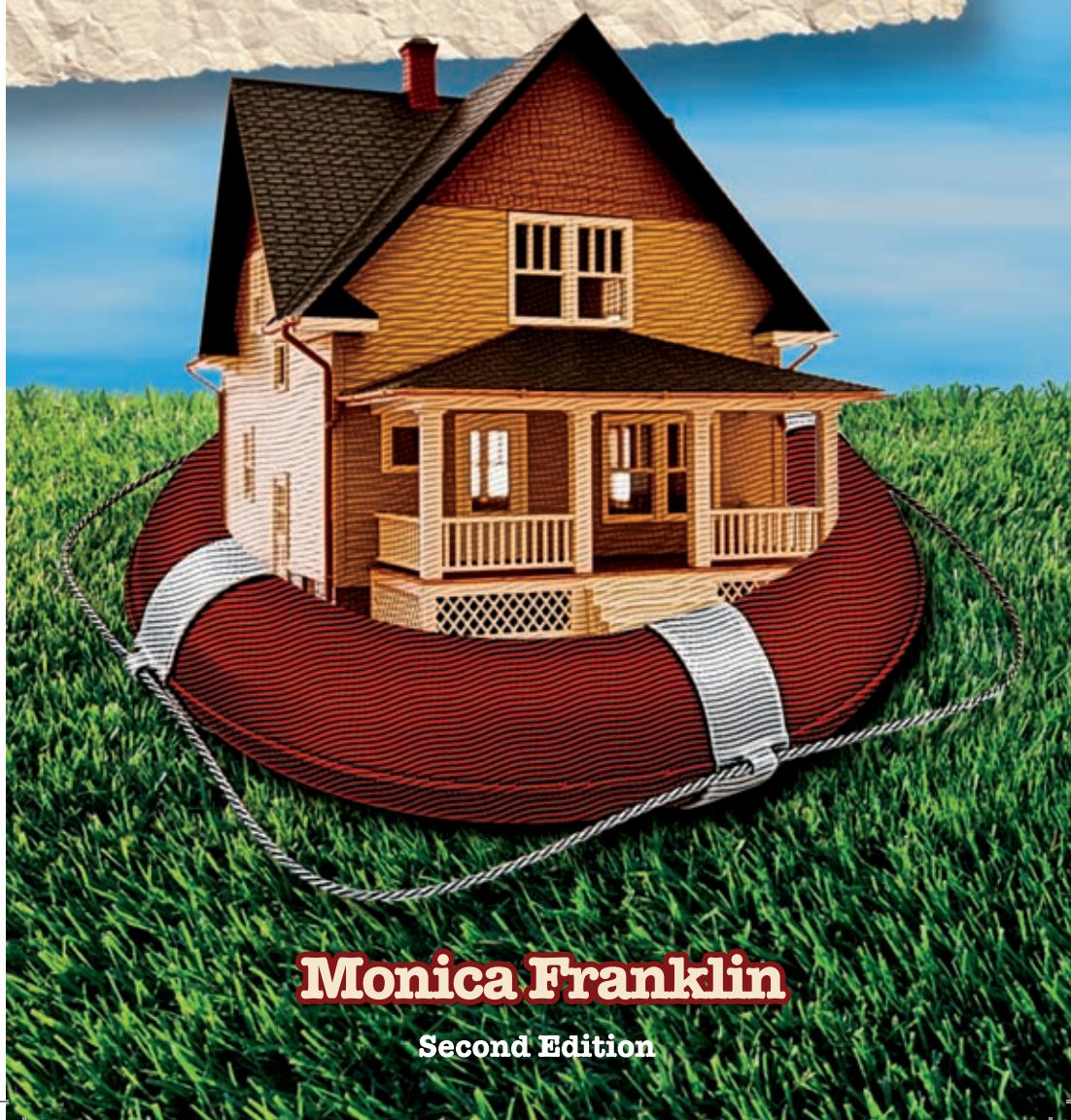


# **Saving Momma's Home**

**10 FAQs  
About Nursing  
Home Medicaid**



**Monica Franklin**

**Second Edition**



# **SAVING MOMMA'S HOME**

10 Frequently Asked Questions  
About Nursing Home Medicaid

**Monica Franklin**

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### ***Disclaimer***

This booklet addresses common questions and myths about the family paying for long-term care by accessing public benefits. It does not contain legal advice. Each family's situation is unique. There is no cookie-cutter long-term care plan, which is the reason many families seek the services of a certified elder law attorney. **Please do not take any legal action based on this booklet.**

Instead, use this booklet as a springboard for further planning with a Certified Elder Law Attorney (CELA), who must be certified by the National Elder Law Foundation, <http://www.nelf.org>. The requirements to be certified are stringent and include a test that I considered harder than the bar exam!

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



## Introduction

This is the second edition of *Saving Momma's Home*. The law has changed since the first edition was published in 2011; this edition incorporates those revisions. Our blog, *Gray Matters*, contains information about specific areas of elder law. The blog is available at <http://www.monicafranklinelderlaw.com>.

The two most common questions I hear in my practice 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 one is the focus of this booklet. Throughout the booklet, I usually will speak in first person. When I mention “we” or “our,” I am referring to our amazing team, which includes elder law attorneys, licensed clinical social workers, public benefits specialist and support staff. To learn more about the team and how we assist our clients, see our website: <http://www.monicafranklinelderlaw.com>.

As a Life Care Planning Elder Law firm, we focus on the special legal and care needs of older adults and their families. We also work with families to address the legal needs of disabled persons through conservatorships and special needs trusts. The following list describes how we assist with the navigation of complex legal, financial and care needs of older adults.

### ***Our elder law attorneys and elder care coordinators:***

- Help families save the home and qualify for Medicaid faster.
- Develop life care plans to guide families through legal, financial and care issues as they navigate the maze of long-term care.
- Assist families in obtaining public benefits, such as Medicaid and veterans' benefits, to pay for long-term care.
- Provide alternatives to “just spending down,” which enables families to preserve financial resources.
- Draft legal documents, such as wills and financial powers of attorney, suited for carrying out a long-term care plan; health care advance directives; irrevocable trusts; revocable trusts; and special needs trusts.
- Use special needs trusts to help disabled people preserve a windfall and retain government benefits, such as Supplemental Security

Income (SSI) and Medicaid. We also use a special needs trust to preserve assets for a married couple. You may download a copy of *Special Needs Trusts: 10 FAQs about Special Needs Trusts* at <http://www.monicafranklinelderlaw.com>.

