University of Dayton Law Review

Volume 49 | Number 3 Article 2

6-15-2024

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Cover Page Footnote

I would like to thank my friends, colleagues, and professors and I would specifically thank Professor Blake Watson, who taught my very first class of law school, instilled an appreciation for Real Property in me, and guided me throughout writing this Comment. I would also like to thank my family, and most importantly, my parents, for always supporting me through life's many ups and downs, especially when the path ahead was unclear.

IS IT ADDING UP? AN EXAMINATION OF LIFE ESTATE VALUATIONS IN OHIO

Daniel L. Wiest[*]

I. INTRODUCTION

Alice is a 20-year-old woman who stands to eventually inherit her father's farm worth roughly $1,000,000. However, when her father died, he left a will that stated, "Nevin has been a good friend to me, and I want to allow him to live on my farm until he dies. When Nevin has died, I want the property to transfer to my only daughter, Alice." Alice does not dispute Nevin's life estate and is willing to wait because she expects the farm to become a large

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portion of what she eventually passes on to her own children. In addition, she is aware that Nevin is 70 years old and, unfortunately, his health is deteriorating.

In fact, the very next week, Nevin collapses in his home and is taken to the hospital, where he is cared for and placed on Medicaid due to his lack of health insurance. In this situation, one might expect that Alice may soon take possession of the farm that her father had meant for her to inherit. However, if Nevin stays on Medicaid, a very odd phenomenon will occur. Under Ohio law, the Department of Medicaid is required to seek recovery for the costs of services that Medicaid pays for.[1] The Department can implement this recovery for payments through the use of liens.[2] Once a lien is placed on a property, the lienholder can bring a partition action against the landholder, force the property to be sold, and take repayment out of the proceeds from the sale.[3]

In the above example, this means that if Nevin stays on Medicaid, three things will occur. First, the Department of Medicaid will determine what costs they have incurred while caring for Nevin. Second, assuming Nevin has no other assets by which to repay the costs, it will place a lien against his life estate on the farm. And third, it could eventually force the sale of the farm in order to recoup the costs that it incurred in the care of Nevin.

Ohio regulations are clear about the valuation of a life estate in regard to the repayment of Medicaid obligations. In this case, considering that Nevin is 70 years old and is in terminal hospitalization, his prorated share of the total value of the property is 60.522%.[4] This means that the Department of Medicaid could force the sale of the farm and, assuming it sold for fair market price of $1,000,000, take possession of Nevin's "portion" of the property

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[1] OHIO REV. CODE § 5162.21(B) provides as follows:

> To the extent permitted by federal law, the department of medicaid shall institute a medicaid estate recovery program under which the department shall, except as provided in divisions (C) and (E) of this section, and subject to division (D) of this section, do all of the following:
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> (1) For the costs of medicaid services the medicaid program correctly paid or will pay on behalf of a permanently institutionalized individual of any age, seek adjustment or recovery from the individual's estate or on the sale of property of the individual or spouse that is subject to a lien imposed under section 5162.211 of the Revised Code;
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> (2) For the costs of medicaid services the medicaid program correctly paid or will pay on behalf of an individual fifty-five years of age or older who is not a permanently institutionalized individual, seek adjustment or recovery from the individual's estate …."

[2] "Except as provided in division (C) of this section, the department of medicaid may impose a lien against the real property of a medicaid recipient who is a permanently institutionalized individual and against the real property of the recipient's spouse, including any real property that is jointly held by the recipient and spouse. The lien may be imposed on account of medicaid paid or to be paid on the recipient's behalf." OHIO REV. CODE § 5162.211(B).

[3] OHIO REV. CODE § 5307.03; OHIO REV. CODE § 5307.14.

[4] OHIO ADMIN. CODE § 5160:1-3-05.17(G).

which would be valued at $605,220.

The oddity of this situation becomes clearer when one looks at the exact same situation from Alice's point of view. Alice is expecting to receive the property and eventually be able to pass it along to her kids. Perhaps she plans to sell it in the future or mortgage it to fund some new venture. Either way, this million-dollar property represents life-changing prosperity that she expects to receive once Nevin's life estate has ended. However, due to events completely outside the control of Alice, her future property is now being sold and her future interest in the property is being extinguished. Where Alice was on the verge of finally taking possession of the million-dollar farm, she instead will be paid out his calculated portion of the property, which amounts to $394,780.[5] Alice surely would be happy to be receiving such an amount for something which she never physically had possession, but if she was dependent upon having the full value of the land, this amount will certainly seem unfair.

This hypothetical scenario was used for demonstrative purposes, but it displays the inherent problems in the methods that are currently used to value life estates in Ohio. Life estates have long been a valid property interest, but have been overvalued by statutes and regulations in Ohio.[6] While this overvaluation may help some people, it ends up hurting others who do not receive the full benefit to which they should be entitled. This inequity is one that courts and the legislature have been hesitant to address due to multiple factors.

The courts have been unable or unwilling to address the apparent conflict between the law and equity due to the clarity with which the laws and regulations are written.[7] This inactivity can perhaps be excused because the judicial branch's focus is properly on applying the laws as written, not making policy decisions regarding what the law *should* be. One can only speculate as to the reason that the legislature has refrained from addressing the issue, but the lack of discussion around the topic, as well as the hesitancy most people experience when considering mathematics, are perhaps some reasons explaining the legislators' inaction on the topic. Regardless of the reason for

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[5] *Id.*

[6] Granting property for life dates back to at least the feudal ages in England. "The two earliest charters of [transferring land ownership] which we possess, dating from before 1087, seem to have contemplated nothing more than grants for life . . . ." S. E. Thorne, *English Feudalism and Estates in Land*, 17 CAMBRIDGE L.J. 193, 196 (1959).

[7] "[W]e are not persuaded that this discrepancy permits us to conclude that the Appendix A Table is unreasonable as a matter of law." Cook v. Ohio Dep't of Job & Fam. Servs., 2003-Ohio-3479, 16 (Ohio Ct. App.).

inaction, Ohio statutory valuations of life estates no longer comply with equitable or common-sense principles and must be changed in order to accurately display the value of long-term land ownership.

This Comment is intended to look at the fairness and efficiency of life estate valuations by the state of Ohio. First, this Comment will look into the background behind life estates, examining the history and the methods by which the current valuations have come to be. Second, this Comment will look at the valuation process as it currently plays out in multiple areas of law, including Medicaid repayment, partition actions, and eminent domain seizures. Third, different proposals for new valuation models will be addressed.

II. BACKGROUND

A. Home Ownership in the United States

For many Americans, home ownership is one of the most important fiscal assets they possess. According to the 2019 Survey of Consumer Finances conducted by the Board of Governors of the Federal Reserve System, 64.9% of United States residents owned homes.[8] At that time, homeowners had a median net worth of $255,000—more than 40 times the median net worth of individuals who were renters.[9] In fact, for all but one of the age groups polled, the primary residence was the largest asset they had.[10] For individuals under the age of 35, their primary residence added an average of $185,000 to their net worth.[11] The average jumped up to $250,000 for home owners between 35 and 54 before declining in the older demographics.[12]

In today's world, the equity that is built by owning, possessing, and being able to sell a home is a large and significant portion of most people's wealth. Homeownership promotes long term wealth building because it acts as a forced savings mechanism and creates an asset which is able to independently appreciate in value.[13] In most cases, both homeowners and renters pay monthly in order to continue to reside in their homes, but the key difference is that for renters the payment is a sunk cost, whereas each payment made by the homeowners increases the equity that they own in their home and

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[8] *Homeownership Remains Primary Driver of Household Wealth*, NAT'L ASSOC. OF HOME BUILDERS (Feb. 18, 2021), https://www.nahb.org/blog/2021/02/homeownership-remains-primary-driver-of-household-wealth/.

[9] *Id.* During that same time, renters' median net worth was only $6,300.

[10] *Id.* The only age group which reported a different asset as their largest was the 55-64 demographic, which reported that their primary residence was equal in value to their business interests.

