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## We'll Always Have Shady Pines: Surrogate Decision-Making Tools for Preserving Sexual Autonomy in Elderly Nursing Home Residents

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WE'LL ALWAYS HAVE SHADY PINES: SURROGATE  
DECISION-MAKING TOOLS FOR PRESERVING SEXUAL  
AUTONOMY IN ELDERLY NURSING HOME RESIDENTS

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INTRODUCTION

Nursing homes are not sexy;<sup>1</sup> they engender thoughts of illness and infirmity. People consider placing a loved one in one to be a necessary evil,<sup>2</sup> a transition between a retirement community and interment. Few people consider a complicated issue that can plague nursing home administrators and patients' families when it arises: nursing home residents sometimes have sex.<sup>3</sup>

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1. See *Sexy Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/sexy> (last visited Jan. 10, 2014); see also COLLEEN L. JOHNSON & LESLIE A. GRANT, *THE NURSING HOME IN AMERICAN SOCIETY* (1985); PETER S. SILIN, *NURSING HOME: THE FAMILY'S JOURNEY* (2001); PETER WOOLFSON, *OLD AGE IN TRANSITION: THE GERIATRIC WARD* (1997).

2. See LYNN DICKINSON & XENIA VOSEN, *LIVING WELL IN A NURSING HOME: EVERYTHING YOU AND YOUR FOLKS NEED TO KNOW 1* (2006).

3. See, e.g., GAYLE APPEL DOLL, *SEXUALITY AND LONG-TERM CARE: UNDERSTANDING AND SUPPORTING THE NEEDS OF OLDER ADULTS 14* (2011).

Elderly residents who have lost their spouses or merely their memory of their spouses can find solace and happiness in new romantic relationships.<sup>4</sup> Their families and nursing home staff might condone and even encourage such relationships as long as they comport with contemporary ideas of how older persons should behave.<sup>5</sup> Once a relationship turns sexual, however, attitudes often change.<sup>6</sup> If American society is already puritanically reticent to discuss sex,<sup>7</sup> that reluctance is multiplied when the conversation turns to the love lives of the elderly.<sup>8</sup> Though numerous media pieces have explored the topic of sex in residential care facilities,<sup>9</sup> most of us would prefer not to acknowledge that our parents or grandparents still crack open the brandy decanter and put on “Moonlight Serenade” when the mood strikes.<sup>10</sup> As an unprecedented number of Americans continue to live into old age,<sup>11</sup> and nearly one-quarter are projected to suffer from dementia,<sup>12</sup> it is time to engage in a frank dialogue about the issues associated with geriatric sexuality in a long-term care setting.

Some 1.4 million older Americans live in nursing homes or other residential care facilities.<sup>13</sup> An American who lives to be sixty-five years old has a twenty-five percent chance of residing in a nursing home before the end of his or her life.<sup>14</sup> Of course, few people live in

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4. See Melinda Henneberger, *An Affair to Remember*, SLATE (June 10, 2008, 1:14 PM), [http://www.slate.com/articles/life/family/2008/06/an\\_affair\\_to\\_remember.html](http://www.slate.com/articles/life/family/2008/06/an_affair_to_remember.html).

5. See *id.*

6. See *id.*

7. See Matthew Hutson, *Still Puritan After All These Years*, N.Y. TIMES (Aug. 3, 2012), <http://www.nytimes.com/2012/08/05/opinion/sunday/are-americans-still-puritan.html>.

8. See, e.g., Ira Rosofsky, *Sex Bans in Nursing Homes*, L.A. TIMES (Aug. 3, 2009), <http://articles.latimes.com/2009/aug/03/opinion/oe-rosofsky3>.

9. See, e.g., Daniel Engber, *Naughty Nursing Homes: Is It Time to Let the Elderly Have More Sex?*, SLATE (Sept. 27, 2007, 5:23 PM), [http://www.slate.com/articles/life/the\\_sex\\_issue/2007/09/naughty\\_nursing\\_homes.html](http://www.slate.com/articles/life/the_sex_issue/2007/09/naughty_nursing_homes.html); Alex Morris, *Very Legal: Sex and Love in Retirement*, N.Y. MAG. (July 29, 2012), <http://nymag.com/news/features/sex/2012/retirement-home-sex/>; Jessica Stoller-Conrad, *Dementia Complicates Romance in Nursing Homes*, NAT'L PUB. RADIO (June 26, 2012, 5:47 PM), <http://www.npr.org/blogs/health/2012/06/26/155792238/dementia-complicates-romance-in-nursing-homes>.

10. The suggestion that this particular mood-setting combination is popular among the World War II set is purely conjecture.

11. FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, OLDER AMERICANS 2012: KEY INDICATORS OF WELL-BEING xvi (2012), available at [http://www.agingstats.gov/agingstatsdotnet/Main\\_Site/Data/2012\\_Documents/Docs/EntireChartbook.pdf](http://www.agingstats.gov/agingstatsdotnet/Main_Site/Data/2012_Documents/Docs/EntireChartbook.pdf) (“Americans are living longer than ever before . . .”).

