

A silver key with a green house-shaped keychain is positioned diagonally across the frame. The background is a textured, light brown wood. The keychain is a bright green felt house shape with a heart-shaped cutout in the lower right. The key is attached to a silver ring.

Legal Aid Services of  
Oklahoma  
*3<sup>rd</sup> Annual Memorial Elder  
Abuse Symposium*  
June 22, 2020

EXTREME HOME  
TAKEOVERS:  
DEALING WITH THOSE  
"CONCERNED"  
RELATIVES

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# OVERVIEW

- My Background with Penn State-Dickinson Law's Elder Protection Clinic
- Why is the Family Home an Issue?
- Introducing a Case Study
- Identifying Possible Problems/Approaches/Goals/Solutions
- Comparative Approaches:
  - Lessons in Filial Support and Improvident Transactions
- An Almost Universal Concept:
  - The Failed "Support Deed" under Oklahoma Law
- Additional Resources

# FINANCIAL CRIMES ENFORCEMENT NETWORK

- December 2019 Report issued by FinCEN analyzed Suspicious Activity Reports (SARs) filed between October 2013 and August 2019
- Six-Year data showed Elders facing 20-30% increase in threats to their financial security from both domestic and foreign actors
- Many reports involved “Money Services,” i.e., where older adults were using international money transfers when falling victim to scams
- BUT depository institutions and securities/futures companies reported that **“family members and caregivers were most often responsible for theft from elders”**
- Source:  
[https://www.fincen.gov/sites/default/files/shared/FinCEN%20Financial%20Trend%20Analysis%20Elders\\_FINAL%20508.pdf](https://www.fincen.gov/sites/default/files/shared/FinCEN%20Financial%20Trend%20Analysis%20Elders_FINAL%20508.pdf)

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# CASE STUDY: RUTH'S "CONCERNED RELATIVES"

- 80+ year old woman - "Ruth"
- The issue: starting about a year ago, Ruth began finding it hard to live at home alone, with a history of falls
- Family Meeting: Everyone agrees Ruth needs availability of 24/7 assistance; after discussion family members agree that Daughter RayAnn's oldest daughter, Maxine, an LPN (& her husband Mark) are best choice
- Two of Ruth's three children take Ruth to an attorney, where they explain that all 3 children agree that Maxine and Mark will care for Ruth as needed & payment will be "the house" (value: \$90k+/-)
- The "children and Ruth" ask the attorney to deed the house to Maxine and Mark for "\$5"
- Maxine and Mark move 150 miles in order to live with Ruth
- Ruth becomes dissatisfied within 3 months. Issues include:
  - Mark at house 24/7, but smokes "heavily"
  - Maxine is rarely there as she has a new nursing job at a local hospital
  - They have "too much furniture" and Ruth says she can't eat the food they prepare
- After 3 more months, Ruth moves out (to friend's house) & comes to you, an attorney, for legal advice or counseling

# USING "CHAT" - LET'S IDENTIFY ISSUES/SOLUTIONS

1. What Went Wrong with Original Plan?

2. How Should We Approach Family on Behalf of Ruth?

Goal: Assist Ruth

3. Is There a Better/Safer Plan for Ruth?

4. Does Oklahoma Law Provide Possible Solutions?

# FILIAL SUPPORT LAWS



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- Filial Support Laws: trace to Colonial America and beyond, including Elizabethan Poor Laws
- At one time as many as 40 states had such laws
- Pennsylvania has such a law and strengthened it by providing third-party standing

## ■ Core Concepts:

**Certain individuals “have the responsibility to care for and maintain or financially assist an indigent person” including:**

- The spouse of the indigent person
  - The child of the indigent person
  - A parent of the indigent person
- Pennsylvania Law extends jurisdiction over a claim “by any person . . . Having any interest in the care, maintenance or assistance of such an indigent person.” 23 Pa.C.S. Sections 4601-4606 (part of Pennsylvania’s Domestic Relations Code since 2005)
  - A nursing home is viewed as providing “shelter, sustenance and care” and treated as having “sufficient interest” to bring suit against adult child for direct payment. *Presbyterian Medical Center v. Budd*, 832 A.2d 1066, 1075 (Pa. Superior Ct. 2003)
  - Pennsylvania’s statute also asserts the state has a lien to enforce the provisions of the support law, running against any property of the indigent person to extent public payments were made to nursing home. 23 Pa. C.S. Section 4604

