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When Does Yes Mean Yes?

DEMENTIA AND SEXUALITY



by W. Kelly Johnson and Marilyn J. Maag

A recent decision in Iowa focused national attention on an important issue relating to elder care and sexuality: at what point does a dementia patient lose the right to say yes? Through the Rayhons case, this article will explore issues relating to sexuality and aging and will review the issue of consent under Ohio law.

In 2005, Henry Rayhons, a member of the Iowa House of Representatives, began flirting with Donna Lou Young at a church choir practice. Young and Rayhons, both in their 70s, were single after the deaths of their longtime spouses. In 2007, they were married in the church where they met, surrounded by their children, grandchildren and hundreds of guests. Friends and family members say that Donna and Henry were very much in love and that their marriage gave them a second chance at life. The couple was inseparable; Donna accompanied Henry to the State Capital for his official duties and he even purchased a beekeeping suit so he could join her in her favorite hobby. It was obvious that the couple was smitten with each other.

Unfortunately, a few years into the marriage, Donna was diagnosed with early onset Alzheimer's disease. Donna suffered from headaches and forgetfulness and it was reported that she drove her car on the wrong side of the road. Her daughters from her previous marriage became concerned when she appeared at lunch wearing only lingerie beneath her winter coat and when she put her hands in the toilet bowl in the restaurant bathroom.

In March 2014, Donna was moved to a care facility approximately five minutes from their marital home. Rayhons and Donna's daughters reportedly clashed over the move and how Donna should be cared for at the facility. Several months later, Donna's daughters met with staff at the facility and developed a care plan for Donna. At the meeting, the daughters and physicians concluded that Donna was no longer able to consent to sex

and Rayhons was informed of that decision.

Approximately a week later, surveillance video showed Rayhons spending about 30 minutes in his wife's room. When he left, he was holding her underwear which he dropped into a laundry bag in the hallway. Donna's roommate informed nursing home staff that Rayhons came into the room, closed the privacy curtain around his wife's bed and she heard noises indicating the couple was having sex. Donna was taken to the hospital for rape tests and her underwear and bedding were sent to a crime lab for examination.

A short time later, a judge named one of her daughters her temporary guardian. At the same time, a state investigator interviewed Rayhons at his home about the alleged assault, and Rayhons admitted to having "sexual contact" with his wife.

Donna died several months later and Rayhons was arrested and charged with sexual abuse a week after her funeral. Shortly after the charges were filed, Rayhons withdrew from the race to serve a tenth term as a State Representative in Iowa.

In April of this year, the trial of Henry Rayhons began. According to reports, much of the state's evidence that Rayhons and his wife had sex on the day in question was inconclusive. The hospital examination and rape kit for Donna found no evidence that she had been assaulted. Further, although stains on the bed sheets matched Rayhons' genetic profile, the lab technician testified that the age of the samples was unclear. During the trial, Donna's roommate testified that she was not sure if the sounds that she heard in the bed were sexual. Further, Rayhons denied that he had sex with his wife after being informed that Donna was no longer able to consent to sexual activity. He testified that he had been intimate with her at the nursing home before he was told that she was mentally incapable of consent but that Donna had always initiated contact. During his 3½

hours of testimony, Rayhons broke down in tears numerous times and said, “I loved her very much. I miss her every day.” After a multiple day trial, the jury found Rayhons not guilty. It is unclear upon what basis the jury reached that verdict.

Consent and Sexuality in an Aging Population

As baby boomers reach retirement age, statistics concerning dementia are sobering. About 5 million Americans currently suffer from Alzheimer’s disease, and this number is expected to rise to 20 million by 2050. If other forms of dementia are added to this calculation, the current number is closer to 7 million and rising to 25 million by mid-century.

A reality of dementia is that as short term memory vanishes, fundamental behaviors, such as sadness, happiness, and sexuality, are heightened. In addition, many dementia patients, especially those suffering from Alzheimer’s, exhibit no apparent physical impairments in the early and middle stages of the disease.