12. See Pam Belluck, *Dementia Care Cost Is Projected to Double by 2040*, N.Y. TIMES (Apr. 3, 2013), <http://www.nytimes.com/2013/04/04/health/dementia-care-costs-are-soaring-study-finds.html>.

13. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES: 2011 7 (2012), available at <http://www.cdc.gov/nchs/data/hus/hus11.pdf>.

14. 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, 676–77 (2009) (citing Ramzi R. Hajjar & Hosam K. Kamel, *Sexuality in the Nursing*

nursing homes on their own volition.<sup>15</sup> Debilitating health problems and chronic illnesses leave most with no better alternative. In the face of daily health maintenance, emergency treatment, and death, caretakers often ignore the topic of sex.<sup>16</sup> Many facilities have no formal policy regarding sex between residents.<sup>17</sup>

This is not only because staff and residents' families are squeamish about the issue, but also because facility administrators and staff may face liability issues if they allow residents to have sexual relations.<sup>18</sup> Numerous factors complicate romance in nursing homes: diseases such as Alzheimer's and dementia cloud issues surrounding consent,<sup>19</sup> healthy spouses and children do not wish to allow their ill family members to commit adultery,<sup>20</sup> and residents might sustain injuries and communicate sexually transmitted diseases during romantic encounters.<sup>21</sup> All can lead to costly and unpleasant litigation. Nursing home administrators can attempt to avoid legal threats by expressly prohibiting sexual activity among residents or discouraging it by suppressing opportunity and discussion.<sup>22</sup>

In the coming decades, members of the baby boomer generation will likely help redefine long-held ideas and beliefs about the existence of sexuality in residential care settings because of their sheer number and because many hold beliefs about relationships and sexuality that fundamentally differ from those of their parents.<sup>23</sup> In light of this prospect, nursing homes should reexamine their policies regarding sexuality and find ways to promote the sexual autonomy of residents while shielding themselves from serious negative consequences. Doing so would not open the floodgates of hedonism; it would allow elderly residents to maintain their dignity and enjoy intimate relationships with others at the end of their lives.

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*Home, Part 1: Attitudes and Barriers to Sexual Expression*, 5 J. AM. MED. DIRECTORS ASS'N., Mar.–Apr. 2004, at S42, S43).

15. See, e.g., Katie Zezima, *Experiencing Life, Briefly, Inside a Nursing Home*, N.Y. TIMES (Aug. 24, 2009), <http://www.nytimes.com/2009/08/24/health/24nursing.html>.

16. See, e.g., *Nursing Home Sex Becoming More Acceptable*, FOX NEWS (Nov. 19, 2008), <http://www.foxnews.com/story/2008/11/19/nursing-home-sex-becoming-more-acceptable/>.

17. Elizabeth Nolan Brown, *The Takeaway: Sex and the Nursing Home*, AM. ASS'N RETIRED PERSONS (June 26, 2012), <http://blog.aarp.org/2012/06/26/sex-nursing-homes-and-dementia-patients/> (“[M]ost nursing facilities don’t have formal policies against sex, but the environment is often prohibitive—no locks on doors, rooms with only single beds, etc.”).

18. See *id.* (“Staff either disregard or discourage sexual activity because of . . . fear of legal problems . . .”).

19. See *id.*

20. Tenenbaum, *supra* note 14, at 696–97.

21. Brown, *supra* note 17.

22. Laura Tarzia et al., *Dementia, Sexuality, and Consent in Residential Aged Care Facilities*, 38 J. MED. ETHICS 609, 610 (2012).

23. See, e.g., Katie Moisse, *Nursing Home Sex Stifled by Safety Fears*, ABC NEWS (June 26, 2012), <http://abcnews.go.com/Health/Alzheimers/nursing-home-sex-stifled-safety-fears/story?id=16643448&page=2#.UKU-keOe8sc>.

Expanding the common estate and life planning tools of power of attorney and advance directives to encompass elders' sexual choices is one potential avenue toward this end. Though utilizing tools that are designed to be applied to objective medical and financial decisions<sup>24</sup> could raise thorny issues when applied to the more subjective realm of the heart, it is one option worthy of study and application. This Note explores the feasibility of and drawbacks to a so-called "sexual power of attorney" coupled with an advance directive that outlines a resident's wishes regarding sexual relationships.

## I. BACKGROUND ON SEXUALITY AND THE ELDERLY

### A. Changing Demographics, Attitudes, and Technologies

The life expectancy of Americans has been on the rise for decades.<sup>25</sup> People are not only living longer, they are remaining active longer as well.<sup>26</sup> Though longevity has increased, many elderly individuals struggle with chronic health issues that necessitate continuous, skilled care in residential facilities like nursing homes.<sup>27</sup>

The baby boomer generation comprises some seventy-nine million people,<sup>28</sup> or roughly one quarter of the U.S. population.<sup>29</sup> By 2030, when every member of the generation will be sixty-five years or older, eighteen percent of the United States population will fit into that demographic.<sup>30</sup> As boomers age, the issue of residents' sexuality will

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24. See MARSHALL B. KAPP, *LEGAL ASPECTS OF ELDER CARE* 107 (2009).

