

Saving Momma's Home

10 FAQs
About Nursing
Home Medicaid



Monica Franklin



SAVING MOMMA'S HOME

10 Frequently Asked Questions
About Nursing Home Medicaid

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Disclaimer

This book addresses common questions and urban myths about the family paying for care in the nursing home. It does not contain legal advice. Each family's situation is unique. There is no cookie-cutter long-term care plan. ***Please do not take any "legal" action based on this booklet.*** Rather, use this booklet as a springboard for further planning with a qualified elder law attorney. See the Appendix to find out how to determine if an attorney is qualified as a certified elder law attorney.

Note: While the legal issues are real and the outcomes true, the names and personal facts are fictional.

Introduction

This is the first booklet in the “Gray Matters” series. Each booklet contains information about a particular area of elder law. It is written by a certified elder law attorney. (Read more about my education and experience on the back cover of this booklet.)

*The two most common questions I hear are, “**What is an elder law attorney,**” and “**Is the State (or nursing home) going to take my home?**” The first question has a rather short answer, but the second question is the entire focus of this booklet. Throughout this booklet, I will speak in first person, but if I refer to “we” or “our,” I am referring to my wonderful team: Susie Stiles, Judy Wyrick, Gwen Lawless, Trish Kennedy, Brooke Givens and Gabrielle Blake. To learn more about our team, see our website: www.MonicaFranklin.com.*

As an elder law firm, we are focused on the special legal needs of older adults and their families. We also work with families to address the legal needs of disabled adult children through conservatorship and the parents’ estate planning. The following short list describes how an elder law attorney helps families.

An elder law attorney...

- *Helps families save Momma’s home and get Medicaid faster.*
- *Guides families through the long-term care maze.*
- *Assists families in obtaining public benefits such as Medicaid and Veteran’s benefits to pay for long-term care.*
- *Drafts legal documents such as deeds, wills, powers of attorney, trusts and special needs trusts.*
- *Helps disabled people preserve a windfall but retain government benefits such as Supplemental Security Income and TennCare Medicaid.*
- *Advocates for good care whether at home, in assisted living or in a nursing home.*
- *Helps families find relief from caregiver stress.*
- *Makes referrals to other community resources.*
- *Makes recommendations about preserving assets for now and later.*

- *Obtains a conservatorship when necessary.*
- *Guides families through estate administration after a loved one passes away.*
- *Writes family agreements such as personal care agreements and behavioral agreements.*
- *Works with families to resolve disputes.*
- *Negotiates with care providers, Medicare insurance companies and family members.*

*As you read this book, you may see unfamiliar terms. Any term in bold italics will be defined in the **Glossary**. If you want more information about a topic, check to see if it is included in the “Gray Matters” series.*



*You may also check my **website: www. MonicaFranklin.com** and review the articles and newsletters which are chock full of good info.*



*Susie Stiles and I write a weekly elder care blog, “**Gray Matters.**” You may read our blog at **www. elderlawblogtn.com**.*

facebook

*By all means, please “Friend” us on Facebook, **www.facebook.com/pages/Knoxville-TN/ Monica-Franklin-Elder-Law-Practice**.*

Now, let’s talk about saving Momma’s home.



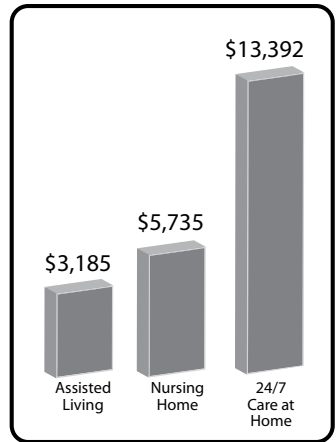
Many clients tell me that they “just have one simple question. Will Momma lose the family home if she needs nursing home care?” While that seems to be a simple question, the answer is complex and depends on each family’s situation.

Why are families worried about nursing home care? Sometimes, families think that Momma is going to move from home straight to the nursing home. Older adults often need a lower level of care such as assisted living care or in-home assistance before they make that leap to the nursing home.

When clients ask about losing Momma’s home, they usually mean, “We are scared that Momma’s care costs will deplete all of her assets.” So, to answer their question about the home, our conversation begins with a discussion of the elder care continuum, the various levels of care needed by our client as she proceeds along the continuum, and the resources to pay for care. Those resources may include the client’s income, savings, home, Medicare, Veteran’s benefits, and Medicaid.

Our discussion about financing nursing home care begins with Medicare, the payor source commonly used when patients enter a nursing home. This insurance coverage will fund a rehabilitation stay in the nursing home’s skilled care unit. With beds in short supply, nursing homes can be harder to enter than an exclusive country club! The waiting list at our own Ben Atchley State Veterans’ Home exceeds 400 applicants. In order to bypass these wait lists, the prospective nursing home resident must be in need of skilled care following a qualifying minimum of three days in the hospital.

Consider the case of Virginia Creeper. Mrs. Creeper's family met with an elder law attorney and explained the recent catastrophic health events Mrs. Creeper had endured. Mrs. Creeper suffered from dementia and macular degeneration. One day, she tripped on a sidewalk crack and fractured her leg. The injury required surgery. After surgery, she was released to a nursing home for skilled rehabilitation. Since she had original Medicare, a three-day hospitalization, and needed skilled care, Mrs. Creeper was readily accepted to the nursing home rehab wing, even though her name was not on the waiting list. The Creeper family asked this question about Medicare and Medicaid:



National Median Cost of Care for One Month
Source: Genworth 2010 Cost of Care Survey



FAQ # 1 If a nursing home patient has Medicare, will she eventually need Medicaid?

Yes, it is possible that a nursing home patient will need Medicaid. Medicare only pays for skilled care in a nursing home for a short time. After skilled care ends, some patients, like Mrs. Creeper, will continue to need nursing care. Let's examine this in more detail.

Medicare is health insurance for people over the age of 65, people under 65 with certain disabilities and people of any age with End-Stage Renal Disease. There are different parts to Medicare, including hospital insurance (Part A), Medical Insurance (Part B), Medicare Advantage Plans (Part C) and Prescription Drug Coverage (Part D). Medicare covers hospitalization, doctors' visits and medical equipment. Medicare will also cover home health care if a plan of

care is approved by a doctor. Medicare deductibles and co-pays are often covered by a supplemental policy called a Medigap policy.

Most nursing home stays begin with a hospitalization of at least three days. Then the patient is discharged to a skilled care facility (usually a nursing home) for rehabilitation or skilled care. This may include physical, speech or occupational therapy. Medicare covers a limited number of nursing home days (up to 100) following a qualifying three-day hospitalization. After entering the nursing home, the patient's first 20 days of skilled care are covered 100%.