Depending on the scientific study, it is estimated that inappropriate sexual behavior occurs in 7 to 25 percent of dementia patients. About a third of those exhibit “hypersexual” behavior, which equates to an actual increase in sexual desire beyond the norm for that individual. Douglas Wornell, M.D., a geriatric psychiatrist and author of the book *Sexuality and Dementia*¹, estimates that inappropriate sexual behavior effects over 75 percent of people with dementia. Studies show that hypersexual behavior in dementia patients is equally distributed between the sexes.

Long-term care facilities, because of close quarters, are often the scene of problematic sexual behavior. Most incidents of elder sexual abuse, 70 percent of reported cases, occur in care facilities. It is estimated that 5 to 10 percent of the elderly suffer from some degree of abuse and that 5 percent of those cases involve some sort of sexual assault.

In American culture, sexual attraction and activities focus on the young and the young-looking. The thought of getting older and remaining sexually

active is dismissed, if not joked about or regarded as something distasteful.

Consent Under Ohio Law

Ohio Revised Code §2907.02 establishes the charge of Rape under Ohio law. Unlike other sexual offenses, which preclude the spouse of the victim from being charged, §2907.02 allows the charge of rape to be pursued against a spouse who “is living separate and apart from the offender.”² Section (A)(1) of this provision prohibits sexual conduct when “the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.”

Ohio Revised Code §2913.73³ provides that:

“If the lack of consent of a victim is an element of the provision that allegedly was violated, evidence that, at the time of the alleged violation, the victim lacked the capacity to give consent is admissible to show that the victim did not give consent. As used in this section, “lacks the capacity to consent” means being impaired for any reason to the extent that the person lacks sufficient understanding or capacity to make or carry out reasonable decisions concerning the person or the persons’ resources.”

The standard applicable in criminal matters for lack of the intent to consent is very similar to the standard used to determine adult incompetence in guardianship, elder law, or estate planning matters. According to Ohio Revised Code §2111.01(D), an incompetent adult is a person who is so mentally impaired that the person is incapable of taking proper care of the person’s self or property, or fails to provide for others the person is responsible for. Under Ohio law, an adult cannot be found incompetent by a probate court, and a guardian appointed, without notice to the alleged incompetent, the right to a hearing, the

right to independent counsel, and the opportunity to object.⁴ In other words, family members and a physician do not simply talk the matter over and decide an adult is “incompetent.”

For estate planning purposes, the terms “incompetence” or “incapacity” may be defined by the drafter of a document. A common example is defining when the current trustee of a trust is “incapacitated,” requiring the successor trustee to assume responsibility for the trust administration. In such cases, the document defines when a person can no longer perform a certain role or task, as compared to the very serious scenario of a court finding an adult “incompetent” and taking away the person’s civil rights.

Although the authors were able to locate no Ohio cases dealing with sexual offenses involving a spouse with dementia, a review of the facts in the Rayhons case indicates that a similar charge could be pursued under Ohio law. In the Iowa case, Rayhons was living separate and apart from his wife who had been placed in a care facility by her adult children. Further, Rayhons had been advised by his wife’s adult children, and health professionals at the care facility, that she was no longer able to consent to sexual relations.

Conclusion

Discussions concerning the sexuality of an aging parent are a difficult task, even under the best of circumstances. The issues raised by the Rayhons case suggest the need for open and frank discussions among partners, their children, guardians, and the facilities in which those who suffer from dementia live. With more than 6 percent of the American population expected to suffer from dementia by the year 2050, many families will need to make difficult decisions regarding this basic human need.

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¹ Douglas Wornell, *Sexuality and Dementia* (2014).

² Ohio Revised Code § 2907.02(A).

³ Ohio Revised Code § 2913.73.

⁴ Ohio Revised Code § 2111.02.