25. Preliminary data for 2011 places the estimated life expectancy at birth for the total U.S. population at 78.7 years. DONNA L. HOYERT & JIAQUAN XU, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORTS: DEATHS: PRELIMINARY DATA FOR 2011, at 1 (2012), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_06.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf). A decade ago, that figure was 77.3 years. KENNETH D. KOCHANNEK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORTS: DEATHS: FINAL DATA FOR 2002 1 (2004), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53\\_05.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_05.pdf). A century ago, it was 53.5 years. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES NO. HS-16, EXPECTATION OF LIFE AT BIRTH BY RACE AND SEX: 1900 TO 2001 (2003), available at <https://www.census.gov/statab/hist/HS-16.pdf>. What's more, the gap between male and female life expectancy at birth has been on the decline in recent years. See *id.*

26. E.g., Bruce Baert, *Boomeritis: Energetic Adults Keeping Active Later in Life*, PASADENA STAR-NEWS (Mar. 8, 2012, 9:00 PM), <http://www.pasadenastarnews.com/general-news/20120309/boomeritis-energetic-adults-keeping-active-later-in-life>.

27. See ROBERT F. BORNSTEIN & MARY A. LANGUIRAND, *WHEN SOMEONE YOU LOVE NEEDS NURSING HOME, ASSISTED LIVING, OR IN-HOME CARE* (2d ed. 2009).

28. John Haaga, *Just How Many Baby Boomers Are There?*, POPULATION REFERENCE BUREAU (Dec. 2002), <http://www.prb.org/Articles/2002/JustHowManyBabyBoomersAreThere.aspx>.

29. U.S. CENSUS BUREAU, *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now* (Dec. 12, 2012), <http://www.census.gov/newsroom/releases/archives/population/cb12-243.html>.

30. JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., U.S. POPULATION PROJECTIONS: 2005–2050 20 (Feb. 11, 2008), available at <http://pewhispanic.org/files/reports/85.pdf>.

likely become more difficult for nursing home staff to ignore.<sup>31</sup> Not only will the sheer number of new nursing home residents likely increase substantially in the next few decades, but many of those future residents came of age during the sexual revolution of the 1960s and 1970s<sup>32</sup> and possess vastly different attitudes toward sex than their conservative parents.<sup>33</sup>

Furthermore, age-induced physical and physiological changes do not always prevent older people from being intimate.<sup>34</sup> Medical advances like erectile dysfunction drugs<sup>35</sup> and female sexual dysfunction treatments<sup>36</sup> allow individuals to remain sexually active long past their reproductive years.<sup>37</sup>

### *B. Geriatric Sexuality and the Value of Sexual Expression*

The World Health Organization (WHO) postulates that “[s]exuality is an integral part of the personality of everyone: man, woman and child; it is a basic need and aspect of being human that cannot be separated from other aspects [of] life.”<sup>38</sup> WHO defines sex as encompassing “sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and

31. The U.S. Census Bureau recognizes the baby boomer generation as those individuals born between 1946 and 1964. U.S. CENSUS BUREAU, *Oldest Baby Boomers Turn 60!* (Jan. 3, 2006), <http://www.census.gov/newsroom/releases/pdf/cb06-ffse01-2.pdf>.

32. See DAVID SMITH ALLEN, *MAKE LOVE, NOT WAR: THE SEXUAL REVOLUTION: AN UNFETTERED HISTORY* 50 (2001).

33. See Karen Springen, *Meryl Streep, 'Hope Springs,' and Senior Sex: Why Seniors Are Getting It On*, THE DAILY BEAST (Aug. 10, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/08/10/meryl-streep-hope-springs-and-senior-sex-why-geezers-are-getting-it-on.html> (“The World War II generation, in their 80s, is less open about talking about sex, says Dr. William Dale, chief of geriatrics and palliative medicine at the University of Chicago. Sixty-somethings are another story. ‘That generation is much more comfortable with their sexuality,’ he says.”); see also AM. ASS’N RETIRED PERSONS, *TRACING BABY BOOMER ATTITUDES THEN AND NOW: A COMPARATIVE LOOK AT THE ATTITUDES OF BABY BOOMERS IN THE 1970S AND 2002* 4 (2002), available at <http://assets.aarp.org/rgcenter/general/bbattitudes.pdf>.

34. Stacey Tessler Lindau et al., *A Study of Sexuality and Health Among Older Adults in the United States*, 357 NEW ENG. J. MED. 762 (2007).

35. See Duff Wilson, *As Generics Near, Makers Tweak Erectile Drugs*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/2011/04/14/health/14pills.html>; *Erectile Dysfunction: Viagra and Other Oral Medications*, MAYO CLINIC, <http://www.mayoclinic.com/health/erectile-dysfunction/MC00029> (last visited Jan. 10, 2014).

36. See *Female Sexual Dysfunction: Treatments and Drugs*, MAYO CLINIC, <http://www.mayoclinic.com/health/female-sexual-dysfunction/DS00701/DSECTION=treatments-and-drugs> (last visited Jan. 10, 2014).

37. See *Old Age 'No Barrier' to Sex Life*, BBC NEWS (Aug. 23, 2007, 10:48 AM), <http://news.bbc.co.uk/2/hi/americas/6959977.stm>.

38. *Sexuality*, AM. ASS’N OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, <http://aaidd.org/news-policy/policy/position-statements/sexuality#.UsxsE6yB0XU> (last visited Jan. 10, 2014).

expressed in thoughts, fantasies, desires, beliefs, attitudes, values, [behaviors], practices, roles and relationships.”<sup>39</sup> For older people, sexuality comes in many forms and can have many meanings.<sup>40</sup> For some, it is an important form of expression when other forms have been lost.<sup>41</sup> One book designed to help seniors and their families plan for the future notes:

Sex is always more than sex. For the elderly it is a statement of continued involvement with life, a source of emotional support, and a validation of self-worth. It may not even result in orgasms. It can be simply caresses and gentle touching. Self-help manuals abound, and many describe techniques and approaches to sex that are more elder-friendly.<sup>42</sup>

Although sexual activity does decline with age, older adults still enjoy active sex lives.<sup>43</sup> A 2007 study published in the *New England Journal of Medicine* reported that fifty-three percent of respondents ages 65–74 years and twenty-six percent of respondents ages 75–85 years reported being sexually active with a partner in the previous twelve months.<sup>44</sup> Of those, 65.4 percent of men and women ages 65–74 years and 54.2 percent of men and 54.1 percent of women ages 75–85 years reported participating in sexual activity with a partner at least two to three times per month.<sup>45</sup> Another study of healthy people ages eighty to 102 found that eighty-eight percent of men and seventy-two percent of women have sexual fantasies.<sup>46</sup> Seventy-two percent of men and forty percent of women engage in self-stimulation and sixty-six percent of men and thirty-eight percent of women continue to have sexual intercourse.<sup>47</sup>

The need for contact, affection, and intimacy is universal and extends beyond cognitive status.<sup>48</sup> A 2012 report published in the *Journal of Medical Ethics* stated that the “lack of attention paid by aged care facilities to residents’ sexual needs is concerning.”<sup>49</sup> The

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39. Linda McAuliffe et al., *Sexuality and Intimacy*, in *NURSING OLDER ADULTS* 191, 192–93 (Jan Reed, Charlotte Clarke & Ann MacFarlane eds., 2012).

40. *See id.*

41. *Id.* at 193.

42. KENNEY F. HEGLAND & ROBERT B. FLEMING, *NEW TIMES, NEW CHALLENGES: LAW AND ADVICE FOR SAVVY SENIORS AND THEIR FAMILIES* 101 (2009).

43. Authors defined sexual activity as “any mutually voluntary activity with another person that involves sexual contact, whether or not intercourse or orgasm occurs.” Lindau et al., *supra* note 34, at 763.

44. *Id.* at 762.

45. *Id.* at 766.

46. HEGLAND & FLEMING, *supra* note 42, at 101.

47. *Id.*

48. DOLL, *supra* note 3, at 4–6.

49. Tarzia et al., *supra* note 22, at 609.



authors strongly argued that sex should be an accepted part of all stages of adult life and advanced the idea that individuals in the early stages of dementia should be allowed to participate in sexual activity.<sup>50</sup> They claimed that not allowing nursing home residents to express their sexual needs stifled their autonomy and personhood.<sup>51</sup>

In 2009, the Kansas State University Center on Aging surveyed nursing home administrators to determine how often sexual expression was demonstrated in nursing homes.<sup>52</sup> Researchers surveyed administrators on the prevalence of sexual talk, sexual acts, implied sexual acts, false sexual allegations or abuses, and romantic relationships.<sup>53</sup> Nearly all responded that some activity occurred relatively frequently.<sup>54</sup> Over eighty percent of administrators acknowledged that sexual talk and acts occurred in their facilities, over sixty percent were aware of romantic relationships, nearly sixty percent acknowledged implied sexual acts, and thirty percent had handled false sexual allegations.<sup>55</sup>

The American Association on Intellectual and Developmental Disabilities and The Arc, two organizations that promote policies and practices to promote the human rights of individuals with intellectual and developmental disabilities,<sup>56</sup> adopted a position statement reading: "People with intellectual and/or developmental disabilities, like all people, have inherent sexual rights and basic human needs. These rights and needs must affirmed, defended, and respected."<sup>57</sup>

## II. DEMENTIA AND ALZHEIMER'S IN NURSING HOMES

Dementia (also called senility) is a group of symptoms caused by disorders that affect the brain.<sup>58</sup> Dementia results in a progressive decline in cognitive functioning because of nerve cell degeneration in the brain<sup>59</sup> and may result in memory loss and trouble performing

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50. *See id.* at 611.

51. *See id.*

52. DOLL, *supra* note 3, at 21.

53. *See id.*

54. *See id.*

55. *See id.*

56. *Mission*, AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, <http://www.aidd.org/about-aidd/mission> (last visited Jan. 10, 2014); *Mission Statement*, THE ARC, <http://www.thearc.org/page.aspx?pid=2345> (last visited Jan 10, 2014).