If skilled care continues, days 21-100 are covered at 80% after the daily co-pay is met. A patient receiving skilled care in a nursing home receives care from skilled providers such as nurses, therapists and doctors as well as from custodial providers such as certified nurse assistants (CNAs). Custodial care usually consists of help with bathing, dressing, walking, toileting, incontinence, feeding and medication management. Medicare pays for both skilled and custodial care during the coverage period.

After the Medicare benefit period ends, the nursing home patient must pay for care from income, savings, or long-term care insurance. If the patient does not have enough income, savings or long-term care insurance, then she should apply for Medicaid through the local Medicaid agency.

In Tennessee, the Medicaid agency is called the ***Department of Human Services (DHS)***. Often, a nursing home business office staff member will submit a Medicaid application for the patient without first discussing the Medicaid application with the family. Why? Because the nursing home needs payment as soon as Medicare ends. Submitting a Medicaid application may actually create eligibility problems for the patient. However, nursing home staff is merely trying to make sure the patient's medical bills will be paid.

In Mrs. Creeper's case, after forty-five days of therapy, the therapist determined that Mrs. Creeper was no longer participating; therefore, Medicare payment would end. Mrs. Creeper's family learned that she would have to pay for her future nursing home care from her income and savings. The Creeper family did not want Mrs. Creeper's life savings to be spent on the nursing home, yet not one of the children was able to care for her at home. They wondered if Mrs. Creeper would qualify for Medicaid.



FAQ # 2 How does a nursing home patient qualify for Medicaid?

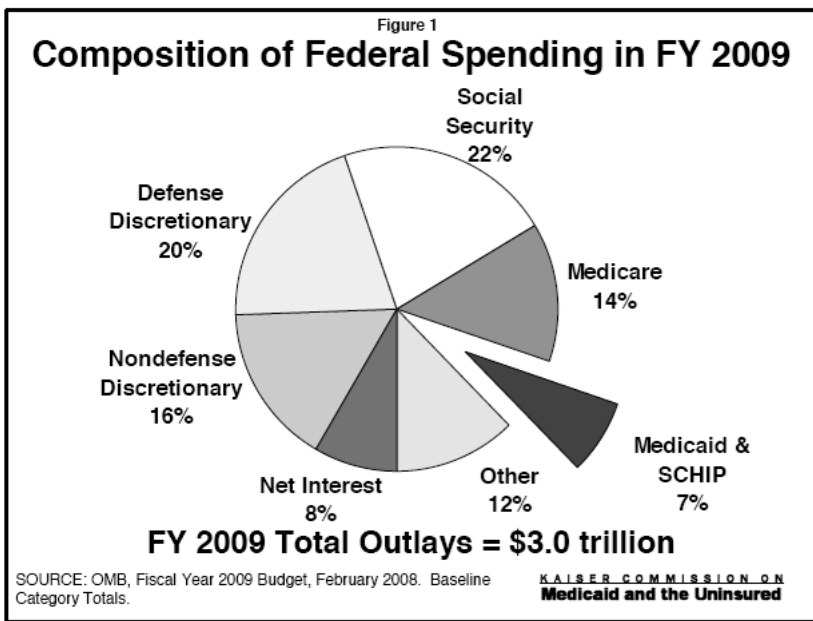
When an *unmarried* patient-homeowner applies for Medicaid, she must show that she meets three simple eligibility criteria:

- She must have less than \$2,000 in countable assets.
- Her gross monthly income must be under \$2,022 (2010) if she lives in an income cap state such as Tennessee. If her gross income exceeds \$2,022/month, then she must have a ***Qualified Income Trust (QIT)***.
- She must be medically qualified and pass a ***Patient Admission Evaluation (PAE)***.

For an unmarried patient, the elder law attorney may recommend setting aside funds in a special needs trust that will be used to improve the patient's quality of life in the nursing home. There are simple spend-down ideas that benefit the patient, such as purchasing an irrevocable prepaid funeral/burial plan or purchasing any good or service that benefits the patient. The elder law attorney may also suggest ways to set aside funds for the family without jeopardizing the patient's medical care.

For example, Mrs. Creeper's family had numerous questions about Medicaid and Mrs. Creeper's care needs. After learning about the family, Mrs. Creeper and her resources, the elder law attorney explained several ways to set aside funds for Mrs. Creeper and the

children. First, the attorney recommended the use of a “pooled trust.” This exception special needs trust may be used only for Mrs. Creeper’s benefit. (See Gray Matters booklet 10 FAQs about Special Needs Trusts.)



Medicaid is a small slice of the federal budget compared to other expenditures.

The family shared that Mrs. Creeper felt lonely and depressed. The funds in the pooled trust could be used to hire a private caregiver to “fluff up” Mrs. Creeper by reading to her, taking her for a ride, playing a game with her or doing whatever would alleviate Mrs. Creeper’s loneliness when her working children were not available.

Then, the elder law attorney explained that some of Mrs. Creeper's assets could be given to the children. However, to avoid Medicaid penalties, the process required the knowledge, skill and step-by-step guidance of the elder law attorney. The children asked about the five-year look-back, and the attorney explained how she could assist the family in accelerating qualification for Medicaid even though Mrs. Creeper's assets would not last five years. The family, of course, wanted to hear specifically how that could be accomplished!

Mrs. Creeper is single, and the rules are different when a patient has a spouse who is not in a nursing home. For a married patient, the elder law attorney may use those techniques described above and others. The Medicaid rules for a married couple are different because the law provides protection from impoverishment for the community spouse. The elder law attorney uses techniques to maximize the income and assets that the *community spouse* retains so that he/she will not be impoverished by the high cost of the disabled spouse's nursing home care.

The Creeper family had always heard that if Momma was on Medicaid, then the nursing home would take her home. The elder law attorney began to talk about the interplay between Medicaid and the family home.



FAQ #3 What are the Medicaid rules about the family home?

The home is an exempt asset for Medicaid eligibility purposes. In other words, a patient may keep her home and Medicaid will still pay for her nursing home care. The patient's home is not a countable asset, as long as the patient intends to return home. In Tennessee, the intent to return home is presumed. There is no requirement that the family prove the patient has the ability to return home. (The value of the home must be less than \$500,000 for the unmarried applicant.) Why all the fuss about saving the home? If the home is exempt

while the patient receives Medicaid benefits, then what are we worried about? The worry begins when the DHS counselor informs the family about estate recovery. Here's how it works:

When people apply for Medicaid assistance, the eligibility counselor must inform the patient's family about estate recovery. The Medicaid counselor advises families that the State will recover funds paid out for the patient's care from the patient's estate. The counselor will then advise the patient's family that this means the State will recover against or "take" the family home after the patient dies.

