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## Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Department of Medical Assistance Services
<b>Virginia Administrative Code (VAC) citation</b>	12VAC30-40-290
<b>Regulation title</b>	Eligibility Conditions and Requirements
<b>Action title</b>	Treatment of Life Estates
<b>Document preparation date</b>	

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive review ([www.townhall.state.va.us/dpbpages/apaintro.htm#execreview](http://www.townhall.state.va.us/dpbpages/apaintro.htm#execreview)) and the Virginia Registrar of Regulations ([legis.state.va.us/codecomm/register/regindex.htm](http://legis.state.va.us/codecomm/register/regindex.htm)), pursuant to the Virginia Administrative Process Act ([www.townhall.state.va.us/dpbpages/dpb\\_apa.htm](http://www.townhall.state.va.us/dpbpages/dpb_apa.htm)), Executive Orders 21 (2002) and 58 (1999) ([www.governor.state.va.us/Press\\_Policy/Executive\\_Orders/EOHome.html](http://www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html)), and the *Virginia Register Form, Style, and Procedure Manual* ([http://legis.state.va.us/codecomm/register/download/styl8\\_95.rtf](http://legis.state.va.us/codecomm/register/download/styl8_95.rtf)).

### Preamble

*The APA (Section 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.*

- 1) Please explain why this is an “emergency situation” as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The Administrative Process Act (Section 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date. This suggested emergency regulation meets the standard at COV 2.2-4011(ii) as discussed below.

Item 306 NN of the 2008 Appropriations Act (Chapter 879 of the *2008 Acts of the Assembly*) directs the Department of Medical Assistance Services (DMAS) to count life estates as a resource in determining Medicaid eligibility for covered groups for which a resource determination is required, including individuals requesting Medicaid payment for long-term care services. The specific language of 306 NN is as follows:

**NN.** The Department of Medical Assistance Services shall, at the direction of the Secretary of Health and Human Resources, amend the State Plan for Medical Assistance to count all life estates as a resource in the determination of Medicaid eligibility for covered groups for which a resource determination is required, including those individuals requesting Medicaid payment of long-term care services. Life estates held in the property serving as the principal residence at the time an individual becomes institutionalized are not a countable resource in the Medicaid determination for the first six months following admission to a long-term care facility. This provision shall apply only to life estates created after the effective date of agency regulations implementing this provision. The department shall have the authority to promulgate emergency regulations to implement this amendment within 280 days or less from the enactment of this act.

This action is intended to satisfy that mandate.

### Purpose

*Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

This regulatory action is intended to change the way life estates are evaluated in the Medicaid eligibility determination process per the requirement of the 2008 Appropriations Act. Upon implementation of this change, life estates will be evaluated as a resource for those Medicaid groups that have a resource requirement. This change will require the amendment of regulations addressing Medicaid eligibility.

This change is needed to eliminate the opportunity to shelter assets equal to the value of a life estate for individuals who are subject to a resource test for Medicaid eligibility.

### Legal basis

*Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and

amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services. The 2008 Appropriations Act Item 306 NN directed this agency action.

### Substance

*Please detail any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons why the regulation is essential to protect the health, safety, or welfare of Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.*

The Medicaid State Plan section affected by this regulatory action is Eligibility Conditions and Requirements (12VAC30-40) (Attachment 2.6-A).

Currently, the Medicaid State Plan does not provide for consideration of the value of life estates in the resource determination portion of the Medicaid eligibility process.

A life estate confers upon one or more individuals certain rights in a property during the life of the individual(s). The owners of a life estate have the right to possess, use, obtain profits from the property, and sell his or her life interest unless the instrument establishing the life estate ownership places restrictions on the rights of the life owner. Current Medicaid policy exempts life interest or life estates in the resource eligibility determination. There is no limit to the number of life estates an individual may own under current Medicaid policy.

The financial and resource eligibility rules for Medicaid coverage of Aged, Blind and Disabled individuals are based on the program rules of the Supplemental Security Income (SSI) program. In 1972 when the SSI program was developed, states were given the option of imposing more restrictive criteria than the SSI program. States that opted to have more restrictive criteria were called 209(b) states. States that opted for 209(b) status were given the flexibility to set eligibility criteria no more restrictive than those set by the state Medicaid program on January 1, 1972. This 209(b) option provided an alternative to mandating Medicaid eligibility for all SSI eligible individuals that would have resulted in additional expenditures in state funds for the cost of Medicaid. States that chose this option were allowed to impose more liberal methodologies for treating resources and, for the aged, blind and disabled, allowed to impose more restrictive ones.