[11] *Id.*

[12] *Id.*

[13] *Research Series: How Does Homeownership Contribute to Wealth Building?*, HABITAT FOR HUMAN., https://www.habitat.org/our-work/impact/research-series-how-does-homeownership-contribute-to-wealth-building (last visited Nov. 7, 2023).

thereby increase their own net worth.[14] The ownership of the home then gives options to be able to borrow more money against their equity or create intergenerational wealth by passing the home on to children.[15]

Owning a home allows children of homeowners to transition to homeownership themselves at an earlier time. This lengthens the time over which they can accumulate wealth and leads to compounding increases further down the generational line. Children who grow up in families which own their homes also experience higher rates of becoming homeowners themselves, by about 25 percentage points, when compared with the children of renters.[16]

Homeownership also affects many areas outside of the net worth of individuals. For example, parental homeownership significantly impacts high school graduation among children from lower income households.[17] Additionally, studies have shown that children who grow up in a homeowning family experience fewer social problems.[18] Ownership of a home is imperative in order to create personal wealth, and the unexpected loss of housing would be severely detrimental to most people.

B. Life Estates and the Rights of the Remainderman

Life estates are not a new concept. They have been employed since at least feudal England, and while they are not the most commonly used land conveyance strategy today, they are still a useful method that some choose to utilize.

1. Life Estates in Feudal England

Evidence exists of life estates being employed in post-Norman England as early as 1087.[19] In this early period of English feudalism, the giving of life estates was considered a customary form of repayment for a Lord's homage and service to the King.[20] These life estates were not true life estates as the term would be commonly understood today. The King reserved the right to be able to reclaim the lands if the Lord discontinued the homage

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[14] *Id.*
[15] *Id.*
[16] Thomas P. Boehm & Alan M. Schlottmann, *Housing and Wealth Accumulation: Intergenerational Impacts*, JOINT CTR FOR HOUS. STUD. OF HARV. UNIV. (Oct. 2001), https://www.jchs.harvard.edu/sites/default/files/media/imp/liho01-15.pdf.
[17] *Id.*
[18] *Id.*
[19] Thorne, *supra* note 6, at 196.
[20] *Id.*

and loyalty on which the gift was predicated.[21]

This method by which the King gave land to loyal Lords was subsequently used by Lords to give life estates to loyal Barons and other vassals.[22] Initially, these offerings would have ended at the death of the life estate tenant, but a mechanism developed in which the heirs would be able to petition to retain rights to the property.[23] However, there was no requirement under the feudal laws for the landowner to award the property to the heirs of the prior life estate holder.[24] Often, the heirs would be required to make a payment of homage known as a "relief," which was normally paid to the landowner.[25]

However, it was not just possession at the most local level that needed to be determined under the feudal laws of England. When a King gave the land to a Lord, who subsequently gave the land to a local Baron, the land was still ultimately owned by the King. The Baron may have been entitled to possess the land under a life estate granted by the Lord, who himself was granted a life estate by the King, but all rights ultimately still remained with the King.

This became an issue when the Baron was in possession of the land but the intermediate Lord died. In this situation, the life estate of the Lord was expired, and the lands reverted back to the King.[26] While the Baron was free to petition the King or the new Lord of the land for the right to possess the land, the Baron had no legal options or rights to be able to ensure their continued residence on and use of the land.

Understanding this problem, by the middle of the twelfth century, the laws began to change to allow the life estate holder to retain some rights after the death of the intermediary Lord.[27] These rights came at the expense of the rights of the King, who would no longer be able to exercise full control as he desired.[28] The life estate giver always had the superior title to the land, but the tenant's rights to the life estate outweighed the rights of the Lord to assert the claim.[29]

As the twelfth century progressed, the payment of reliefs for the life estate began to evolve once again. The homage payment began to be regarded

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[21] *Id.*
[22] *Id.*
[23] *Id.* at 197. Two of the earliest charters that are known today did in fact become hereditary. *Id.* at 196.
[24] *Id.* at 197. In some cases, a different scheme developed for life estate holders who were given land pursuant to military service. In those cases, the landowner was obligated to award a life estate to the heirs in exchange for a payment of homage.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 199.
[28] *Id.*
[29] *Id.* at 200.

as remaining valid until both the giver and the receiver of the payment had died.[30] When a Lord who had given a life estate died, the tenant's payment was considered valid and binding on the subsequent Lord who took control.[31] Likewise, when a life estate tenant died, but had an heir who was immediately and physically on the property and ready to take over the responsibility and the service to the Lord, the Lord was barred from asking for an homage payment for as long as that heir lived.[32]

In 1215, English nobles rose in rebellion against the rule of King John and, after brief fighting, forced him to sign the Magna Carta.[33] Among other rights, this document created a set expectation of the magnitude of "relief" that would be paid for a life estate in the country.[34] As the thirteenth century progressed, tenants began to transfer their tenancy to others without needing to pay any relief to the Lord.[35] The Lords thus attempted to inject order into the transfer of property and passed the Statute of Quia Emptores in 1290.[36] This statute led to the unforeseen collapse of the feudal system of land ownership.[37]

By the 1400s, English tenants had begun using techniques to write wills with language that allowed the land to be passed after death.[38] To do this, a tenant would put language in his will requiring another identified individual to "use" the property for a certain purpose.[39] This language was not effective in ordinary common law courts, but a second type of English courts, called Chancery Courts, were more focused on equitable solutions to cases and frequently enforced this employment of "use" covenants.[40]

In 1536, Henry VIII passed the Statute of Uses over the objections of

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[30] *Id.* at 200–01.
[31] *Id.* at 201.
[32] *Id.*
[33] History.com Editors, *King John Puts His Seal on Magna Carta*, HIST., https://www.history.com/this-day-in-history/magna-carta-sealed (June 13, 2022).
[34] Thorne, *supra* note 6, at 201.
[35] *Id.* at 209.
[36] Ronald Benton Brown, *Teaching Important Property Concepts: The Phenomenon of Substitution and the Statute Quia Emptores*, 46 ST. LOUIS L.J. 699 (2002).
[37] *Id.* at 709. The statute no longer allowed Barons (or by extension Lords) to convey life estates, but instead it allowed the current estate tenants to convey their interests and made the inheritance of estates an explicitly legal practice. In action, this resulted in free transfer of property among the population with the caveat that if an estate holder died without an heir the land returned to the Baron, then to the Lord, and then ultimately the King. Eventually the King would once again hold free title to all land. *Id.*
[38] JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 268–69 (5th ed. 2009).
[39] P. Tucker, *The Early History of the Court of Chancery: A Comparative Study*, 115 ENG. HIST. REV. 791, 792 (2000).
[40] *Id.*

Parliament, converting the "use" covenants into specified legal interests.[41] This opened these conveyances and devises to feudal burdens, including a relief which would be paid to the King.[42] Though this statute was repealed only four years later due to its vast unpopularity, one lasting effect was the ability to convey property through a written instrument.[43]

Underpinning all of the development of life estates in feudal England was the notion that all land in the country was ultimately still the property of the King.[44] The improvements in the rights of other nobles and lower vassals paved the way for the modern system of property rights that exist today. Rights like the use of written documents, the ability to buy and sell restrictions on land, and even the different types of land ownership would not have occurred if not for the Middle Ages in England. Without the new legal creations, the system of owning land in fee simple absolute, as a term for years, or as a life estate would not have come into practice.

2. Modern Life Estates under Ohio Law

Ohio, like most jurisdictions, currently recognizes the right to transfer life estates.[45] Many courts today require precise language in order to make it clear that the transfer is for only the life estate and not the whole right to the property.[46] When life estates are created, they are often measured by the length of the life of the person to whom the property is conveyed, but this is not required.[47] Moreover, once a person is in possession of a life estate, they have the ability to lease or sell their interest in the property to someone else for the duration of the life estate.[48] When this action is taken, the recipient of the property is known as a life tenant *pur autre vie*.[49] In this case, when the reference life ends, the rights of the recipient also end, regardless of the

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[41] Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 284 (1995).

[42] Joel Hurstfield, *The Revival of Feudalism in Early Tudor England*, 37 HIST. 131, 137 (1952).

[43] Prior to this statute, property was required to be transferred through the livery of seisin. This required the parties to physically enter the land in question and perform acts which third parties would understand as the handing over of the estate from grantor to grantee. Reid, *supra* note 41, at 281–82. Before written conveyances were allowed by law, children would often be brought to observe the transfer and then struck in the head or face in order to create a lasting memory that they would be able to testify to. Allegra di Bonaventura, *Beating the Bounds: Property and Perambulation in Early New England*, 19 YALE J.L. & HUMAN. 115, 141 (2007).