57. *Life in the Community Summary*, THE ARC, <http://www.thearc.org/page.aspx?pid=2363> (last visited Jan. 10, 2014).

58. *Dementia*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/dementia.html> (last visited Jan. 10, 2014).

59. *See* Tenenbaum, *supra* note 14, at n.22 ("[Alzheimer's disease] is a chronic, progressive, degenerative illness associated with neuropathological changes for which there is no cure. A definitive diagnosis of [Alzheimer's disease] can be made only at autopsy, when the



everyday tasks like getting dressed or eating.<sup>60</sup> Individuals who suffer from dementia are “significantly limited in their ability to make well-informed, rational, decisions and ‘to advocate for [their] interests and ideals.’”<sup>61</sup> Alzheimer’s disease is the most common form of dementia.<sup>62</sup> Over half of nursing home admissions occur because of dementia and Alzheimer’s disease.<sup>63</sup> Studies have indicated that sexuality continues when dementia is present.<sup>64</sup> Dementia and Alzheimer’s disease can actually increase sex drive and cause sufferers to engage in inappropriate sexual behavior.<sup>65</sup>

### III. BARRIERS TO SEXUAL EXPRESSION IN NURSING HOMES

In addition to practical obstacles, such as lack of access to partners,<sup>66</sup> there are several barriers to sexual expression in nursing homes. Ageism,<sup>67</sup> staff members’ attitudes and beliefs,<sup>68</sup> residents’ family members’ attitudes and beliefs,<sup>69</sup> and the threat of regulatory repercussions,<sup>70</sup> criminal liability,<sup>71</sup> and civil liability<sup>72</sup> are powerful deterrents, on their own and collectively, to sexual expression in nursing home settings. Consider this anecdote:

Ben walked into his 95-year-old father Bob’s assisted living room to find him in bed with his 82-year-old girlfriend, Dorothy. Both were residents, and they had been diagnosed as being in the

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distinctive neurological changes in the brain can be seen.”) (quoting George Byron Smith, *Alzheimer Disease and Other Dementias*, LIPPINCOTT’S CASE MGMT. Mar.–Apr. 2002, at 78).

60. *Dementia*, *supra* note 58.

61. Tenenbaum, *supra* note 14, at 678.

62. *Id.*, at 677 (citing Andrew Casta-Kaufteil, *The Old and the Restless: Mediating Rights to Intimacy for Nursing Home Residents with Cognitive Impairments*, 8 J. MED. & L. 69, 70 (2004)).

63. *Id.*

64. DOLL, *supra* note 3, at 102.

65. *Id.* at 136 (“Hypersexuality is a form of disinhibition described as an abnormally high desire to engage in sexual activities. Hypersexuality refers to persistent, uninhibited sexual behavior directed at oneself or other people . . . [and] usually involves an insatiable desire for sexual conduct with others. It may also include lewd or suggestive language, fondling, flirting, disrobing, and other overt sexual acts.”).

66. *Id.* at 23.

67. *Id.* at 22.

68. *Id.*

69. See, e.g., Henneberger, *supra* note 4.

70. See DOLL, *supra* note 3, at 52–55.

71. Valarie Honeycutt Spears, *Hazard Nursing Home Charged in Sex Abuse Case*, LEXINGTON HERALD-LEADER (Aug. 6, 2010), <http://www.kentucky.com/2010/08/06/1378702/hazard-nursing-home-charged-in.html>.

72. Bruce Vielmetti, *Jury to Decide Nursing Home’s Liability in Rape, Death of Resident*, MILWAUKEE J. SENTINEL (Oct. 10, 2012), <http://www.jsonline.com/blogs/news/173380781.html>.

early stages of dementia. Ben was irate and insisted that the staff keep the couple apart.

The incident threw the nursing home into turmoil. Ben believed that Dorothy had been the aggressor and told the staff that he thought sexual activity would be bad for his father's heart. The private nurse assigned to Bob had been supportive of the relationship when it was in the "cute" stage of handholding, but when it became sexual she "lost her senses" for religious reasons. She asked the staff to intervene and keep the two apart. It was not just the nursing staff who tried to separate them. Some of the other residents were jealous, and Bob and Dorothy were forced to sneak around in order to continue their relationship.

Eventually, Bob's son moved him from the facility. Dorothy, who had blossomed under Bob's attention, lost more than 20 pounds and spent her days sitting near a window waiting for him to return. In one of her more lucid moments she asked her daughter, a lawyer, to publicize the incident. The daughter asked if Dorothy could meet with Bob one last time to say goodbye. When Bob's family said no, she tried to make it happen legally but was told that she could not make a case against the family because Bob could not be put on the witness stand because of his dementia.<sup>73</sup>

### A. Ageism

The first deterrent to sex in nursing homes is age discrimination. Society's perceptions of and attitudes toward geriatric sex do not mesh with data that shows that people continue to have sexual relationships into old age.<sup>74</sup> We believe that old people do not have sex and that they do not desire sex.<sup>75</sup> Even health professionals are reluctant to initiate conversations about sexuality and sexual health because of embarrassment and discomfort.<sup>76</sup> Viewing older adults as asexual prevents nursing homes from developing and implementing new ideas and education to better address their needs regarding their sexuality.<sup>77</sup>

### B. Staff Members' Beliefs, Attitudes, and Training

Nursing home staff members can operate as barriers to sexual expression whether or not they are aware of it.<sup>78</sup> Caregivers who tolerate

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73. DOLL, *supra* note 3, at 77–78.