There are exceptions to the rule about estate recovery. The State must jump through legal hoops *in probate court* in order to recover against the estate. Often families are so stressed that they only hear "the State will [eventually] take Momma's home." Families often leave the DHS meeting feeling hopeless because they mistakenly believe the State will take the home as soon as Momma draws her last breath.

Some families feel intimidated by the estate recovery process and relinquish the family home to the Bureau of TennCare-Estate Recovery Division. Why? Perhaps those families believed the TennCare worker when he/she said the family must turn over the home and then failed to seek competent legal advice. These families were unaware of other options and their right to seek legal advice. Estate recovery and how to avoid or diminish estate recovery will be discussed in FAQ #9 below.



FAQ # 4 Why save the family home?

For many, home ownership is a part of the American dream. The family home is often built with the blood, sweat and financial sacrifice of generations. It is a symbol of prosperity and the source of family memories. Passing the home along to the next generation is an American tradition.

When faced with the high cost of long-term care, the Creeper family wondered what will happen to Mrs. Creeper's most valuable asset—her home. Will the nursing home take the home? Will “the State” swoop down and grab the deed from Momma's frail, clutching hand? Is it “legal” to try to save the home?



FAQ #5 Is it wrong to try to save our family home?

Some folks, including Mrs. Creeper's family, feel guilty for investigating ways to save the home “legally.” They worry that there is something illegal, immoral or wrong about getting help to save the home. Yet, the wealthy have no problem consulting with high-priced estate planning attorneys, accountants, and financial planners to avoid or diminish income, estate or inheritance taxes. Here's what a famous lawyer said about tax planning:



“Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands.”

-Judge Learned Hand

In other words, there is nothing “wrong” with trying to save the family home or avoid estate recovery, just as there is nothing sinister about arranging one's affairs to avoid paying taxes. Neither the Internal Revenue Service nor the Medicaid agency may penalize a citizen for arranging her affairs even though it may decrease eventual revenue for that agency. Both taxpayers and Medicaid recipients have received government services. Why would anyone consider it

acceptable to help a client save money on taxes yet “wrong” to help a client save the home? The Creeper family’s next question was a common one.



FAQ #6 Who could take our family home?

Families often think the home or the home equity will be spent on taxes or nursing home care. Let’s examine each possibility.

• *Are we saving the home from taxes?*

Most people do not have a taxable estate; therefore, there is no reason to do anything with the home for inheritance or estate tax purposes. In fact, generally it is best to pass the home along after death so that the heirs will get a step-up in basis. In Tennessee, an estate valued at less than \$1 million is not subject to the inheritance tax. It is important to let that last sentence sink in. Many clients have given away the farm (literally) because they incorrectly believed that their children would have to pay some sort of tax.

• *Are we saving the home from the nursing home?*

Nursing homes are in the care business, not property management. They are merely looking for someone to pay their monthly bill. The nursing home business office manager questions family as to whether the nursing home will receive payment from the patient’s income, savings, long-term care insurance, or family, or whether the family needs access to Medicaid.

• *Are we saving the home from the State?*

Eventually, yes, but it is crucial that patients and families understand that a Medicaid recipient does not have to surrender the keys to her castle in order to access Medicaid. In fact, in many states, including Tennessee, the home is an exempt asset for Medicaid eligibility purposes as long as the patient is married, has a special family member or intends to return home.

• ***Are we saving the home from estate recovery?***

Ultimately, the answer to this question is yes. The State is required to attempt estate recovery after the death of the Medicaid recipient and after the death of special family members. So, yes, we are trying to save the home equity from being diminished by the high cost of nursing home care before and after the patient’s death.

When a patient applies for nursing home Medicaid, generally a family member will go to DHS and provide financial and other information about the patient. The DHS eligibility counselor is required to inform the “authorized representative” that the home is subject to estate recovery.

The Creeper family members liked the idea of accelerating qualification for Medicaid, but they were worried because Mrs. Creeper had signed a quitclaim deed giving her home to her daughter, Ivey, only a year before her nursing home admission. They were told that Ivey would have to sign a deed to return ownership to Mrs. Creeper and “cure the gift.” The elder law attorney explained that returning the home was an option, but Mrs. Creeper might have other options as well. The elder law attorney began to learn more about what had occurred before Mrs. Creeper entered the nursing home. The elder law attorney also shared stories and examples with the Creeper family to educate them about the possibilities.



FAQ #7 May I give our family home to my children and receive Medicaid benefits?

The answer is, “it depends.” Most people who want to give away their home are driven by fear. Folks are scared they will lose the family home to the nursing home or “the State.” This belief sometimes propels worried families to the attorney, accountant or financial planner.

Sometimes, the parents sign a quitclaim deed, transferring the home to the children. Usually, these families are uninformed about the consequences of giving away the home. A gift tax, loss of control, a Medicaid penalty and possible liens by the children's judgment creditors are some of the negative consequences of giving away the home. These loving parents do not realize that giving away their largest asset too early may limit their long-term care options later. Let's explore the consequences of giving away the home in more detail.

Medicaid law requires a patient to reveal all gifts (transfers for less than fair market value) that occur in the five years preceding the Medicaid application. If the patient (or someone on his behalf) has made a transfer during the sixty months preceding the Medicaid application, then the Medicaid agency will impose a Medicaid penalty period.

That penalty period is calculated by dividing the value of the transfer by the State's penalty divisor. The *quotient* is the number of months during which the patient will not receive Medicaid assistance to pay for his nursing care. In Tennessee, the penalty divisor is presently \$3,874. The State's position is that this is the "average" monthly cost of nursing home care in Tennessee. In the real world, the average cost is higher.

Once calculated, the Medicaid penalty period will begin to tick after the patient is "otherwise eligible" for Medicaid. It is important to note that the Medicaid penalty period may exceed the time remaining in the look-back period. For most folks, this rule is clear as mud the first ten times they hear it. To illustrate, let's consider the cases of Mrs. Betsy Ross and Mr. Cirrus Lee.

Mrs. Betsy Ross gives away her home. On January 13, 2007, Mrs. Ross signed a quitclaim deed transferring her home to her children, Sally and Jane. For the following three years, Mrs. Ross spent over \$100,000 on private caregivers in her home. Then, she

fell and broke her hip. After a hospitalization, she was released to a skilled nursing facility where she received physical and occupational therapy. Unfortunately, Mrs. Ross was not able to return home.



