

# The Cautionary Tale and Tragic Death of Virginia Kermath

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Everything I know about Virginia Kermath came from reading a Michigan Court of Appeals opinion.<sup>1</sup> In that opinion, I learned that Virginia was a demented 89-year-old who, on a particularly cold Michigan night, wandered outdoors and became locked out of the building where she lived, experienced hypothermia and frostbite, conditions which led to her death.

I don't know what feelings of pain, fear, or confusion Virginia suffered in those minutes, as she tried to get back into the

building. And while I don't want to minimize the human aspects of this tragedy, the details of Virginia's death are not what this story is about. Rather, this story is about how Virginia ended up in a place that was ill-suited for her care needs, how families can struggle to understand and select care facilities for aging adults, and how our courts (at least the courts involved in this case) allocate fault when such tragedies occur.

## The court's decision

After her death, Virginia's family sued the place she lived for causing her to suffer and die as she did. The family lost at the "trial court" level, and the trial court's dismissal of the case was affirmed by the Michigan Court of Appeals.

The decision of these courts seems to ride on the proposition that Virginia's family placed her in an independent living facility. When she locked herself out, the facility was not at fault because the facility was designed for people who could take care of themselves. If Virginia needed more care, the family should have placed her in a facility that provided a higher level of protection.

But perhaps their analysis is too simple.

## Housing options

When people begin looking for care for older adults, they become exposed to many labels. Words like "independent living," "assisted living," and "nursing homes" are tossed around, often interchangeably and imprecisely.

In fact, while there are many "levels of care" available for older adults seeking housing options, understanding those levels is only part of what people need to understand in order to make good choices. To fully understand senior housing options, people need to recognize that this is an industry and, like most industries, the options they are being offered are shaped by the business models of the companies that own these facilities.

Businesses that own buildings in which older adults are housed have chosen to be licensed or unlicensed, and have also decided whether their facilities will or won't be structured to allow residents to access government benefits like Medicaid. These business decisions determine the level of regulation to which they are subject and shape the care choices families can expect from them. What's more, the nice

people that show family members around these buildings and who explain how things will work, are salespeople. Their primary job is to keep as many of those rooms filled as possible, and to make promises and representations to families as needed to accomplish that one fundamental objective.

As an example, let's look what we know about the place where Virginia was living.

Virginia's family chose to place her in an "independent living" residence (a decision that the trial court found to be significant in allocating blame between the family and the facility). Essentially, this meant that Virginia rented an apartment which also provided her with some meals in a cafeteria and other services, such as laundry. But it's helpful to know that on the other side of the same building, owned by the same business entity, there were other apartments for people who had higher care needs. Those apartments were more expensive, but came with "enhanced" services, including caregivers and greater security arrangements that, had Virginia been living there, might have avoided her tragic death.

It is also telling to understand that even though Virginia was a resident of the independent living side of this complex, she was receiving assistance with her dementia needs from outside caregivers, and that the people who managed the independent living section of the building maintained a list of such vendors which they gave to residents who needed help remaining "independent."

In addition, prior to her death, Virginia's dementia had become so pronounced that she was disruptive in the cafeteria on the independent side of the building, which was addressed by having her take her meals on the assisted living side of the building or in her own room.

Finally, on more than one occasion, the people managing the independent side of the building had to call Virginia's caregivers to the lobby to have her taken back to her room, when it was clear that Virginia was confused about where she was.

The point of all this is that the labels businesses place on these housing options are often misleading. People are told every day that if they place their parent in this "independent" apartment, that they will be allowed to bring in additional care as their care needs increase, and that the

facility will provide contacts to the families to facilitate this arrangement. To suggest that all (or even most) older people who live in facilities that label themselves "independent" can in fact live independently ignores the reality of this marketplace.

## Conclusion

Managing the care needs of an aging parent can be (and almost always is) a daunting task. When it becomes clear that an older adult can no longer care for themselves safely in their home, there are many options to consider. The important considerations that impact the quality of their care, their safety, and the cost (including when and how government assistance might become available) are often obfuscated by marketing labels as well as the promises of salespeople who are under pressure to fill rooms.

I can't say whether Virginia's family should or should not have won their case. But I can say that, to my thinking, the simple analysis adopted by the Court of Appeals belies the true complexity of the choices families face when trying to find care for older adults.

Because this issue comes up so frequently, and because the resulting mistakes lead to so many bad outcomes, I have attempted to use Virginia's story to enlighten others who face these same challenges and choices. To the extent I have succeeded, any thanks should go to Virginia.

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