- Advocate for good care whether at home or in assisted living or nursing home.
- Help families find relief from caregiver stress.
- Make referrals to other community resources.
- Make recommendations about preserving assets for now and later.
- Write family contracts, such as personal care and behavioral agreements.
- Work with families to resolve disputes.
- Communicate with care providers, Medicare, insurance companies and other entities to resolve problems associated with care and its costs.

As you read this booklet, you may encounter unfamiliar terms. Any term in ***bold italics*** will be defined in the **Glossary**.



You may review our blog, *Gray Matters*, at <http://www.monicafranklinelderlaw.com>.



We invite you to “like” us on Facebook!  
<http://www.facebook.com/pages/Knoxville-TN/Monica-Franklin-Elder-Law-Practice>

If you would like to receive our monthly Elder Law News Flash, please send an email to [info@monicafranklinelderlaw.com](mailto:info@monicafranklinelderlaw.com). A copy can be sent via email or snail mail.

We have short Vimeo videos about elder law, produced by the National Elder Law Foundation, at <http://www.monicafranklinelderlaw.com>.

### ***Now, let's talk about saving Momma's home.***

Many clients and their families tell me that they have just one simple question: "Will we lose the family home if Momma or Daddy needs nursing home care?" While the question seems simple, the answer is complex and depends on each family's situation.

Why are families worried about nursing home care? Sometimes, families think a parent is going to move directly from home to a nursing home. Older adults often may benefit from a lower level of care, such as day care, in-home assistance or assisted living, before they make the leap to a nursing home. In Tennessee, the medical requirements to receive nursing home Medicaid benefits are stringent. If our clients are denied benefits based on their score on the TennCare medical test (*Pre-Admission Evaluation* or "**PAE**"), we may file an appeal with TennCare.

When families ask about losing Momma's home, they usually mean: "*We are scared that the cost of our parents' care will deplete all of their assets.*" To answer their question about the home, our conversation begins with a discussion of the elder care continuum, the various levels of care available as older adults proceed along that continuum and the resources to pay for care. Those resources may include the client's income, savings, long-term care insurance, family caregivers, the home, Medicare, veterans' benefits and Medicaid/TennCare/CHOICES.

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 wait lists, the prospective nursing home resident must be in need of skilled care following a minimum three-day "admission" to a hospital. If the Medicare beneficiary's hospitalization is classified as an "observation" stay, then under present law the hospitalization will cost more, and the patient will not be able to receive Medicare payment for skilled care in a rehabilitation facility – usually a nursing home.

Our client may be in a hospital room, and one would think that qualifies as admission; however, the doctor may mark the chart as observation. We

advise our clients and their families to make sure the doctor has classified the hospitalization as an admission.

For more information about the important difference in “admission” vs. “observation” and how these classifications affect the elderly, read the fall 2013 newsletter on our website at <http://www.monicafranklinelderlaw.com>.

We also include information on how families may advocate for the “admission” status.

### ***What is the cost of care?***

Before we talk about resources to pay for care, it helps to know the approximate cost. Genworth provides statistics regarding the cost of care in each state: <https://www.genworth.com/corporate/about-genworth/industry-expertise/state-maps.html>.

On the Genworth website, you may choose your state and then see an annual comparison of the lowest rate, highest rate and the median or midpoint rate. Each chart is dedicated to a certain level of care, and several cities are listed with the low, high and median costs. For our purposes, I have used the chart with the 2015 statewide information for Tennessee.

### **Tennessee – State Median: Annual Care Costs in 2015**

Home Care	Median Cost	Median Annual Cost	5-year Annual Growth
Home health aide	\$18/hour	\$41,184 (44 hours/week x 52 weeks) \$157,248 annual median cost of 24/7 care at home	1%
Adult Day Health Care	\$62/day	\$16,120 (\$62/day x 5 days x 52 weeks)	2%
Assisted Living	\$3,395*/month	\$40,740 annually	
Nursing Home Care	Median Cost	Median Annual Cost	5-year Annual Growth
Semi-private room	\$192/day	\$70,080 annually	
Private room	\$198/day	\$72,088 annually	4%

This is the median assisted living rate for a one bedroom single occupancy. Generally these rooms will hold a twin bed, nightstand, dresser and chair. If the resident would like a small living room, the price increases. In addition, most assisted living facilities charge as the resident needs more care. These are called care level increases.

Let's consider the hypothetical case of Virginia Creeper. Mrs. Creeper's family met with an elder law attorney and explained the recent catastrophic health events that Mrs. Creeper had endured. She 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 rehabilitation wing, even though her name was not on the waiting list.

The Creeper family needed this question answered about Medicare and Medicaid:



**FAQ #1: *If a nursing home patient has Medicare, will the patient 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 (ESRD) or amyotrophic lateral sclerosis (ALS), often referred to as Lou Gehrig's 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 also will cover home health care if a doctor approves the patient's plan of care. Medicare deductibles and co-pays often are covered by a supplemental policy called Medigap.

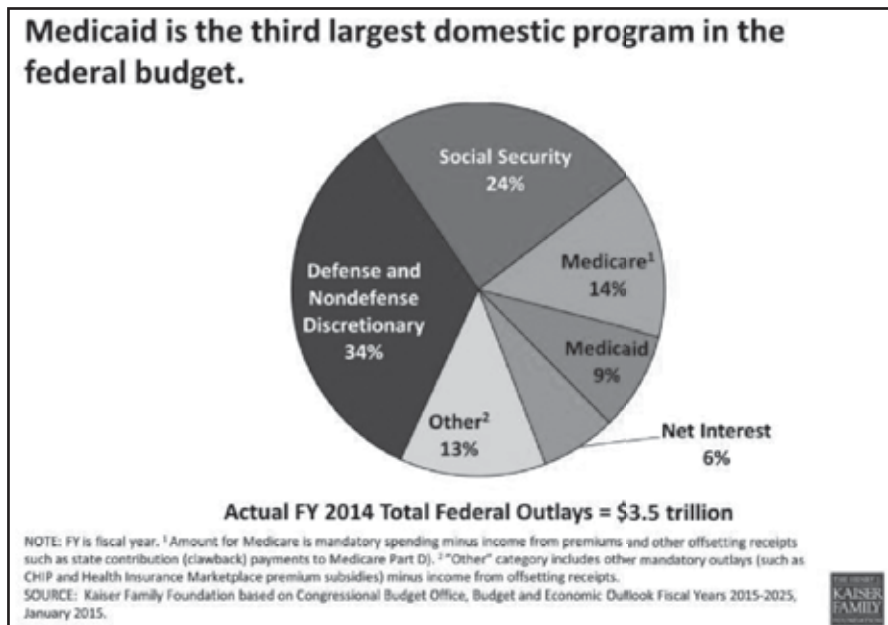
Most nursing home stays begin with a hospitalization of at least three days. Then, the patient is discharged to a skilled care facility (usually a nursing home) for rehabilitation or skilled care. This may include physical, speech or occupational therapy. Medicare covers a limited number of nursing home 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 percent. Then, days 21-100 have co-pays. If you have a Medicare supplemental policy, also called a Medigap policy, then your insurance should pay the co-payments.