[44] Thorne, *supra* note 6, at 200.

[45] See OHIO ADMIN. CODE § 5160:1-3-05.17(B)(2)(d) ("A life estate owner owns the property only for the duration of the life estate. The owner can sell only his or her interest in the life estate. The owner cannot take any action concerning the interest of the remainderman.").

[46] *See* Lane v. Lane, 187 N.E.2d 71, 72–74 (Ohio Ct. App. 1961) (Interpreting one paragraph of a will which was disputed to either grant a life estate and a vested remainder or a modified life estate which would retain an interest in the property if any of the remaindermen passed away before the life estate holder.).

[47] Sullinger v. Reed, 178 N.E.3d 29, 36 (Ohio Ct. App. 2021); Durben v. Malek, 2014-Ohio-2611, 4 (Ohio Ct. App.).

[48] Howell v. Howell, 172 N.E. 528, 529–30 (Ohio 1930); *Durben*, 2014-Ohio-2611 at 66.

[49] *Howell*, 172 N.E. at 530. "Pur autre vie" translated from its original French means "for another's life." *Pur autre vie*, BLACK'S LAW DICTIONARY (7th ed. 1999).

lifetime of the recipient themselves.[50]

The act of holding a life estate *pur autre vie* is rarely a contested issue, but it was at the center of an Ohio appellate case in 1980. In *Lamp v. Reynolds*, the plaintiff, Lamp, brought an action for forcible entry and detainer against the possessor of a property in which he held a remainder.[51] Defendant had taken possession of the property pursuant to a life estate measured by a third-party life.[52] When that third party died, the defendant attempted to make a claim for repayment of money spent making improvements to the property, but Ohio law is clear that even when the measuring life is a third party, the outgoing life estate holder retains no rights to the property when the reference life dies.[53]

Life estate holders, however, still maintain many rights while in possession of the property. For example, life estate holders still maintain the right to move out of state and rent out the property as they see fit for income.[54] They also maintain the right to sell or transfer the property by quitclaim deed without the permission of the remainderman.[55] In addition, when a third party undertakes an action that diminishes the value of both the life estate and the remainder, both parties are able to sue for their respective damages.[56] If a life estate holder dies and the life estate terminates, the personal representatives of the deceased owner still maintains the right to cultivate and harvest crops that had been planted prior to the termination of the life estate.[57] Life estate holders are commonly afforded mineral rights and proceeds from the mining that occurs during their possession, but this can be explicitly or implicitly preempted by the conveyer.[58]

The right to possession of the land is not unqualified. If a court determines that the rightful life estate owner would be likely to damage the value of the property to the remainderman, the court can order that the property be held in trust.[59] Additionally, any mortgages or leases given by the life estate holder do not survive the termination of the life estate.[60]

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[50] The reference life is the life that was identified in the initial conveyance which created the life estate.
[51] Lamp v. Reynolds, No. 79CA4, 1980 Ohio App. LEXIS 10049, at *1 (Ohio Ct. App. May 14, 1980).
[52] *Id.*
[53] *Id.* at *1, *3.
[54] *See* Fruth v. Shultz, No. WD-94-052, 1995 Ohio App. LEXIS 1980 (Ohio Ct. App. May 12, 1995).
[55] *See* Prentiss v. Goff, 949 N.E.2d 560, 562–63 (Ohio Ct. App. 2011).
[56] *See In re* Est. of Worthington, 4 Ohio Dec. 381 (Ohio Prob. Ct. Hamilton Cnty. 1896).
[57] *See In re* Specht's Est., 36 N.E.2d 865 (Ohio Ct. App. 1941).
[58] *See, e.g.*, Brooks v. Hanna, 10 Ohio Cir. Dec. 480 (Ohio Ct. App. 1899); *In re* Est. of Wernet, 22 N.E.2d 490, 492 (Ohio Ct. App. 1938).
[59] *See In re* Miller's Est., 121 N.E.2d 26 (Ohio Ct. App. 1953).
[60] *See* Rippel v. Rippel, 82 N.E.2d 140 (Ohio Ct. App. 1948).

Life estates are certainly not the most common forms of land transfer today, but they remain an option for individuals seeking to transfer land. The quintessential method by which life estates are created or granted is through the use of express language such as, "I grant this property to my daughter for life."[61] When a life estate is granted, the grantor has the choice to decide what will happen to the property after the termination of the life estate. The grantor may choose to give the remaining interest to another party, but if he takes no action, the default rule is that his estate retains the rights to the property after the life estate ends.[62]

The party that receives the remaining interest in the property, whether it is a third party or the granting party, also retains some rights to the property.[63] This remainder party can sell their interest, sue for wasteful conduct by the possessor, and has a vested right to future use of the property.[64] The knowledge that at some point in the future the remainderman will have full possession and rights to the property is a large portion of the value inherent in the remainder.[65]

In today's society, the ability to control property, sell it, or pass it on to heirs are some of the key ways that generational wealth is accumulated and maintained.[66] Despite the collapse of the housing market in 2008, homeownership is still the greatest source of wealth in the United States.[67] Remaindermen rely on the idea that while they do not currently have possession of the home or property in question, a day will come where they do have possession and they can then pass on the property and create the generational wealth that many believe constitutes the "American Dream."

C. An Introduction to Actuarial Tables

In order to understand the current scheme of life estate valuations, one must also have a basic understanding of actuarial tables. Most commonly, an actuarial table is a compilation of death probabilities and life expectancies for the current population.[68] These tables can be relatively simple, using possibly only one added variable, or they can be massively complex, using a multitude of variables in an effort to more accurately mirror the human

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[61] D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 12, 68 (2009).

[62] *Id.* at 12.

[63] *Id.* at 15.

[64] *Id.*

[65] Danaya C. Wright, *Empirical Analysis of Wealth Transfer Law: What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2617–19, 2634–37 (2020).

[66] *Id.* at 2608.

[67] *Id.* at 2609.

[68] *Actuarial Life Table*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/STATS/table4c6.html (last visited Nov. 7, 2023).

population.[69]

The goal of an actuarial table is to attempt to forecast how many people in a large population will be expected to reach "x" number of years old.[70] These tables are essential for both the Social Security Administration ("SSA") as well as insurance companies because they allow those organizations to accurately forecast the distribution of benefits.[71] As a result, those organizations have a great incentive to ensure that the tables are accurate to the behaviors displayed by the public.

The SSA releases an updated actuarial table each year that is based on new data and new information about the American public.[72] This allows the administrators of the SSA and legislators to better forecast the future needs of Social Security and Medicare.

D. The Method by Which Actuarial Tables Influence the Calculation of Life Estate Valuation

Ohio has adopted the use of an actuarial table to determine the valuation of life estates.[73] Specifically, the Ohio Administrative Code ("OAC") contains a section passed originally in 1977 which assigns percentages of the overall value of the property to both the life estate holder and the remainderman, depending upon the present age of the life estate holder.[74] In 1999, the Code was updated and took the numbers from the Internal Revenue Service ("IRS") mortality table in circulation at that time.[75] The percentages in the table have not changed since 1999.[76]

Federal law requires all states to implement a program for recoupment of costs paid for medical care under Medicaid.[77] States vary quite dramatically in how they choose to determine whom to bill and what assets

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[69] The Social Security Administration publishes tables based on only a male/female factor, but insurance companies will use tables that take into account gender, smoking habits, race, occupation, socio-economic status, gambling, and debt load, to name only a few. *Id.*; Julia Kagan, *Actuarial Life Table: What it is, How it Works, FAQs*, INVESTOPEDIA, https://www.investopedia.com/terms/a/actuarial-life-table.asp (July 22, 2023).

[70] Kagan, *supra* note 69.

[71] *Id.*

[72] *Actuarial Life Table*, *supra* note 68.

[73] OHIO ADMIN. CODE 5160:1-03-05.17(G).

[74] *Id.*

[75] Cook v. Ohio Dep't of Job & Fam. Servs., 2003-Ohio-3479, 15–17 (Ohio Ct. App.).