74. See, e.g., Lindau et al., *supra* note 34; Rosofsky, *supra* note 8.

75. See Rob Stein, *Elderly Staying Sexually Active*, WASH. POST. (Aug. 23, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/22/AR2007082202000.html>.

76. See Amanda J. Hordern & Annette F. Street, *Constructions of Sexuality and Intimacy After Cancer: Patient and Health Professional Perspectives*, 186 *MED. J. AUSTRALIA* 224, 225–26 (2007).

77. DOLL, *supra* note 3, at 19–20.

78. See *id.* at 118 ("The psychological means employed to control resident sexuality may include stifling sexual expression by showing disapproval or by threatening and punishing

or even condone loving and caring or romance between residents may be confused, embarrassed, or angered when residents display feelings of sexual excitement or desire.<sup>79</sup> They generally view residents' sexual expressions negatively and believe the behavior is inappropriate or pathological.<sup>80</sup> Some staffers might discourage sexual expression for religious or moral reasons.<sup>81</sup> They might overlook female residents' expressions but view males' as threats to staff and other residents.<sup>82</sup> They might react with apathy or hostility toward residents who express sexual needs,<sup>83</sup> or they may ignore the behavior.<sup>84</sup>

Staff can unknowingly dissuade sexual expression by preventing residents from spending time alone. Nursing homes are intended for individuals who need constant or routine care, and facilities are designed so that staff can easily observe and access residents.<sup>85</sup> Residents share rooms, and staff members typically leave doors open.<sup>86</sup> Most nursing homes lack accessible private spaces.<sup>87</sup> Even facilities that allow or encourage sexual expression may at times discourage it by requiring residents to follow daily routines and schedules.<sup>88</sup>

### *C. Family Members' Attitudes and Beliefs*

A third barrier to sexual expression is the attitudes and beliefs of residents' family members. Family members may object to their loved ones participating in sexual relationships in the nursing home setting for a variety of reasons. Family members have enormous influence over the transition to a nursing home and retain that influence for the duration of their loved one's residency.<sup>89</sup> Adult children who must care for their own parents "may develop paternal attitudes . . . . An adult child caregiver may view a sexual situation involving an aging parent as they would a pre-teen in a sexual situation . . . . The adult child feels it is important to make the decision for the parent."<sup>90</sup>

Family members can be motivated by less benevolent forces as well. Children and spouses may become envious that their parent

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a resident. Other measures include moving a resident to another floor, denying the use of private space, using restraints, putting clothes on backward or dressing residents in zipperless jumpsuits, imposing curfews, and using nighttime nursing checks.").

79. *See id.* at 47-48.

80. *See id.* at 48.

81. *See Henneberger, supra* note 4.

82. *See DOLL, supra* note 3, at 48.

83. *See id.* at 49.

84. *See id.*

85. *See id.* at 23.

86. *Id.*

87. *Id.*

88. DOLL, *supra* note 3, at 23.

89. *Id.* at 78.

90. *Id.* at 88.

or spouse is paying attention to someone else.<sup>91</sup> Heirs may also be concerned about their rights to a parent's estate and discourage close relationships that could put a future inheritance in jeopardy.<sup>92</sup> Further, in the case of married residents with dementia or Alzheimer's disease, spouses or other family members may disapprove of their loved one committing adultery.<sup>93</sup>

#### *D. Regulatory Consequences*

A fourth barrier is the fear of regulatory penalties. Nursing homes are regulated at both the state and local levels.<sup>94</sup> Federal law sets minimum requirements that states and facilities must meet in order to operate,<sup>95</sup> and states handle licensure requirements and monitor compliance.<sup>96</sup> Additionally, facilities must meet minimum quality and performance standards in order to receive Medicare and Medicaid payments.<sup>97</sup> The Centers for Medicare and Medicaid Services (CMS), the Department of Health and Human Services agency that administers both programs, contracts with states to conduct on-site inspections to ensure its nursing homes meet certain quality and performance standards.<sup>98</sup> These inspections cover over 150 regulatory standards ranging from food preparation to inadequate care practices.<sup>99</sup> Nursing home administrators may fear fines, censure, or loss of licensure if a state or federal inspection uncovers substandard care or a failure to protect residents from sexual abuse.<sup>100</sup> Furthermore, CMS might fine a facility or terminate its payment agreement, among other actions,<sup>101</sup> which could have a devastating impact on a home's

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91. *Id.*

92. *See id.*; *see also* Henneberger, *supra* note 4.

