

## Can Elderly Individuals With Dementia Consent to Sexual Contact?

Because of their conditions, it is difficult to determine demented persons' reactions to sexual activity. Some have argued that the sexual instinct survives mental incapacity, and intimacy with a long-term partner may be comforting. Dementia also reduces inhibitions, so demented persons may approach others sexually or masturbate in public places.

Partly to avoid involvement in litigation that might follow, nursing homes often restrict sexual contact between a resident and the individual's intimate partner. But many elders are opposed to the idea of having to give up their marital intimacy:

Children and institutions, with their prejudices against seniors' sexual behavior, are being needlessly cruel in punishing elderly people who insist on continuing intimate contact. (Jane Bedno, *Nursing Home Case: Dementia and Sexual Consent*, N.Y. Times, Apr. 16, 2015, at A26, available at [www.NYTimes.com/2015/04/16/opinion/Nursing-Home-Case-Dementia-And-Sexual-Consent.html](http://www.NYTimes.com/2015/04/16/opinion/Nursing-Home-Case-Dementia-And-Sexual-Consent.html).)

The author of the statement above, Jane Bedno, 83, whose husband is 90, was outraged that she and her husband might be expected or forced to end their intimacy of over six decades if either became cognitively impaired. Her article resulted in numerous letters to the editor. In one, "Joe" said that his wife tried to initiate sex when she was severely demented. He did not respond, but said that there would have been nothing immoral about engaging in intimacy. "EV," who had worked at an assisted living facility, said that sexual relationships between demented people were ubiquitous; despite their disabilities, "they still knew that sex felt good and was comforting." However, some letter writers said that it was wrong to have sexual contact in a semi-private room, because of the roommate's privacy rights. (Nancy Wartik, *A Lively Comment Discussion About Dementia and Sex*, N.Y. Times, Apr. 17, 2015, available at [www.NYTimes.com/2015/04/17/health/A-Lively-Comment-Discussion-About-Dementia-And-Sex.html](http://www.NYTimes.com/2015/04/17/health/A-Lively-Comment-Discussion-About-Dementia-And-Sex.html).)

Some commentators have argued that nursing home bans on sexual relations may reflect staffers' prejudices about appropriate behavior by the elderly, or their own feelings that old people are unattractive and should not engage in sexual conduct.

### Debate About Competing Objectives When One Party Is Cognitively Impaired

The Rayhons case spurred debate about the competing objectives of limiting sexual contact between spouses when one of them is cognitively impaired. (See Sidebar: *Nursing Residents and Sex Raise Questions About Consent*.) In a debate between philosophers John Corvino and Ron Belgau, both agreed that nonconsensual sexual activity is

case was experienced by Mrs. Rayhons' daughter—not by Mrs. Rayhons. He said that the case raises moral challenges. Does entering into a marriage operate as "standing consent" for sex when a person remains married, but would not be able to consent to creating a new sexual relationship? Corvino said that neither doctors nor daughters have any special expertise in resolving these serious questions.

**Responses to Debate.** The Times printed a number of responses to the debate. "Molly" said that anyone who deals with a dementia patient has all the power; the sick person is entirely powerless, and it is wrong for a healthy spouse to prioritize his needs above those of the sick spouse.

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always wrong and that society must protect its vulnerable populations. (N.Y. Times Opinion Pages, *Can People With Dementia Have a Sex Life?*, N.Y. Times, Apr. 22, 2015 (noting that a reader asked why two male philosophers were chosen for a debate critically involving the interests of a woman), available at [www.NYTimes.com/RoomForDebate/2015/04/22/Can-People-With-Dementia-Have-A-Sex-Life.html](http://www.NYTimes.com/RoomForDebate/2015/04/22/Can-People-With-Dementia-Have-A-Sex-Life.html).) The rationale for interfering in cases involving cognitively impaired elderly persons is to preserve the autonomy of the person with dementia. Belgau opined that the reactions to the Rayhons case fell into two camps. One asked why a spouse could be charged with sexual assault when there was no coercion or injury. The other group advocated for evaluating the ability to consent to acts of intimacy incident by incident.

**Ethical Status Depends on Facts.** Corvino said that the ethical status of an activity depends on the facts of the case; Mrs. Rayhons "appeared to enjoy her husband's affections," and the marriage was extremely relevant to the question of consent. He said that the distress in this

"Bill Haywood" said that making doctors responsible for determining consensual capacity is "fetishizing the rule of experts," and a long-term partner would have the most insight into whether the sick spouse enjoyed the contact. "Taking sex away from Mrs. Raylon [sic] did not restore choice to her, it just shifted control from the husband to the authorities."