[76] OHIO ADMIN. CODE 5101:1-39-32 (2002 & Supp. 2003–2004).

[77] 42 U.S.C. § 1396p(b)(1)(A) ("[T]he State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan . . . [T]he State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.").

to target. For example, in 2019, Hawaii's Medicaid estate recovery program collected only $31,000.[78] In comparison, Iowa, which has a population roughly double that of Hawaii, recovered more than $26 million that same year.[79]

In Ohio, when a person requires the use of Medicaid to pay for medical assistance, OAC Section 5160:1-3-05.1 determines eligibility for the program and the necessary estate recovery based upon the person's resources.[80] Section 5160:1-3-05.17 specifically determines whether, and to what extent, a person's life estate is included in their resources.[81] There is a subsection in the Code that allows a person to exclude the value of the life estate if it is the person's "principal place of residence."[82] However, this exception no longer applies if an individual is taken to a hospital or other facility and placed in palliative care.[83] In fact, from a purely financial point of view, the individual's estate is more protected if they opt to remain at home instead of seeking out the best possible care.

If a determination is made that a person needs Medicaid insurance, the life estate holder is left with few options to prevent the property from being counted against them. Ordinarily, the potential value of the property is determined by fair market value, and not by any actual subsequent sales.[84] In fact, even if a life estate holder manages to sell their interest in the property, the Code instructs courts to ignore the sale and value the property based solely on the statutory "market value."[85]

When a fair market value for the property has been determined, the court deducts from that value the cost of any liens or encumbrances on the property.[86] At that point, the court reaches what they refer to as the "equity value" of the property.[87] The court then consults the table in the Code to determine the equitable amount of the value which should be allotted to the

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[78] Tony Leys, *They Could Lose the House – to Medicaid*, NPR (Mar. 1, 2023, 12:02 PM), https://www.npr.org/sections/health-shots/2023/03/01/1159490515/they-could-lose-the-house-to-medicaid.

[79] *Id.*

[80] OHIO ADMIN. CODE 5160:1-3-05.1.

[81] OHIO ADMIN. CODE 5160:1-3-05.17.

[82] OHIO ADMIN. CODE 5160:1-3-05.17(E) ("If the life estate is the individual's principal place of residence, as described in rule 5160:1-3-05.13 of the Administrative Code, the fair market value of the life estate is excluded as a resource."). OHIO ADMIN. CODE 5160:1-3-05.13(B)(2) defines what residences count as a "principal place of residence." In order to qualify, the person must be physically present and living in the location or show an intent to return to the location.

[83] OHIO ADMIN. CODE 5160:1-3-05.13(C)(2).

[84] OHIO ADMIN. CODE 5160:1-3-05.17(D); Stutz v. Ohio Dep't of Job & Fam. Servs., 96 N.E.3d 963, 967 (Ohio Ct. App. 2017) ("Ms. Stutz has failed to demonstrate that the general statute defining 'fair market value' (Ohio Adm.Code 5160:1-3-05.1(B)(4)) should be used by the Agency instead of Ohio Adm.Code 5160:1-3-05.17(F), the specific statute, to value life estates.").

[85] OHIO ADMIN. CODE 5160:1-3-05.17(D)(1)(b) ("If the individual has the right to transfer or sell the life estate, the life estate's fair market value is considered a countable resource unless it qualifies as an excluded resource as described in rule 5160:1-3-05.14 of the Administrative Code.").

[86] OHIO ADMIN. CODE 5160:1-3-05.17(G)(2)–(3).

[87] OHIO ADMIN. CODE 5160:1-3-05.17(G)(4).

life estate holder, a portion of which has been reprinted as Figure 1.

Figure 1: Current OAC Medicaid Table.[88]

Age	Life Estate	Remainder
65	.67970	.32030
66	.66551	.33449
67	.65098	.34902
68	.63610	.36390
69	.62086	.37914
70	.60522	.39478
71	.58914	.41086
72	.57261	.42739
73	.55571	.44429
74	.53862	.46138
75	.52149	.47851

The multipliers in the table determine the final amount of equity in

[88] OHIO ADMIN. CODE 5160:1-3-05.17(G)(5).

the property that both the life estate and the remainderman hold.[89] Many states use the same method, with similar tables, to calculate the value of life estates for purposes of Medicaid.[90]

What is notable about Ohio's table is that it was originally written in 1999 using the IRS table in place at the time.[91] Since 1999, the IRS has updated their model, but the Ohio version has not been touched.[92] This failure to bring the table in line with modern data has resulted in the table becoming inadequate. This Comment seeks to show why this method is inherently out-of-touch with what it attempts to accomplish. In the next section, this Comment will further explore the mechanism by which this method is used and will demonstrate, through cases and examples, why the method needs to be re-examined by the legislature.

III. ANALYSIS

The use of the table stated in the OAC and the problems that arise from using it can be more easily displayed through a discussion of cases. In this section are a selection of cases that show the implementation of this principle in a variety of circumstances. This Comment will then further define the problems that are borne out by the cases.

A. Valuation in Practice

The valuation of life estates is a matter that arises in a multitude of legal issues. Most commonly, the problem arises in the areas of Medicaid eligibility and recovery, partition actions, and eminent domain seizures. This Comment will display in each of these scenarios how the state applies the valuation of life estates.

1. Medicaid Eligibility

The ability to take advantage of the Medicaid program in general rests on the fact that the possible user does not have the resources to pay for medical care themselves.[93] In order to ascertain that fact, the possible user must be under a certain threshold of countable assets.[94] One potential problem that arises under this method is the addition of the life estate valuations to countable assets, even if they are in no way able to be liquidated or able to be used to pay for medical care.

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[89] For example, if a court determines the value of the property to be $100,000 and the life estate holder is 70 years old, the court will multiply 100,000*(.60522) and determine that the life estate holder has $60,522 in equity in the house and the remainderman has only $39,478 in equity in the house.

[90] Pike *ex rel*. Pike v. Sebelius, 2013 U.S. Dist. LEXIS 183196, at *19 n.6 (D.R.I. Nov. 13, 2013).

[91] Cook v. Ohio Dep't of Job & Fam. Servs., 2003-Ohio-3479, 17 (Ohio Ct. App.).

[92] *Id.* at 18.

[93] *Id.* at 10–11.

[94] *Id.* at 11.

Medicaid eligibility and recovery is the quintessential use of the life estate chart in the OAC. In fact, the chart is in the OAC under the Chapter 5160:1-3, labeled "Medicaid for the Aged, Blind, or Disabled (ABD)."[95] The section itself lays out a very clear rule about determining the value of the property, the relative percentage of the life estate, and the value of the life estate.[96] Within the same section is an option for an individual to challenge the valuation of the property.[97] However, the court does not frequently accept the valuation presented by challengers.

In *Stutz v. Ohio Dep't of Job & Family Services*, the life estate holder, Ms. Stutz, entered a nursing home facility and was approved for Medicaid.[98] At the time she entered the home, she owned a life estate in a parcel and her sons owned the remainder interest.[99] Ms. Stutz had the life estate appraised at a value of $2,000 and then subsequently sold the life estate to her sons for $1,800.[100] However, the Medicaid agency had concluded that the proper value of the life estate was approximately $24,000 and—as a result of her selling the property for far less than its "fair market value,"—determined that Ms. Stutz would enter Restricted Medicaid Coverage for many months.[101] Ms. Stutz appealed the administrative decision, specifically the valuation of the life estate, arguing that her valuation was in fact a "fair market value" considering all the circumstances.[102] Her argument rested on another OAC section which defined "fair market value" as: "the going price, for which real or personal property can reasonably be expected to sell on the open market, in the particular geographic area involved."[103]

While the court did not disagree that Ms. Stutz's result would be a fair valuation, it found the more specific statute applicable to life estates and Medicare valuation took precedence over more general interpretations elsewhere in the Code.[104] Consequently, the court refused to apply Ms.

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[95] OHIO ADMIN. CODE 5160:1-3-05.17.

[96] *Id.*

[97] OHIO ADMIN. CODE § 5160:1-3-05.17(H) ("If the individual disagrees with the county auditor's determination of the fair market value of the property . . . the individual may have a licensed real estate broker perform an appraisal of the property's value, which may be substituted as the fair market value of the property . . . .").