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.

When your loved one enters a nursing home for therapy, contact a certified elder law attorney as soon as possible. There is a great deal of misinformation about how to qualify financially for Medicaid in a nursing home. Whether you hear it from a neighbor or friend, or from someone who works in a long-term care setting, those who advise you to “just spend down” are not doing you any favors. A qualified, experienced elder law attorney can provide options to access public benefits and preserve resources for the patient and family.

In Mrs. Creeper’s case, after 45 days of skilled rehabilitation, the therapists determined that Mrs. Creeper’s therapy must end because she had stopped participating. Medicare payment is based upon whether



or not Mrs. Creeper needs skilled care to “maintain her present level of functioning.” If so, Medicare will continue to pay up to the maximum of available days. However, if the person stops participating, even with encouragement and support of health care professionals, then Medicare will stop paying.

Mrs. Creeper’s family learned that after Medicare stops, she would have to pay for her future nursing home care from income and savings. The Creeper family did not want Mrs. Creeper’s life savings to be spent on the nursing home, yet none of the children were able to care for her at home. They wondered if it was possible to preserve some of Mrs. Creeper’s assets without jeopardizing her care.



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

When an unmarried patient-homeowner applies for Medicaid, he or she must meet three simple eligibility criteria:

- Have less than \$2,000 in countable assets.
- Have gross monthly income under \$2,199 (2015), if living in an income cap state, such as Tennessee. If gross income exceeds \$2,199/month, patient must have a ***Qualified Income Trust (QIT)***.
- Must be medically qualified by passing a ***Pre-Admission Evaluation (PAE)***.

An elder law attorney may recommend setting aside funds in a special needs trust, called a “pooled trust,” that will be used for the benefit of our client. The pooled trust is a Medicaid exception trust authorized by federal and state laws. That means our client may fund the pooled trust with no Medicaid penalty. The funds may be used for anything our client needs that is not covered by Medicaid. These funds often are used for private sitters, clothing, haircuts and other personal needs, or to cover expenses related to the home. To learn more about special needs trusts, including the ***Qualified Income Trust*** and the ***Pooled Trust***, download my booklet, *Special Needs Trusts: 10 FAQs about Special Needs Trusts*, at <http://www.monicafranklinelderlaw.com>.

There are simple spend down ideas that benefit the patient, such

as purchasing an irrevocable prepaid funeral/burial plan or goods or services that benefit our client. 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 many 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."

The family shared that Mrs. Creeper felt lonely and depressed. The funds in the trust could be used to hire a private caregiver to enrich Mrs. Creeper's life with interaction, such as reading aloud, taking car trips and playing games, to alleviate her loneliness when her working children were not available.

Then, the attorney explained that some of Mrs. Creeper's assets could be given to the children. However, in order to pay for Mrs. Creeper's care during a penalty period, the family needed the knowledge, skill and step-by-step guidance of an experienced elder law attorney. The attorney explained that the family could preserve assets and accelerate qualification for Medicaid without jeopardizing Mrs. Creeper's care. The family, of course, wanted to hear specifically how that could be accomplished!

Mrs. Creeper is single. The rules are different when a Medicaid applicant has a spouse who is not in a nursing home. For a married patient, the elder law attorney will use different strategies. The Medicaid rules for a married couple are different because the law provides protection from impoverishment of the *community spouse*. The elder law attorney uses techniques to maximize the amount of income and assets that the community spouse retains. This prevents the impoverishment of the well spouse as a result of the high cost of the disabled spouse's nursing home care. This will be illustrated with the next example.

The Creeper family had always heard that if Momma were on Medicaid, then the nursing home would take her home. The elder law attorney began to explain 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 the home, and Medicaid will still pay for 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 presently no requirement that the family prove the patient has the ability to return home. The value of the home must be less than \$552,000 (2015) for the unmarried applicant. There is no limit on the value of the home if there is a spouse who lives in the home or a child who is disabled or under the age of 21.

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 family is informed about estate recovery. Read on to learn about estate recovery in Tennessee.

When individuals apply for Medicaid assistance, they receive information by mail regarding estate recovery, which is the process used by the state to recover funds paid for the patient's care from the patient's estate. Most Medicaid recipients still own their homes at death, so this usually is the asset that must be sold to reimburse the Medicaid program. Neither the state nor a nursing home will actually "take" the home. However, the state may indeed be reimbursed from the equity in the home *up to the amount the state paid for the Medicaid beneficiary's care*.

There are exceptions to the rules about estate recovery. The state must clear legal hoops in probate court in order to recover against the deceased patient's estate. Often families are so stressed that they only hear "the state will [eventually] take Momma's home." Families often feel 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 readily relinquish the family home to the Bureau of TennCare Estate Recovery Division. Why? Perhaps those families failed to seek competent legal advice and simply obeyed the TennCare worker when he/she said the family must sell the home and turn over proceeds.

These families were unaware of their right to seek legal advice and

learn about other options. Estate recovery and how to avoid or diminish estate recovery will be discussed in FAQ #9.



#### **FAQ #4: *Why save the family home?***

For many, homeownership is a part of the American dream. The family home often is 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 would 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 clutched in Momma's frail hand? Is it legal to try and save the home?



#### **FAQ #5: *Is it wrong to try to save the family home?***

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

Some folks, including Mrs. Creeper's family, feel guilty for investigating ways to save the home. They worry there is something illegal, immoral or just 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 reduce 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 citizens for legally arranging their 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 is a common one.



### **FAQ #6: *Who could take the family home?***

- ***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, income or estate tax purposes. In fact, generally it is best to pass along the home after death so that the heirs will get a step-up in basis. Often, individuals think if they give away their home while alive, it will save taxes. What are "death taxes?" In Tennessee, an estate valued at less than \$5 million (2015) is not subject to the inheritance tax. In 2016, the Tennessee Inheritance Tax is abolished. In other words, there will not be a Tennessee Inheritance Tax after Dec. 31, 2015. The federal estate tax exemption is over \$5 million.