On May 1, 2010, a nursing home employee submitted a Medicaid application to the Department of Human Services and advised the family that one of them would need to gather information and attend a DHS appointment. When Jane Ross met with the DHS eligibility counselor, she provided a copy of Mrs. Ross's deed as requested. The DHS eligibility counselor advised Jane that Mrs. Ross would not qualify for Medicaid due to the transfer of the home three years prior. The DHS counselor advised Jane to see an attorney and transfer the home back to Mrs. Ross.

Jane spoke with her sister, Sally, who stated she absolutely would not sign a deed conveying the real property back to Mrs. Ross. Jane advised the DHS eligibility counselor of Sally's position. The DHS counselor calculated the penalty period to be 64.5 months. She advised the daughter that the penalty period would start ticking immediately because Mrs. Ross was eligible for Medicaid "but for" her gift of the family home to her children. The DHS counselor said that Medicaid would not pay for Mrs. Ross's nursing home bill until after September 16, 2014 (May 1, 2009 + 64.5 months).

Mrs. Ross's case illustrates several problems for this family. Sometimes, a nursing home employee may file a Medicaid application for the patient without discussing the details with family. This may be a problem because, as illustrated by the Ross family, the penalty period of 64.5 months exceeds the amount of time remaining in the look-back period. If the Ross family had waited two more years before submitting the Medicaid application, then the transfer of the home would be outside the 60-month look-back period. Families are

not required to reveal any transfers that were completed more than 60 months before the Medicaid application. Note that the penalty period for this transfer exceeds the 60-month look-back period. If you are thinking, “That’s not fair!” you are in good company.

During the penalty period, Mrs. Ross’s nursing home care must be paid for by her family. If the family does not pay for Mrs. Ross’s nursing home care, the nursing home will discharge Mrs. Ross. Jane would either have to pay for her mother’s care from savings or care for Mrs. Ross at home. Failure to pay the nursing home is a legitimate basis for discharge of the non-paying patient.

This case also shows how Mrs. Ross lost control of her largest asset as a result of signing a quit claim deed. Transferring real property or “putting the kids on the deed” only requires the signatures of the present owners, the parents who are conveying an interest to someone else. “Getting the kids off the deed” requires the kids to agree and sign a deed conveying the property back to the parents.

The Cirrus Lee case illustrates another quirk in the Medicaid penalty rules: the penalty period only begins ticking when the patient is “otherwise eligible” for Medicaid.

Mr. Cirrus Lee gives away his home and avoids gift tax.

Mr. Cirrus Lee enjoyed his retirement by volunteering his time and expertise as a carpenter to Habitat for Humanity. He had a generous pension of \$2,380 per month, \$200,000 in cash savings, and his home was mortgage free.



Cirrus was very generous to his children. His accountant advised him that he could give away \$13,000 per child per year without

incurring a gift tax. Mr. Lee “sold” his home to his children, and the children signed a promissory note promising to pay Mr. Lee \$13,000 per year until the note was paid in full. Each year, Mr. Lee forgave the \$13,000 payment for each child.

Mr. Lee made these annual gifts mistakenly believing that this plan would reduce estate and inheritance taxes. In fact, his estate was well below the value of a taxable estate. Only estates that exceed \$1 million are subject to the Tennessee Inheritance Tax. The federal estate tax is in flux. Check www.irs.gov for updated information.

Mr. Lee suffered a stroke at age 78, which made it difficult for him to cook, drive, bathe, dress or brush his teeth. He moved into assisted living for the next three years. Unfortunately, he suffered another massive stroke and needed care in a skilled nursing facility. Without knowing Mr. Lee’s financial situation, a staff member submitted a Medicaid application.

Mr. Lee’s daughter, Sarah, attended the DHS appointment. She explained that her father had sold the home to his children. She provided a copy of the promissory note signed by the children, which explained the terms of the family agreement. The children promised to pay their dad \$13,000 per year per child until the note was satisfied.

The DHS counselor requested Mr. Lee’s bank statements showing the children’s payments. Sarah explained that Mr. Lee had generously forgiven those payments annually. In fact, over the past few years, he had forgiven \$78,000 in payments owed. Sarah also stated that Mr. Lee had about \$100,000 remaining in savings. The DHS counselor advised Sarah that her dad would not qualify for Medicaid due to the fact that his countable assets were over \$2,000. The counselor advised Sarah to spend the funds on her dad’s care.

Sarah followed that advice and 18 months later submitted another Medicaid application. This time, Mr. Lee’s cash assets were below \$2,000, he was medically eligible, and he had a Qualified Income Trust. Sarah met with a new DHS counselor who had just attended a booster class on the Medicaid penalty period. The DHS counselor reviewed the file and denied Medicaid.

Sarah was appalled. Sarah explained that she had been told by the first DHS counselor that her dad would qualify for Medicaid, if he would just “spend down.” The DHS counselor was sympathetic to her plight and gently explained the issue. For transfers that occur during the five years preceding the Medicaid application, the penalty period does not start ticking until the patient is “otherwise eligible” for Medicaid. That means that the penalty for the \$78,000 in cash gifts did not start ticking on the date of the gift. The penalty clock only started ticking when Mr. Lee had exhausted all of his cash assets, was medically eligible for Medicaid, and his income either was under the income cap or he had a QIT in place. Mr. Lee had not been “otherwise eligible” when the first Medicaid application was submitted because he had more than \$2,000 in countable assets, and he was over the income cap.

The DHS counselor imposed a penalty of 20.1 months to begin on the date of Sarah’s recent Medicaid application. Sarah learned that the nursing home would discharge Mr. Lee due to non-payment.

These cases illustrate the pitfalls of failing to seek *competent* legal counsel before taking action. There’s an old saying: “an ounce of prevention is worth a pound of cure.” There are situations in which the transfer of the home is *not* subject to a Medicaid penalty period. Those exceptions are explained in *FAQ #8*.

The Creeper family, while fascinated by the Ross and Lee stories, wanted to know if there were any exceptions to the penalty rule for giving away the home.



FAQ #8 Are there exceptions to the Medicaid penalty rule for giving away the family home?

Yes! There are several exceptions to the Medicaid penalty rule for giving away the family home. A nursing home patient may transfer the home to the patient's blind or disabled child without incurring a Medicaid penalty. This is an opportunity to benefit a disabled child, usually an adult, who still lives in the home. A disabled child is one who is disabled according to Social Security law. The transfer will generally trigger a gift tax.

Of course, one must consider the impact, if any, on the child's government benefits and the child's ability to handle home ownership, including the ability to pay related expenses and avoid creditors' liens. If home ownership is not in the disabled person's best interest, there are other options available to preserve the home or home equity for the disabled child's benefit.