[98] Stutz v. Ohio Dep't of Job & Fam. Servs., 96 N.E.3d 963, 964 (Ohio Ct. App. 2017).

[99] *Id.*

[100] *Id.*

[101] *Id.* At the hearing, the court determined that the property in total was worth $51,170, which, when combined with the fact that she was 77 years old, meant that her life estate should be worth 48.742% of that total, coming to $24,941. *Id.* at 966–67.

[102] *Id.* at 965.

[103] *Id.* at 967 (quoting OHIO ADMIN. CODE 5160:1-3-05.1(B)(4)).

[104] *Id.*

Stutz's requested use of § 5160:1-3-05.1(B)(4) and instead used the chart contained in § 5160:1-6-05.17(F).[105]

In 2003, a separate Ohio appellate court examined a different case in which an attempt to avoid the OAC Medicaid chart failed again. In 1997, Ms. Cook began receiving Medicaid to pay for her long-term care facility.[106] At that time, she retained a life estate in two lots that she and her husband had conveyed to their son a couple years before.[107] For several years, her life estate did not count as an asset for the purposes of Medicaid because several local realtors stated that the life estate could not be sold due to the advanced age of the life estate holder.[108] In 2000, Ms. Cook signed off with her son, and they conveyed the property to a buyer, therefore ending Ms. Cook's life estate.[109] The unintended consequence of selling the property was that it demonstrated that Ms. Cook's life estate was transferable and, therefore, countable against her assets.[110] As a result, she was judged to be above the line where she was not able to use Medicaid to assist the payments for her long term care.[111]

Ms. Cook attempted to argue that the determination was unfair, especially in light of the fact that she did not actually receive money from the sale by her son and still had very little real resources with which to pay for her care.[112] She put forward at least two other methods by which to calculate the life estate valuation—the American Experience Table and the Carlisle Table—both of which were denied by the court.[113] The court understood that there is an inherent difficulty in properly valuing life estates, but in light of the fact that the lower court used the method in the OAC, it could not rule that doing so was an abuse of the court's discretion.[114]

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[105] *Id.*

[106] Cook v. Ohio Dep't of Job & Fam. Servs., 2003-Ohio-3479, 3 (Ohio Ct. App.).

[107] *Id.* at 2.

[108] *Id.* at 3. At the time *Cook* was decided, the OAC stated that "[i]f the life estate owner has the right to use the property but cannot transfer that right, the property is not considered an available resource." *Id.* at 11.

[109] *Id.* at 4.

[110] *Id.*

[111] *Id.* The property was sold by Ms. Cook's son for a profit of $11,962.86. Due to Ms. Cook's age (80 years old), her percentage of the total value was 43.659%, and therefore the court calculated her life estate's value to be $5,222.87. *Id.* at 12, 15.

[112] *Id.* at 13.

[113] *Id.* at 14–15. The American Experience Table would have calculated her life estate to be worth $2,990.95. The Carlisle Table would have calculated the value at $3,984.84. *Id.* at 15.

[114] *Id.* at 16–17. The court briefly discussed different methods for calculating life estate values.

> One old common law rule computed the value of a life interest by simply assigning it one-third the value of the fee. Another rule valued life estates at 'seven years' purchase of the fee.' The more modern practice is to estimate the value of a life estate with reference to the life tenant's life expectancy as shown by recognized mortality tables.

Id. at 16 (internal citations omitted). Besides the American Experience Table and the Carlisle Table, the court also mentioned using the IRS mortality tables that had served as the basis for the OAC table in 1999. *Id.* at 17.

2. Partition Actions

When co-tenants or multiple individuals holding an interest in property come to a disagreement, they often have the ability to request a judicial partition of the property.[115] This action can involve either the physical division of the land, if possible to complete in a fair manner, or the forced sale of the land followed by division of the profits among the parties.[116] One important consideration that courts keep in mind during this process is the comparative equity in the property between the parties.[117] If two parties own a property equally, the division of profits or land is much simpler than a similar plot of land co-owned by seven people, all with varying percentages of ownership.

A similar problem is confronted when faced with a property subject to a life estate. While to some it may seem counterintuitive and contrary to the original intent of the party who created the interest, a life estate holder is commonly given the right to partition the property.[118] This has been upheld in Ohio courts, although due to the unique nature of real property and life estates, partition by sale and division of the proceeds are usually the preferred course of action.[119]

A group of four siblings faced this very issue in Champaign County, Ohio.[120] In *Simon v. Underwood*, the four siblings had been bequeathed life estates in their father's properties, and after several years of disputes over how to fairly run the properties, two siblings filed a lawsuit to divide the properties.[121] The properties in question were mainly farmland, and the commissioner tasked with reviewing the property determined that the land could not be divided without making the parcels too small for modern farming methods, and thereby severely decreasing the overall value to the property.[122] As a result, the property was valued by assessing the fair market of the fee

[115] Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 5 (2014).
[116] *Id.*
[117] Simon v. Underwood, 2017-Ohio-2885, 64, 68 (Ohio Ct. App.).
[118] Fehringer v. Fehringer, 367 S.W.2d 781, 784 (Tenn. 1963).
[119] *Simon*, 2017-Ohio-2885 at 68. Ohio law calls for a commissioner to determine how or whether a property may be divided in a partition action. This is accomplished through a manual examination and appraisal of the property. OHIO REV. CODE § 5307.06. Once an appraisal is completed, either of the owners have the option to purchase the others' shares of the property at the appraisal value, otherwise the property may be ordered to be sold by the appropriate court. OHIO REV. CODE § 5307.11.
[120] *Simon*, 2017-Ohio-2885 at 1.
[121] *Id.* at 2, 4.
[122] *Id.* at 71.

simple of the land, and then multiplied by the current IRS actuarial table.[123] This produced a much fairer result than the result mandated by the Ohio Medicaid Table.

The use of actuarial tables also occurs in cases involving dower interests. In Ohio, a spouse is given a right to an estate for life in one-third of certain real property.[124] While these rights are often signed away when one spouse sells the property, these rights are the much more common form of life estates found in Ohio.[125] Under current law, when a court forces the sale of property subject to a spouse's dower rights, the right is sold along with the rest of the property and the spouse is paid a sum of money equal to the value of the dower interest.[126]

The Ohio Supreme Court has long held that the proper method to valuate a dower interest in property is through an analysis involving actuarial tables and the parties' ages at the time.[127] While the exact actuarial table in use has changed over time, the IRS table has supplanted both the Carlisle Table of Mortality and the American Experience Table of Mortality.[128] In *Drown v. JP Morgan Chase Bank, N.A.*, the Bankruptcy court was tasked with the determination of the value of a wife's dower interest and opted to continue the longstanding practice under Ohio law of using the IRS tables.[129]

Importantly, the IRS tables are used, rather than the other tables mentioned above, because of the fact that the IRS routinely modifies and

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[123] *Id.* at 24, 58; Magistrate's Order at 2, Simon v. Underwood, 2017-Ohio-2885 (Ohio Ct. App. June 30, 2017) (No. 2014 CV 131); Final Appealable Order at n.8, Simon v. Underwood, 2017-Ohio-2885 (Ohio Ct. App. June 30, 2016) (No. 2014 CV 131).

[124] OHIO REV. CODE § 2103.02. Subject to exceptions, "[a] spouse who has not relinquished [dower] or been barred from it shall be endowed of an estate for life in one third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage." *Id.*

[125] Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

[126] OHIO REV. CODE § 2103.041. It provides that

> In any action involving the judicial sale of real property for the purpose of satisfying the claims of creditors of an owner of an interest in the property, the spouse of the owner may be made a party to the action, and the dower interest of the spouse, whether inchoate or otherwise, may be subjected to the sale without the consent of the spouse. The court shall determine the present value and priority of the dower interest in accordance with section 2131.01 of the Revised Code and shall award the spouse a sum of money equal to the present value of the dower interest, to be paid out of the proceeds of the sale according to the priority of the interest. To the extent that the owner and the owner's spouse are both liable for the indebtedness, the dower interest of the spouse is subordinate to the claims of their common creditors.

Id.

