



## 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 regarding a woman prosecuted for the death of her elderly mother. The question at issue in *State v. Flontek*<sup>1</sup> was: What is the 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 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 criminal law, an adult child has no legal duty to support a parent unless a contract, express or implied, exists.

### 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."

\*This *Members Only* brief is an update of an earlier brief on this subject dated March 23, 2010 (Volume 128 Issue 12).

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



Determining what is "adequate support" requires weighing the dependent's needs with the adult child's ability to pay.

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. In *Flontek*, an elderly woman died from 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 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 her own money 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 Ohio Supreme 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 – 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 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.<sup>2</sup>

Regarding what "adequate support" means, the Wood County Common Pleas Court has held 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 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.<sup>3</sup>

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.<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 providing financial support.

### Defenses

R.C. 2919.21 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> 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.<sup>7</sup>

The other 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.<sup>8</sup>

### **Penalty**

Whoever violates the prohibition is guilty of nonsupport of dependents, a misdemeanor of the first degree.<sup>9</sup> 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.<sup>10</sup>

### **Crime of nonsupport of a functionally impaired person**

R.C. 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 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 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.

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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 disabled 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.*



*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 is either a second degree misdemeanor or a fourth degree felony if the person suffers serious physical harm.*

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

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

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.<sup>15</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>16</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>17</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>18</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>19</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 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 an agreement 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 agreement made between the parent and child.<sup>20</sup>

A child may agree, either orally or in writing, to pay a third person to provide care for the parent.<sup>21</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>22</sup>

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.<sup>23</sup> 

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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> 82 Ohio St.3d 10, 693 N.E.2d 767 (1998).

<sup>2</sup> 82 Ohio St.3d at 12-16.

<sup>3</sup> *State v. Messer*, 62 Ohio Misc.2d 232, 234, 597 N.E.2d 568 (C.P. 1992) (overruled on other grounds as reported in *State v. Lizanich*, 93 Ohio App.3d 706, 708, 639 N.E.2d 855 (10th Dist. 1994)).

<sup>4</sup> *State v. Kelly*, 2 Ohio App.2d 174, 176, 207 N.E.2d 387 (9th Dist. 1965); *Beutel v. State*, 36 Ohio App. 73, 77, 172 N.E. 838 (8th Dist. 1930).

<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*, 5 Ohio App.3d 220, 222-223, 451 N.E.2d 1232 (5th Dist. 1982).

<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*, 12th Dist. Clermont No. CA98-11-105, 1999 Ohio App. LEXIS 4815, \*5, \*8-\*10 (October 11, 1999).

<sup>16</sup> R.C. 2903.16(C)(1).

<sup>17</sup> R.C. 2903.16(C)(2).

<sup>18</sup> *St. Clare Center Inc. v. Mueller*, 34 Ohio App.3d 69, 70, 517 N.E.2d 236 (1st Dist. 1986); *Slapin v. Slapin*, 233 F.Supp. 716, 717-718 (S.D. Ohio 1964).

<sup>19</sup> *Gardner v. Hines*, 68 N.E.2d 397, 398 (C.P. 1946); *Slapin*, 233 F.Supp. at 716.

<sup>20</sup> *Gardner*, 68 N.E.2d. at 398; *St. Clare*, 34 Ohio App.3d at 70-71.

<sup>21</sup> *St. Clare*, 34 Ohio App.3d at 71-72.

<sup>22</sup> 42 U.S.C. 1395i-3(c)(5)(A)(ii) and 1396r(c)(5)(A)(ii).

<sup>23</sup> *Slapin*, 233 F.Supp. at 717-718.

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