If a family has an estate worth millions, the members should earn enough from investments and other income to pay privately for care. However, many of our clients are "land rich and cash poor." In those cases, they may indeed need to access the Medicaid program to pay for care, but they need to know how to save the family home.

- ***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 the monthly bill. The nursing home business office manager questions families as to whether the nursing home will receive payment from the patient's income, savings, long-term care insurance or family – or if the patient 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 the home 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 intends to return home, *or* is married, *or* has a special family member.

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

Ultimately, the answer to this question is yes. According to federal and Tennessee laws, the state is required to attempt estate recovery after the death of the Medicaid recipient. So, yes, we are trying to save the home equity from being diminished by the high cost of nursing home care.

***Back to the Creeper family ...***

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



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

The answer is “it depends.” Most people who want to give away their homes are driven by fear. Folks are scared they will lose the family home to the nursing home or the state. This belief sends worried families to an elder law attorney.

Sometimes, parents sign a quitclaim deed, transferring the home to the children. Usually, these families are uninformed about the consequences of giving away the home. 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 surrendering 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 occurred in the five years preceding the Medicaid application. If the patient (or someone on his or her behalf) has made a transfer during the 60 months preceding the Medicaid application, then the agency will impose a Medicaid penalty period. During that period, Medicaid will not pay for the patient's care. The penalty may exceed the 60-month look-back period. Therefore, the timing for submitting an application is a crucial factor to be considered. Usually, a nursing home representative will submit a Medicaid application for a resident. However, if there has been a gift during the 60-month look-back period, this practice can be very detrimental to the resident and family. It is best to seek legal advice *before* submitting the Medicaid application.

When a gift has been made during the 60-month ***look-back period***, a penalty period is imposed by the Medicaid agency. That 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 nursing care. In Tennessee, the penalty divisor is presently \$5,472 (2015). 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 much higher. In our community, the average cost of long-term care in a nursing home is \$7,000 per month.

Once calculated, the Medicaid penalty period will begin to tick *only* after the patient is "otherwise eligible" for Medicaid. To be "otherwise eligible," the Medicaid applicant must meet the following criteria:

- Countable assets are less than \$2,000.
- Applicant must have income less than \$2,199 (2015) or have a Qualified Income Trust (QIT).
- Applicant must be medically eligible for Medicaid benefits.

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 as clear as mud the first 10 times they hear it. To illustrate, let's consider the case of Mrs. Betsy Ross.

***Mrs. Betsy Ross gives away her***

***home.*** On Jan. 13, 2014, Mrs. Ross signed a quitclaim deed transferring the home to her children, Sally and Jane. The value of the home at the time of the transfer was \$400,000. During 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, 2014, a nursing home employee submitted a Medicaid application to the Bureau of TennCare. We prefer that nursing home staff do not submit a Medicaid application until we have an opportunity to meet with the family. She included all the supporting information and checked the box on the application that Mrs. Ross had made a \$400,000 transfer or gift in the previous five years.

TennCare denied the application and imposed a penalty period. The penalty period would start ticking immediately because Mrs. Ross was “otherwise eligible” for Medicaid “but for” her gift of the family home to her children. The TennCare eligibility counselor calculated the penalty period as follows: \$400,000 divided by \$5,472 equals 73 months. This penalty period exceeds the look-back period, which illustrates why families should seek competent legal advice rather than allowing someone else to submit the application.

The TennCare eligibility counselor advised that Medicaid would not pay for Mrs. Ross’ nursing home bill until after Sept. 16, 2014, (May 1, 2009 + 64.5 months). In other words, Mrs. Ross would not qualify for Medicaid due to the transfer of her home three years prior. The nursing home staff advised Jane to see an attorney and transfer the home back to Mrs. Ross. Jane contacted her sister to discuss the recommendation. Sally responded that she had no intention of signing a deed conveying the real property back to her mother. However, during their meeting with a qualified elder law attorney, Jane and Sally learned that it was

possible for Mrs. Ross to access Medicaid benefits *and* preserve part of the home equity for her children. Sally decided to cooperate and follow the attorney's plan.

Mrs. Ross' case illustrates several of the challenges faced by families when there has been a transfer of assets. In the event someone files a Medicaid application for the patient without first discussing the details with family, it is problematic because the penalty period may *exceed* the amount of time remaining in the 60-month look-back period. If Mrs. Ross had funds to pay for her nursing home care during the remaining years of the look-back period, it would have been best for her children to pay privately or take her back home and care for her to avoid incurring the excessive penalty 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, her family must pay for Mrs. Ross' nursing home care. If the family does not pay for the care, the nursing home will discharge Mrs. Ross for nonpayment. Failure to pay the nursing home is a legitimate basis for discharge from the nursing home.

This case also illustrates how Mrs. Ross lost control of her largest asset as a result of signing a quitclaim deed. Transferring real property or "putting the kids on the deed" only requires the signatures of the present owner, the parent(s) who are conveying an interest



to someone else. "Getting the kids off the deed" requires the children to agree and sign a deed conveying the property back to the parents.



#### **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. A nursing home patient or a person who qualifies for TennCare

through the CHOICES program Groups 1 or 2 (see Glossary) 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. Of course, one must consider the impact, if any, on the child's government benefits. One also must consider 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 there and received Social Security disability benefits due to her intellectual 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 then was used to pay for "extras" for Sally, such as clothing, vacations or even a caregiver to accompany her on a vacation. One of my clients used the funds in this type of trust for her son to go on a Disney cruise with his caregiver. The funds may be used for movie tickets, concerts, sporting events, television, computer – perhaps one equipped especially for her disability – or a care manager who would identify services and goods to improve quality of life and care. The cost of these activities and services would not be covered by Social Security or Medicaid benefits.

Another exception to the Medicaid penalty rule for transfer 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 that enabled the parent to avoid moving to a nursing home (or enabled the parent to delay qualification for CHOICES Group 2).

What if the parent has other children and lacks capacity to understand the impact of signing a deed transferring the home to one child? In these

cases it is crucial that the other children agree to the transfer. Why? Those children may feel 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, if the attorney-in-fact signed the deed***. I require all of the siblings to enter into a written agreement regarding the transfer to the caregiver child in order to avoid future litigation on this issue. If my client has capacity to sign a will or power of attorney, then I recommend that those documents contain language approving a transfer of the home to the “special family member.” If my client has capacity to sign the deed, then the client certainly may do so.