As a 209(b) state, Virginia is one of eleven states that have rules on the treatment of resources which are more restrictive in some instances and more liberal in others than the SSI rules. Under current Virginia Medicaid policy, life interest or life estates in real property are not counted in the resource eligibility determination. Under SSI rules, the value of a life estate in property which serves as the individual's home is not a countable resource. SSI may treat the life interest in property on which the individual does not reside as a countable resource.

Since life estates in Virginia have not been countable resources, the acquisition of life estates has been used to transform a countable resource (cash) into an exempt resource (life estate). The federal Deficit Reduction Act of 2005 (DRA) recognized the abuse of the life estate and transfer of asset rules. To deter this abuse, the DRA limited an individual's ability to purchase a life interest in another individual's property. The purchase of a life estate in another individual's property on or after February 8, 2006, is now evaluated as an uncompensated transfer of resources unless the purchaser resides in the home for at least twelve consecutive months after the date of the purchase. If the purchaser does not reside on the property for twelve consecutive months, the entire purchase amount is considered an uncompensated transfer subject to a penalty period. However, the scope of the DRA does not extend beyond those individuals subject to the asset transfer rule; thus leaving opportunity for continued abuse since life estates remain an exempt resource in Virginia.

The Joint Legislative Audit and Review Commission (JLARC) Special Report, Senate Report Number 12, 2007, regarding the DRA changes affecting asset sheltering for Medicaid noted that states have the option to request the authority from the Centers for Medicare and Medicaid Services (CMS) to pursue the counting of life estates. The report went on to note that this option has not yet been pursued by Virginia.

When Virginia chose to exempt the value of life estates as a countable resource, property values were lower and the life estate was retained on the property in which the person lived. For example, the father died leaving the home property to the children and leaving his wife a life estate. With the increase in property values over time there has been a corresponding increase in the value of the life estate. Even with the changes made with passage of the DRA, since life estates remain an exempt resource under current Virginia Medicaid rules, it continues to leave an avenue to pursue the sheltering of an individual's assets. The purchase of life estates is viewed as a valid strategy in estate planning, allowing individuals to access Medicaid Program benefits without expending their own funds.

A variety or series of real estate transactions are used to provide a life estate to an individual wishing to shelter assets in order to leave them to a family member. The individual gaining the remainder interest is almost always a relative of the applicant or recipient.

- One transaction is for an individual to transfer the remainder share of his home property to a relative, keeping a life estate in the property for himself. No payments are received for the transfer of the remainder share in the property. The holder of the remainder interest inherits the balance of the property upon the death of the life estate holder. The remainderman then owns the entire property without having paid for it.
- Another method that is utilized is for an individual to sell his home and then purchase a life estate in the home of a relative. The purchaser of the life interest transfers money from the sale of his home to the relative, usually his child, for a life interest. The purchaser may do this for more than one piece of property. Current Medicaid policy imposes no limit on the number of life estates an individual may own. Again, upon the death of the life estate holder the remainderman inherits the entire property, having received no payment for the life estate.

- In addition, a recent strategy has arisen since implementation of the DRA which seeks to hide the purchase of a life estate through a series of various types of real estate transactions. The individual purchases a fee simple interest in property, then the seller transfers a life interest back to the purchaser.

The result of each transfer noted above is the same; the individual has effectively transferred his funds to his family in exchange for a life estate that is not a countable resource, and the Medicaid program pays for benefits for an individual who would otherwise be resource ineligible.

The solution to this issue of resource-shifting and hiding is to treat life estates the same way real property is treated for Medicaid eligibility purposes. Current Medicaid policy states that property a Medicaid applicant or recipient owns, resides on and considers to be his home property is excluded as a resource in the Medicaid eligibility determination. If the individual leaves the property but continues to have ownership and the property is not occupied by a spouse or dependent or disabled child, then the equity value of the property becomes a countable resource. If the property is not home property but other real property, such as a vacant parcel of land, the equity value is always considered a countable resource in the eligibility determination. Treating life estates in the same manner as real property aligns these policies and provides for a determination of resource eligibility that takes into consideration any exemptions that may exist before value must be considered.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
12VAC30-40-290		Life rights to real property are not counted as a resource.	Life rights to real property established on or after July 1, 2008 are counted as a resource in the Medicaid eligibility determination.

**Alternatives**

*Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action.*

There are no viable alternatives to this proposed regulatory action. Item 306 NN of the 2008 Appropriations Act directed DMAS to make this change. Absent this action, DMAS will be out of compliance with a General Assembly mandate.

## Family impact

*Please assess the impact of the emergency regulatory action on the institution of the family and family stability.*

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These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; it does encourage greater economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment.