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Let's Talk About Sex: A Call for Guardianship Reform in Washington State

Sage Graves

I. INTRODUCTION

“Alzheimer’s disease was first identified over 100 years ago.”¹ Although a great deal is still unknown about the disease’s symptoms, causes, and treatment, research has increased over the last 30 years.² Congress, recognizing this lack of information, unanimously approved the National Alzheimer’s Project Act in 2011.³ The Act calls for the development of the country’s first-ever national Alzheimer’s plan by 2025.⁴ Since the implementation of the Act, annual funding for Alzheimer’s research has reached \$591 million—an amount that is still far short of the \$2 billion a year scientists have stated is the “minimum necessary to accomplish the 2025 goal.”⁵

A seldom-discussed issue surrounding the prevalence of Alzheimer’s among the elderly is how the disease affects sexual desires and tendencies.⁶ Although some prefer to see the elderly population as asexual, this perception does not reflect the reality that elderly adults remain sexually

¹ ALZHEIMER’S ASS’N, ALZHEIMER’S DISEASE FACTS AND FIGURES 8 (2014), *available at* http://www.alz.org/downloads/Facts_Figures_2014.pdf.

² *Id.*

³ *President’s Budget Acknowledges Alzheimer’s Disease As Unchecked Threat But Does Not Meet Urgent Funding Needs*, ALZHEIMER’S ASS’N (Feb. 2, 2015), http://www.alz.org/news_and_events_unchecked_threat.asp; *The National Alzheimer’s Project Act (NAPA)*, ALZHEIMER’S ASS’N, <http://napa.alz.org/national-alzheimers-project-act-backgroun> (last visited Nov. 14, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ ALZHEIMER’S SOC’Y, *Sex and Dementia*, LIVING WITH DEMENTIA MAG. (Feb. 2011), https://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=1562.

active into the later years of their lives.⁷ This remains true despite health ailments such as dementia or other degenerative diseases that affect an individual's decision-making abilities.⁸ The fact that elderly adults with Alzheimer's continue to be sexually active, while so much is still unknown about the disease and how it affects capacity to consent to sexual activity, raises new legal questions in the area of guardianship law.

This issue is more than just an emerging legal question; it also affects individuals and families on a personal level. Such is the case with retired Supreme Court Justice Sandra Day O'Connor. Her late husband, John O'Connor, moved into an assisted living facility 17 years after his Alzheimer's diagnosis.⁹ Within 48-hours of his relocation to the facility, Mr. O'Connor began an intimate relationship with a fellow Alzheimer's patient.¹⁰ Instead of feeling jealous, the retired justice felt pleased that her husband was comfortable at the center and happy.¹¹

Although retired Justice O'Connor was not jealous or upset that her husband formed a new intimate relationship, this reaction is not always the case. Some reports suggest that family members, upon learning that their loved one is engaging in a sexual relationship at a facility, become upset

⁷ See generally *Sexed-up Seniors Do It More Than You'd Think*, NBC NEWS (Dec. 3, 2013, 12:37 PM), <http://www.nbcnews.com/id/20395061> (This source provides statistical information concerning sex among the elderly. The article states that statistical results from a federally funded survey on the matter "overturns some stereotypical notions that physical pleasure is just a young person's game.").

⁸ See generally Paula Span, *Sex in Assisted Living: Intimacy Without Privacy*, N.Y. TIMES (June 10, 2014), <http://newoldage.blogs.nytimes.com/2014/06/10> (This article tells the story of one elderly adult, described as a "sexual kitten," who was still sexually active with her husband after she was diagnosed with dementia. This article also discusses concern for privacy among sexually active adults in facilities.); see also ETHEL L. MITTY, DECISION-MAKING AND DEMENTIA, HARTFORD INST. FOR GERIATRIC NURSING & ALZHEIMER'S ASS'N, N.Y. (2012) available at http://consultgerirn.org/uploads/File/trythis/try_this_d9.pdf.

⁹ See *Justice O'Connor's Husband Finds New Love*, CBS NEWS (Nov. 13, 2007, 11:18 AM), <http://www.cbsnews.com/news/justice-oconnors-husband-finds-new-love>.

¹⁰ *Id.*

¹¹ *Id.*

with facility administration for failing to dissuade or forbid the relationship.¹² A PBS News story from 2013 reported that an Iowa nursing home fired its administrator and director after discovering two residents, both suffering from dementia, in bed together on multiple occasions.¹³

When an elderly individual has lost physical capacity, mental capacity, or both, it is common for that individual to move into a facility for assistance with activities of daily living. Similarly, once an elderly adult has lost mental capacity, a situation may arise that requires a court-appointed guardian to act as a surrogate decision maker.¹⁴ Because the individual no longer has the mental capacity to make certain decisions on his or her behalf, a guardianship becomes the necessary option of last resort for substitute decision-making.¹⁵ Such a situation arises when, for instance, an individual has lost mental capacity without an effective durable power of attorney or advance healthcare directive in place.¹⁶

By virtue of the guardianship, the elderly individual loses certain rights.¹⁷ For example, an individual under a guardianship may lose the right to vote,

¹² See Amy Moss Strong, *Assisted Living Sex Stirs Worry*, THE WORLD (Jan. 28, 2012), http://theworldlink.com/news/local/assisted-living-sex-stirs-worry/article_2fda0cb8-49ef-51bf-a259-099a698ff91.html. “Adult children and geriatric caretakers often express disapproval or disgust when they discover sexual relationships between older adults, especially in long-term care settings where patients are often infantilized by nurses and relatives.” Lauren Breland, *Lost Libido, or Just Forgotten? The Legal and Social Influences on Sexual Activity In Long-Term Care*, 38 LAW & PSYCHOL. REV. 177, 179 (2014).

¹³ *Issue of Sexual Consent Between Elderly Adult with Dementia Proves Problematic*, PBS NEWSHOUR (July 23, 2013, 12:00 AM), http://www.pbs.org/newshour/bb/health-july-dec13-dementia_07-23/.

¹⁴ See WASH. REV. CODE § 11.88.010 (2008).

¹⁵ ANN VINING, ALTERNATIVES TO GUARDIANSHIP 9 (2012), available at <http://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/392E02E5-DDD9-3257-2013-D64145502759/3302en.pdf>; Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly: Past Performance and Future Promises*, 23 CT. MANAGER 9, 9 (2008).

¹⁶ See VINING, *supra* note 15, at 4–9.

¹⁷ See WASH. REV. CODE § 11.88.030 (2008).

to consent or refuse medical treatments, or to marry.¹⁸ It follows that the guardian gains certain decision-making powers by virtue of the guardianship. However, little legal guidance exists as to whether it should be presumed that an individual with Alzheimer's under a guardianship lacks the mental capacity to consent to sexual activity, thus giving the guardian the power to restrict or forbid sexual intimacy.¹⁹

This lack of guidance, coupled with the lack of understanding on how Alzheimer's affects one's ability to consent to sexual activity, leads to instances where a guardian forbids or dissuades an incapacitated individual from engaging in sexual activity when that restriction is not necessary to protect the individual's health and safety.²⁰ This may be because guardians are unaware that no rule exists stating an elderly adult loses the ability to consent to sexual activity by virtue of a guardianship. It may also be that guardians lack sufficient training to discern a sexual relationship that is a cause for concern from one that is not. Either way, by prohibiting a sexual relationship when the elderly adult retains the capacity to consent to sexual activity, a guardian oversteps his or her authority and unnecessarily infringes on the elderly adult's autonomy.

In this article, I call for guardianship reform to increase understanding among guardians and in the legal community that no rule exists stating an elderly adult loses the ability to consent to sexual activity by virtue of a court-appointed guardianship. Instead, the guardian should determine on a

¹⁸ *Id.*

¹⁹ Andrew Casta-Kaufteil, *The Old & the Restless: Mediating Rights to Intimacy for Nursing Home Residents with Cognitive Impairments*, 8 J. MED. & L. 69, 73 (2004).

²⁰ I learned of this issue during my externship at Disability Rights Washington (DRW). DRW is a private, non-profit advocacy agency, and it is federally mandated to provide protection and advocacy services to individuals with disabilities in the state of Washington pursuant to the Developmental Disabilities Assistance and Bill of Rights (DD) Act, 42 U.S.C. § 15041, et seq., the Protection and Advocacy for Individuals with Mental Illnesses Act, 42 U.S.C. § 10801, et seq., the Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e, as well as section 71A.10.080 of the Revised Code of Washington.

case-by-case basis whether the elderly individual lacks the capacity to consent to sexual activity. A need exists in Washington for a clear standard to determine whether an individual has the capacity to consent to sexual activity. Additionally, guardians should be trained on how to apply that standard to any elderly adult under a guardianship when a question about the capacity to consent to sexual activity arises. While more research into the intricacies of Alzheimer's and sexual activity must happen before any substantial change in this area of law takes place, I hope this article will serve as a catalyst to start reform in the legal community.

To begin, the next section of this article provides information concerning aging demographics in the United States and sexual tendencies of elderly adults. Section three is a brief overview of guardianships in Washington. Next, the fourth section discusses self-determination and dignity of risk in the context of guardianships. The fifth section presents the applicable law concerning which rights an incapacitated individual under a court-appointed guardianship loses and retains. The sixth section discusses the insufficient standards and enforcement mechanisms that pertain to guardianships in Washington.

Finally, in the moving forward section, I suggest three actions that have the potential to both shine a light on this issue and to eliminate some of its potentially harmful effects. First, more research must be done on how Alzheimer's affects the ability to consent to sexual activity. Second, based on that research, the Certified Professional Guardian Board of Washington State should create a standard on sexual consent and train guardians on how to approach the issue if it arises. Finally, in the meantime, guardians should adopt Washington's criminal law standard for determining whether an elderly adult still has the capacity to consent to sexual activity.