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 interest in the home to a sibling who has an equity interest in the home and has resided in the home for at least one year immediately before the date the patient entered the nursing home or qualified for CHOICES Group 1 or 2. There is no Medicaid penalty for this transfer.

Although these exceptions to the Medicaid penalty rule clearly are authorized by Medicaid law, TennCare eligibility processors do not see these transfers very often. With the application, it is wise to provide references to the state and federal laws, as well as any supporting documentation to show that the patient has met all statutory requirements. If the TennCare representative does not think the client has met all of 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 and family to show that the transfer is justified and not subject to a Medicaid penalty.

Documentation should include proof that the child actually lived with the parent, such as the address on a driver’s license and mail received at that address. The caregiver child should attend the parent’s medical appointments and discuss the care provided to the parent at home. The caregiver child should be sure his or her presence at the medical appointment is noted in the medical record, as well as the level of assistance provided to the parent. Finally, the caregiver child should maintain a daily journal of the actual assistance provided to the parent.

A fourth exception to the Medicaid penalty period rule is that a parent who lives with a child may purchase a **life estate** in that child's home. As long as the parent lives in that home for one year, this is not considered a transfer for less than fair market value. Then, at the parent's death, the title to the home vests in the children who owned the home. A life estate is an ownership interest in the real property that expires at the parent's or the life tenant's death. A life estate gives the parent the right to live in the home for his or her lifetime. It is the parent's responsibility to pay all expenses related to the home such as property taxes, insurance and maintenance. However, the family may certainly share expenses if a parent does not have the resources to do so.

A fifth exception to the Medicaid penalty is a transfer of the home to the community spouse before a Medicaid application is submitted. **Transfers between spouses do not trigger a Medicaid penalty.** Transfer of the home to the community spouse preserves the home, because under present law the Bureau of TennCare may not recover against the estate of a spouse who did not receive Medicaid benefits. 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 Medicaid beneficiary.

**How do we plan for the possibility that the community spouse will die before the nursing home spouse?** After all assets are titled to the community spouse, we draft a new will that includes a testamentary special needs trust for the benefit of the nursing home spouse. Testamentary means the special needs trust must be contained in the community spouse's will.

If the community spouse dies first, the trust assets will be used to supplement but not replace the nursing home spouse's Medicaid benefits. The theory is that the trust should qualify for the *elective share*. It also makes the funds available to pay for those additional goods and services, including assisted living costs at a CHOICES provider, that are not covered by the Medicaid program. At the end of the disabled spouse's life, the funds remaining in the trust are distributed to the beneficiaries named by the community spouse. There is no payback to the state from the remaining funds in the special needs trust. Look at my book, *Special Needs Trusts: 10 FAQs about Special Needs Trusts*, for more information. This book is free to download at <http://www.monicafranklinelderlaw.com>.

Each of these exceptions requires someone to sign a deed to transfer the real property. That means the patient must have the legal capacity to sign a deed. If the client lacks capacity to sign a deed, 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 of the heirs need to be in agreement in the event that one heir is favored. If the family does not fit into any of the exceptions outlined, there are other elder law strategies to save home equity during the client's lifetime.



**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 Medicaid estate recovery?***

In very limited circumstances, it is possible, but the best strategy is to save the home equity during the Medicaid beneficiary's lifetime either by using a complex "gift plan" or by utilizing one of the exceptions described above.

With advancing age comes the worry that we may need care that our families are unable to provide physically, emotionally and financially. However, for many elders, concerns about needing nursing home care are overshadowed by fears of losing the family home to pay for that care.

Myths abound about accessing Medicaid. For example, many people believe that in order to access Medicaid, they have to sign over the home to the state or nursing home. They are under the impression that the state will file a lien against their home.<sup>1</sup> They also believe the state will take the home immediately upon the Medicaid beneficiary's death. Often misunderstood, the actual process is called estate recovery.

So, what is estate recovery? Medicaid is a joint state and federal program that, among other things, pays for nursing home care, some assisted living care and some care at home if the patient meets all the medical, income and asset eligibility criteria. In order for the federal government to help fund the states' Medicaid programs, federal law requires each state to institute an estate recovery program to try and recoup federal and state funds used to pay for care. Under federal law,

states are allowed to define “estate.” Each state may choose whether to utilize “limited” or “expanded” estate recovery.

“Limited” estate recovery is limited to the probate estate of the Medicaid recipient. “Expanded” estate recovery may include the probate estate, property held jointly with right of survivorship, property held as a life estate/remainder interest or property held in a revocable living trust. Usually, the only asset left in the Medicaid



recipient’s “estate” is the home.

Under Tennessee Medicaid regulations, the home is an exempt asset for the lifetime of the patient and a special family member. Even after the patient dies, the state may not recover against the patient’s estate as long as there is a surviving spouse, minor child, blind child, totally and permanently disabled child, caregiver child or a sibling with an equity interest.<sup>ii</sup>

Presently, the Bureau of TennCare must file a claim in the *probate* estate in order to recover the Medicaid funds paid out for the patient’s care. The probate code, Tenn. Code Ann. § 30-2-310, provides that in order for creditors to be paid, the creditor must file a claim within one year of the decedent’s date of death. There is an exception for the payment of taxes that are still due and payable even past the one year. **The Tennessee Court of Appeals has held that this one-year statute of limitations for creditors to file a claim does not apply to the Bureau of TennCare.**

However, the probate code also provides that if an estate is opened in a timely manner, then creditors must file a timely claim. This is defined as being within four months and one day from the date the notice to creditors first was published in the newspaper. In addition, the personal representative or his or her attorney must send an “actual notice to creditors” to TennCare AND a completed “request for release.”

Presently, the probate courts are holding that this rule applies to the Bureau of TennCare. Therefore, if TennCare attempts to file a claim AFTER that four-month and one-day deadline, the administrator

or personal representative for the estate should immediately file an “exception” to the TennCare claim. We are winning these cases. However, while the bureau’s estate recovery program has indicated it will not appeal the cases in which the bureau filed too late, the program is becoming more efficient in filing claims in a timely manner.

**May the Bureau of TennCare recover against assets held in a revocable living trust? Yes.** *In Re Estate of Omer Sridham*, No. E2011-02507-COA-R3-CV (August 23, 2012). In this case, the Bureau of TennCare opened the estate and requested that the court appoint an administrator. The probate estate was insolvent; therefore, the bureau wanted to recover against the real property held in the revocable living trust. The trial court held that the property held in the revocable living trust was subject to creditors’ claims against the estate. The Tennessee Court of Appeals agreed.