# IMPROVIDENT TRANSACTION ANALYSIS



- Improvident Transaction Analysis often focuses on the role that attorneys play in preparing documents used by older adults to transfer property or empower caretakers to handle finances
- Example: *Carroll v Carroll*, decided in 1999 in the Supreme Court of Ireland
  - Fetard in County Tipperary
  - Widowed Father was Owner of a family pub with attached home
    - After his wife died; 2 daughters cared for him and ran the pub, son handled finances
    - May 1990: Son asked lawyer to prepare “papers” for transfer of pub and home to him; father signed papers, conveyed “in consideration of the natural love and affection” father has for son
    - “This will always be home to you” – father told his daughters
    - January 1994: Son involved in fatal accident; son’s widow asserted control over house & pub
- Issue in Court: Whether transaction should be set aside on grounds of undue influence or improvidence of transaction? Court ruled both doctrines established.
- Court rejected attorney’s argument he was handling transaction on behalf of father as the “family solicitor,” and was justified in representing both transferor and transferee
- Findings critical to holding that set aside transaction: Attorney “appeared to misconceive his duty.” Father had no independent legal advice. *Presumption* of undue influence could not be overcome “where the father did not have independent legal advice”
- Maine enacted law protecting “uncounseled” “elderly dependent” individuals from “improvident transfers of title” in 1988, authorizing “appropriate relief” including rescission or reformation of deed, imposition of constructive trust or order enjoining use of property See 33 M.R.S.A. Section 1021 et seq.

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# WHAT DO OTHER JURISDICTIONS' STATUTORY & COMMON LAW APPROACHES OFFER FOR OKLAHOMA?



# OKLAHOMA LAW: SUPPORT DEEDS & FAILURE OF CONSIDERATION

- The Problem: Courts sometimes seem reluctant to set aside transfers of property for grantor's lack of capacity and/or undue influence on part of grantee. Some aversion to "messy" family dynamics?
- Historically, courts in Oklahoma (and most states) have recognized power to set aside deeds, relying on equitable powers
  - for "failure of consideration" because of **unfulfilled** promise to care for and maintain grantor for remainder of life:
- **"Where a person has parted with his property in consideration for support for life and discord thereafter arises between the parties so that it becomes impossible to perform the conditions and agreements made in consideration of the execution of the deed, courts are disposed to restore to the grantor the property if it can be done without manifest injustice to the grantee."** *Ferrero v. Siel*, 397 P.2d 501, 504 (Okla. 1964)
- Courts sometimes describe "support deed" cases as "unique" cases of failure of consideration
  - "On account of the peculiar nature of a contract to support and care for grantor... grantor is entitled to have deed cancelled." *Rayner v. McCabe*, 66 N.E. 2d 41, 419 (Mass. 1946)
- The Lesson: Courts may use equitable powers to fashion appropriate remedy for failure of consideration in support deeds

# OKLAHOMA CASES

- *Moffatt v. Moffatt*, 159 P. 2d 531 (Okla. 1945) Widower/Grantor, age 83, sues to rescind deed for home given to son:
  - Court observed that son had not fulfilled agreement to fix up property and share any profits in event of sale with other son; Court distinguishes cases denying rescission where grantee's siblings are the parties seeking relief following death of parent/grantor
  - Rescission of deed affirmed, as "equity has the right to cancel the deed upon the failure to perform because of failure of consideration," citing support deed cases in other states (Minnesota and Iowa)
- *Tate v. Murphy*, 217 P. 32d 177, 187 (Okla. 1949) Court reviews history of support deeds:
  - "[T]his court has recognized the adequacy of a promise to care for and support a grantor for the remainder of his life, in the absence of fraud or undue influence and unless the consideration is so grossly inadequate as to shock the conscience of the court."
  - "In considering the adequacy of consideration in cases of this nature, it should be kept in mind that conditions existing at the time the contract is made are controlling...."
  - Upheld transfer of house where caregiver and her family attended the grantor "day and night until they became exhausted. She lived only eleven days after commitment [to a mental health facility]. . . . We find no evidence of refusal on the part of [the caregiver] to pay [for hospital care], and the evidence clearly shows that her action was for the best interest of [the grantor] after she became insane in 1944." Evidence cited showed care provided in the home from December 1942 to January 1944, when grantor became "very ill, both physically and mentally."
- *Easterling v. Ferris*, 651 P.2d 677 (Okla. 1982):
  - Court recites general rules that execution and delivery of a deed merges the contract (and any prior negotiation) and that deeds are usually effective to convey title even if not supported by consideration.
  - "The general rule, however, is not without exception. Rescission or cancellation of a deed may be ordered when that which was undertaken to be performed in the future was 'so essentially a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract....' **Another common situation to which this exception applies is a promise by the Grantee to support the Grantor for life...."**