[127] *See* Mandel v. McClave¸ 22 N.E. 290 (Ohio 1889), paragraph one of the syllabus; Unger v. Leiter, 32 Ohio St. 210, 214 (1877); Adm'r of Black v. Kuhlman, 30 Ohio St. 196, 199–200 (1876) ("the exact value of the widow's right of dower cannot be known with absolute certainty. It will depend largely on the length of her life, which can not be foreseen by the court. Yet its present value can be approximately ascertained. Tables have been constructed, based on wide and long observation, from which, the age of the widow being known, the probable duration of her life, and the present value of her dower right may be ascertained with reasonable certainty.").

[128] Drown v. JPMorgan Chase Bank, N.A. (*In re* Barnhart), 447 B.R. 551, 563 (Bankr. S.D. Ohio 2011).

[129] *Id*. at 565.

updates their own tables.[130] Life expectancy changes as medicine improves and living conditions change. Additionally, the importance of land ownership varies with different time periods. By improving and updating the mortality tables to take both of those factors into account, the IRS tables provide a modern examination into the issues.

B. The Lingering Problems of the Current Models

In some circumstances, like dower interest valuation, Ohio law incorporates reference to the IRS mortality tables. This stands in stark contrast to the method used by Medicaid. By implementing a system where the actuarial projections, and therefore the relative valuations of properties, can change in response to consistent updates made to keep the information current, the entire enterprise reflects a more fair understanding of what a "life estate" truly is. Conversely, by choosing to set in the OAC the exact proportions of ownership when it comes to Medicaid, Ohio has created a rigid framework that needs to be affirmatively changed by the state itself before it can respond to fluctuations of lifespans. The current framework is so rigid in fact, that while it was originally written into the Code in 1999, it has not been updated a single time since then.[131] In comparison, the IRS table has been through multiple updates, and as of January 2023, a new table is undergoing development with data from 2022.[132]

The most up to date IRS table differs dramatically from the current table used in the OAC. A small sample of the difference has been replicated below.

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[130] As noted by the court:

> Not surprisingly, "current mortality assumptions ... can change over time [.]" Stephanie Rapkin, *Rapkin on New Valuation Table*s, LEXSEE 2009 Emerging Issues 3636 (May 19, 2009) at 1 (footnote omitted) (copy attached as Exhibit A to the Tr.'s Resp.). As a result, tables such as the American Experience Table eventually become outdated. *See Palmore v. Swiney*, 807 S.W.2d 950, 953 (Ky. Ct. App. 1990) (describing the American Experience Table as "very outdated"); *Berry v. President & Dirs. of Bank of Manhattan Co.*, 133 N.J. Eq. 164, 31 A.2d 203, 204 (N.J. Ch. 1943) ("It is ... common knowledge that the average life has been extended many years since the [American Experience Table of Mortality was] drawn up."). By contrast, the Internal Revenue Service ("IRS") regularly updates the IRS Tables. *See* Rapkin at 1.

Id. at 564–65.

[131] OHIO ADMIN. CODE 5101:1-39-32 (2002 & Supp. 2003–2004).

[132] *Actuarial Valuations*, IRS (June 2023), https://www.irs.gov/pub/irs-pdf/p1457.pdf.

Figure 2: Comparison of OAC Table and current IRS Table[133]

	OAC Table		IRS Table	
Age	Life Estate	Remainderman	Life Estate	Remainderman
65	.67970	.32030	.54138	.45862
66	.66551	.33449	.52733	.47267
67	.65098	.34902	.51310	.48690
68	.63610	.36390	.49865	.50135
69	.62086	.37914	.48401	.51599
70	.60522	.39478	.46914	.53086
71	.58914	.41086	.45407	.54593
72	.57261	.42739	.43882	.56118
73	.55571	.44429	.42344	.57656
74	.53862	.46138	.40796	.59204
75	.52149	.47851	.39242	.60758

An examination of the table shows the remarkable differences between the OAC table, written in and unupdated since 1999, and the current model used by the IRS. There is a consistent difference between the two tables with the IRS table giving more equity to the remainderman by a margin of around 13 percentage points.

It cannot be understated how truly shocking it is that the OAC table has not been updated since 1999. This rigidity and inability to account for changes in life expectancy, and evolving notions of property ownership, has led to the OAC table becoming woefully inadequate. As such, the table must be updated or new methods must be explored.

[133] Information contained within comes from OHIO ADMIN. CODE 5160:1-3-05.17(G)(5) and the current IRS Table S (2010CM), using the interest rate of 4.6% in place on Jan. 1, 2023.

C. Constitutional Takings Clause Concerns

Although the Takings Clause has not yet been raised by the remaindermen in a Medicaid recovery suit, it could potentially give courts pause over the constitutionality of the current method. The Takings Clause, applicable to the States through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."[134] In general, this idea of "just compensation" has been interpreted to mean the "fair market value of the property on the date it is appropriated."[135] The Supreme Court defined the fair market value of the property as being "'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[136]

While the state certainly has some power to seize and sell property interests, this power is not endless. In May 2023, the United States Supreme Court released a decision in *Tyler v. Hennepin County, Minnesota*.[137] *Tyler* involved a statutory scheme in Minnesota where delinquent taxpayers were given three years to pay their back-owed taxes.[138] If, at the end of those three years, the taxpayer had not paid their debts, the state had the authority to sell their real property and use the proceeds to cover the tax debt.[139] The added wrinkle in this statutory scheme was that the state was also allowed to keep any excess money from the sale of the property and it was split between the county, the town, and the school district.[140] While the Court reiterated the right of the state to force the sale of the property, the Court saw the retention of the profits in excess of the debt to be a clear Takings Clause violation.[141]

After analyzing the text of the Fifth Amendment and examining the ordinary meaning of the Takings Clause in light of the Supreme Court's ruling in *Kirby Forest*, one could leave open the argument that the government-forced sale of land is unconstitutional based on undercompensation. A very similar argument is raised in other delinquent taxpayer land sales.

While not specifically in the Medicaid Reimbursement landscape, the Supreme Court has given guidance on determining whether to proceed with government-forced sales of real estate subject to multiple interests. In *U.S. v.*

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[134] U. S. CONST. amend. V.

[135] Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984) (quoting United States v. 564.54 Acres of Land, 441 U.S. 506, 511–13 (1979)).

[136] *Id.* (quoting United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979)).

[137] 598 U.S. 631 (2023).

[138] *Id.* at 635.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 643.

Rodgers, the Supreme Court stated four non-exhaustive considerations a court should make when the interests of third parties are involved.[142] The *Rodgers* Court articulated four factors to guide a district court in the exercise of its limited discretion not to authorize the forced sale of an entire property: (1) "the extent to which the Government's financial interests would be prejudiced if it were relegated to a forced sale of the partial interest actually liable for the delinquent taxes"; (2) "whether the third party with a nonliable separate interest in the property would, in the normal course of events . . ., have a legally recognized expectation that that separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors"; (3) "the likely prejudice to the third party, both in personal dislocation costs and in . . . practical undercompensation"; and (4) "the relative character and value of the nonliable and liable interests held in the property."[143]

Applying these considerations to the case of a parcel subject to a life estate sold to satisfy Medicaid reimbursement is a novel but unsurprising endeavor. As to the first interest, the government certainly has a financial interest in being reimbursed for amounts expended under Medicaid.[144] However, this interest is not unwavering. The fact that the repayment program is largely dependent on a particular state's policy choices is a sign that there is no rigid overpowering interest.[145]

In comparison, the other three *Rodgers* considerations weigh heavily against these sorts of state-mandated sales. The second consideration deals with the third party's expectation that they would not be subject to a forced sale. The *Rodgers* Court identified that "[t]he usual cotenancy arrangement, which allows any cotenant to seek a judicial sale of the property and distribution of the proceeds, but which also allows the other cotenants to resist the sale and apply instead for a partition in kind" is one that would weigh against requiring the forced sale of that third party's interest.[146] Arguably, the life estate/remainderman scenario is even more protecting of the third party's (or in this case remainderman's) expected protection from forced sale. The remainderman's interest in the property is not contingent on any conditions occurring or any promises that will need to be fulfilled. It is a concrete interest that they will one day own the property in fee simple—an interest which they are already allowed to exert in certain scenarios like waste.