II. AGING DEMOGRAPHICS AND SEXUAL TENDENCIES OF ELDERLY ADULTS

We have an aging society. By 2030, the 65-and-older age group will account for roughly 20 percent of the US population, compared to roughly 13 percent in 2010.²¹ This is the result of an aging baby boomer generation and medical advances that increase life expectancy.²² While a longer life is in some senses a positive thing, an extended life does not necessarily mean that an elderly adult will maintain the same or similar quality of life they enjoyed as an adolescent or as an adult. Rather, aging is associated with loss of mental capacity, loss of physical capacity, loss of income, and increased dependence on others.²³ Importantly, aging is also associated with an inability to defend one's own legal rights.²⁴ One common reason for the loss of mental capacity is degenerative diseases, such as Alzheimer's, which are expected to rise in tandem with the retirement of baby boomers.²⁵ Today, one in nine older adults suffer from Alzheimer's.²⁶

Alzheimer's is the most common form of dementia, an overarching term characterized by a decline in memory or other thinking skills required to

²¹ JENNIFER M. ORTMAN, VICTORIA A. VELKOFF & HOWARD HOGAN, U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES POPULATION ESTIMATES AND PROJECTIONS REPORTS 2–3 (2014), available at <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

²² See generally Paul Barr, *The Boomer Will Transform Healthcare as They Age*, HOSPS. & HEALTH NETWORKS (Jan. 1, 2014), <http://www.hhnmag.com/Magazine/2014/Jan/cover-story-baby-boomers> (This article discusses the impact of an aging baby boomer generation on the US healthcare system. The article states, "The fastest growing part of the population is the group that is older than 85 . . . 'We are adding a lot of elderly each year, and they age one year at a time. But because of longevity increases, we're also increasing more rapidly the proportion of people older than 85'").

²³ LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 10–20 (5th ed. 2011).

²⁴ *Id.*

²⁵ Bryan Gruley, *Boomer Sex with Dementia Foreshadowed in Nursing Home*, BLOOMBERG (July 21, 2013, 9:01 PM), <http://www.bloomberg.com/news/articles/2013-07-22/boomer-sex-with-dementia-foreshadowed-in-nursing-home>.

²⁶ ALZHEIMER'S ASS'N, *supra* note 1, at 16.

perform everyday activities.²⁷ The onset of degenerative disease is also associated with decreased ability to think, plan, and remember, due to a shriveling cortex in the individual's brain.²⁸ Alzheimer's patients have a limited cognitive ability to "understand information, to formulate abstractions involved in having values, and to engage in decision-making processes."²⁹

When an elderly adult is at risk of personal or financial harm, the state, because of its *parens patriae*³⁰ responsibility to supervise the affairs of incapacitated individuals, must step in to ensure that the individual's basic needs are met.³¹ Accordingly, the Washington State Legislature granted the superior court of each county the power to appoint a guardian for the person or estate of an incapacitated person.³² It is estimated that "80 percent of adults under guardianships are age 60 or over."³³ This is so, despite the fact that adults over the age of 60 represent a small, but growing, percentage of the population.³⁴

"The personal and emotional needs of older adults are similar to those of young adults and include needs of intimacy and sexual expression."³⁵ Studies investigating sexual behaviors of elderly adults indicate no strict correlation between age and sexual activity; rather, individuals maintain a

²⁷ *Id.* at 5–6.

²⁸ *Get inside the human brain – More brain changes*, ALZHEIMER'S ASS'N, https://www.alz.org/braintour/healthy_vs_alzheimers.asp (last visited Nov. 16, 2015).

²⁹ Leslie Pickering Francis, *Decisionmaking at the End of Life: Patients with Alzheimer's or Other Dementias*, 35 GA. L. REV. 539, 546 (2001).

³⁰ *Parens Patriae* is "the right held by the court to take a reasonable decision on the part of a person who is unable to make one for himself. Usually, such people suffer from disabilities, rendering it impossible for them to make the right decision." *What is Parens Patriae?*, LAW DICTIONARY, <http://thelawdictionary.org/parens-patriae/> (last visited Nov. 16, 2015).

³¹ WASH. REV. CODE § 11.88.010 (2008).

³² *See* WASH. REV. CODE § 11.88.005 (2012); WASH. REV. CODE § 11.88.010(1) (2008).

³³ FROLIK & BARNES, *supra* note 23, at 355.

³⁴ *Id.*

³⁵ Winona Griggs, *Sex and the Elderly*, 78 AM. J. NURSING 1352, 1352 (1978).

constant sex drive.³⁶ As stated previously, this is so despite mental incapacity.³⁷ One study found that, for adults over 70, 46 percent of men and 33 percent of women masturbate, and 43 percent of men and 22 percent of women still engage in sexual intercourse.³⁸ Similarly, a 2007 federally funded survey indicates that nearly one-third of sexually active 75 to 85-year-olds performed or received oral sex.³⁹ Not surprisingly, rates of sexually transmitted diseases among older people are climbing.⁴⁰ In fact, the reported cases of syphilis and chlamydia among older adults have outpaced the national average. Between 2005 and 2009, reported cases of syphilis increased by 70 percent among those in the 55 to 64-year-old age group.⁴¹ That is 10 percent higher than the national average of 60 percent.⁴²

While there are psychological and physiological benefits for an elderly adult to remain sexually active, uncertainty as to whether an individual can consent to sex is associated with rape and victimization. “There are reported instances where dementia patients, specifically women, mistakenly thought their sexual partners were their husbands.”⁴³ Other patients can “become disoriented and confused during sex, making consent ambiguous.”⁴⁴

³⁶ *Id.*

³⁷ Span, *supra* note 8; MITTY, *supra* note 8.

³⁸ Barbie Latza Nadeau, *Sex and the Senior Citizen: How the Elderly Get It On*, THE DAILY BEAST (Jan. 31, 2015, 3:50 PM), <http://www.thedailybeast.com/articles/2015/01/31/sex-and-the-senior-citizen-how-the-elderly-get-it-on.html>.

³⁹ Marilyn Marchione, *Sex and the seniors: Survey shows many elderly people remain frisky*, N.Y. TIMES (Aug. 22, 2007), <http://www.nytimes.com/2007/08/22/health/22iht-22sex.7216942.html?pagewanted=all>.

⁴⁰ Span, *supra* note 8.

⁴¹ Marni Jameson, *Seniors' Sex Lives Are Up- and So Are STD Cases Around the Country*, ORLANDO SENTINEL (May 16, 2011), http://articles.orlandosentinel.com/2011-05-16/health/os-seniors-stds-national-20110516_1_std-cases-syphilis-and-chlamydia-older-adults.

⁴² *Id.*

⁴³ Evelyn M. Tenenbaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 IND. L. REV. 675, 686 (2009).

⁴⁴ *Id.*

Further, problems arise when a sexual partner with dementia “fails to understand when to stop or when one of the sexual partners has higher cognitive functioning than the other.”⁴⁵ Finally, dementia patients can suffer from sexual disinhibition, which can result in “inappropriate, and sometimes physically aggressive, sexual behavior.”⁴⁶ The patient’s deteriorating cerebral function causes such conduct and diminishes their ability to suppress sexual impulses.⁴⁷

Despite these concerns, the benefits associated with an elderly individual engaging in a sexual relationship must not be ignored. Interestingly, for dementia patients, sexual sensations are “among the last of the pleasure-giving biological processes to deteriorate.”⁴⁸ Additionally, in instances where the individual retains the capacity to consent to sexual activity, there are benefits associated with the maintenance of a sex life.⁴⁹ The need for intimate relationships, rather than subsiding as one grows older, “actually increases as one copes with loss—the loss of family members, declining health, dislocation from a long-time home, and other factors.”⁵⁰ Law Professor Evelyn Tenenbaum noted, “Sexual conduct can relieve depression and physical pain, promote health and healthy self-images, provide safe exercise, and prevent social disengagement.”⁵¹ Additionally, intimate relationships are strongly correlated with life satisfaction, physical and psychological wellbeing, and have been shown to extend an individual’s life.⁵²

Thus, arguments exist both for and against an elderly individual engaging in a sexual relationship. In the instances where consent is ambiguous,

⁴⁵ *Id.*

⁴⁶ *Id.* at 688.

⁴⁷ *Id.*

⁴⁸ *Id.* at 685.

⁴⁹ *See id.* at 683–84.

⁵⁰ Kristine S. Knaplund, *The Right of Privacy and America’s Aging Population*, 86 DENV. U. L. REV. 439, 440 (2009).

⁵¹ Tenenbaum, *supra* note 43, at 683–84.

⁵² *Id.*; *see also* Breland, *supra* note 12, at 179.

concern may be warranted. However, concern is not warranted in all situations where an elderly, incapacitated individual is sexually active. While it might make for an uncomfortable discussion, it is both natural and common for sexual desire to persist despite the onset of degenerative disease. That being the case, as much as possible needs to be done to ensure those who do retain the capacity to consent to sexual activity are not prohibited or dissuaded from doing so.

III. GUARDIANSHIPS IN WASHINGTON

Guardianship is a legal process created by state law in which a court gives one person or entity, the guardian, the duty and power to make personal and/or property decisions for another, the ward, upon a finding that the person lacks capacity.⁵³ Essentially, guardianship is a device by which a capable person is empowered to make decisions for an incapacitated person.⁵⁴ The guardianship process begins with the filing of a guardianship petition in the superior court for the county in which the elderly alleged incapacitated individual resides.⁵⁵ “Any person or agency interested in the welfare of the alleged incapacitated person can petition the court to appoint a guardian.”⁵⁶ However, those seeking a guardianship appointment must bring the petition in “good faith” and upon a “reasonable basis” for alleging the person is incapacitated and in need of a guardian.⁵⁷ Often, it is family or

⁵³ BRENDA K. UEKERT, NAT’L CTR. FOR STATE COURTS, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY 6 (2010), *available at* <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/291>; Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 93 (2012).

⁵⁴ *See generally* COLUMBIA LEGAL SERVS., QUESTIONS AND ANSWERS ON GUARDIANSHIP 1–5 (2012), *available at* <http://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/392DDECE-0E7D-E018-A78A-BF8B457C39FB/3300en.pdf>.

