



# Members Only

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## Duty of Adult Children to Support an Aged or Infirm Parent\*

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### Introduction

In 1998, the Ohio Supreme Court considered a case addressing the prosecution of a woman for the death of her elderly mother. The court's decision in *State v. Flontek*<sup>1</sup> raises the question: What is the duty under Ohio law of adult children to support their aged or infirm parents?

The criminal statute under which the prosecution in *Flontek* was brought 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 criminal prohibition addresses only *financial support*, not 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 the realm of criminal law, there is no legal duty to support a parent. In the absence of an agreement to do so, an adult child has no civil liability for care for his or her needy parents.

### Crime of nonsupport of aged or infirm parent

Revised Code section 2919.21 provides “[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.”

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*It is a crime for an adult child to abandon or fail to support his or her aged or infirm parent who is needy.*

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\* This *Members Only* brief is an update of an earlier brief on this subject dated September 15, 1998 (Volume 122 Issue 9).



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*The crime of nonsupport of an aged or infirm parent concerns only financial support, not proper care, feeding, or medical attention.*

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*Determining what is “adequate support” requires weighing the needs of the dependent with the adult child’s ability to pay.*

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*Even if another child is caring for a parent, a child who is not providing support may be criminally liable.*

Under *State v. Flontek*, this criminal statute contemplates only financial support for a dependent parent; it does not include proper care, feeding, and medical attention as financial support.<sup>2</sup> In *Flontek*, the Supreme Court addressed a situation in which an elderly woman died from severe but preventable medical problems while living with her adult daughter. The coroner reported that the mother had bruises, ulcers, and gangrenous tissue on various parts of her body; that she had untreated cataracts and broken bones; and that her death was due to severe medical problems due to “gross neglect.” 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 follow that advice. The daughter also had used her own money to provide her mother with a nice home and comfortable surroundings and had made sure that the home was clean and that her mother had proper food and clothing.

The court, in affirming the appellate court’s reversal of the conviction of the daughter under section 2919.21, determined that the daughter had provided adequate financial support to her elderly mother and that the General Assembly intended the criminal prohibition to apply only to financial support, not to nonfinancial support such as care, feeding, and medical attention. Had the General Assembly intended to

include nonfinancial support it would have expressly done so in the statute. The court also felt that interpreting the criminal prohibition to include more than financial support could lead to unwarranted prosecutions of adult children in cases in which the elderly parents refuse advice to seek medical attention or the adult children live far away from their elderly parents and are unable to supervise their care. The court felt the General Assembly did not intend to put adult children in such untenable situations and create grounds for unreasonable and excessive prosecutions.

With respect to what is considered “adequate support,” it was held in a case addressing support of a child that despite the subjectiveness of the term, a person of ordinary common intelligence should be able to comprehend its meaning and determine the amount of support necessary to comply with section 2919.21.<sup>3</sup> This can be done by weighing the needs of the dependent with the person’s ability to pay for the dependent’s support.

Ohio courts also have held that although other children have contributed to or are providing support for a destitute parent, that does not protect a child from prosecution for failure to provide support to the parent.<sup>4</sup> 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 paying support.



## Defenses

The statute provides two affirmative defenses.<sup>5</sup> 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.<sup>6</sup> To establish this defense, the accused must prove the lack of means to provide the support and that the accused provided some support consistent with the accused's means. Lack of effort to provide support is fatal to the ability to prove the defense.<sup>7</sup> The other affirmative defense requires the accused to prove that the parent abandoned the accused or failed to support the accused as required by law, while the accused was under age 18, or was mentally or physically handicapped and under age 21.<sup>8</sup>

## Penalties

Whoever violates the prohibition is guilty of nonsupport of dependents, a misdemeanor of the first degree.<sup>9</sup> However, a sentence imposed for a violation may be suspended if a person, after conviction and before sentencing, appears before the court in which the conviction took place and enters into a bond with the state, in a sum fixed by the court at not less than \$500 nor more than \$1,000, on the condition that the person will furnish the dependent parent with necessary or proper home, care, food, and clothing, or will pay each week to the Office of Child Support

in the Department of Job and Family Services a sum fixed by the local child support enforcement agency to cover the costs of housing, care, food, and clothing.<sup>10</sup>

## Crime of nonsupport of a functionally impaired person

Revised Code section 2903.16 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<sup>11</sup> or serious physical harm<sup>12</sup> 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 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 his or her own care or protection.<sup>13</sup> "Caretaker" means a person who assumes the duty to provide for the care and protection of a functionally impaired person on a voluntary

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*Nonsupport of an aged or infirm parent is a first degree misdemeanor. There are two affirmative defenses: (1) the adult child provided the support he or she was capable of providing, and (2) the parent had abandoned or failed to support the child as a minor or while the child was mentally or physically handicapped and under age 21.*

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*It is a crime for an adult child who is the caretaker of the child's functionally impaired parent to knowingly or recklessly fail to provide treatment, care, goods, or services necessary to the parent when the failure results in physical harm.*



