



Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

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Duty of Adult Children to Support an Aged or Infirm Parent

In 1998, the Ohio Supreme Court considered a case regarding a woman prosecuted for the death of her elderly mother. The question at issue in *State v. Flontek*¹ was: What is the scope of duty under Ohio law of adult children to support their aged or infirm parents?

The statute invoked in *Flontek* provides that adult children of an aged or infirm parent who cannot support himself or herself may be held criminally liable for failing to provide adequate support to the parent. The Court held that the statute addresses only *financial* support, and no other types of support, such as care, feeding, and medical attention.

Another Ohio statute provides that a person who is acting as the caretaker of a functionally impaired person may be criminally liable for knowingly or recklessly failing to provide treatment, care, goods, or service necessary to maintain the health or safety of the person when the failure causes harm to the person.

Outside of criminal law, an adult child has no legal duty to support a parent unless a contract, express or implied, exists.

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Crime of nonsupport of aged or infirm parent

R.C. 2919.21(A)(3) provides that “[n]o person shall abandon, or fail to provide adequate support to . . . [t]he person’s aged or infirm parent or adoptive parent, who from lack of ability and means is unable to provide adequately for the parent’s own support.”

The Ohio Supreme Court held in *State v. Flontek* that this criminal statute contemplates only financial support for a dependent parent; it does not include proper care, feeding, and medical attention as financial support.

In *Flontek*, an elderly woman died from medical problems while living with her adult daughter. The autopsy revealed that the mother had bruises, ulcers, gangrenous tissue, dried skin debris, untreated cataracts, and broken bones. The coroner determined that severe medical problems due to “gross neglect” caused her death. The daughter asserted at trial that she had advised her mother to seek medical attention when her health began to fail, but the mother refused to do so. The daughter also used a substantial portion of her savings to provide her mother with a nice home and comfortable surroundings, made sure that the home was clean, and provided proper food and clothing.

The Court, in affirming the appellate court’s reversal of the daughter’s conviction under R.C. 2919.21, found that the daughter provided adequate financial support to her elderly mother and that the General Assembly intended the criminal prohibition to apply only to financial support. The Court reasoned that had the General Assembly intended to include nonfinancial support, it would have expressly done so in the statute. The Court also held that interpreting the prohibition to include more than financial support could lead to unwarranted prosecutions of adult children when elderly parents refuse advice to seek medical attention or the adult children live far away from their parents and are unable to supervise their care. The Court concluded that the General Assembly did not intend to put adult children in such untenable situations and create grounds for unreasonable and excessive prosecutions.¹

Regarding what “adequate support” means, the Wood County Common Pleas Court has held that, despite the subjectivity of the term, a reasonable and practical construction of the statute would allow a person of ordinary common intelligence to determine the amount of support necessary to comply with R.C. 2919.21. This can be done by weighing the needs of the dependent with the person’s ability to pay for the dependent’s support.²

Two Ohio appellate courts have held that other children providing support for a destitute parent does not protect a child from prosecution for failure to provide support to the parent.³ Thus, the fact that another child is providing adequate support for the destitute parent is not a defense to an alleged violation by a child who is not providing financial support.

¹ *State v. Flontek*, 82 Ohio St.3d 10, 12-16 (1998).

² *State v. Messer*, 62 Ohio Misc.2d 232, 234, Wood C.P. (January 21, 1992) (overruled on other grounds as reported in *State v. Lizanich*, 93 Ohio App.3d 706, 708 (10th Dist., Franklin Cnty., March 22, 1994)).

³ *State v. Kelly*, 2 Ohio App.2d 174, 176 (9th Dist., Summit Cnty., May 12, 1965); *Beutel v. State*, 36 Ohio App. 73, 77 (8th Dist., Cuyahoga Cnty., June 2, 1930).

Defenses

R.C. 2919.21 provides two affirmative defenses.⁴ The first is that the accused was unable to provide adequate support but did provide the support that was within the accused's ability and means.⁵ For this defense, the accused must prove: (1) the lack of means to provide the support, and (2) that the accused provided some support consistent with the accused's means.⁶

The second affirmative defense requires the accused to prove that the parent abandoned or failed to support the accused as required by law, while the accused was under age 18 or was mentally or physically disabled and under age 21.⁷

Penalty

Whoever violates the prohibition is guilty of nonsupport of dependents, a misdemeanor of the first degree.⁸ However, a sentence may be suspended if a person, after conviction and before sentencing, appears before the court and enters into a bond with the state, in a sum fixed by the court. The bond cannot be less than \$500 or more than \$1,000, and is conditioned on the person furnishing the dependent parent with necessary or proper home, care, food, and clothing.⁹

Crime of nonsupport of a functionally impaired person

R.C. 2903.16(A) provides "[n]o caretaker shall *knowingly* fail to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service that is necessary to maintain the health or safety of the functionally impaired person when this failure results in *physical harm*¹⁰ or *serious physical harm*¹¹ to the functionally impaired person." The section also provides that "[n]o caretaker shall *recklessly* fail to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service that is necessary

⁴ An affirmative defense imposes on the accused the burden of providing evidence to prove the defense and the risk that the defense does not apply if not proven by a preponderance of the evidence. R.C. 2901.05(A).

⁵ R.C. 2919.21(D).

⁶ *State v. Brown*, 5 Ohio App.3d 220, 222-223 (5th Dist., Stark Cnty., February 10, 1982).