⁵⁵ WASH. REV. CODE § 11.88.010(1) (2008).

⁵⁶ KING CTY. BAR ASS’N, FAMILY GUARDIAN VOLUNTEER HANDBOOK 15 (2010), *available at* https://www.kcba.org/CLE/family_volunteer_guardian_handbook.pdf.

⁵⁷ WASH. REV. CODE § 11.88.030 (2011).

friends of the alleged incapacitated person that will petition a court for guardianship. However, the Attorney General's Office can also petition for a guardian if there is no family or if there is reason to believe the alleged incapacitated person is at risk for harm.⁵⁸

Because a presumption exists that all adults are sufficiently competent to make their own decisions, the court can only appoint a guardian after it has determined that an individual is "incapacitated" as to the individual's ability to manage their person, estate, or both.⁵⁹ A person may be deemed incapacitated when the court determines that the individual is at a "significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety."⁶⁰ Incapacitation is a legal decision, not a medical decision, and is "based upon a demonstration of management insufficiencies over time in the area of person or estate."⁶¹ The Washington State Legislature made it clear that "age, eccentricity, poverty, or medical diagnosis alone" does not justify a finding of incapacity.⁶²

The burden of proof in guardianship proceedings is on the petitioner, the party claiming that the older person is incapacitated.⁶³ The petitioner must establish with clear, cogent, and convincing evidence both that the alleged incapacitated person is in fact incapacitated and that the individual is in need of a guardian.⁶⁴ Thus, if the alleged incapacitated person has "appointed a surrogate health care decision maker, and lives, for example, in an assisted living facility that meets all of his or her personal needs, the court may find that there is no need for a guardian and so refuse to appoint

⁵⁸ *Id.*

⁵⁹ WASH. REV. CODE § 11.88.010(1)(a) (2008).

⁶⁰ *Id.*

⁶¹ WASH. REV. CODE § 11.88.010(1)(c) (2008).

⁶² *Id.*

⁶³ WASH. REV. CODE § 11.88.010(1)(a) (2008).

⁶⁴ WASH. REV. CODE § 11.88.045 (2012).

one.”⁶⁵ While the burden of proof rests with the petitioner, “the weight of expert testimony supporting the allegations of the petition tends to shift the burden to the respondent to show that he or she does in fact have capacity.”⁶⁶ The simple act of filing the petition “introduces doubt about the respondent’s mental capacity.”⁶⁷

While not substantive,⁶⁸ the statute containing the language for the petition to appoint a guardian lists certain decision-making powers that an individual may lose as a result of a guardianship.⁶⁹ Among those rights are the right to marry, the right to enter into a contract, the right to revoke a will, the right to possess a license to drive, the right to sue or be sued, the right to consent or refuse medical treatment, and the right to “make certain decisions concerning aspects of [one’s] social life.”⁷⁰ The court that issues the order appointing a guardian is required to state which, if any, of those powers the individual will retain.⁷¹ If the order states that the individual retains any decision-making powers, the court considers the guardianship a “limited guardianship.”⁷² Any guardianship that is not limited is a full guardianship, which presumes the individual does not retain any decision-making powers.

⁶⁵ FROLIK & BARNES, *supra* note 23, at 369.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *In re Estate of Alsup*, 327 P.3d 1266, 1272 (Wash. Ct. App. 2014) (In this case, the court rejected a claim by a personal representative that the incapacitated person lost the ability to enter into a contract or make or revoke a will simply because that right is listed on the form of notice among those rights that may be lost if a guardian is appointed. The court noted that the form of notice, which is sent to the alleged incapacitated person when a petition for guardianship is filed, is “not a substantive part of the statute.” Instead, “it was added in 1990, in a substantial overhaul of chapter 11.88 RCW that our Supreme Court has characterized as ‘removing language that the passage of time had rendered offensive to the modern ear and updating procedures to reflect current realities.’”).

⁶⁹ WASH. REV. CODE § 11.88.030 (2011).

⁷⁰ WASH. REV. CODE § 11.88.030(5)(b) (2011).

⁷¹ WASH. REV. CODE. § 11.88.010 (2008).

⁷² VINING, *supra* note 15, at 2.

If an individual needs protection or assistance, because of their incapacity, but is still capable of managing some of their personal and financial affairs, a court can appoint a limited guardianship.⁷³ In such an instance, the court will impose “only such limitations and restrictions on an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person’s protection.”⁷⁴ The statute authorizing the use of limited guardianships continues to state that

A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as a result of being placed under a limited guardianship, except as those rights and disabilities specifically set forth in the court order . . . establishing such a limited guardianship.⁷⁵

One example of this is an order prohibiting an individual from making decisions concerning their health care, while retaining the right to marry.⁷⁶

Despite the fact that courts have the ability to issue limited guardianships, and the fact that individuals often retain the capacity to make certain decisions, Washington courts are much more apt to appoint a full guardianship over a limited guardianship. The Office of Guardianship and Elder Services of Washington reported that, in 2013, the court granted 1,403 full guardianships, as compared to only 21 limited guardianships.⁷⁷ Thus, in 2013, the court granted limited guardianships in less than two percent of the petitions.⁷⁸ Lawrence Frolik, a professor and nationally recognized elder law expert,⁷⁹ suggests that judges are unlikely to order

⁷³ WASH. REV. CODE. § 11.88.010 (2008).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *In re* Guardianship of Stamm v. Crowley, 91 P.3d 126, 128 (Wash. Ct. App. 2004).

⁷⁷ This data was obtained “using data in the Washington State Superior Court Case Management System.” E-mail from a staff member, Wash. State Admin. Office of the Courts, to author (Nov. 12, 2014, 01:16 PM PST) (on file with author).

⁷⁸ *Id.*

⁷⁹ Lawrence Frolik is a law professor at University of Pittsburg. His faculty bio states, “Professor Frolik is a national expert on the legal issues facing older Americans. One of the founders of the field of Elder Law, he is the author, co-author or editor of over a

limited guardianships because they do not “understand their value, nor do they appreciate the gain to the ward in limiting the power of the guardian.”⁸⁰ Professor Frolik notes, “Now that limited guardianship exists as an option, the concept must be ‘sold’ to the judges.”⁸¹ He continues to state, “Until the judiciary shares the reformers’ zeal for limited guardianship, it will never be more than an empty, little-used statutory right.”⁸²

Not including periodic reporting requirements, court intervention ends after the appointment of a guardian.⁸³ However, there are certain things that a guardian cannot consent to on behalf of the ward. In these limited instances, the guardian does not have the power to act by virtue of the guardianship and must obtain specific permission from the court. For example, the Washington Supreme Court and Washington legislature have determined that judicial intervention is required before certain medical treatments can be provided or procedures performed. Such is the case for highly invasive and irreversible treatments such as electroconvulsive therapy,⁸⁴ involuntary administration of antipsychotic medication,⁸⁵ and involuntary sterilization.⁸⁶ Notably, court intervention post-guardianship

dozen books.” *Faculty Directory*, UNIV. OF PITTSBURG LAW, <http://www.law.pitt.edu/people/lawrence-frolik> (last visited Apr. 7, 2015).

⁸⁰ Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL’Y REV. 347, 354 (1998).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See KING CTY. BAR ASS’N, *supra* note 56, at 18.

⁸⁴ WASH. REV. CODE § 11.92.043(5)(a) (2007); WASH. REV. CODE § 11.94.010(3)(b) (2011).

⁸⁵ WASH. REV. CODE § 11.92.043(5) (2007).

⁸⁶ See *Matter of Guardianship of Hayes*, 608 P.2d 635, 641 (Wash. 1980) (“The decision to sterilize an incompetent individual can only be made in a superior court proceeding in which (1) the incompetent individual is represented by a disinterested guardian ad litem, (2) the court has received independent advice based upon a comprehensive medical, psychological, and social evaluation of the individual, and (3) to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual. Within this framework, the judge must first find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own

appointment is limited to certain areas, such as the ones previously mentioned, and does not include a court order forbidding an incapacitated person from having sex. The court order appointing a guardian does not even list “sex” as a right that the incapacitated individual loses or retains.⁸⁷

Still, limited guardianship is an effective mechanism to abate unwarranted restrictions on elderly incapacitated persons. If an elderly individual has a court document that states he or she retains the right to make certain decisions, the infringement of those rights is less likely. Conversely, if an elderly individual has a court document that states he or she is under a full guardianship, and no rights are to be retained, that individual is in a position to be more vulnerable to unwarranted restrictions. If the only difference between the individual under a full guardianship and a limited guardianship is a court order, and not their decision-making ability, the distinction between the two is both arbitrary and unfair. Even still, limited guardianship does not fully address the issue raised in this article—to what extent should guardianship limit the ability to consent to sexual activity?

IV. SELF-DETERMINATION AND DIGNITY OF RISK

The fact that elderly individuals are having sex quite frequently and that it is such a seldom-discussed topic suggests a great deal of social stigma exists surrounding the subject. As such, it is necessary to examine societal biases and misconceptions surrounding elderly adults’ sexual lives and how those misconceptions in turn reflect in the practice of guardianship law. One doctrine of thought, coined “dignity of risk,” is particularly applicable to the issue of sexual expression in guardianship law.

decision about sterilization, and (2) unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.”).

⁸⁷ WASH. REV. CODE § 11.88.030(5)(b) (2008).