In their appeal, the attorney for the heirs acknowledged that in most instances, a creditor may recover against assets held in a revocable living trust. Tenn. Code Ann. §35-15-505(a)(5).

However, since the General Assembly has not expanded the term “estate” to include assets held in a revocable living trust, the bureau was barred from recovering.

The court of appeals responded by explaining that the term “estate” under federal law “may include at the option of the State, assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, a revocable living trust or other arrangement.” 42 USC §1396p(b)(4)(B).

The court held that “any property that can be reached by the Personal Representative, pursuant to Tenn. Code Ann. §35-15-505 for the payment of debts of an insolvent estate may be reached by the probate court for the purpose of reimbursing the Bureau.” The court relied on the Uniform Trust Code, which provides that assets held in a revocable living trust may be used to pay creditors’ claims in a probate proceeding. The court also held that the burden to obtain a TennCare release is on the personal representative and not the trustee.

**May the Bureau of TennCare recover if the decedent owned property jointly with right of survivorship at the date of death?  
No ... for now.**

This question has not been addressed on appeal. Under the present statutory scheme, the Bureau of TennCare may only recover against *probate* assets. The General Assembly has not expanded estate recovery to include property held jointly with right of survivorship. However, Justice William Koch made an interesting comment in the case of *In re Estate of Trigg*, 2012 Tenn. LEXIS 379, 47-48 (Tenn. May 30, 2012). In footnote 62, Justice Koch stated:

By enacting 42 U.S.C. § 1396p(b)(4)(B), Congress determined that the states may obtain reimbursement for Medicaid benefits from any jointly held survivorship interests in property that the deceased recipient held at the time of death. Ms. Trigg's estate argues that TennCare cannot recover such interests because the General Assembly has not enacted an "expanded" definition of "estate" that would permit TennCare to take advantage of the "expanded recovery option" permitted by 42 U.S.C. § 1396p(b)(4) (B). We need not address this question here because the property at issue in this case is not a jointly held interest in property with right of survivorship. [ ... ] The question of whether the General Assembly must enact an expanded definition of "estate" before TennCare may seek reimbursement from a deceased recipient's jointly held property with survivorship rights must await another case. (*Emphasis added*).

This *dicta* indicates that the courts may not wait on the General Assembly to expand estate recovery to assets held jointly with right of survivorship. The elder law attorney will be mindful of this possibility when planning how the family will pay for a parent's long-term care.

**May a court expand estate recovery?**

Good question! In 2007, the AARP Public Policy Institute funded a study by the American Bar Association Commission on Law and Aging. In the Wood and Klem report, *Protections in Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices*, the Appendix B "Table of Statutory and Regulatory Authorities for Estate Recovery" lists for each state, the statutory and regulatory authority

for estate recovery. It appears based on the research of Erica Wood and Ellen Klem that, as of 2007, “estate” has been defined by the individual state legislatures. Whether other state courts have interpreted “estate” to reach beyond probate assets, as mentioned in Trigg, is a subject for further study.

The full report is available at: [http://assets.aarp.org/rgcenter/il/2007\\_07\\_medicaid.pdf](http://assets.aarp.org/rgcenter/il/2007_07_medicaid.pdf).

Interestingly, in 2005, the Tennessee General Assembly entertained the idea of amending Tenn. Code Ann. §71-5-116 to expand estate recovery beyond the probate estate, *House Bill 2323 and Senate Bill 2307*. The House bill was deferred to the Judiciary Committee, and the Senate bill was deferred to the General Health and Welfare subcommittee. The fact that our legislature considered and rejected expanding estate recovery is a strong argument against the bureau’s assumed authority to recover against a home that was jointly titled with right of survivorship.

### **May the Bureau of TennCare recover from the estate of a surviving spouse for benefits paid for the nursing home spouse?**

The Tennessee Court of Appeals, in at least one case, held that if the nursing home spouse did not hold an interest in the real property at death, the bureau may not recover from her spouse’s estate. The Tennessee Court of Appeals considered this issue in *In Re Estate of James Clifford Smith*, 2006 Tenn. App. LEXIS 715 (Tenn. Ct. App. Nov. 1, 2006). In that case, Mrs. Smith transferred her interest in all of the couple’s assets, including the real property, to Mr. Smith. (There is no Medicaid penalty for transfers between spouses when the transfers are made prior to the Medicaid application.) Mrs. Smith received Medicaid benefits to pay for her nursing home care. Mrs. Smith died. Subsequently, Mr. Smith died. The Bureau of TennCare filed a claim in Mr. Smith’s estate for benefits paid for Mrs. Smith’s care.

The Tennessee Court of Appeals held that estate recovery is not allowed from the deceased spouse’s estate for benefits paid for the predeceased spouse because the predeceased spouse did not own an interest in the property at the time of her death. 42 U.S.C. §1396p(b)(1)(B).

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 client who received Medicaid benefits,*
- *Within the applicable time period provided by the probate code.*

The laws pertaining to estate recovery are presently in flux. The courts' efforts to interpret these statutes in light of very real fiscal public policy concerns are understandable. However, the expansion of estate recovery may have unforeseen negative consequences for elders.

Families may attempt to "save Momma's home" by precipitously transferring their homes to the children. Often older adults need the home equity to pay for care that is not covered by Medicaid. Medicaid will not pay for care just because a person is out of money. The Medicaid applicant must qualify medically and financially to obtain benefits. The rules for qualifying medically eligible are very stringent.

Some of my clients who transferred their home to the children also believed they could place the home back in the parents' names just by going to the courthouse. It does not work that way. Once a home is conveyed to the children, all the children must agree to sign a deed transferring the home to their parents. In addition to this causing the possible denial of Medicaid benefits, such "voluntary" impoverishment also may result in a higher incidence of exploitation and neglect.

For example, many years ago, a dear lady transferred her home to her son because he promised to take care of her, and she would never have to go to a nursing home. Subsequently, there was friction between the lady and her son's girlfriend. One night, the son called 911 and reported that his mother was very ill. This was not the case. She was merely sleeping in her bedroom. The paramedics talked her into going to the emergency room. The next day, the daughter took her mother back home.

To the mother's shock and dismay, her son had changed the locks and refused to let her into the house. That is when she came to my firm and retained me to sue her son for the return of her home. Fortunately,

we won that case based on the fact that her son was in a caregiver relationship with her, he exerted undue influence to have her sign the deed, and she did not have independent counsel.