# ANOTHER “MODERN” CASE RECOGNIZING FAILURE OF CONSIDERATION IN A SUPPORT DEED CONTEXT

- *Gilbert ex rel. Roberts v. Rainy*, 71 S.W. 3d 66 (Ct. App. Ark. 2002)
  - Mother brought action to rescind deed in which mother conveyed home to daughter in consideration of providing mother with care & support for remainder of life, after daughter “became unable to provide for mother’s care & support.”
  - Consideration recited in the deed mentions “past and future love and affection” but no mention of support or care
  - Trial court held that for support deed, “true consideration of the deed may be proven by parole evidence”
  - Mother not required to prove daughter intended to defraud mother
  - Daughter entitled to expense incurred in improving and maintaining mother’s home (\$127!)
  - Appellate Court affirmed **recission of deed for failure of consideration**

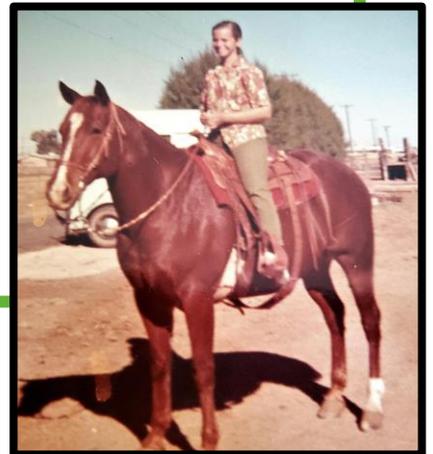
# PRACTICAL CONSIDERATIONS

- **Who is the plaintiff?** Speed counts. Court more likely to order relief when filing party is the grantor, even if that party passes away before court issues final ruling. Compare *Ex parte Alexander*, 806 So.2d 1222 (Ala. 20001) (rejecting claim by surviving widow of grantor arguing she was a third-party beneficiary of an Alabama statute recognizing voidable nature of support deeds)
- **Will state have to provide financial/medical care for abused elder?** Introduce any evidence that Medicaid for long-term care would be unavailable because of “gift” – courts sometimes seem as worried about public benefit expense as individual need
- **Will the outcome of the case depend on parol evidence rather than “mere” deed?**
  - **Family member/caregiver often eager to tell you how much work they do to help grantor; sets stage for parol evidence**
  - Consider theories that permit oral evidence. Compare *Dassel v. Hershberger*, 2010 WL 5621536 (Ct. App. Ohio 2010)(admitting parol evidence to show deed’s reference to “valuable consideration” was promise to care for grantors for rest of their lives)
- **Did the Grantor have “independent advice”?** Carefully examine whether legal advice was given with awareness of key facts. See *Brown v. Lambdin*, 521 P.2d 1386, 1392(Okla. 1974)(grantor had “competent advice from attorneys & accountants”)
- **What relief is properly sought?** Consider calling upon the court’s equitable powers to be creative in allocating value of property over the long term for promisors who have given “some” care; consider whether partial-caregiver should be reimbursed for out-of-pocket expenses

# RESOURCES & CONTACT INFORMATION

- K. Pearson, *Perils of Serving as a Financial Caregiver*, BIFOCAL (Journal of ABA Commission on Law & Aging - 2018)
- K. Pearson, *Filial Support Laws in the Modern Era*, 20 ELDER L. J. 269 (2013) (includes state law table)
- K. Pearson, *The Lesson of the Irish Family Pub*, 40 STETSON L. REV. 237 (2010)
- K. Pearson & T. Cowart, THE LAW OF FINANCIAL ABUSE & EXPLOITATION (Bisel Company, 2010) (includes state law table of abuse & protection statutes)
- **ELDER LAW PROF BLOG**, hosted by Professor Rebecca Morgan (Stetson Law) and Professor Katherine Pearson, at
  - [https://lawprofessors.typepad.com/elder\\_law/](https://lawprofessors.typepad.com/elder_law/)

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Professor Pearson's favorite horse, "Okie" – naturally, from Oklahoma