For example, assume Mrs. Ross owned a home, and her daughter, Sally, lived in the home and received Social Security disability benefits due to her cognitive disabilities. After Mrs. Ross entered the nursing home, she transferred her home to a special needs trust for the sole benefit of her disabled daughter. Due to her disabilities, Sally could not live in the home alone. She entered a group home with 24/7 care. The Trustee of Sally's Trust sold the family home and deposited the proceeds into an account titled to the special needs trust. This trust fund was then used to pay for the "extras" for Sally that were not covered by her Social Security or Medicaid benefits. There is no Medicaid penalty for a parent's transfer of assets to a payback special needs trust for the benefit of a disabled child. Mrs. Ross immediately qualified for Medicaid.

Another exception to the Medicaid penalty rule for transfers of the home is the *caregiver child* exception. Medicaid law provides that the home may be transferred to a child who has lived in the home for two years and provided care for the patient that enabled the patient

to avoid nursing home placement. The transfer will usually trigger a gift tax, and if the patient has other children, it is crucial that they agree to the transfer. Why? Those children may feel that they are losing a share of their inheritance. The envious siblings may oppose the transfer to the caregiver child, and they might sue the caregiver child or the attorney-in-fact.

In Mrs. Creeper's case, one daughter had lived in Mrs. Creeper's home and provided care; however, the other children resented her because she had always been Mrs. Creeper's favorite. Since the siblings did not agree to the transfer, and Mrs. Creeper's capacity to make good decisions was questionable, the elder law attorney advised that this exception was not a practical solution for the family.

A less common third exception is that a Medicaid patient may transfer the home to a ***sibling who is a joint owner of the home***. The Medicaid patient may transfer his interest in the home to a sibling who has an equity interest in the home and who resided in the home for at least one year immediately before the date the patient entered the nursing home. There is no Medicaid penalty for this transfer.

Although these exceptions to the Medicaid penalty rule are clearly authorized by Medicaid law, DHS eligibility counselors do not see these transfers very often. It is wise to provide references to the State and federal law as well as any supporting documentation to show that the patient has met all the statutory requirements. If the DHS counselor does not think the client has met all the statutory requirements and imposes a penalty for the transfer, then the Elder Law Attorney files an appeal for a fair hearing and continues to advocate until there is a positive outcome or the appeal process is exhausted. The burden is on the patient, her family, and the elder law attorney to show that the transfer is justified and not subject to a Medicaid penalty.

A fourth exception to the Medicaid penalty rule is a transfer of the home from the Medicaid patient to the spouse. ***Transfers between spouses do not trigger a Medicaid penalty.*** Transfer of the home to the community spouse provides an opportunity for creative estate



planning in the event the community spouse predeceases the nursing home spouse. (Note that if the home is transferred from the community spouse to another person, such as an adult child, that transfer will result in a penalty period for the patient.)

After all assets are titled to the community spouse, he/she may execute a new will and leave all of the assets to a ***special needs trust*** for the nursing home spouse. If the community spouse dies first, the trust assets will be used to supplement but not supplant the government benefit. This trust should qualify at the very least for the ***elective share***. It also makes the funds available for those additional goods and services that are not covered by the Medicaid program.

Each of these exceptions requires someone to sign a deed to transfer the real property. That means that the patient must have the legal capacity to sign a legal document, such as a power of attorney or a deed. If the patient lacks capacity to sign a legal document, then the family will need a valid ***durable power of attorney*** that authorizes the attorney-in-fact to make gifts and convey real property. Of course, as a practical matter, *all* the heirs need to be in agreement if any one heir is favored.

The Creeper family chose to rent the home in order to reduce the amount paid by the Medicaid program. They decided that the worst-case scenario would be that Medicaid would recover against Mrs.

Creeper’s only asset owned at death—the home. However, they also wondered if the elder law attorney had any tools to avoid estate recovery after Mrs. Creeper’s death.



FAQ #9 Our family home is titled to my deceased parents, both of whom received Medicaid benefits. Is it possible to save the family home from estate recovery?

Yes, in many cases it is possible to preserve the family home and avoid estate recovery. Estate recovery is the process through which the state Medicaid agency attempts to recover funds paid out for the Medicaid patient’s care. Estate recovery only applies to patients who are over the age of 55 when they received Medicaid benefits.

Why does the State try to recover against the patient’s estate? It’s all about the need to replenish the government’s coffers. The federal government provides funds to the states to help pay for medical care for the needy. This program, called Medicaid, is a joint state and federal program that, among other things, pays for nursing home care if the patient meets all the medical, income and asset eligibility criteria.

The federal government provides Medicaid funds to a state, but there are strings attached. One of those strings is that the State must try to recover funds paid by the Medicaid program for the patient’s care after the patient and certain special family members pass away. In addition, the federal government allows each state to define “estate” according to its probate code. Some states have “limited” estate recovery. That means that the State, according to its probate code, may only recover against assets in the “probate” estate.

Other states have “expanded estate recovery.” In those states, the Medicaid agency may recover against assets in the probate estate, assets held jointly with right of survivorship, assets held as a life estate remainder interest and assets held in a revocable living trust. Since the home is exempt during the patient’s lifetime, it is the

Medicaid patient's only valuable asset when he dies. Even after the patient's death, the State may not recover against the patient's estate as long as there is a surviving spouse, minor child, blind or totally and permanently disabled child.

What does estate recovery have to do with the home? Contrary to popular belief, the State of Tennessee is not automatically entitled to the home equity after the patient dies. There is no lien recorded by the State at the local register of deeds.

In order to recover against a deceased Medicaid patient's home, the State must:

- file a claim,
- in the probate estate,
- of the patient who received Medicaid benefits,
- within 1 year of the Medicaid patient's date of death.

If the Medicaid patient died on or after January 1, 2007, then the State must file its claim in the probate court within one year of the patient's death. For Medicaid recipients who died prior to January 1, 2007, the probate code's one-year statute of limitations does not apply to the Bureau of TennCare.

Many attorneys choose to wait one year after the Medicaid recipient's death before opening probate. Then, after giving notice to the Bureau of TennCare that an estate has been opened, the probate court may set a hearing to determine if the Bureau of TennCare has filed a valid claim. Most probate courts rule that for patients who die after January 1, 2007, the State must file its claim within one year of the patient's death. If the State misses that one-year deadline, then the State is barred from recovering against the family home.

How is this possible? The probate code allows any creditor to open an estate and file a claim. Why doesn't the State open probate within one year and file its claim in a timely manner? In some cases, the State does open probate within one year and file a timely claim. We must assume that the State does not have the resources (i.e. money and staff) to open an estate every time a Medicaid patient dies.