Dignity of risk, defined as “the ability to assume personal responsibility for [one’s own life] and bear the consequences of their choices,”⁸⁸ has its roots in the disability rights movement. Dignity of risk is closely associated with the concept of “sanism,” also an idea that largely controls modern disability law. Sanism is an irrational prejudice against people who have been labeled as having a mental disability.⁸⁹ It is similar to other irrational prejudices such as racism, sexism, homophobia, and ethnic bigotry, in that it is based predominantly upon stereotype, myth, superstition, and de-individualization.⁹⁰ “Sanism is largely invisible, and largely socially acceptable.”⁹¹

Deprivation of dignity for any individual with a disability is often a reflection of sanism on the part of the government and private decision makers. Professor Michael Perlin, a recognized expert in disability law, believes that individuals, such as lawyers, allow sanist myths to exert great influence over persons with mental disabilities.⁹² Professor Perlin wrote, “the use of stereotypes, typification, and de-individualization” can have an impact on the lawyer’s ability to advocate for their clients.⁹³ Professor Perlin went on to write that sanist judicial decisions involving persons with mental disabilities “rob individuals of the basic dignity to which they are entitled.”⁹⁴

Unconscious stereotypes and beliefs can be detrimental to elderly adults. For example, ageism can increase the risk that an elderly adult will be

⁸⁸ Robert W. Pratt, *Whither the Disability Rights Movement?*, 109 MICH. L. REV. 1103, 1104 (2011).

⁸⁹ Michael L. Perlin, “*Things Have Changed:*” *Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 536 (2003).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Michael L. Perlin, “*You Have Discussed Lepers and Crooks:*” *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 684 (2003).

⁹⁴ Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients:*” *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 272–73 (2014).

diagnosed with a sexually transmitted disease, such as HIV. In an article entitled “Addressing Ageism in Elderly Sexuality,” author Jennifer Hillman PhD wrote, “Ageism exists when health care providers fail to ask, or even consider, whether an older adult patient is at risk for HIV infection.”⁹⁵ The article continues on to state that the oldest person documented to have AIDS involved an 88-year-old widow believed to have contracted the disease through her ex-husband. It took over seven years before her healthcare provider made the correct diagnosis.⁹⁶

Clearly, one should not advocate for dignity of risk, or the ability to assume personal responsibility for the potential consequences of one’s actions, in cases of reckless sexual behavior. However, the perpetuation of sanist and ageist beliefs that elderly adults are asexual makes it less likely that elderly adults will practice safe sex. The stigma undoubtedly keeps elderly adults from discussing safe sex practices and their desire to engage in a sexual relationship with professionals who can help ensure that, if elderly adults choose to have sex, they use some form of protection to avoid the spread of sexually transmitted diseases. Where dignity of risk applies and consent is not an issue, an elderly adult should be the sole person to decide whether they want to engage in a sexual relationship.

Guardians, like attorneys, are likely influenced by sanist thoughts, whether conscious or not.⁹⁷ However, guardians should not allow their own perception of what an elderly individual’s sexual life should be like to impact their ability to advocate for the individual’s rights. Similarly, sanist

⁹⁵ Jennifer Hillman, *Addressing Ageism in Elderly Sexuality*, NAT’L REG. OF HEALTH SERVICE PSYCHOLOGISTS, http://www.e-psychologist.org/index.ihtml?mdl=exam/show_article.mdl&Material_ID=44 (last visited Oct. 16, 2015).

⁹⁶ *Id.*

⁹⁷ “The entire legal system makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their conditions are immutable.” Perlin, *supra* note 93, at 688.

thoughts should not determine which rights an incapacitated individual loses and retains under a court-appointed guardianship.

V. THE LAWS CONCERNING WHICH RIGHTS ARE LOST AND RETAINED BY AN INCAPACITATED INDIVIDUAL

The decision-making powers that are divested by the individual and acquired by the guardian should be dependent on the needs and capacity of the individual. To achieve this end, there are two legal principles that shape guardianship law in Washington. The first legal standard adopted by the Washington State Legislature requires that an incapacitated individual's liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to provide for the individual's health and safety.⁹⁸ The second legal standard acts as a restriction on guardianships, requiring that guardianships must not violate constitutional protections regarding equal protection, liberty, due process, and privacy.⁹⁹

A. The Importance of Least Restrictive Alternatives and Self-Determination

In 1991, the Washington legislature modified the statute concerning legislative intent in the context of guardianship to reflect the principle of least restrictive alternatives—the idea that a ward's liberty and autonomy should be restricted through the guardianship process to the minimum extent necessary.¹⁰⁰ The Washington legislature intended the amendment to abate unwarranted limitations on the rights of the ward.¹⁰¹ Prior to the 1991 amendments, the statute stated, “it is the intent and purpose of the Legislature to recognize that disabled persons have special and unique

⁹⁸ See 26 WASH. PRAC., ELDER LAW AND PRACTICE § 4:3 (2d ed.); See WASH. REV. CODE § 11.88.005 (2012).

⁹⁹ 26 WASH. PRAC., ELDER LAW AND PRACTICE § 4:3 (2 ed.).

¹⁰⁰ See *id.*; see also WASH. REV. CODE § 11.88.005 (2012).

¹⁰¹ *In re Estate of Alsup*, 327 P.3d 1266, 1272 (Wash. Ct. App. 2014).

abilities and competencies with varying degrees of disability.”¹⁰² The modified legislation states that it is “the intent of the Legislature to protect the liberty and autonomy of all people in this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person.”¹⁰³ The revised statute indicates that the legislature intended for all individuals to exercise their rights under the law to the maximum extent possible, and further, to minimize any unnecessary restrictions placed on the individual.

Additionally, support for the doctrine of least restrictive alternatives in the context of guardianship is found in the Uniform Guardian and Protective Proceedings Act (UGPPA). The UGPPA contains language that emphasizes the importance of the concept of least restrictive alternatives in guardianship.¹⁰⁴ Specifically, the UGPPA states that a guardian should be appointed “only when necessary, and then, with only those powers that are necessitated by the respondent’s actual limitations.”¹⁰⁵ In the context of guardianship under the standards of the uniform act, an “adjudication of incapacity is not sufficient to relieve the individual of all of his or her decisional capacity or privilege.”¹⁰⁶ Rather, the “modern trend is to recognize that mental capacity is a continuum on which an individual may have the ability to conduct certain activities, while lacking capacity to evaluate and interpret other activities.”¹⁰⁷ For example, in Washington, a person with a guardian does not automatically lose the right to execute a will.¹⁰⁸

¹⁰² WASH. REV. CODE § 11.88.005 (1977), *amended by* WASH. REV. CODE § 11.88.005 (1991).

¹⁰³ WASH. REV. CODE § 11.88.005 (2012).

¹⁰⁴ UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT, cmt. to § 409 (1998).

¹⁰⁵ *Id.*

¹⁰⁶ Michael A. Kirtland, Catherine A. Seal, *Intimacy in the Elder Law Setting*, 22 PROB. & PROP. 34, 36 (2008).

¹⁰⁷ *Id.*

¹⁰⁸ *See In re Estate of Alsup*, 327 P.3d 1266, 1271–72 (Wash. Ct. App. 2014).

An individual also does not lose their right to self-determination by virtue of the guardianship.¹⁰⁹ Rather, the finding of total incapacity imparts on the guardian the duty to exercise the incapacitated individual's rights on their behalf.¹¹⁰ If a guardian can determine what course of action an incapacitated individual would choose if competent, the guardian must advocate for that position.¹¹¹ One example of the incapacitated individual's right to self-determination is in the context of medical treatments.

Washington courts have held that an incapacitated individual's expressed wishes regarding medical treatment should be given substantial weight, even if made while the individual is "legally incapacitated."¹¹² In *Matter of Guardianship of Ingram*, the Washington Supreme Court considered whether a guardian had the power to order surgery on an incapacitated person who expressed her opposition to the surgery.¹¹³ The case involved a 66-year-old woman, Opal Ingram, who was appointed a guardian after she was diagnosed with throat cancer.¹¹⁴ The treatment options were either radiation therapy or the removal of her vocal cords.¹¹⁵ Although not fully able to comprehend her disability, Opal repeatedly expressed her opposition to the surgery and her preference for radiation therapy.¹¹⁶ The court noted that, despite a finding of total incapacity, degrees of incapacity exist, and some individuals have greater incapacity than others.¹¹⁷ The court went on to hold that the incapacitated individual's express wishes must be given substantial weight, even if made while the individual is incapacitated.¹¹⁸

¹⁰⁹ See *Matter of Guardianship of Ingram*, 689 P.2d 1363, 1369 (Wash. 1984).

¹¹⁰ *Id.*

¹¹¹ *Raven v. Dep't of Soc. & Health Servs.*, 306 P.3d 920, 926 (Wash. 2013).

¹¹² See generally *Ingram*, 689 P.2d at 840–41; *Raven*, 306 P.3d at 927 ("courts cannot apply a 'reasonable person' test, but must apply a subjective test based on the ward's 'attitudes, biases, and preferences.'").

¹¹³ *Ingram*, 689 P.2d at 1364.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 841.

¹¹⁸ *Id.* at 839–40.

The court reasoned that, despite the finding that she was incapacitated, her opposition to the surgery should be regarded as a “strong indicator of what treatment she would choose if competent to do so.”¹¹⁹ In a similar case involving the authority of a guardian to withdraw life-sustaining treatment, the Washington Supreme Court emphasized that “these decisions must be made on a case-by-case basis with particularized consideration of the best interest and rights of the specific individual.”¹²⁰

The case of *Raven v. Department of Social and Health Services*¹²¹ is a perfect illustration of the tension between self-determination and concerns about professional liability. The case involved an elderly adult, Ida, who suffered from a fall that made her bedbound.¹²² Eight years after the fall, Ida was deemed incapacitated and was assigned to Raven, a licensed mental health counselor and certified professional guardian.¹²³ After Raven met with Ida and became familiar with her medical history and situation, she determined that “Ida, when competent, consistently refused to be placed in a nursing home or other long-term care facility.”¹²⁴ As such, Raven consented to a plan of care that would allow Ida to stay in her own home. However, Ida’s behavior became too combative for in-home care staff to manage. As such, Raven petitioned the court for direction on what steps to take next. The court advised Raven to seek out-of-home placement for Ida.¹²⁵ However, because Raven determined this “ran afoul” of Ida’s wishes, she did not pursue the court’s suggestion.¹²⁶

¹¹⁹ *Id.* at 841.