The third consideration outlined by the *Rodgers* Court concerns the impact that the sale would have on the third party, whether that involves the

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[142] United States v. Rodgers, 461 U.S. 677, 709–711 (1983).

[143] *Id*. at 709–11.

[144] This interest is created by statute, codified at 42 U.S.C. § 1396p (b)(1)(A) ("[T]he State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan . . . [T]he State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.").

[145] *See supra* text accompanying notes 67–69.

[146] *Rodgers*, 461 U.S. at 711.

costs of relocation or the undervaluation that they would receive from the sale of their interest. In their decision, the Court discusses the issues with a mathematical calculation and the inherent unfairness that could result.[147] Without considering the costs of relocation or making new arrangements that would befall a remainder who suddenly is without a long-term property prospect, the undervaluation potential looms large, considering the issues with the valuation methods currently in place under Ohio law.

The Court's fourth consideration requires more analysis. In describing this concern, which is described as "the relative character and value of the nonliable and liable interests held in the property," the Court states that the lack of a present possessory interest in the property would weigh in favor of the sale.[148] Yet, in the process, the Court also states that a higher proportional interest in the value of the property by the remainderman would weigh against the sale.[149] While the remainderman would have no present possessory interest, as evidenced by their present ability to sue and protect the land, they do have *some* present interest. Additionally, as more thoroughly described above, there is a strong argument that the proportional interest possessed by the remainderman could be quite substantial.

The four *Rodgers* considerations were never designed to be exhaustive, nor were they intended to serve as factors in a "'mechanical checklist' to the exclusion of common sense and consideration of special circumstances."[150] However, these examples provide some insight into the contemplations that need to be given to the remainderman in a Medicaid recovery case. While it appears that no suit has been brought by remaindermen on these grounds, challenging the state's use of forced-sale Medicaid recovery, it would not be difficult to imagine a court ruling that the practice as currently employed is in fact unconstitutional in violation of the Takings Clause. Instead, the state must ensure that it takes measures to ensure that "just compensation" is paid to the remainderman at the correct "fair market value," and not based on an outdated chart that is no longer in line with current life expectancies or current societal values placed on homeownership.

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[147] *Id.* at 703–04. The Court describes a scheme employed in eminent domain cases where the property is sold, and the proceeds placed in a trust account. The annual proceeds from this account are then given to the life estate holder and upon their death, the principal amount given to the remainderman. *Id.* at 704–05.

[148] *Id.* at 711.

[149] *Id.*

[150] *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983)).

IV. PROPOSALS

This section attempts to show possible solutions that could be implemented by either the Executive or Legislative branch. Due to the fact that the current regulation is found in the OAC, any updates may be done through the ordinary course of passing new administrative measures. Of course, the same change could be enacted through a legislative measure, by passing a law clarifying how to go about calculating countable assets. These solutions vary in their complexity, but the implementation of any one of them would help to bring the Medicare valuation of life estates more in line with an actual valuation of the life estate.

A. Reservation of the First Two-Thirds-Share for the Fee Simple Holder

In late 1600s England, the traditional common law rule of apportionment gave a one-third interest to the tenant and a two-thirds interest to a remainderman in a life estate.[151] That rule ended up falling out of disfavor because of the results that it produced in some cases. For example, compare a 75-year-old with perhaps only a couple years left with the life estate with a 20-year-old possibly having decades still to go on his life estate. Under the doctrine of apportionment, those two individuals would be assigned an equal value for their life estates.[152]

While those results are indeed unusual, there may be some merit to the idea that a large portion of the total value of the estate should be reserved to the remainderman. However, it seems a wiser and more fair method to combine the doctrine of apportionment with the current valuation table. The difference can be more fully appreciated when testing it with a scenario of a 20-year-old holding a life estate in a property worth $1,000,000.

In this situation, the 20-year-old's life estate would be worth $333,333.33, and the person holding the remainder to the property, who holds the long-term value of the property, would have $666,666.67 in equity. When this is combined with the current Medicaid table, the 20-year-old's value in the property decreases only slightly to $324,550.00.[153] In this scenario, the difference of $8,783.33 would be allotted to the remainderman, in addition to the two-thirds portion initially reserved.

This scenario also works in the case of a 75-year-old. In this case, the first two-thirds are still reserved for the remainderman, but due to the age

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[151] Keniston v. Gorrell, 64 A. 1011, 1102 (N.H. 1906).

[152] *See* Williams' Case, 3 Bland. 186, 222–23 (Md. High Ct. Ch. 1831).

[153] According to the Medicaid table, a 20-year-old with a life estate is allotted 97.365% of the total value of the property. OHIO ADMIN. CODE 5160:1-3-05.17(G)(5).

of the life estate holder, the life estate would be worth only $173,830.00.[154] This means that the remainderman's long-term interest in the property would be worth a total of $826,170. The below figure shows the comparison between this proposed method and the current method.

Figure 3: Comparison of Reservation Method and Current Medicaid Table Method (Assuming a total estate worth $1,000,000)

	Reservation Method		Current Medicaid Table Method	
Age of Life Estate	Life Estate	Remainderman	Life Estate	Remainderman
20	$324,550	$675,450	$975,900	$24,100
75	$173,830	$826,170	$521,490	$478,510

The above table makes it clear that this proposed method would have dramatic effects, but these effects are only to bring the relative valuations more in line with traditional notions of what it means to own long-term property rights.

B. Calculation of Valuation Based Upon Projected Rent Payments

The second proposed method would involve more judicial and economic resources in order to determine the value of the life estate. In cases where a life estate holder has been deprived of the use of their life estate for one reason or another, courts have determined the damages as the rental value of the property during the time they were deprived.[155] This method would likely require an appraisal of the property at issue, especially if the property is not actively used as a rental property. This may present separate challenges, but many appraisers are just as capable of providing a rental price for a property as they would a purchase price.

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[154] According to the Medicaid table, a 75-year-old with a life estate is allotted 52.149% of the total value of the property. *Id.*

[155] Miller v. Miller, 2003-Ohio-1342, 47 (Ohio Ct. App.) ("Mrs. Miller received an inherent power to rent the property in which she was granted a life estate and, therefore, the trial court did not err in holding that she was entitled to compensation in the amount of $57,772.00, the fair-market rental value of the property for the period of time in which she was ousted from the property.").

Once the rental price is determined on a per-month or per-year basis, it would be fairly easy to calculate an estimation of the long-term value of the property. Based on recent history, it is fair to assume that the rental price would increase instead of remain constant for whatever timeframe needed. This could be modeled using a simple exponential equation such as the following:

Formula 1: Calculation of rental price at time t

$$R_t = R_1 * (1 + G)^t$$

t = Time
R_t = the rental price at Time t
R_1 = the initial rental price
G = Growth Factor

This formula would require three inputs in order to calculate the rental price of a property at any given time. R1 would be the initial rental price calculated by the appraiser. G would be the growth factor, or the amount of increase during each period that would occur to the rental price.[156] The above formula would have the benefit of easily working with any length of rental period, whether it is days, weeks, months, or years. As long as the growth factor is framed in the same temporal units as the time *t*, the equation will give the correct answer.

However, this equation only does half of the job. The equation gives the rent price only for a particular time, not the cumulative rent over a longer range. In order to calculate the total rent over a long period of time, another equation must be used.

Formula 2: Calculation of cumulative rent

$$\int_1^t R_1 * (1 + G)^t dt$$

t = Time
R_1 = Initial Rental Price
G = Growth Factor

The use of Formula 2 allows a court, a mediator, or any party to

[156] For example, if it is determined that the rental price would increase by 5% each year, G would be 0.05. Or if the rental price would increase by 1.5% each year, G would be 0.015.

calculate for themselves what the long-term cumulative rent would be for a property, given only a couple of factors. Again, this formula requires the knowledge of an initial rent, likely determined by an appraiser, and a growth factor for the timeframe.

Two potential drawbacks of this method also warrant discussion. The first is the speculative nature of this process. By endeavoring to determine the rate at which the rental price will change in value, the formula tries to predict what the rate will be far into the future. In a theoretical case where the life estate of a 20-year-old is trying to be calculated, the court may find itself trying to speculate the growth of rental values decades into the future. Even if the court does manage to estimate values 40 years into the future, it is possible that the reference life may have ended long before the specified period ends.