"MsPea" said that it should not be presumed that Mrs. Rayhons consented, because it is impossible for outsiders to know whether marital sexual relations are mutually enjoyed. She said that Rayhons' actions showed disregard for Mrs. Rayhons' modesty and privacy, and perhaps the marriage had involved other types of disrespect. (N.Y. Times Opinion Pages, *supra*.)

### Constant Kissing

Katherine Peterson reported in the Elder Law Prof Blog that an English reader sent her a news item from The Independent. Thomas Middleton, aged 87, sued the Derby City Council when

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he was told he could only continue to visit his wife, Joan, 84, in the publicly operated care home where she lives if he stops “constantly” kissing her. He was told he could kiss her only at the beginning and end of the supervised two-hour visits. In 2012, a court ruled that Mrs. Middleton lacked decisional capacity. Mr. Middleton said that the

decision led him to “lose the will to live,” and that he loves his wife so much that he does not want to leave her.

The counterpoint, however, is that the news item reports that the staff at the facility imposed an eight-point agreement because Middleton’s constant “kissing, pulling, and poking his wife” was distasteful to her, and Middleton became “nastier and nastier” when his wife did not respond positively to him. Staff

workers said that he intimidated them, and they were afraid he would abduct his wife if she were allowed to make a visit to her former home. (Katherine C. Pearson, *Husband’s “Constant Kissing” of Wife in Care Home Leads to Court*, Elder Law Prof Blog, June 24, 2015, available at [http://LawProfessors.typepad.com/elder\\_law/2015/06/Husbands-Constant-Kissing-Of-Wife-In-Care-Home-Leads-To-Court.html](http://LawProfessors.typepad.com/elder_law/2015/06/Husbands-Constant-Kissing-Of-Wife-In-Care-Home-Leads-To-Court.html).)

## Nursing Residents and Sex Raise Questions About Consent

Donna Lou Rayhons, an Alzheimer’s sufferer, lived in a nursing home in Iowa. Her husband, Henry Rayhons, a former state legislator, was tried for third-degree felony sexual abuse of his wife after she passed away in August 2014. The prosecution asserted that the nursing home staff informed Rayhons that his wife was incapable of consent to sex because of her mental condition. Nevertheless, Rayhons had sex with his wife in her nursing home room on May 23, 2014. (He later testified that he believed this to be medical advice, not an order.)

Testimony at Rayhons’ trial showed that his wife was always pleased to see her husband, and her family doctor had said that “intimacy is beneficial for dementia patients.” However, the facility prepared a care plan for Donna Lou on May 15, 2014, and informed family members that her outings should be limited. Social worker Michelle Dornbier asked the facility’s

physician, Dr. John Brady, if Donna Lou was capable of consenting to sexual activity. He said that she was not.

On May 23, Donna Lou was moved from a single room to a one with a roommate. The roommate said that Rayhons closed the curtain around his wife’s bed, and she heard sexual noises. A security camera in the hall recorded Rayhons placing his wife’s underwear in a laundry bag in the hallway. However, he denied having a sexual encounter with his wife at that time.

A complicating factor in this case was that Mr. and Mrs. Rayhons had married after each had been widowed. Donna Lou’s daughter from her previous marriage, Suzan Brunes, was named as her mother’s guardian. There was a conflict between Suzan Brunes and her stepfather. (Pam Belluck, *Sex, Dementia, and a Husband on Trial at Age 78*, N.Y. Times, Apr. 13, 2015, available at [www.NYTimes.com/2015/04/14/health/Sex-Dementia-And-A-Husband-Henry-Rayhons-On-Trial-At-Age-78.html](http://www.NYTimes.com/2015/04/14/health/Sex-Dementia-And-A-Husband-Henry-Rayhons-On-Trial-At-Age-78.html).)

Brunes transferred her mother to a different facility operated by the same company and placed her in a specialized dementia unit. Acting as guardian, Ms. Brunes limited Rayhons’ visits. Shortly after his wife’s death, Rayhons was arrested.

He was acquitted after a three-day jury trial. The case had broader implications, highlighted by Rayhons’ attorney, who argued that convicting him would place spouses at risk of sexual intimacy being treated as sexual abuse. But prosecutors lamented that the verdict put other nursing home residents at risk of abuse. (AP, *Henry Rayhons Acquitted of Sexual Abuse of Wife, an Alzheimer’s Patient*, Apr. 23, 2015, available at [www.CBC.ca/news/world/Henry-Rayhons-Acquitted-Of-Sexual-Abuse-Of-Wife-An-Alzheimer-Patient-1.3045185](http://www.CBC.ca/news/world/Henry-Rayhons-Acquitted-Of-Sexual-Abuse-Of-Wife-An-Alzheimer-Patient-1.3045185).) ■



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