¹²⁰ *In re Guardianship of Hamlin*, 689 P.2d 1372, 1375 (Wash. 1984).

¹²¹ *Raven v. Dep’t of Soc & Health Servs.*, 306 P.3d 920, 923 (Wash. 2013).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 924.

¹²⁶ *Id.*

Because she was bedbound, a significant source of medical concern for Ida was pressure sores.¹²⁷ Ida's condition worsened after a winter storm caused a power outage that left both Raven and Ida without power for several days.¹²⁸ The air mattress Ida apparently slept on had deflated, leaving her susceptible to worsened pressure sores.¹²⁹ Although stabilized at a treatment center, Ida died later that year. Following Ida's passing, the Department of Social and Health Services (DSHS) made a finding of neglect against Raven, alleging "a pattern of conduct or inaction that constituted neglect."¹³⁰ The finding of neglect mostly stemmed from Raven's choice to not place Ida in a facility, despite the fact that Ida's level of care essentially required it.

On appeal, the Washington Supreme Court held that Raven's actions did not constitute neglect.¹³¹ The court found that Raven acted in accordance with the law by not pursuing such an arrangement because it was specifically against Ida's wishes to be placed in a residential treatment facility.¹³² The court wrote, "While evidence indicates that Ida had some delusions about institutional care settings, DSHS found that Raven in good faith determined that Ida, when competent, had consistently rejected traditional medical methods and had always expressed a preference to die at home with minimal medical intervention."¹³³ Despite the fact that Ida required more care than could be delivered in a home setting, "in matters of consent, though a ward may choose a course of action that would strike

¹²⁷ "Pressure sores (also variously known as skin breakdowns, pressure wounds, pressure ulcers, or bedsores) occur when a bony protrusion under an individual's skin (for example, the tailbone) has prolonged contact with a surface. Frequent repositioning of a bedbound individual is required. Pressure sores are exacerbated by lack of timely personal hygiene such as infrequent cleansing after bowel movements or urination. Left untreated, bedsores can become severe and life-threatening." *Id.* at 923.

¹²⁸ *Id.* at 925.

¹²⁹ *Id.* at 926.

¹³⁰ *Id.*

¹³¹ *Id.* at 928.

¹³² *Id.* at 928–29.

¹³³ *Id.* at 927.

many as unreasonable, if the guardian can determine that the ward would choose such an action if competent, the guardian is bound to advocate for that position.”¹³⁴

Raven is extremely powerful in what it stands for. It may seem to some, as it did to the Washington Court of Appeals,¹³⁵ that *Raven* acted negligently when she allowed an elderly individual to stay at home, sleeping on an air mattress, when she was clearly in need of advance medical assistance. However, as the Washington Supreme Court reasoned, *Raven* did not act negligently because she made a good faith determination, based on all of the information at her disposal, that staying at home was what *Ida* wanted.¹³⁶ After *Raven*, a reasoned decision to follow the wishes of an adult under a court-appointed guardianship is unlikely to result in liability on behalf of the guardian even if it results in overall decline in the individual’s health and wellbeing. As the *Raven* decision illustrates, it can be difficult to balance an individual’s right to self-determination with the desire to ensure that guardians are able to protect the individual’s health and safety. *Raven* also illustrates how important the concepts of self-determination and least restrictive alternatives are to guardianship law.

B. The Right to Engage in Sexual Activity as a Fundamental Right Protected by the Constitution

In addition to the doctrine of least restrictive alternatives, guardianship proceedings must not result in the violation of constitutional legal protections, which include the right to equal protection, liberty, due process, and privacy.¹³⁷

¹³⁴ *Id.* at 926.

¹³⁵ See generally *Raven v. Dep’t of Soc. & Health Servs.*, 273 P.3d 1017 (Wash. Ct. App. 2012) (*rev’d sub nom*; *Raven v. Dep’t of Soc. & Health Servs.*, 306 P.3d 920 (Wash. 2013)).

¹³⁶ *Raven*, 306 P.3d at 927.

¹³⁷ 26 WASH. PRAC., ELDER LAW AND PRACTICE § 4:3 (2 ed.).

In the context of an individual's right to engage in sexual activity, it makes little sense to discuss each of these constitutional protections—equal protection, liberty, due process, and privacy—in isolation. This is because privacy, the right that the Supreme Court has held encompasses an individual's right to engage in consensual sexual activity without governmental intrusion,¹³⁸ emanates from the constitutional protections of due process and liberty.¹³⁹ Thus, considered together, these protections provide that an elderly adult has a constitutionally protected right to engage in consensual sexual activity free from governmental intrusion.

As an initial matter, the Supreme Court has recognized that the Constitution can protect rights and liberties not enumerated in the Constitution itself.¹⁴⁰ Therefore, although the US Constitution does not explicitly reference a right to privacy, the Supreme Court has said that this right arises from the specific guarantees of the Bill of Rights and from the language of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.¹⁴¹ The Court recognizes privacy as an implied fundamental right protected by the Constitution under the doctrine of substantive due process, which encompasses the idea that there are certain areas of an individual's life that the government cannot intrude upon, even with appropriate procedural due process.¹⁴²

In particular, the liberty provision of the Due Process Clause of the Fourteenth Amendment protects the right to privacy. Courts, in assessing

¹³⁸ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹³⁹ See William R. Musgrove, *Substantive Due Process: A History of Liberty in the Due Process Clause*, U. ST. THOMAS J. L. & PUB. POL'Y 125, 130–31 (2008).

¹⁴⁰ *Id.*

¹⁴¹ *Matter of Welfare of Colyer*, 660 P.2d 738, 741 (Wash. 1983) (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)); see also *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right of privacy was a personal right broad enough to encompass a woman's decision whether or not to terminate her pregnancy, subject only to countervailing, compelling state interests); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (holding that a competent individual has a constitutionally protected liberty interest under the Fourteenth Amendment to refuse unwanted medical treatment).

¹⁴² Musgrove, *supra* note 139, at 130–31.

this right to privacy, look to the Fourteenth Amendment's guarantee that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without the due process the law."¹⁴³ While the US Constitution does not define the parameters of an individual's right to privacy, the Supreme Court has recognized several areas of an individual's private life that can be protected from governmental intrusion. The right to privacy can be viewed as an umbrella that encompasses fundamental rights, such as parental control over the upbringing of children,¹⁴⁴ procreation,¹⁴⁵ family,¹⁴⁶ and private sexual activity.¹⁴⁷

In 1942, the Supreme Court first considered the issue of rights related to sex in *Skinner v. Oklahoma*.¹⁴⁸ The case involved an Oklahoma statute that required "habitual criminals," defined as individuals convicted of three or more felonies of "moral turpitude," to be sterilized.¹⁴⁹ The statute distinguished between blue-collar and white-collar criminals; thus, one category of convict, a thief, would come under the provisions of the law, while an embezzler would not.¹⁵⁰ The court reasoned that the statute was significantly underinclusive, and it invalidated the law on equal protection grounds.¹⁵¹ The court did recognize, however, that the statute "deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring."¹⁵² Therefore, the Court recognized a fundamental right to marriage and procreation, despite the fact that neither

¹⁴³ U.S. CONST. amend. XIV § 1.

¹⁴⁴ See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a state law that forbids teachers from teaching languages other than English in schools).

¹⁴⁵ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that the right to have an offspring is a fundamental right protected by the Constitution).

¹⁴⁶ See *id.* at 535.

¹⁴⁷ Musgrove, *supra* note 138, at 130–31.

¹⁴⁸ See *Skinner*, 316 U.S. at 535.

¹⁴⁹ *Id.* at 537.

¹⁵⁰ *Id.* at 539.

¹⁵¹ *Id.* at 536.

¹⁵² See *id.*

is enumerated in the Constitution. The opinion in *Skinner* initiated a body of case law that largely addressed the issue of right to sexual intimacy by recognizing a right to engage in procreational sex.¹⁵³

“The development of a constitutional right to sexual privacy arose within the context of birth control and the Planned Parenthood movement.”¹⁵⁴ The Supreme Court again recognized the legitimacy of privacy as it related to marriage in the 1965 decision of *Griswold v. Connecticut*.¹⁵⁵ In that case, the court struck down a statute that prevented doctors from giving married persons any means to prevent pregnancy by restricting access to all means of contraception.¹⁵⁶ Justice Douglas, writing for the majority, reasoned that the “right to privacy is a legitimate one,” and that forbidding the use of contraception is “repulsive to the notions of privacy surrounding the marriage relationship.”¹⁵⁷ The Court then held that the statute violated a fundamental right to privacy because it intruded on the marital relationship and violated the rights of marriage and procreation.¹⁵⁸

In 1972, the Supreme Court first extended the right of privacy into the bedrooms of unmarried persons in *Eisenstadt v. Baird*.¹⁵⁹ That case concerned a Massachusetts statute, which permitted married persons to obtain contraceptives to prevent pregnancy, but did not allow for the distribution of contraceptives to single persons for that same purpose.¹⁶⁰ The Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment because it limited the availability of contraceptives

¹⁵³ See *Skinner*, 316 U.S. at 535; see also Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 915–16 (2005).

¹⁵⁴ Hermann, *supra* note 153, at 916.

¹⁵⁵ *Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 485–86.

¹⁵⁸ *Id.*

¹⁵⁹ See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that a statute limiting the distribution of contraceptives based on classifying between single and married persons violates the Equal Protection Clause of the Fourteenth Amendment).