⁷ R.C. 2919.21(E).

⁸ R.C. 2919.21(G)(1).

⁹ R.C. 3113.04(A).

¹⁰ "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration. R.C. 2901.01(A)(3).

¹¹ "Serious physical harm to persons" means any of the following: (1) any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment, (2) any physical harm that carries a substantial risk of death, (3) any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity, (4) any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement, or (5) any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain. R.C. 2901.01(A)(5).

to maintain the health or safety of the functionally impaired person when this failure results in *serious* physical harm to the functionally impaired person.”

A “functionally impaired person” includes, among others, any person whose infirmities caused by aging prevent the person from providing for that person’s own care or protection.¹² “Caretaker” means a person who assumes the duty to provide for the care and protection of a functionally impaired person on a voluntary basis, by contract, through receipt of payment for care and protection, as a result of a family relationship, or by order of a court.¹³ Under these definitions, it appears that an aged or infirm parent who cannot care or protect himself or herself is a functionally impaired person, and the adult child who is caring for the parent is the caretaker.

A 1999 Twelfth District Court of Appeals decision held that a functionally impaired person’s refusal of care is an affirmative defense to the crime of nonsupport of a functionally impaired person. In *State v. Dunville* a man with multiple sclerosis died while in his wife’s care. An autopsy revealed that the husband was extremely emaciated and had bedsores, skin irritations, and numerous insect bites.

The wife asserted at trial that the husband’s refusal of care excused her from providing care to him. The trial court heard testimony that the husband wished to remain at home and refused his daughter’s suggestion to move to a nursing home. The court, in affirming the wife’s conviction of assault and nonsupport of a functionally impaired person, held that the wife failed to prove the defense of refusal of care. The court reasoned that a functionally impaired person’s statement that the person wishes to remain at home, rather than in an institutional facility, is not considered a refusal of all care.¹⁴

Penalties

A caretaker who knowingly fails to provide for a functionally impaired person, when the failure results in physical harm, is guilty of a first degree misdemeanor. If the functionally impaired person suffers *serious* physical harm as a result of the knowing failure, the violation is a felony of the fourth degree.¹⁵

A caretaker who recklessly fails to provide for a functionally impaired person when the functionally impaired person suffers *serious* physical harm as a result is guilty of either a second degree misdemeanor or a felony of the fourth degree. Because the statute establishes two penalties for the same offense and makes little distinction concerning their application, it is unclear which penalty applies in any specific case.¹⁶

¹² R.C. 2903.10(A).

¹³ R.C. 2903.10(B).

¹⁴ *State v. Dunville*, 1999 Ohio App. LEXIS 4815, *4-*5, *8-*10 (12th Dist., Clermont Cnty., October 11, 1999).

¹⁵ R.C. 2903.16(C)(1).

¹⁶ R.C. 2903.16(C)(2).

Liability outside of the criminal law to care for aged or infirm parent

Outside of the criminal law, no Ohio statute imposes liability on an adult child for care of his or her needy or destitute parent. Liability cannot be implied from the criminal prohibition against abandoning or failing to provide adequate support to an aged or infirm parent.¹⁷

In the absence of a statute imposing it, civil liability for care of an aged or infirm parent who is needy or destitute can only arise pursuant to a contract to care for the parent.¹⁸ A contract to care for the aged or infirm parent may be made between the parent and that parent's adult children. Such a contract does not require an express exchange of a promise; it can be implied from the parties' conduct under the facts and circumstances in evidence. But, if a contract contains sufficient consideration, such as a transfer of real estate as payment, it is valid and enforceable between the parties. However, liability for costs incurred by a third party in caring for a needy or destitute parent cannot be imposed on the parent's adult child based on a care contract made between the parent and child.¹⁹

A child may agree, either orally or in writing, to pay a third person to provide care for the parent.²⁰ However, federal law governing the Medicare and Medicaid programs prohibits a skilled nursing facility or nursing facility from requiring an adult child to guarantee payment for care as a condition of a parent's admission to, or continued stay in, the facility.²¹ Additionally, in determining Medicaid eligibility, the financial responsibility of any individual for an applicant or recipient of assistance cannot be taken into account unless that individual is the applicant or recipient's spouse or child who is under 21.²²

An adult child who cares for an aged or infirm parent alone without financial or other help from other siblings has no right of contribution from the siblings for the cost of caring for their parent.²³

¹⁷ *St. Clare Center Inc. v. Mueller*, 34 Ohio App.3d 69, 70 (1st Dist., Hamilton Cnty., Aug. 27, 1986); *Slapin v. Slapin*, 233 F.Supp. 716, 717-718 (S.D. Ohio 1964).

¹⁸ *Gardner v. Hines*, 68 N.E.2d 397, 398, Tuscarawas C.P. (June 27, 1946); *Slapin*, 233 F.Supp. at 716.

¹⁹ *Gardner*, 68 N.E.2d. at 398; *St. Clare*, 34 Ohio App.3d at 70-71.

²⁰ *St. Clare*, 34 Ohio App.3d at 71-72.

²¹ 42 United States Code (U.S.C.) 1395i-3(c)(5)(A)(ii) and 1396r(c)(5)(A)(ii).

²² 42 U.S.C. 1396a(a)(17)(d).

²³ *Slapin*, 233 F.Supp. at 717-718.