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*Knowing failure to provide for a functionally impaired person when physical harm results is a first degree misdemeanor. If serious physical harm results, the violation is a fourth degree felony. Reckless failure to do so is either a misdemeanor of the second degree or a fourth degree felony if the functionally impaired person suffers serious physical harm.*

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*A functionally impaired person's refusal of care is an affirmative defense to the crime of nonsupport of a functionally impaired person.*

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*Outside the criminal law, an adult child is not liable for support of an aged or infirm parent.*

basis, by contract, through receipt of payment for care and protection, as a result of a family relationship, or by order of a court.<sup>14</sup> Under these definitions, it appears that an aged or infirm parent who is being cared for by an adult child of the parent because the parent cannot care or protect himself or herself is a functionally impaired person and the adult child 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.<sup>15</sup> In *State v. Dunville*, the court addressed a situation in which 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 appellate 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.<sup>16</sup>

### **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.<sup>17</sup> 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.<sup>18</sup>

### **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.<sup>19</sup>

In the absence of a statute imposing it, liability for care of an aged or infirm parent who is



needy or destitute can only arise pursuant to an agreement to care for the parent.<sup>20</sup> An agreement to care for the aged or infirm parent may be made between the parent and that parent's adult children; such an agreement, if founded on sufficient consideration, such as a transfer of real estate as payment, is valid and enforceable between the parties.<sup>21</sup> However, liability for costs incurred by a third party in caring for a needy or destitute parent cannot be imposed on the adult child of the parent based on a care agreement made between the parent and child.<sup>22</sup>

A child may agree, either orally or in writing, with a third person,

which agreement requires the third person to provide care for the parent and requires the adult child to pay the costs of caring for the parent.<sup>23</sup> 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.<sup>24</sup>

An adult child who cares for an aged or infirm parent alone, without the help, financial or otherwise, of other siblings has no right of contribution from the siblings for the cost of caring for their parent.<sup>25</sup>

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*An adult child may enter into an agreement for a third party to care for the parent and the child to pay the cost. Under Medicare and Medicaid, however, nursing facilities and skilled nursing facilities are not permitted to require an adult child to guarantee payment for care.*

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*An adult child caring for a parent alone has no right of contribution from siblings for the costs of care.*

## Endnotes

<sup>1</sup> (1998), 82 Ohio St.3d 10.

<sup>2</sup> *Flontek*, 82 Ohio St.3d at 14-15.

<sup>3</sup> *State v. Messer* (1992), 62 Ohio Misc.2d 232 (Wood Cty. C. P.) (overruled on other grounds as reported in *State v. Lizanich* (1994), 93 Ohio App.3d 706) (10th Dist. App. Ct., Franklin Cty.).

<sup>4</sup> *State v. Kelly* (1965), 2 Ohio App.2d 174 (9th Dist. App. Ct., Summit Cty.); *Beutel v. State* (1930), 36 Ohio App. 73 (8th Dist. App. Ct., Cuyahoga Cty.).

<sup>5</sup> An affirmative defense imposes on the accused the burden of going forward with 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).

<sup>6</sup> R.C. 2919.21(D).

<sup>7</sup> *State v. Brown* (1982), 5 Ohio App.3d 220 (5th Dist. App. Ct., Stark Cty.).

<sup>8</sup> R.C. 2919.21(E).

<sup>9</sup> R.C. 2919.21(G)(1).

<sup>10</sup> R.C. 3113.04(A).

<sup>11</sup> "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration. R.C. 2901.01(A)(3).

<sup>12</sup> "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).

<sup>13</sup> R.C. 2903.10(A).

<sup>14</sup> R.C. 2903.10(B).

<sup>15</sup> *State v. Dunville* (1999), 1999 Ohio App. LEXIS 4815 (12th Dist. App. Ct., Clermont Cty.).

<sup>16</sup> *Dunville*, 1999 Ohio App. at 9.

<sup>17</sup> R.C. 2903.16(C)(1).

<sup>18</sup> R.C. 2903.16(C)(2).

<sup>19</sup> *St. Clare Center Inc. v. Mueller* (1986), 34 Ohio App.3d 69 (1st Dist. App. Ct., Hamilton Cty.); *Slapin v. Slapin*, 233 F.Supp. 716 (S. D. Ohio 1964).

<sup>20</sup> *Gardner v. Hines* (1946), 34 Ohio Op. 25 (C. P. Tuscarawas Cty.); *Slapin*, 233 F.Supp. at 716.

<sup>21</sup> *Gardner*, 34 Ohio Op. at 25.

<sup>22</sup> *Gardner*, 34 Ohio Op. at 26.

<sup>23</sup> *St. Clare*, 34 Ohio App. at 71-72.

<sup>24</sup> 42 United States Code §§ 1395i-3(c)(5)(A)(ii) and 1396r(c)(5)(A)(ii).

<sup>25</sup> *Slapin*, 233 F.Supp. at 717-718.

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