¹⁶⁰ *Id.*

by classifying persons based on their marital status.¹⁶¹ The court noted, “If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.”¹⁶²

It was not until 2003 in *Lawrence v. Texas* that the Supreme Court answered the broader question of whether the interests of liberty and privacy granted the general right of consenting adults to engage in private sexual conduct without governmental intrusion.¹⁶³ That case concerned a Texas statute that made sodomy between two males a criminal act. Two men were convicted under the statute after a police officer responding to a 911 call found two men engaged in a sexual act in the privacy of their own home.¹⁶⁴ The issue in the case was “whether the petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interest in the liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.”¹⁶⁵ Answering that question with a resounding “yes,” the decision in *Lawrence* explicitly recognized the right to engage in private sexual activity.¹⁶⁶ The majority in *Lawrence* used the Due Process Clause to establish a right to sexual intimacy on substantive due process grounds, suggesting it should have recognition as a fundamental right.¹⁶⁷

It seems clear from the preceding series of decisions that the Supreme Court considers the right to engage in consensual sexual activity free from governmental intrusion to be an important, fundamental right. Because

¹⁶¹ *Id.*

¹⁶² *Id.* at 453.

¹⁶³ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the Fourteenth Amendment).

¹⁶⁴ *Id.* at 562–63.

¹⁶⁵ *Id.* at 564.

¹⁶⁶ *Id.*

¹⁶⁷ Hermann, *supra* note 153, at 909.

guardianships must not infringe on an individual's right to liberty, privacy, equal protection, and due process, it follows that a guardian should not infringe upon an individual's right to engage in sexual activity. This is so only with an important qualifying consideration—consent. The Supreme Court's discussion of an individual's right to liberty and privacy only extends to sex that is consensual. This is because the right to have sex free from governmental intrusion clearly cannot apply to sexual scenarios that lack consent, such as rape. Thus, despite the fact that the Supreme Court has recognized that the Constitution protects an individual's right to engage in sexual activity, the inquiry does not end there. The issue of consent requires adequate consideration in order to determine whether an individual's right to engage in sexual activity is actually protected by the Constitution.

VI. INSUFFICIENT STANDARDS AND ENFORCEMENT MECHANISMS

An elderly adult under a court-appointed guardianship can have either a professional guardian or a “lay guardian.” A lay guardian is a nonprofessional guardian, such as an elderly adult's family member or friend.¹⁶⁸ One of the issues concerning guardianship accountability, however, is that professional guardians are held to different standards than lay guardians. Additionally, there are varying training and qualification requirements for professional guardians that do not apply to lay guardians.¹⁶⁹ Therefore, issues of accountability arise when the guardian is a lay, rather than a professional, guardian.

¹⁶⁸ WASH. ST. BAR ASS'N, ELDER LAW SECTION, REPORT OF THE GUARDIANSHIP TASK FORCE TO THE WSBA ELDER LAW SECTION EXECUTIVE COMMITTEE: RECOMMENDATIONS FOR IMPROVING THE AOC'S LAY GUARDIAN TRAINING PROGRAM 1 (2013), available at <http://www.wsba.org/~media/Files/Legal%20Community/Sections/Elder%20Law/Opinions/Lay%20Guardian%20Training%20%20Report%20%20%20Recommendations%201%208%2013.ashx/>.

¹⁶⁹ See *Certified Professional Guardian Program*, WASH. CTS., https://www.courts.wa.gov/programs_orgs/Guardian/ (last visited Apr. 6, 2015).

First, professional guardians receive more training than lay guardians do.¹⁷⁰ The lack of training is “especially apparent in cases where family or friends are assigned as guardians with little guidance on the boundaries of their authority or knowledge of appropriate actions.”¹⁷¹ The only educational qualification for a lay guardian is the completion of a short, one-time, online training.¹⁷² The training takes approximately two hours to complete and requires the individual to take an exam to demonstrate that they have learned all of the material.¹⁷³

Conversely, in order to become a Washington Certified Professional Guardian (CPG), a person must complete a mandatory Guardianship Certificate Program training through the University of Washington Extension Office (UWEO).¹⁷⁴ The UWEO Guardianship program is a nine-month program, which consists of 56 classroom sessions and 44 hours of online distance learning.¹⁷⁵ Additionally, professional guardians have more opportunities for training, including courses offered by the Center for Guardianship Certification. Family guardians, on the other hand, may find some resources at the National Guardianship Association, for which they are able to join for a nominal fee, but they are not required to join.¹⁷⁶

Secondly, professional guardians are under an obligation to abide by standards enforceable by the Certified Professional Guardian Board

¹⁷⁰ See *Lay/Family (Non-Professional Guardian Training)*, WASH. CTS., https://www.courts.wa.gov/programs_orgs/guardian/?fa=guardian.layGuardianship&type=training (last visited Apr. 15, 2015); *Steps to Become a Certified Professional Guardian*, WASH. CTS., https://www.courts.wa.gov/committee/?fa=committee.display&item_id=571&committee_id=114 (last visited Apr. 6, 2015).

¹⁷¹ UEKERT, *supra* note 53, at 7.

¹⁷² See *Lay/Family (Non-Professional) Guardian Training*, *supra* note 170.

¹⁷³ 26 WASH. PRAC., ELDER LAW AND PRACTICE § 4:1 (2d ed.).

¹⁷⁴ *Steps to Become a Certified Professional Guardian*, *supra* note 170.

¹⁷⁵ *Id.*

¹⁷⁶ UEKERT, *supra* note 53.

(Board), to which all Washington professional guardians belong.¹⁷⁷ The Supreme Court of Washington created the Board, which regulates the education, certification, and discipline of professional guardians within the state. The Board issues standards of practice to which all certified professional guardians are held.¹⁷⁸ Any person may file a complaint against a professional guardian, alleging that the guardian violated one or more of the Board-promulgated standards.¹⁷⁹ If the Board finds that the guardian has violated one or more standards, the Board can discipline the guardian or forbid them or from acting as a professional guardian in the future.¹⁸⁰ This is significant because, in comparison to lay guardians, professional guardians have a licensing entity that can strip them of their powers if the Board determines that the guardian has violated some rule or standard.¹⁸¹

Two CPG standards are particularly relevant here. First, the CPG standards echo the general policy considerations of self-determination and least-restrictive alternatives. The standard states, “Whenever appropriate a guardian shall consult with the incapacitated person, and shall treat with respect, the feelings, values, and opinions of the incapacitated person. The guardian shall acknowledge the residual capacity and preferences of the incapacitated person.”¹⁸² The regulation continues, “When making decisions on behalf of the incapacitated person, the guardian shall evaluate the alternatives that are available and choose the one that best meets the needs of the incapacitated person while placing the least restrictions on the

¹⁷⁷ *Certified Professional Guardian Board (CPGB)*, WASH. CTS., http://www.courts.wa.gov/programs_orgs/guardian/?fa=guardian.CPGBoard (last visited Apr. 6, 2015).

¹⁷⁸ *Steps to Become a Certified Professional Guardian*, *supra* note 170.

¹⁷⁹ *Guide to Filing Complaint (Grievance)*, CERTIFIED PROF'L GUARDIAN BOARD, http://www.courts.wa.gov/programs_orgs/forms/index.cfm?fa=forms.display&theFile=grievanceComplaintInstructions (last visited Apr. 6, 2015).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² STANDARDS OF PRACTICE REGULATIONS § 403.2, *available at* http://www.courts.wa.gov/content/publicUpload/CPG/20131014_SOP_Regulations.pdf.

incapacitated person's freedom, rights, and ability to control his or her environment."¹⁸³

Additionally, one CPG standard directly relates to sexual expression. That standard instructs guardians to "acknowledge the incapacitated person's right to interpersonal relationships and sexual expression."¹⁸⁴ The standard also states that guardians should "take reasonable steps to ensure that a private environment conducive to this expression is provided."¹⁸⁵ Finally, the standard requires guardians to "take reasonable steps to protect the incapacitated person from victimization," and to "ensure that the incapacitated person is informed of birth control methods when appropriate."¹⁸⁶

Whether the Board actually enforces its standards is another issue.¹⁸⁷ A 2010 article in *The Seattle Times* reported, "In five years, the board has taken action against seven guardians or guardian companies."¹⁸⁸ Of those seven actions, only one resulted in a guardian losing his or her certification. A few guardians, the article reported, negotiated deals in which they "promised not to break the rules," while others agreed to additional monitoring.¹⁸⁹

In comparison to a professional guardian, recourse against a lay guardian is limited to the ability to petition the court to terminate or modify the

¹⁸³ STANDARDS OF PRACTICE REGULATIONS § 403.3, available at http://www.courts.wa.gov/content/publicUpload/CPG/20131014_SOP_Regulations.pdf.

¹⁸⁴ STANDARDS OF PRACTICE REGULATIONS § 403.8.1, available at http://www.courts.wa.gov/content/publicUpload/CPG/20131014_SOP_Regulations.pdf.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.*

¹⁸⁷ Cheryl Phillips & Maureen O'Hagan, *Missing Money Points Up Flaws in State Oversight of Guardians*, SEATTLE TIMES (Dec. 3, 2006), http://seattletimes.com/html/yourcourts/theirsecrets/2003459423_guardianshipside03m.html.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

guardianship.¹⁹⁰ The superior court that originally ordered the guardianship oversees the lay guardian.¹⁹¹ In order for a lay guardian to be disciplined, the issue must first be brought to the court's attention, at which time the court could take appropriate action, including terminating or modifying the guardianship.¹⁹² In Washington, any person can ask the court to order the replacement of the guardian with a new guardian.¹⁹³ To request the termination or modification of a guardianship, an individual must first write the clerk of the court to provide information on the reasons why the guardianship should be changed.¹⁹⁴ The clerk must then deliver the request to the judge the next day the court is in session.¹⁹⁵ From there, the judge can decide whether to deny the request, schedule a hearing, and/or appoint a guardian ad litem to investigate the issues raised.¹⁹⁶ Therefore, the court can only intervene once it becomes aware of a problem. However, because of the elderly person's vulnerable state, he or she may not be able to advocate for him or herself and report the abuse.