The Bureau of TennCare really isn't "Big Brother." The division of estate recovery does not automatically know which Medicaid recipients owned real property at death. When a Medicaid patient dies, the Department of Health notifies the Bureau of TennCare of the death. Eventually, a form letter is sent to the decedent's family. This letter sounds very threatening. An example of the letter is below.



STATE OF TENNESSEE
BUREAU OF TENNCARE
Third Party Liability Division
310 Great Circle Road, 4th Floor
NASHVILLE, TENNESSEE 37243
Toll Free: OFFICE: (866) 389-8444 FAX: (615) 413-1941

DATE

Personal Representative

RE: Estate of _____

Dear: _____

Enclosed please find an Affidavit for a Medicaid claim on behalf of the State of Tennessee, Bureau of TennCare, in which the State incurred medical expenses for nursing home care on behalf of _____

Please send a check or money order for the claim amount made payable to Treasurer - State of Tennessee. The account number _____ must appear on your payment to ensure proper credit. Please mail your payment only to:

TennCare
MSC #1337
PO BOX 305133
Nashville, TN 37230-1337

All other correspondence should be addressed to Estate Recovery. If you have any questions or need further assistance you may contact our office at 866-389-8444.

Thank you for your attention to this matter.

Sincerely,

Estate Recovery

Often the Bureau has a telephone number for a family member. Someone, who claims to be with the Bureau of TennCare, calls the family and demands reimbursement or conducts a “fishing” expedition to determine if the decedent owned real property at death.

The fact is this “representative” of the Bureau is actually employed by a third party collection agency. That collection agency has a contract with the State of Tennessee (Bureau of TennCare) to try to collect from the estate of the deceased Medicaid patient.

Generally, people who do collections work are skilled at bullying folks because they only make money when they collect money. These collection agents feel no obligation to advise families that they may hire an attorney or oppose the State’s claim. Many families have been bullied into simply “signing over” the family home to the State because they failed to seek legal counsel and believed that they had no choice.

There are other methods to save the home after a Medicaid recipient’s death. Sometimes, the State files its claim in the wrong estate. This happened in a case that was decided by the Tennessee Court of Appeals. Mrs. Smith received Medicaid to pay for her nursing home care. She died, and later, her husband, Mr. Clifford Smith, died.

Mrs. Smith had transferred all of her assets, including her interest in the home, to her husband. Mrs. Smith received Medicaid benefits to pay for her nursing home care, and then she died. Subsequently Mr. Smith died, and his estate was admitted to probate. He did not receive Medicaid benefits.

The State of Tennessee, Bureau of TennCare, filed a claim to recover for nursing home benefits paid on Mrs. Smith’s behalf from Mr. Smith’s estate. The Tennessee Court of Appeals applied 42 USC §1396p(b)(1)(B) and held that the State may only recover from the estate of the individual who actually received the Medicaid benefit. The court pointed out that the transfers from Mrs. Smith to Mr. Smith

were not fraudulent and were not made to defeat creditors. The court held that the State had filed its claim in the wrong estate.

The *Smith* case reminds us that:

In order to recover against a deceased Medicaid patient's home, the State must:

- file a claim,
- in the *probate* estate,
- *of the patient* who received Medicaid benefits,
- *within 1 year* of the Medicaid patient's date of death.

The *Smith* case illustrates how the Tennessee appellate courts have interpreted and applied the probate and Medicaid statutes. Even if the home was not transferred to the “well” spouse during life, some attorneys have argued successfully that the home passed automatically at death to the well spouse, and therefore, the State is barred from recovering.

There are other exceptions to estate recovery. These exceptions are a mirror image of the transfer exceptions described in FAQ #8 above. The law provides that the State may not recover if the deceased Medicaid patient is survived by a spouse, a child under age 21, a disabled child, a caregiver child, or a sibling with an equity interest in the home. Each of these exceptions is spelled out in the statutes and case law interpreting the statutes.

For example, the caregiver child must have lived in the home and provided care for two years, and that care must have kept Momma out of the nursing home. 42 U.S.C. §1396p(b)(2). Of course, just because this is the law does not mean that the Bureau of TennCare is going to agree readily that the family may keep the home. In most cases, the Bureau will send a lawyer to probate court to argue why the special family member does not fit within the statutory exception. It is crucial that families have competent legal representation when they believe an exception to estate recovery exists.



FAQ #10 How have your friends and neighbors benefited from elder friendly law?

In this answer, when I refer to “we” or “our,” I am referring to our wonderful team: Susie Stiles, Judy Wyrick, Gwen Lawless, Trish Kennedy, Brooke Givens and Gabrielle Blake. To learn more about our team, see our website: www.MonicaFranklin.com. This section includes several examples of how families have benefited from elder-friendly law.

Special Needs Trusts: Virginia Creeper’s family members then referred their cousins and aunt Georgia O’Grief to the elder law attorney. At ninety-three, Georgia was in good shape physically, but her dementia was progressing quickly.



Georgia’s daughter, Carrie, was cognitively disabled and in her mid-fifties. Georgia’s only concern was that Carrie would be cared for after Georgia’s death. Georgia and Carrie lived together in a small 1930s bungalow. Although Georgia owned her home, Georgia had Alzheimer’s dementia, and she realized she needed help with Carrie.

It was clear that Georgia lacked the psychological capacity to sign any legal documents such as a will and power of attorney. When a person lacks capacity to sign legal documents, it is usually necessary to petition the court and seek the appointment of a ***conservator***. A conservator then handles the disabled person’s financial and healthcare decisions. In contrast, Georgia’s twin sister, Betty, still

had capacity to sign legal documents and was able to sign a Power of Attorney and a new will with a special needs trust for Georgia and Carrie.

A few years after a conservator was appointed for Georgia, she suffered a stroke and required nursing home care. The conservator called and asked if there was anything we could do to preserve Georgia's assets for her disabled daughter, Carrie.

With the court's approval, we established a special needs trust for Carrie. We transferred Georgia's home and \$200,000 in cash assets to the trust. Then, the conservator applied for Medicaid to pay for Georgia's nursing home care. Georgia's care was paid by the Medicaid program for the rest of her life.

The house was eventually sold, and the funds invested for Carrie's benefit. The funds in the trust have been used for almost a decade to keep Carrie comfortable in assisted living. Georgia's wishes have been honored, and Carrie is content and receiving 24/7 care and supervision.

Georgia died, and then Virginia died. Virginia's will was submitted to probate. Then, the special needs trust in Virginia's will was used to open and fund a trust account for Carrie's benefit using Virginia's estate assets.