93. *See* Tenenbaum, *supra* note 14, at 704.

94. *Nursing Homes: About Nursing Home Inspections*, MEDICARE.GOV, <http://www.medicare.gov/nursing/aboutinspections.asp> (last visited Jan. 10, 2014).

95. *See, e.g.*, 42 C.F.R. § 483 (2013).

96. *Id.*

97. *Nursing Homes*, CTR. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/NHs.html> (last visited Jan. 10, 2014).

98. *Id.*

99. *See Nursing Homes*, *supra* note 94.

100. An example of a state complaint investigative report related to sexual abuse is available at *Office of Health Facility Complaints Investigative Report*, MINN. DEPT. OF HEALTH (Feb. 16, 2011), <http://www.health.state.mn.us/divs/fpc/directory/surveyapp/ohfcfindings/hl20566002.pdf>.

101. *See, e.g.*, *Somerset Nursing & Rehab. Facility v. U.S. Dep't of Health & Human Servs.*, 502 Fed. Appx. 513, 516 (6th Cir. 2012) (affirming CMS civil monetary penalty (CMP) of \$3,050 per day for a 250-day period resulting from a Medicare-certified nursing home's failures to protect its residents from sexual abuse by another resident and to implement its abuse policy).

operations.<sup>102</sup> It is easier for nursing homes to avoid potential problems than to fight regulatory consequences, especially because a congested judicial system may prevent them from contesting or appealing oversight agencies' determinations.<sup>103</sup>

### *E. Criminal and Civil Liability*

A fifth barrier is the fear of legal repercussions, whether criminal or civil. It is in this context that the difficulty associated with determining dementia and Alzheimer's patients' capacity to consent to sexual contact is most relevant. Like a hospital, a nursing home has legal rights and responsibilities and might be liable for failing to provide care and services to residents or for doing so negligently.<sup>104</sup> In certain circumstances, facility owners and administrators may have personal liability.<sup>105</sup> Physically disabled older residents and cognitively impaired residents are among the three groups of residents who are most likely to be sexually abused in a nursing home.<sup>106</sup> Although cases of nursing home employees sexually assaulting and abusing patients are often in the news,<sup>107</sup> prosecutors also consider and bring charges against residents who assault other residents.<sup>108</sup>

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102. Philip Moeller, *Nursing Homes Squeezed by Medicare Cuts*, U.S. NEWS & WORLD REP. (Aug. 8, 2011), <http://money.usnews.com/money/blogs/the-best-life/2011/08/08/nursing-homes-squeezed-by-medicare-cuts> (discussing the impact of Medicare reimbursement cuts on nursing homes).

103. Timberly Ross, *Neb. Nursing Home: Affection Isn't Sex Abuse*, BUS. WEEK (Apr. 8, 2011), <http://www.businessweek.com/ap/financialnews/D9MFI9GG0.htm> (detailing one nursing home's inability to appeal a deficiency on its record because the sanction, denial of federal funding, had been lifted).

104. Philip M. Gassel, *Nursing Home Law*, in *LAW OF THE ELDERLY* 197, 214 (Jonathan A. Weiss ed., 1977).

105. *See id.*

106. Elizabeth A. Capezuti & Deborah J. Swedlow, *Sexual Abuse in Nursing Homes*, 2 MARQ. ELDER'S ADVISOR 51, 52 (2000).

107. *See* Mary Jane Farmer, *Nurse's Aide from Sherman Jailed on Sexual Assault Charges*, HERALD DEMOCRAT (July 10, 2012), <http://heralddemocrat.com/sections/news/news/local/nurse%E2%80%99s-aide-sherman-jailed-sexual-assault-charges.html>; Kay Fate, *Jury Convicts Man on One Count of Sexual Abuse*, POST-BULLETIN (Oct. 24, 2012, 9:24 AM), <http://www.postbulletin.com/news/stories/display.php?id=1512707>; Adam Wisnieski, *Nursing Home Janitor Arrested for Sexual Abuse*, RIVERDALE PRESS (Dec. 5, 2012), <http://riverdalepress.com/stories/Nursing-home-janitor-arrested-for-sexual-abuse,51491>; *Police: Nursing Home Employee Sexually Assaulted Elderly Woman*, CHI. TRIB. (Oct. 25, 2011), [http://articles.chicagotribune.com/2011-10-25/news/chi-police-nursing-home-employee-sexually-assaulted-elderly-woman-20111025\\_1\\_elderly-woma-nursing-home-felony-criminal-sexual-assault](http://articles.chicagotribune.com/2011-10-25/news/chi-police-nursing-home-employee-sexually-assaulted-elderly-woman-20111025_1_elderly-woma-nursing-home-felony-criminal-sexual-assault); *State: Aide Sexually Assaulted [Two] Residents of Rochester Assisted-Living Facility*, MINNEAPOLIS STAR TRIB. (Mar. 11, 2011, 7:29 PM), <http://www.startribune.com/local/117799083.html?refer=y>.