After the trial ended, my client eventually decided to sell the home, and she learned another drawback to conveying the home to her son. Before we sued him, he had purchased a car and then defaulted on the loan. The finance company sued, won a judgment against him and then attached a lien to the home because at that point it was titled to him. Unfortunately, my client had to pay her son's car debt before she could sell her home.

We must be very thoughtful as we advise clients about preserving the home equity for future generations. Assuring the client's access to care, whether paid privately or through the Medicaid program, must always be our first priority.

There are other exceptions to estate recovery as written in the state's plan. These exceptions are almost a mirror image of the transfer exceptions described in FAQ #8. However, there are several significant differences.

### **Exceptions to Estate Recovery after Death**

**The undue hardship exception:** After the Medicaid recipient's death and assuming he or she still owned the home, the family may avoid estate recovery if they can prove that "undue hardship" would result if the state were to recover against the property. One way to prove undue hardship is to show the property is the sole-income producing asset for the family.

For example, this could be a farm that the family operates as the sole source of income. I spoke with a colleague at the Bureau of TennCare estate recovery division, and he indicated that they only see about five of these cases each year. It is a complex process that requires both the attorney general and the governor to approve the exception. In other words, it is very difficult, but not impossible, to obtain a waiver of estate recovery based on undue hardship.

Another way to prove undue hardship after the client passes away is to show there is a caregiver child who lived in the home for two years and provided care that prevented the parent from going to a nursing home. The caregiver child must continue to live in the home, and when he or she moves out, the home is then subject to estate recovery. In contrast, if

the home is transferred to the caregiver child during the parent's lifetime, there is no requirement that the child continue to live in the home.

Finally, the exception for a sibling joint owner is very different as compared to a lifetime transfer. After the death of the Medicaid recipient, his or her ownership share may not be subject to estate recovery if the well sibling provided care for two years that prevented the disabled sibling from going to the nursing home or obtaining CHOICES Group 2 assistance. The sibling must continue to live in the home, and if he or she moves out, then the home is subject to estate recovery. Note that if the transfer had been done during the disabled sibling's lifetime, there is no requirement that the other sibling provide care.

It is crucial that families have a certified elder law attorney represent them if they believe an exception to estate recovery exists after the Medicaid recipient's death. The lesson here is that it is best to plan with a certified elder law attorney before the death of your loved one



#### **FAQ #10: *So, how does this work in real life?***

The following examples illustrate how your friends and neighbors have benefited from seeking the assistance of a qualified elder law attorney.

Virginia Creeper's family referred their cousins and aunt Georgia O'Grief to the elder law attorney. At 93, Georgia was in good shape physically, but her dementia was progressing quickly.

Georgia's daughter, Carrie, was intellectually disabled and in her mid-50s. 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 dementia related to Alzheimer's disease and realized she needed help with Carrie.

It was clear that Georgia lacked legal capacity to sign estate planning 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. (For FAQs about conservatorship, see our website at <http://www.monicafranklinelderlaw.com>.) A conservator then handles the financial and health care decisions of the person with a disability. 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. The Medicaid program paid for Georgia's care the rest of her life. This type of trust is called a "payback trust" or a "D4A" special needs trust. At the end of the disabled child's life, any funds remaining in the trust are used to reimburse the state. See *Special Needs Trusts: 10 FAQs about Special Needs Trusts* on our website at <http://www.monicafranklinelderlaw.com>.

The house eventually was sold and the funds invested for Carrie's benefit. The funds in the trust were 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. The point is that with careful planning and targeted legal tools, a special needs child enjoys a better quality of life, and her mother rests easy knowing her child is well cared for going forward. See my book, *10 FAQs about Special Needs Trusts* at <http://www.monicafranklinelderlaw.com>.

**Disabled spouse:** Jack and Jill Hill had been married 50 years and raised three daughters. At the age of 68, Jack suffered a serious fall resulting in a closed head injury, and he 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. A gift or transfer between spouses is not penalized by the Medicaid agency as a "transfer for less than fair market value."



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 bureau was given notice that Jill had died.

After probate was completed, the trustee (a responsible adult child) opened an account titled to the Jack Hill testamentary special needs trust. 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 Jack, roll his wheelchair outside for fresh air and take him on an occasional drive. In other words, this was Jack's personal enrichment fund. This fund was used to support quality of life. This trust did not affect Jack's Medicaid benefits, and he remained on Medicaid to pay for 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 56, 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. Ruth suffered a fall and fractured her hip, and after a qualifying hospitalization, went to a nursing home for rehabilitation. At age 95 and with some 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 anymore, 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 the family was a transfer of the home from Ruth to Mary. All the appropriate documentation was provided to TennCare, 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, N.C., on a weekly basis for five years checking on his mother, Edith. Tom attended Edith's doctors' appointments, set up her medicine boxes and handled the housekeeping, yardwork and home maintenance. Eventually, Tom decided to move into Edith's home and care for her. While living with his mother, Tom 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 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, and Edith transferred her home to Tom. We provided the appropriate documentation to TennCare, and Edith was immediately approved for Medicaid assistance. Tom continues to live in the home and visits 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 retired family dentist. Although he had lived frugally, a divorce and poor investments had left Sam with very little cash savings. At age 67, Sam was diagnosed with dementia related to Alzheimer's disease. 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 to his grandchildren for life and then to a land conservancy.

After discussing various options with Sam, we determined that with Sam's retirement income, veteran 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, as long as a Medicaid application is not submitted for five years following the last transfer to the irrevocable trust.

Needless to say, these families felt overwhelmed with all of 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 guide them through the process of helping the client and family find, get and pay for care using private and public resources, while also preserving assets and advocating for our client.

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

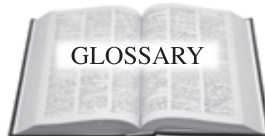


## **Conclusion**

*When did growing older get so complicated?! Many call long-term care a “maze.” Negotiating the maze requires a plan and “holding hands” with qualified experts who have knowledge and experience. I hope this book will help older adults, their families and those who work with older adults realize the truth behind the many myths about nursing home Medicaid. 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 multi-disciplinary team will advocate for high-quality care and preservation of assets for the benefit of the client and, to the extent possible, the family.*

<sup>i</sup> No lien may be imposed against the real property of any recipient prior to the individual’s death, on account of medical assistance paid or to be paid on the recipient’s behalf pursuant to this part, except pursuant to a court judgment for recovery of benefits incorrectly paid on behalf of the recipient. Tenn. Code Ann. §71-5-116.