This example illustrates two different types of special needs trusts. Each of these trusts supplement Carrie's Social Security disability income and any government benefits she receives. Each trust has different legal requirements. While a description of those requirements exceeds the scope of the present discussion, watch for a sequel to this booklet in the near future. The point is that with careful planning and special legal tools, a special needs child enjoys a better quality of life, and her mother rests easy knowing her child is well cared for.

Disabled spouse: Jack and Jill Hill had been married for fifty years and raised three daughters. At the age of 68, Jack suffered a fall resulting in a serious closed head injury and required 24/7 care in a nursing home. Jill was devastated. After discussing their assets, income and future care needs, we took action. The first step was to petition the court for spousal support. Jill needed more of Jack’s income than the Medicaid default rules allow. The second step was to petition for a transfer of part of Jack’s assets to



Jill as additional spousal support. We showed that but for the transfer of assets from the disabled spouse to the well spouse, Jill would be at risk of impoverishment. This transfer from one spouse to another is authorized by Medicaid law.

Finally, after all assets were shifted to Jill, we revised Jill’s will so that it included a special needs trust for Jack. Subsequently, Jill was tragically killed in a car wreck. We submitted her will to probate court. Her estate included their home and \$50,000 in the bank. Since Jack was on Medicaid, the Department of Human Services was given notice that Jill had died.

After probate was completed, the Trustee (a responsible adult child) opened an account titled to the Hill Testamentary Special Needs Trust for Jack. The Trustee sold the house and deposited those funds into a trust account for Jack. These funds were used to hire private caregivers to visit with Jack, roll his wheelchair outside for fresh air and take him on a drive now and then. In other words, this was Jack’s “fluffer” fund. This fluffer fund was used to support his quality of life. This trust did not affect Jack’s Medicaid benefits. Jack remained

on Medicaid to pay for his nursing home care. After Jack's death, the funds in the trust were distributed to the beneficiaries named in the trust.

Disabled adult child: Mary, at age fifty-six, was blind, diabetic, and financially and emotionally dependent on her mother, Ruth. Mary lived at home with her mother for most of her adult life. Eventually, Ruth suffered a fall and fractured her hip. At age ninety-five and experiencing a little dementia, Ruth struggled with the strenuous rehabilitation required to get back on her feet. At some point, Ruth decided she just couldn't work at it any more, and her rehab ended. Ruth remained in the nursing home.

Ruth had five other children who were caring and concerned about Mary's well-being. They felt that remaining in the home environment was crucial to Mary's psychological health. While Mary could live on her disability check, she could only do so because she did not have to pay rent or a house payment.

We discussed the options available to the family. They decided the best option for their family was a transfer of the home from Ruth to Mary. The siblings paid the gift tax on that transfer. All the appropriate documentation was provided to DHS, and Ruth was approved for Medicaid. Mary's estate plan was established in order to preserve the home for her siblings after her death.

Caregiver child: Tom, a professional musician, traveled back and forth between Knoxville and Asheville for five years checking on his mom, Edith. Tom attended Edith's doctors' appointments, set up her medicine boxes, and did her housekeeping, yard work and home maintenance. Eventually, he decided to move into Edith's home and care for her. While living with her, he prepared her meals, administered medication, provided transportation and eventually assisted her with bathing and dressing. This arrangement lasted another three years.

Then Edith fell and fractured her shoulder. She could no longer transfer alone from her bed to her wheelchair, and she was incontinent. Tom realized that with his arthritic spine, he could no longer provide the hands-on care his mother required. After meeting with Tom, we advised him to fund a pooled trust for her benefit (a fluffer fund), and Edith transferred her home to Tom. We provided all the appropriate documentation to DHS, and Edith was immediately approved for Medicaid assistance. Tom continues to live in the home and visits his mom daily at the nursing home.

Avoiding estate recovery: Sam lived on his family’s 150-acre farm his entire life. The farm had been passed down through five generations. Sam was a Vietnam veteran and a retired family dentist. Although he had lived frugally, a divorce and poor investments left him with very little cash savings. At age 67, Sam was diagnosed with Alzheimer’s dementia. Sam explained that he wanted to prepare for his long-term care needs, but above all, he wanted to protect the family farm. His plan was to pass the farm along to his grandchildren for life and then to the Land Conservancy.

After discussing various options with Sam, we determined that with Sam’s retirement income, Veteran’s benefits and long-term care insurance, he would be able to afford assisted living care indefinitely. As a result of that analysis, Sam decided to transfer his farm to an irrevocable trust. This trust protects the farm from Medicaid estate recovery.

Sam then referred his neighbor, John, to our firm. John’s land had been in his family for several generations. His father had just passed away at the age of ninety-nine in a nursing home. John’s father had received Medicaid, and John received a letter from the Bureau of TennCare. The letter stated that John’s family owed TennCare



\$150,000. John was devastated that his family's legacy, the land, would have to be sold in order to pay back the Medicaid agency. John wanted to know if there were any options available to his family to preserve the farm.

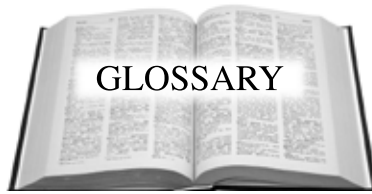
I explained estate recovery to John and the one-year statute of limitations (see FAQ #9 above). John decided to wait to see if TennCare opened his father's probate estate. One year passed after his father's death. John retained our firm to open the estate and clear the claims of all creditors, including TennCare. Ultimately, TennCare was barred from recovering because TennCare failed to file a timely claim in probate court.

Needless to say, the Creeper family was overwhelmed with all this information and wondered where to begin. The elder law attorney and her team, including a Public Benefits Specialist and an Elder Care Coordinator, reassured the family that they would "hold hands" and guide the family through the process of preserving assets for Mrs. Creeper and the family to the extent possible without compromising Mrs. Creeper's care or quality of life.

Note: While the legal issues are real and the outcomes true, the names and personal facts are fictional.

Conclusion

When did growing older get so complicated?! Many call long-term care a "maze." Negotiating the maze requires a plan and handholding with qualified experts who have knowledge and experience. I hope that this book will convince older adults, their families and those who work with older adults that many "truisms" are actually urban myths. A qualified elder law attorney is able to shine the light of knowledge and experience on each family's unique situation. The elder law attorney and her team will advocate for quality care and preservation of assets for the benefit of the patient and, to the extent possible, the family.



basis: In this context, I mean the “tax basis.” The tax basis is the value of an asset, used for computing a gain or loss when the asset is sold.

caregiver child: A “caregiver child” according to the Medicaid law is the Medicaid applicant’s child who has lived with the Medicaid applicant for at least two years and provided care that prevented the Medicaid applicant from going to a care facility.

