



## Monthly Newsletter May 2015



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## Sex and Dementia: Another Elder Law Topic

### Introduction

Sex and the elderly (specifically those with dementia) is getting a lot of attention lately due to the Iowa case involving Henry Rayhons. This case raises some important questions regarding personal relationships of those who develop memory debilitating diseases and their loved ones.

### State of Iowa v. Henry Rayhons

In May 2014, the State of Iowa charged Henry Rayhons with sexual assault of his wife, a felony. He faced a possible ten (10) year sentence if found guilty.

Henry Rayhons and Donna Rayhons were married in 2007. It was a second marriage for both of them and they both had adult children. According to friends and family, they were very much in love. Donna was diagnosed with Alzheimer's and was eventually placed in a nursing home by her adult daughters.

According to various news reports that covered the trial, Donna was evaluated by a facility doctor for a number of reasons, including capacity. Upon Donna's daughters' request, the doctor

advised Henry that Donna did not have capacity to consent to sex. Eight days after being advised of this doctor's opinion, Henry visited Donna in the facility, which she shared with an 86 year old female roommate. While there it was alleged that he engaged in sexual acts with his wife based on a report made by Donna's roommate and physical evidence gathered at the scene.

### **The Verdict**

In order to prove its case, the prosecution had to prove two facts beyond a reasonable doubt: (1) that Henry and Donna Rayhons, engaged in sexual relations on the night in question; and (2) that Donna Rayhons, was unable to consent to those activities. A jury determined that the prosecution did not prove these two facts and found Henry "not guilty." The exact reasons for the jury's decision are unknown, only that they rendered a verdict of not guilty.

### **Lingering Questions**

Regardless, the case brought up many concerns and questions for all of us. One of the main concerns this case brings up is the necessity of physical touch and intimacy for all people, especially as we age and even more so for those with dementia. Human contact can come in many forms and it is vital for all of us. Sexual intimacy is one form of human contact that many adults take for granted. However, when one goes to live in an assisted living or nursing home facility, that right may be taken away or altered.

The Hebrew Home is a well-known nursing home facility located in New York. It is considered one of the best in the country. Twenty years ago, it became the first facility to implement a "sexual expressions" policy for its residents. However, few facilities have followed suit. In fact, most facilities do not have a policy concerning their resident's rights to have sex with a spouse or any other person. The conversation started by the Rayhons case may encourage facilities to look into implementing such a policy.

Another question that was thrust into the national spotlight by the Rayhons case is whether a patient with dementia can consent to sex, or at what point a person with dementia is no longer able to consent. In the Rayhons case, the prosecutor focused on the incapacity of Donna Rayhons. The prosecutor compared Donna to a twelve-year-old child who is unable to consent simply because the child lacks capacity to consent. Similarly, the prosecution argued, Donna Rayhons' Alzheimer's disease made her incapable of consenting to sex whether she "wanted" to or not. This question of how to determine whether an adult can no longer consent to sex, especially with a spouse, is a difficult one.

The fact that dementia patients have varying levels and moments of capacity makes it even trickier. Many suffering from dementia have "good" days and "bad" days – even "good" hours or minutes and "bad" hours or minutes. So, how do we measure capacity? Is it best to say that once a person has been diagnosed with dementia and has moments of lacking capacity they should no longer be able to consent to sexual activity? Even if we determine that dementia patients do continue to have a right to consent to sex even though they have the disease, the questions don't stop there.

Unfortunately, there may come a point when a person with advanced Alzheimer's may be unable

to recognize a spouse or loved one. This is excruciating for the unrecognized loved one and we imagine it is confusing, frustrating and isolating for the patient. What if that same patient begins to find another patient at the facility attractive, begins to flirt or even “fall in love”? Some of you may recall the national news reports several years ago when a similar situation occurred with Justice O’Connor’s husband who suffered from advanced dementia. A [New York Times](#) article written at the time suggested that sexual activity among older adults is an issue nursing homes will be forced to face.

Many couples who now face this situation may have never discussed how they would like it handled. The Rayhons case has brought the issue of intimate contact to light and now gives couples an opportunity to discuss and decide how they would like the other to proceed if one later develops dementia or any other mentally disabling disease.

### **Legal Solutions**

There are legal documents that can be added to the planning done for seniors that address many of these issues. For example, additional provisions can be added to a durable power of attorney or health care document that address issues of companionship, facility choice, and personal relationships. “Compassion contracts” are also being discussed as a possibility for couples to consider. With a “compassion contract” a couple can agree in advance that each will allow and hold the other harmless for seeking companionship from a third party when one of them no longer recognizes the other. Any variation of such an agreement can be made by the couple to guide them in this unfamiliar territory.

While there are no clear-cut answers to the questions that have been raised by the Rayhons case, it has given the Elder Law community an opportunity to seek better solutions for all. If you or someone you know would benefit from speaking to an Elder Law attorney about the issues raised in this newsletter or any other legal issues, please do not hesitate to contact us. We are always happy to hear from you.

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