<sup>ii</sup> See 42 U.S.C. §1396p.



**Attorney-in-fact.** This is the formal term used by attorneys and judges for the person appointed as an agent under a financial or health care power of attorney. This person is also casually referred to as the “POA” (power of attorney).

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

**Capacity:** A person’s legal capacity is assumed, under the law, until proven otherwise. Often as we age, we suffer diminishing or diminished capacity. Even so, the person with diminished capacity may still be able to understand and sign legal documents. This is a determination made by the client’s attorney after having a pleasant chat with the client. In that conversation, a skilled attorney will incorporate the legal test required by the law to determine capacity to sign legal documents.

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

**CELA:** This designation, pronounced see-la, means Certified Elder Law Attorney. The National Elder Law Foundation, <http://www.nelf.org>, is the ABA- and Tennessee-approved entity to certify attorneys as specialists in elder law.

**CHOICES:** The Long-Term Care Community Choices Act was signed into law in 2008. For those who meet financial and medical qualifications, they may choose to receive long-term care services at home, in a nursing home or in an assisted living facility that accepts CHOICES. There are three groups in CHOICES: Group 1 is for nursing home care; Group 2 is for in-home care or a contribution of \$1,100/month to pay an assisted living facility that accepts CHOICES 2; and Group 3 provides some care in the home, but it is now limited to people who are or would be eligible for Supplemental Security Income (SSI). Most of our clients have Social Security retirement benefits or Social Security Disability Income (SSDI).

**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 public benefits. 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 her stuff!

**Conservator:** A conservator is a person appointed by the court to make health care and/or financial decisions for a person who is physically or psychologically disabled.

**Countable assets:** For Medicaid qualification purposes, assets are divided into two categories, countable assets and exempt assets. Countable assets include cash, investments, property other than the homestead, cash value of life insurance policies, etc. See “exempt assets” definition in this Glossary.

**Department of Human Services Division of Appeals and Hearings:** When a TennCare application is denied for financial reasons, we file an appeal with this agency.

**Dicta:** This is an expression of a judge’s opinion on a topic, but it is not a part of the court’s “holding” or the court’s final decision.

**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 a spouse who is disabled regardless of his or her age who 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 health care 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 the surviving spouse out of the will. Often people enter into a prenuptial agreement so that a surviving spouse will not be entitled to an elective share. Under Medicaid rules, a nursing home spouse receiving Medicaid cannot disclaim or waive the right to an elective share. If the spouse does so, it is considered a disqualifying transfer.

**Enrichment caregiver:** Person whose complete focus during visits with patients and nursing home residents is to provide comfort and enhanced quality of daily life.

**Exempt assets:** Assets, including the home, vehicle, irrevocable prepaid funeral and burial or cremation plan (not to exceed \$6,000 per spouse), that are not counted toward the \$2,000 asset limitation for Medicaid eligibility purposes. Exempt assets also include the spouse's share of the countable assets. The spouse's share is presently equal to one-half of the countable assets up to \$119,220 (2015). The spouse's retirement accounts are presently exempt as long as the spouse is receiving his/her required minimum distributions. However, if the spouse is too young to receive distributions, then we appeal and ask for an exception to this rule.

**Look-back period:** The five years preceding an individual'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 the Bureau of TennCare.

**Medicaid:** This is a large umbrella of benefits for those with disabilities. In Tennessee, the Medicaid program for people with a disability or people over the age of 65 is called TennCare or CHOICES.

**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.

**Pre-Admission Evaluation (PAE):** A form related to the patient's medical condition and functioning that must be completed for each Medicaid applicant. Medicaid applicants must "pass" the PAE or prove that their needs cannot be safely met unless they are in a nursing home in

order to be medically eligible for Medicaid.

**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.

**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, caregiver child, minor child, 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 benefits of a person with a disability.

**TennCare:** TennCare is the Medicaid agency in Tennessee.

**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, or “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 <http://www.nelf.org>. There are only 13 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 (<http://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 still be 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 strenuous full-day certification examination.
8. In addition, the Tennessee Continuing Legal Education Commission requires reference letters from judges and clients and proof of \$1 million of malpractice insurance.



## Meet Monica Franklin

Monica Franklin is certified as a specialist in elder law, commonly known as a “CELA” (Certified Elder Law Attorney) by the National Elder Law Foundation (NELF), <http://www.nelf.org>. To learn more about certification, visit our website at <http://www.monicafranklinelderlaw.com>. The Vimeo entries were produced by NELF and cover elder law issues. To learn about attorney certification, visit <http://www.nelf.org/becoming-certified>.

Monica serves as an East Tennessee delegate for the Tennessee Bar Association-Elder Law Section, and she will be the chair of the Elder Law Section’s executive committee July 2015-2016. Monica serves on the section’s Advance Directive subcommittee, which is studying the development of a directive that more thoroughly addresses end-of-life care for people who suffer a dementing illness.

Monica also serves on a committee that is focused on “The Conversation Project,” an outreach of the Knoxville Academy of Medicine Foundation. The Institute for Healthcare Improvement collaborated with The Conversation Project as a way to help people discuss decisions about end-of-life care by being “Conversation Ready.”

Monica is a member of professional organizations, including the National Academy of Elder Law Attorneys, the Tennessee Bar Association and the Knoxville Bar Association.

Monica is a fellow of the Knoxville Bar Foundation, which was formed in 1992. The foundation, a 501(c)(3) organization, accepts tax-deductible contributions from lawyers to support local programs and has instituted a Fellows Program to both support community services and recognize lawyers for their public service. Additional information can be found at <http://www.kba.org>.

Monica writes a quarterly column for the Tennessee Bar Journal called “Senior Moments with Monica Franklin.” In 2006, Monica won the prestigious Justice Joseph W. Henry award for her cover article, “Securing Momma’s Home.” Monica was only the second woman to receive the award; surprisingly, the first woman was named Monica as well.

Born in West Tennessee, Monica moved to DeRidder, Louisiana, when she was 8 years old. After teaching high school math, Monica happily left behind the humidity of Louisiana and moved to Knoxville in 1989 to attend the University of Tennessee College of Law. She graduated cum laude in 1992. Monica has one son, Connor Hill, and a beloved dog, Scout, a yellow Labrador Retriever.



# 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" (FAQs) 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 counterintuitive 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 a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation, the ABA-approved entity for certifying attorneys as specialists in elder law.

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# **Monica Franklin**

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