the actual “market value” and “equity interest” of the decedent will almost certainly be less than the strict fractional value of \$3,846. Yet the Department’s regulations don’t recognize this adjustment either. Why does the Department go to the trouble of defining both “fair market value” and “equity interest” if it does not plan to use the terms when their use is appropriate?

This error in the proposed regulations is not just abstract or academic. It is likely to come up hundreds if not thousands of times a year.

The Department is now proposing regulations that for some reason ignore its own “fair market value” definitions. Instead they define “life estates” so as to include such limited “retained personal rights of occupancy” and then treats them as if they were full-blown life estates when, in fact, they have a value far below an ordinary life estate, and no value at all at death.

Eventually this confusion will be resolved through litigation as the successors in interest are able to show that the Department’s claims against life estates must be limited to the extent of the decedent’s “equity interest” under proposed regulation §50960.12.

However, *such confusion could also be resolved at this time* with much less waste if the Department would simply clarify the first sentence of §50961(i) to conform with the other proposed regulations. The table referenced in §50961(i) should then be limited to “a common law life estate” to distinguish them from life estates of lesser value.

We recommend that the first sentence be amended to read:

(i) The Department shall claim against life estate interests as part of a decedent's estate at the time of death (to the extent of the decedent's equity interest as defined by §50960.9).

Life Estate Table:

There is a problem with the life estate table that the Department refers to in proposed §50961(i). The Department proposes using a table that is included in the CMS State Medicaid Manual Transmittal 64 for the purposes of determining the value of a life estate for eligibility - not for the purposes of recovery. These tables were formulated in 1984, and are not related to the value of a life estate at the time of death.

When compared to the Internal Revenue Life Estate Tables in its Publication 1457 (<http://www.irs.gov/pub/irs-pdf/p1457.pdf>), it becomes clear that the interest rate assumed by the Department is 8.2 percent! That is the rate that produces a remainder interest that reaches 50 percent at age 77 in both the IRS and Medi-Cal tables. Of course the actual prevailing interest rates are now around 4 percent, or half what the Department assumes. At 4 percent prevailing interest, the remainder interest would reach 50 percent at about age 62 – and sharply reduce the value of the Department's claim. In other words, the Department proposes to stack the deck to enhance its estate recovery claims by falsely overvaluing the life tenant's interest.

There does not appear to be any authority for the Department's choice of table for determining life estate interests. It has reached out to find a life estate table in the State Medicaid Manual intended only for eligibility determinations. That table itself states that it is based on the IRS life estate and remainder interest tables at 26 CFR 20.2031-7. Nevertheless, we have yet to find any table from that IRS section that actually matches the table in the State Medicaid Manual. Moreover, it is clear that the only way to arrive at such high remainder interest values is to grossly overstate the prevailing interest rates. The Department's use of the State Medicaid Manual's table is arbitrary and capricious and will almost certainly result in a number of court challenges. The Department could avoid all these problems by simply referencing "the currently applicable IRS life estate table."

11. Section 50961(i) (revocable transfers)

Proposed §50961(i) says that "where the decedent held a life estate and made a revocable transfer of the remainder interest in the property at any time, the Department's claim shall apply to the fair market value of the property as if the title to the property had remained solely with the decedent." Yet the Department's Statement of Reasons says that the Department's objective is only to recover against remainder interests that are

revocable *at the time of the decedent owner's death*. The language of the proposed regulation does not reflect its stated objective.

The proposed regulation actually says that if the decedent *ever* (i.e., "at any time") made a revocable transfer of a remainder interest, it is subject to recovery. This makes no sense. What if the decedent first made a revocable transfer and then later made it irrevocable? In that case, the interest was irrevocable at the time of the decedent's death, and should be treated no differently from a single transfer that resulted in irrevocability.

The language should instead simply say, "**Where the decedent held a life estate and also the right to revoke the remainder interest at the time of his or her death . . .**"

12. 50961(k) - interest

The interest should run - not from the date of the claim - but from the date the amount of the claim is finally determined.

13. §50962 (c). Notification.

The Fiscal Analysis (Assumption 3) incorrectly states: "After a person dies, the Department has four months to take action to place a lien on the estate." Actually, the Department has four months in which to file a claim, after the notice of death and the death certificate has been sent to the Department. While this section notes the timelines for providing notice to the department, no such timeline is included for the Department's notice. In the interests of equity and due process, the four month time limit under which the Department must mail the notice of claim and the accompanying documents should be included. We recommend the following additions to this section:

(c) The Department shall provide written notice **within four (4) months of receipt of notice of death...**

14. § 50963 (a)(3)

We have previously expressed our concern with this same proposed language in that it imposes a far greater burden of proof on the applicant than currently exists and subjects low-income and elderly applicants to potential fiduciary abuse by unscrupulous financial institutions. In addition, our office has represented numerous applicants for hardship waivers who could not get any financial institutions to even accept a loan application, much less issue a formal letter of denial. We suggest that one denial letter is sufficient and that language be added to protect those who cannot obtain denial letters.

The applicant shall be deemed to be unable to obtain financing if he or she provides loan denial letter(s) or if he or she can provide evidence that such financial institutions refused to accept a loan application; or

15. 50963 (g) Since federal law requires factors other than those prescribed by the proposed regulations to be used in determining hardship. We recommend adding the following subsection:

(b) The Department shall not be limited to the criteria in Section 50963(a) (1) (2) (3) (4) (5) (6) (7) in determining that a substantial hardship exists and may grant a waiver based on the existence of other circumstances.

16. Application for Hardship Form

How would an applicant know what information would affect the Department's decision? At the very least, the form should include how the applicant can provide supplemental information after the application has been submitted if more information is needed to make a decision. We suggest the following be added to the form at the top:

If additional information is needed in the hardship application, the department shall inform the applicant in writing of the information needed and the reason for the request. The applicant shall be responsible for securing the additional information.

17. Fiscal Analysis

1. The fiscal analysis does not include any estimate of collections for the revised life estate rules.
2. The fiscal analysis misstates the Departments obligations regarding sending notice of the claim: "(3) After a person dies, the Department has four months to take action to place a lien on an estate."

This is incorrect, as is the subsequent analysis. The Department actually has four months after notice of death and a copy of the death certificate has been sent to the Department to file a claim and up to three years to file an action (i.e., a legal action). It is not "virtually impossible" for the Department to meet the four month timeframe, since they are only obligated under the timeframe after they have received notice of death and a copy of the death certificate. Otherwise, they can take up to three years.

By making these comments California Advocates for Nursing Home Reform does **not** waive any right it may have under California law to challenge these regulations.

Thank you for consideration of these comments

Sincerely,

Patricia L, McGinnis
Executive Director