CELA: This designation is pronounced /See-la/ and means Certified Elder Law Attorney.

Conservator: A conservator is a person appointed by the court to make healthcare and/or financial decisions for a person who is physically or psychologically disabled. See our website for more information about conservatorships.

Go to: <http://www.monicafranklin.com/elderlaw06.html#conservatorship>

community spouse: The community spouse is the spouse who is not in the nursing home. The community spouse may be at home, in assisted living or any other residential facility other than a nursing home.

competent legal counsel: Many attorneys claim to be elder law attorneys or elder law experts. I have found that many of them actually know very little about elder law. If you want to be sure you have an expert in elder law, hire a certified elder law attorney. The rigorous certification process ensures that a CELA truly knows his/her stuff!

countable assets: Assets that, when added together, must be less than \$2,000 in order for a single patient to qualify for Medicaid. For example, the cash value of a life insurance policy is a countable asset.

Department of Human Services (DHS): This is the Medicaid agency in Tennessee.

disabled child: A child who has been determined disabled by the Social Security Administration (SSA) or who meets the SSA's definition of disabled.

disabled spouse: A spouse over the age of 65 or disabled such that he/she needs care.

durable power of attorney: A power of attorney is a document authorizing someone to act on behalf of the person signing the document. The person signing the power of attorney is called the "principal." The person authorized to act for the principal is called the "agent" or the "attorney-in-fact." A power of attorney may be for healthcare decisions or financial decisions or both. A "durable" power of attorney is a power of attorney that remains effective even if the principal is disabled or lacks capacity to make decisions. A "springing" power of attorney "springs" into effect only upon the principal's disability or incapacity as evidenced by a doctor's statement of disability. Most powers of attorney are immediately effective rather than springing.

elective share: The portion of a deceased spouse's estate to which the surviving spouse is entitled if the dead spouse left her out of his will. Often people enter into a prenuptial agreement so that a surviving spouse will not be entitled to an elective share. Under the Medicaid rules, a nursing home spouse receiving Medicaid cannot disclaim or waive her right to an elective share. If she does so, it is considered a disqualifying transfer.

exempt assets: Assets, including the home, car, irrevocable pre-paid funeral and burial plan, that are not counted toward the \$2,000 asset limitation for Medicaid eligibility purposes.

fluffer: A caring person whose complete focus during visits with nursing home residents is to provide pleasure and comfort.

look-back period: The five years preceding a patient's Medicaid application. All transfers for less than fair market value that occurred during the five years preceding the Medicaid application must be revealed to DHS.

Miranda rights: Police officers making an arrest are required to read Miranda rights to the person being arrested. Those rights include the right to an attorney.

Qualified Income Trust (QIT): If a state is an "income cap" state, then Medicaid patients whose monthly gross income exceeds the cap utilize a Qualified Income Trust. (If that definition is clear as mud, don't worry. It's Medicaid law. It's all clear as mud.)

quotient: The answer to a division problem.

Patient Admission Evaluation (PAE): A form related to the patient's medical condition and functioning that must be completed for each Medicaid applicant in a nursing home. Each patient must "pass" the PAE in order to be medically eligible for Medicaid.

sibling joint owner: A brother or sister who jointly owns a home with the Medicaid applicant.

skilled care: Care that is provided by a skilled professional such as a registered nurse or a physical, occupational, or speech therapist.

special family member: For purposes of Saving Momma’s Home, this term refers to a blind or disabled child, a caregiver child, a minor child, a spouse or a sibling who jointly owns a home with the Medicaid applicant.

special needs trust: A trust that is used for a special needs child or spouse or for the Medicaid applicant. A special needs trust is used to set aside funds to benefit the disabled person without incurring a Medicaid penalty or affecting the Medicaid application of the disabled person.



What is an “Elder Law Attorney” and How do I find one?

Qualified Elder Law Attorneys:

What do I mean by a qualified elder law attorney? It has suddenly become popular to claim elder law expertise. However, caveat emptor! (This means, “buyer beware”!) Claiming elder law expertise is not the same as having elder law expertise. So, what is a consumer to do? I recommend that you work with a certified elder law attorney. You can count on a certified elder law attorney to have the education and expertise needed to guide your family through the long-term care maze.

How to find a Certified Elder Law Attorney:

To find a Tennessee certified elder law attorney, go to www.nelf.org or <http://www.cletn.com/Specialists.aspx> . There are only fourteen attorneys who are certified in elder law in Tennessee. Why? It is very challenging to obtain certification as an elder law specialist.

How to receive certification as an Elder Law Attorney:

In order to be certified as an elder law specialist, an attorney must meet the following criteria established by the National Elder Law Foundation (www.NELF.org):

1. **Licensure** – Attorney must be licensed to practice law in at least one State or the District of Columbia.
2. **Practice** – Attorney must have practiced law during the five years preceding his/her application and must be currently practicing law.
3. **Integrity/Good Standing** – Attorney must be a member in good standing of the bars in all places in which he/she is licensed.
4. **Substantial Involvement** – Attorney must have spent an average of at least 16 hours per week practicing elder law during

the three years preceding his/her application. In addition, he/she must have handled at least 60 elder law matters during those three years with a specified distribution among subjects as defined by the Foundation.

5. Continuing Legal Education – Attorney must have participated in at least 45 hours of continuing legal education in elder law during the preceding three years.

6. Peer Review/Professional References – Attorney must submit the names of five references from attorneys familiar with his/her competence and qualifications in elder law. These reference attorneys must also satisfy specified criteria.

7. Examination – Attorney must pass a full-day certification examination.

8. In addition, the Tennessee Continuing Legal Education Commission requires reference letters from judges and clients and proof of malpractice insurance.



Saving Momma's Home

Readers will find "Saving Momma's Home" an invaluable resource for understanding, preparing and planning for responsible financial management of assets relating to elder care.

Written in an accessible, easy-to-understand question and answer format, Monica Franklin addresses the "Frequently Asked Questions" (FAQ) she's encountered in her elder care law practice. Her years of experience in this highly specialized field imbues her writing with a warmth and thoughtfulness not typically found in legal guides. She brings a reassuring, comforting voice to a topic that can be fraught with counter-intuitive information and conflicting directives. Certainly a "must read" for those embarking on the process of planning long-term care for loved ones.

Monica J. Franklin, CELA

Monica Franklin is Certified as an Elder Law Specialist by the **Tennessee Commission on Continuing Legal Education and Specialization** as well as the **National Elder Law Foundation**.

**Elder Law Practice
of Monica Franklin**

(865) 588-3700

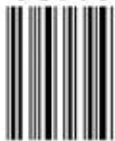
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Monica Franklin