The only way to be sure to avoid that potential pitfall would be to postpone a determination of the rental value until the reference life has ended. But this is counterproductive to the entire process! A rule stating that someone must die in order to determine how much they are entitled to would create even more chaos in a system that this Comment attempts to simplify.

The second drawback is that this method could theoretically end up with damages more than the entire property is worth. Especially in the theoretical case of a 20-year-old, the possibility of decades of rental values could eclipse the value of the property. Assuming a property where the rental value begins at 5% of the overall value of the property and the rental price increases by 5% every year, it would take only 14 years for the total damages to equal more than the value of the property in total.

There are serious issues with using the rental value methodology that would need to be addressed in order to make it a viable solution for most cases. However, there may be some edge cases in which this method may be immediately viable. Cases in which a known, relatively short time frame is the only period needing to be recompensed for, may find this method helpful.

C. Calculation of Valuation with updated IRS tables

Perhaps the easiest solution to updating the Medicaid table written into the OAC is to do just that. *Update* the table. When the table was added into the OAC in 1999, the drafters simply copied the values from the IRS life estate table that was in effect at the time.[157] The easiest fix would be to follow

[157] Cook v. Ohio Dep't of Job & Fam. Servs., 2003-Ohio-3479, 17 (Ohio Ct. App.).

the example set by the federal system and incorporate the table by reference instead of copying the table into the Code.

The United States Congress has specified how the federal system values life estates. Under Title 26 of the United States Code, Congress specified specific tables for use in determining historic values of life estates.[158] For valuations on or after May 1, 2009,

> the present value of the interest is computed by multiplying the value of the property by the appropriate remainder interest actuarial factor (that corresponds to the applicable section 7520 interest rate and remainder interest period) in Table B (for a term certain) or in Table S (for one measuring life).[159]

The section 7520 interest rate which the above statute references is "an interest rate (rounded to the nearest 2/10ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls."[160] As mentioned above, the current Federal midterm rate as of January 1, 2023, is 4.6%.[161]

By incorporating the IRS mortality and life estate tables by reference, the Federal Code allows itself to update with each new table that is promulgated by the IRS. In comparison, Ohio's table has not been updated since 1999. Simply updating the OAC to incorporate the IRS tables by reference would bring the valuations more into line with modern life expectancy and allow the values to more accurately portray common notions of life estates.

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[158] 26 U.S.C. § 20.2031-7 ("Valuation of annuities, interests for life or term of years, and remainder or reversionary interests.").

[159] 26 U.S.C. § 20.2031-7(d)(2)(ii) also defines the following:

> *Ordinary remainder and reversionary interests.* If the interest to be valued is to take effect after a definite number of years or after the death of one individual, the present value of the interest is computed by multiplying the value of the property by the appropriate remainder interest actuarial factor (that corresponds to the applicable section 7520 interest rate and remainder interest period) in Table B (for a term certain) or in Table S (for one measuring life), as the case may be. Table B is contained in paragraph (d)(6) of this section and Table S (for one measuring life when the valuation date is on or after May 1, 2009) is contained in paragraph (d)(7) of this section and in Internal Revenue Service Publication 1457. See § 20.2031–7A containing Table S for valuation of interests before May 1, 2009. For information about obtaining actuarial factors for other types of remainder interests, see paragraph (d)(4) of this section.

[160] 26 U.S.C. § 7520(a)(2) ("For purposes of this title, the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be determined . . . by using an interest rate (rounded to the nearest 2/10ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls.").

[161] *Actuarial Tables*, IRS, https://www.irs.gov/retirement-plans/actuarial-tables (last visited Nov. 10, 2023).

V. CONCLUSION

Ohio's method for determining life estate values is broken. The table created in 1999 and copied into the OAC perhaps represented notions of the value of a life estate in 1999, but it certainly no longer does so. The State of Ohio's Medicaid eligibility program expects that an aging 70-year-old could go out into the public marketplace and be able to find a buyer for his life estate. They expect that buyer to be willing to pay 60% of the total value of the property, regardless of the fact that they would own no long-term rights to it, and that their property interest could evaporate at any time, completely outside of their control.

The current method is a gross over-valuation of life estates generally. Increasingly, real property is looked at as an investment. It can be important collateral in order to get a loan for a new endeavor or it can be a way to earn money through short-term rentals. But a life estate in property does not confer the same benefits that holding the property in totality does. The life estate holder will not be able to mortgage the property for the same value from a bank. They will not be able to offer the same leases they would otherwise.

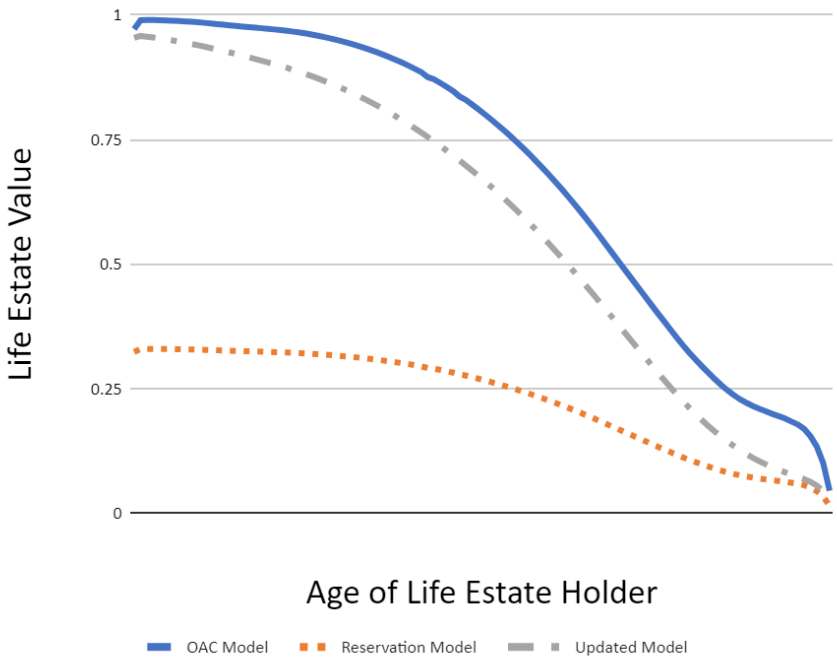
This Comment attempts to identify and display the disparity between the valuation written in the OAC and the "actual, real-world" valuation, but it does not attempt to argue that the real-world valuation should be higher. Instead, this Comment argues that the OAC valuation should be lower and presents several options by which that could happen. Figure 4 shows a direct comparison of the current valuation and the two preferred alternatives demonstrated in Section III. Figure 5 compares the live estate values for all three models.

Figure 4: Comparison between Current OAC model, Reservation model, and Updated model.[162]

	OAC Model		Reservation Model		Updated Model	
Age	Life Estate	Remainder	Life Estate	Remainder	Life Estate	Remainder
65	.67970	.32030	.22656	.77344	.54138	.45862
66	.66551	.33449	.22183	.77817	.52733	.47267
67	.65098	.34902	.21699	.78301	.51310	.48690
68	.63610	.36390	.21203	.78797	.49865	.50135
69	.62086	.37914	.20695	.79305	.48401	.51599
70	.60522	.39478	.20174	.79826	.46914	.53086
71	.58914	.41086	.19638	.80362	.45407	.54593
72	.57261	.42739	.19087	.80913	.43882	.56118
73	.55571	.44429	.18524	.81476	.42344	.57656
74	.53862	.46138	.17954	.82046	.40796	.59204
75	.52149	.47851	.17383	.82617	.39242	.60758

[162] OHIO ADMIN. CODE 5160:1-3-05.17(G)(5); *Actuarial Tables*, *supra* note 161.

Figure 5: Comparison of Life Estate Values



Clearly both alternatives are preferable to the current model and would lead to a more just result. Using the example in Section I, Nevin may have other assets by which he could have paid that much smaller amount, or assets could have been allotted when his estate is probated. This would have allowed Alice to remain in possession of her family farm. In the end, doesn't everyone deserve to be King (or Queen) of their castle?