The state standard for professional guardians clearly recognizes that an individual under a guardianship does not automatically lose the right to consent to sexual activity. However, these standards apply to *all* individuals under a court-appointed guardianship. Therefore, they do not specifically pertain to elderly individuals, let alone those suffering from a degenerative disease such as Alzheimer's. The standard, a guardian could argue, might be more relevant in a case where a young adult, perhaps one with a

¹⁹⁰ *How to Modify or Terminate a Guardianship*, DISABILITY RTS. WASH. (Jul. 6, 2004), <http://www.disabilityrightswa.org/advocacy-news/how-modify-or-remove-guardianship-0>.

¹⁹¹ WASH. STATE BAR ASS'N, REPORT OF THE GUARDIANSHIP TASK FORCE TO THE WSBA ELDER LAW SECTION EXECUTIVE COMMITTEE 8 (2009), *available at* <http://www.wsba.org/~media/Files/Legal%20Community/Sections/Elder%20Law/Report%20of%20Guardianship%20Task%20Force.ashx>.

¹⁹² *How to Modify or Terminate a Guardianship*, *supra* note 190.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

developmental disability, is under a guardianship. In that instance, one might be more hesitant to assert that the incapacitated individual does not have the ability to consent to a sexual relationship. The vagueness of these rules, specifically as they relate to elderly adults under court-appointed guardianships, illustrates the need for guardianship reform specific to the issues of elderly adults with Alzheimer's.

VII. MOVING FORWARD

For the remainder of this article, I suggest three actions to address the issue of unclear standards surrounding the ability of elderly adults under court-appointed guardianships to engage in sexual activity. The first suggestion is increased research and discussion about how Alzheimer's impacts an elderly adult's capacity to consent to sexual activity. The second suggestion is that Washington adopt, based on that research and discussion, a feasible standard specifically for elderly adults with Alzheimer's. Guardians and family members can look to this standard for guidance on the subject. The third suggestion is that, while this area of law is still developing, guardians and professionals adopt Washington's criminal law standard for assessing the capacity to consent to sexual activity in the context of elderly adults with Alzheimer's.

A. More Research and Discussion Among Professionals

The first suggestion is a necessary foundation for meaningful change in guardianship law. As evidenced by the increase in funding to Alzheimer's research, there is a lot to be learned about this disease—its causes, symptoms, and treatment.¹⁹⁷ The recently resolved case of retired Iowa legislator Henry Rayhons illustrates the lack of understanding about the disease, and specifically how it relates to an adult's ability to consent to

¹⁹⁷ *2014 Budget Expands Alzheimer's Funding*, ALZ FORUM (Jan. 17, 2014), <http://www.alzforum.org/news/community-news/2014-budget-expands-alzheimers-funding>.

sexual activity. The State of Iowa charged Mr. Rayhons with sexual abuse in the third degree after he allegedly had sex with his wife, Mrs. Rayhons, who has since passed, at the long-term care facility where she lived.¹⁹⁸

Specifically, the complaint and affidavit alleged that Mr. Rayhons “did commit sexual abuse upon [Mrs. Rayhons] by performing a sex act on [Mrs. Rayhons], a person suffering from a mental defect or incapacity which precludes giving consent.”¹⁹⁹ About two months after Mrs. Rayhons moved into the facility, her family and care staff informed Mr. Rayhons that Mrs. Rayhons lacked the capacity to consent to sexual activity, a determination made by her doctors and daughters.²⁰⁰ One week after Mr. Rayhons received this information, another resident in the facility reported that she heard noises indicating that Mr. and Mrs. Rayhons were engaged in sexual activity.²⁰¹ Video surveillance showed Mr. 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.²⁰² Ultimately, a jury found Mr. Rayhons not guilty of the crime.²⁰³ It is impossible to know, however, whether the jury found that Mrs. Rayhons still had the capacity to consent or whether the judgment rested on a lack of evidence that Mr. Rayhons in fact had sex with his wife that day.²⁰⁴ As such, the conclusion at

¹⁹⁸ Complaint and Affidavit at 1, *State of Iowa v. Henry Vincent Rayhons* (Aug. 14, 2014), available at http://www.dps.state.ia.us/commis/pib/Releases/2014/Rayhons_Complaint_&_Affidavit.pdf.

¹⁹⁹ *Id.*

²⁰⁰ Sarah Kaplan, *In an Iowa Courtroom, an Astonishing Case of Sex and Alzheimer’s*, WASH. POST (Apr. 7, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/07/in-an-iowa-courtroom-an-astonishing-case-of-sex-and-alzheimers/?postshare=1821429757814649>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Sarah Kaplan, *Former Iowa Legislator Henry Rayhons, 78, Found Not Guilty of Sexually Abusing Wife with Alzheimer’s*, WASH. POST (Apr. 23, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/23/former-iowa-legislator-henry-rayhons-78-found-not-guilty-of-sexually-abusing-wife-with-alzheimers/>.

²⁰⁴ *Id.*

trial is “unlikely to end the national conversation the case launched about sex and dementia.”²⁰⁵

The lack of information on how Alzheimer’s affects the capacity to consent to sexual activity can result in grave consequences—for Mr. Rayhons it meant the difference between freedom and the loss of liberty. Not only should there be more financial resources allocated to research in the area of medical science, other professionals and family members that work with elderly adults should voice their professional opinion and share their experiences as it may relate to this subject. Professionals such as social workers, guardians, and assisted living facility administrators, likely all have varying opinions on what facilities and professionals should do when an adult with Alzheimer’s is engaging in a sexual relationship. The more this subject is discussed, the more likely it is that facilities and professionals can obtain some understanding of how the situation should be handled. Facilities that are struggling to confront the issue can take note of those facilities that have approached the subject head-on.

For example, one facility in New York City went as far as to make a policy concerning sexual expression. The Hebrew Home at Riverdale’s policy “recognizes and supports the older adult’s right to engage in sexual activity, so long as there is consent among those involved.”²⁰⁶ The policy created by the facility states that consent can be demonstrated by the words and/or affirmative actions of an older adult, including those with Alzheimer’s and dementia, provided they have an intact decision-making ability.²⁰⁷ The policy also provides directions for staff to not interfere with the resident’s privacy and to ensure that the residents have appropriate consultation for their right to sexual expression.²⁰⁸ It may be helpful for

²⁰⁵ *Id.*

²⁰⁶ HEBREW HOME AT RIVERDALE, POLICIES AND PROCEDURES CONCERNING SEXUAL EXPRESSION AT THE HEBREW HOME AT RIVERDALE 2 (2013), *available at* http://ltcombudsman.org/uploads/files/issues/Sexual_Expression_PP-Hebrew_Home.pdf.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 4.

other facilities to create similar policies and to discuss these issues with staff.

A recent study by AMDA (formerly known as the American Medical Directors Association) indicates that training staff and developing policies on sexual intimacy is a low priority for most elderly care facilities.²⁰⁹ The ADMA's study found that, currently, only 13 percent of survey respondents provide their staff training on sexual behavior.²¹⁰ Almost half of the respondents did not even know that their facilities have policies.²¹¹ The AMDA said this means that employees are "significantly undertrained."²¹² Based on the survey results, AMDA is urging elderly care facilities to consider installing formal training programs and policies. Christopher Laxton, ADMA executive director, noted, "Certainly as dementias increase, I would encourage all nursing homes to at least begin the conversation . . . It doesn't help to hide your head in the sand."²¹³

However, developing policies is fraught with regulatory and legal risks, partly because there is no widely accepted means for determining the capacity to consent to sexual activity.²¹⁴ Clearly, more must be understood about how Alzheimer's affects one's capacity to consent to sexual activity. The more knowledge that is available on Alzheimer's, and specifically how it affects an elderly adult's ability to engage in consensual sex, the more that this area of understanding can develop. Similarly, if more frequent discussion regarding this issue occurs and the inherent stigma associated with it is dispelled, the more the marketplace of ideas can act to compile the best and most accurate data from all professional perspectives.

²⁰⁹ Bryan Gruley, *Sex Among Seniors with Dementia Spurs Call for Policies*, BLOOMBERG (Oct. 27, 2013, 9:00 PM), <http://www.bloomberg.com/news/articles/2013-10-28/sex-among-demented-spurs-group-to-call-for-policies>.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

B. The Board Should Develop an Appropriate Standard

The Board should create a set of standards and suggestions to which guardians can look to for guidance on the subject. These standards should be specific to age and disability, such as the 65-and-older age group with Alzheimer's. Once those standards are established, they should be enforced as strictly and consistently as possible. Additionally, those standards should be discussed with all guardians, whether they are the guardians of an elderly adult with Alzheimer's or not.

Both a lay guardian and professional guardian's training should involve some discussion of how to utilize standards for making individualized determinations. The training process should do this while also stressing the importance of those already established standards that require professional guardians to ensure a safe environment for sexual expression. Although there is no information available as to what the training for lay guardians in Washington consists of, it seems likely that it does not involve discussion of a right to sexual expression or individualized determinations on the matter. Lay guardians, as they are often family members, should also receive information regarding the existence of these standards; this is so even if there is no governing agency that can enforce them.

Sexual consent standards may seem, in the grand scheme of things, small and insignificant. Guardians are entrusted with many responsibilities—they make sure that incapacitated individuals have appropriate health care and are safe from physical harm. One might argue that there are more important things for a guardian to do than make the determination as to whether the elderly adult can consent to sexual activity. A response to that assertion would be that deprivation of any right should only occur after great deal of consideration, regardless of what the right may be. Additionally, it is likely that if the Board took the initiative to create standards, it would transcend just the issue of the ability to consent to sexual activity. The whole idea behind this suggestion would be a standard by which a guardian can, if necessary, make a reasoned *individualized* determination. Individualized

determinations, and standards for making them, will only reinforce the idea that guardians should avoid blanket-statement rules. Guardians should be educated that standards for certain decisions exist and that they should be used to ensure that such decisions are not made hastily or arbitrarily. Standardization “reduces biases, encourages considering all relevant factors, facilitates thinking through complex situations, highlights and justifies why decisions are made, and reduces risk for the client and the professionals making capacity decisions.”²¹⁵

The standards should provide guidelines and rules for documentation when making such a determination. Amy S. Friday, a clinical psychologist, advocates for standardized inquiry and documentation wherever a question of capacity arises.²¹⁶ The author proposes five areas of inquiry when making such a standardized determination.²¹⁷ The first inquiry is to clarify the specific area of capacity in question.²¹⁸ Here, the specific capacity would be the ability to consent to sexual activity. Next, the professional should consider the specific medical or psychiatric condition and document how those problems relate to the capacity in question.²¹⁹ The third inquiry is undue influence. Here, the author advocates that the professional “maintain awareness of medical and psychiatric problems that increase vulnerability to manipulation by others.”²²⁰ This may include a consideration of the concerns and benefits associated with an elderly adult with Alzheimer’s engaging in sexual activity.²²¹ Next, the professional should consider the client’s values, desires, and history. In doing so, the professional should identify the individual’s characteristics and preferences that may influence

²¹⁵ Amy S. Friday, *Evaluating Vulnerable Populations for Capacity*, AGING TODAY (Feb. 23, 2015), <http://www.asaging.org/blog/evaluating-vulnerable-populations-capacity>.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

an overall understanding of capacity.²²² Finally, the author suggests that the professional consider all relevant parties. In doing so, the professional should “list potential relevant parties who may have information or bias that could influence how the client is perceived and understood.”²²³ This may include a consideration as to whether the individual is married or is LGBTQ, both of which are likely to influence the perception of the individual. The author suggests using the data to draw conclusions about the individual’s cognitive ability to process information, understand a situation, and comprehend choices and consequences.²²⁴ All sources of data should then be used to “outline a process of thought regarding the least restrictive alternative for help.”²²⁵

This type of standardized process is an example of the process the Board should establish to guide guardians in their analysis. Although Friday did not specifically advocate for its use in situations of capacity to consent to sexual activity, it is a reasoned approach and one that the Board should consider when or if it creates standards on this issue. Having such a process will help ensure that decisions are not made arbitrarily and that all relevant factors are considered. As research and thoughtful discussion on the subject are still needed, it would be helpful for guardians to have some standard to look to for guidance in the meantime.

C. An Appropriate Standard for Assessing Capacity to Consent to Sexual Activity

Until adequate rules are in place, guardians should use the standards set forth in Washington’s criminal statute if and when an issue of capacity to consent to sexual activity arises. “The term capacity . . . refers to an individual’s actual ability to understand, appreciate, and form a relatively

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

rational intention with regard to some act.”²²⁶ While not linked to a specific diagnosis, capacity is tied to whether an individual can make decisions for himself in a specific domain at a specific time.²²⁷ Therefore, it is important to note that capacity, in this sense, is a legal assessment that varies based on the act or decision being considered. The capacity for some acts or decisions, such as the capacity to make a will, is well defined in the law.²²⁸ However, “there is almost no guidance concerning decision-making capacity to enter into intimate relationships.”²²⁹ Even less guidance is accorded to capacity to engage in sexual activities when the individual is an adult with Alzheimer’s. As a *New York Times* article stated,

Sex is one of the most ambiguous areas in the scientific understanding of Alzheimer’s. While there are established methods of measuring memory, reasoning and the ability to dress, bathe, and balance checkbooks, no widely used method exists for assessing the ability to consent to intimate relations.²³⁰

However, a statutory guideline exists pertaining to the issue of capacity to consent to sexual activity in the context of criminal law. An individual in Washington can be convicted of a crime for engaging in sexual activity with an individual who cannot, because of their disability, understand the nature or consequences of the act of sexual intercourse.²³¹ The Washington Court of Appeals stated that the issue of consent is “best approached on a case-by-

²²⁶ Steven B. Bisbing, *Competency and Capacity: A Primer*, in LEGAL MEDICINE 325 (Rolla Couchman et al. eds., 7th ed. 2007).

²²⁷ Friday, *supra* note 215.

²²⁸ “The testator must have sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition, and to recollect the objects of his bounty.” *In re Estate of Kessler*, 977 P.2d 591, 599 (Wash. Ct. App. 1999).

²²⁹ Tenenbaum, *supra* note 43, at 713.

²³⁰ Pam Belluck, *Sex, Dementia and a Husband on Trial at 78*, N.Y. TIMES (Apr. 14, 2015), http://www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html?_r=0.

²³¹ WASH. REV. CODE § 9A.44.010(4) (2007).

case basis, and by examining whether the non-expert testimony justifies a rational finding that the victim lacked the capacity to consent.”²³² Specifically, the Washington criminal statute defines “mental incapacity” as “a condition, which prevents a person from understanding the nature or consequences of the act of sexual intercourse.”²³³

The Washington criminal standards should apply in the case of elderly persons under court-appointed guardianships because, in addition to the lack of clear legal standards pertaining to this issue, the situation at hand seems to fall within the category established by the Washington State Legislature for the criminal standards. Elderly persons suffering from degenerative diseases may also have a condition that prevents them from understanding the nature or consequences of the act of sexual intercourse.²³⁴ Thus, the standards established by the legislature are the most appropriate established standards for assessing, on an individualized basis, an elderly adult’s capacity to consent to sexual activity.

The Washington Court of Appeals relied on a traditional understanding of capacity to determine that an individual lacked the capacity to consent to sexual activity in the case of *State v. Summers*.²³⁵ In that case, the court determined that the victim’s testimony established that she was unable to consent because she was unable to “comprehend basic facts such as the time of day, much less the nature or consequences of sexual intercourse.”²³⁶ The court noted that, while the victim had basic understanding of the mechanical act of sexual intercourse, she was unable to understand many fundamental, non-sexual matters, such as what day of the week it was or the sequence of the days of the week.²³⁷

²³² *State v. Summers*, 853 P.2d 953, 955–956 (Wash. Ct. App. 1993).

²³³ WASH. REV. CODE § 9A.44.010(4) (2007).

²³⁴ *Id.*

²³⁵ *Summers*, 853 P.2d. at 956.

²³⁶ *Id.*

²³⁷ *Id.* at 957.

As a disability rights advocate, this seems to be a superficial way of understanding whether a person has the capacity to consent to sexual activity. As such, it is likely not the most appropriate standard for an elderly individual suffering from a degenerative disease. Many caregivers or those with elderly loved ones who suffer from dementia know very well that, while the elderly adult might not know the time of day or day of the week, they are still aware of their surroundings and can be extremely present in a given situation. An example of this is one's ability to recall a recent event in great detail, such as a news story or a memory from their recent past. Therefore, knowing the time of day or day of the week might not be the most comprehensive way to determine an individual's capacity to consent to sexual activity.

Conversely, the Washington Supreme Court in *State v. Ortega-Martinez* noted that the key to a proper interpretation of the criminal statute is a sufficiently broad interpretation of the word "understand."²³⁸ The court concluded that a "superficial understanding of the act of sexual intercourse does not itself render [the statute] inapplicable."²³⁹ Instead, a finding that a person is mentally incapacitated for the purposes of the statute is appropriate where the jury finds the "victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse."²⁴⁰ The Washington Supreme Court in *Ortega-Martinez* further held "meaningful understanding" necessarily includes an understanding of the physical mechanics of sexual intercourse.²⁴¹ However, it also includes a wide range of other particulars,

For example, the nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it may under some circumstances result in a

²³⁸ *State v. Ortega-Martinez*, 881 P.2d 231, 236 (Wash. 1994).

²³⁹ *Id.* at 237.

²⁴⁰ *Id.*

²⁴¹ *Id.*

disruption in one's established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death.²⁴²

The meaningful understanding approach taken by the court in *Ortega-Martinez* seems to be a better approach for determining capacity to consent to sexual activity. Rather than focusing on whether an individual knows what day of the week it is or what they ate for breakfast (many adults with Alzheimer's do not), it is appropriate to focus on whether they really understand the nature and consequences of their choice to engage in sexual activity. The Board should adopt this standard, which is sanctioned by the Supreme Court in Washington, as an appropriate standard for assessing the capacity to consent to sexual activity in the meantime before any official standard has been created.

VIII. CONCLUSION

Guardianship is an important mechanism to ensure that all people within the state can function with the highest possible degree of autonomy. However, a guardianship can unnecessarily infringe on an elderly adult's ability to make choices regarding the most personal of decisions—including some as personal as when, and with whom, to have sex. What I hope is clear from this article is that this issue warrants a discussion.

Guardians must make an individualized determination that an elderly adult lacks the capacity to consent to sexual activity before dissuading or forbidding the relationship in order to ensure that they are not overstepping their legal authority as a guardian. Even an elderly individual under a full guardianship should not be automatically presumed to lack the capacity to consent to sexual activity. Clear standards need to be developed on the issue of capacity to have sex in the context of elderly adults with a degenerative disease. Guardians, in the meantime, should be guided by the criminal law

²⁴² *Id.*

standards in Washington pertaining to the capacity to consent to sexual activity. These standards take the position that a person has the capacity to consent to sexual activity when he or she can meaningfully understand the nature of the relationship. The criminal standard provides a persuasive starting point for reform.

Finally, guardians should be cognizant of their own biases that may impact their ability to advocate for an individual. It is not lost on me how difficult it may be to remain objective in a situation where, for example, a child may be serving as a guardian for an elderly parent. It is not a comfortable thing for a child to think about his or her mother or father as a sexual being. As such, if and when I come to learn that one of my parents is engaging in a new, sexual relationship with a fellow Alzheimer's patient in a facility, I can only imagine that such news would make me uncomfortable. It is easy to see how such a feeling of discomfort might result in a guardian choosing an action that is at odds with what the elderly person wants, and possibly even needs.

What is important to note is that, while we all have an uncontested right to have an opinion about what is right and wrong, the guardianship system was not intended to give a surrogate decision maker the power to completely substitute their own judgment for that of the incapacitated individual. Rather, the role of a guardian should be limited to advocating for the elderly adult's expressed wishes and ensuring that they are not victimized. This should be so in all aspects of guardianship decision-making, including in the context of sexual activity.