108. *See, e.g.*, Craig Anderson, *Dover Nursing Home Resident Faces Felony Charges*, DEL. STATE NEWS (Nov. 10, 2012, 6:18 AM), <http://delaware.newszap.com/centraldelaware/117831-70/dover-nursing-home-resident-faces-felony-charges>; *see also* Thomas

Nursing homes may also face negligence suits as a result of allowing or not preventing sexual contact between residents.<sup>109</sup> The general standard of care required of a rest, convalescent, or nursing home is the degree of care, skill, and diligence used by such homes generally in the community.<sup>110</sup> The duty of such a home in a particular case depends on the circumstances<sup>111</sup> and must therefore be commensurate with a patient's physical and mental condition.<sup>112</sup> It must take into account the patient's ability or inability to care for himself.<sup>113</sup> Consequently, nursing homes may wish to prohibit all sexual activity out of an abundance of caution.<sup>114</sup>

In *Healthcare Centers of Texas, Inc. v. Rigby*, the daughter of a blind and deaf nursing home resident sued the facility for negligence after a male resident, who was a known threat and had engaged in numerous instances of inappropriate sexual behavior, sexually assaulted her mother.<sup>115</sup> The jury found for the plaintiff, though the trial court remitted actual damages and the appellate court barred recovery of punitive damages.<sup>116</sup>

In *Dupree v. Plantation Pointe, L.P.*, the daughter of a nursing home resident sued the facility for negligence after an employee found a male resident who suffered from dementia on top of the plaintiff's mother with his pants down and his penis out, moving his hips in an up and down motion.<sup>117</sup> Though the trial court entered a judgment on a jury verdict for the nursing home, the appellate court affirmed in part and reversed and remanded in part.<sup>118</sup> Similarly, in *Free v. Franklin Guest Home*, the wife of a nursing home resident filed suit against the facility, alleging negligence and breach of contract after

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Geyer, *Nursing Home Resident Charged in Sex Assault*, QUAD-CITY TIMES (Aug. 10, 2011, 3:30 AM), [http://qctimes.com/news/local/crime-and-courts/nursing-home-resident-charged-in-sex-assault/article\\_b6bb1dd0-c2ff-11e0-a535-001cc4c002e0.html](http://qctimes.com/news/local/crime-and-courts/nursing-home-resident-charged-in-sex-assault/article_b6bb1dd0-c2ff-11e0-a535-001cc4c002e0.html).

109. See Henneberger, *supra* note 4.

110. See Laurent B. Frantz, Annotation, *Patient Tort Liability of Rest, Convalescent, or Nursing Homes*, 83 A.L.R.3d 871 § 2(a) (1978) 83 A.L.R.3d 871 § 2(a) (1978); see also *Brown v. Univ. Nursing Home, Inc.*, 496 S.W.2d 503, 509 (Tenn. Ct. App. 1972); *Le Blanc v. Midland Nat'l Ins. Co.*, 219 So. 2d 251, 253 (La. Ct. App. 1969); *MacAlpine v. Martin*, 205 So. 2d 347, 349 (Fla. Dist. Ct. App. 1967).

111. See Frantz, *supra* note 110, at § 2(a); see also *MacAlpine*, 205 So. 2d at 349.

112. See Frantz, *supra* note 110, at § 2(a); see also *Dunahoo v. Brooks*, 128 So. 2d 485, 488 (Ala. 1961); *Lagrone v. Hellman*, 103 So. 2d 365, 368 (Miss. 1958); *Murphy v. Allstate Ins. Co.*, 295 So. 2d 29, 35 (La. Ct. App. 1974).

113. See Frantz, *supra* note 110, at § 2(a); see also *MacAlpine*, 205 So. 2d at 349.

114. See *Dupree v. Plantation Pointe, L.P.*, 892 So. 2d 228 (Miss. 2004); *Healthcare Ctr's of Texas, Inc. v. Rigby*, 97 S.W.3d 610 (Tex. App. 2002); *Free v. Franklin Guest Home*, 397 So. 2d 47 (La. Ct. App. 1981).

115. *Rigby*, 97 S.W.3d at 616.

116. *Id.* at 617.

117. *Dupree*, 892 So. 2d at 230.

118. *Id.* at 236.



a psychologically impaired resident allegedly assaulted the plaintiff's husband.<sup>119</sup> Even when two residents seemingly consent to sexual activity, their ability to consent may be blurred or diminished by dementia or Alzheimer's disease.<sup>120</sup>

Another reason facilities hesitate to allow sexual activity is because elderly residents might fall and sustain injuries during the activity.<sup>121</sup> Falls are the most common source of nursing home litigation.<sup>122</sup> The outcomes in cases involving unattended falls are split almost evenly, but plaintiffs have a slight edge.<sup>123</sup> Nursing home administrators and staff may be unwilling to allow frail, unstable residents to spend much time engaging in physical activity outside the presence of a staff member.<sup>124</sup>

Sexually transmitted diseases (STDs) can be another source of liability. From 2005 to 2009, the number of reported cases of syphilis and chlamydia among adults fifty-five years old and older increased by forty-three percent.<sup>125</sup> In Florida, reported cases increased by sixty-two percent over the same period; the increase in central Florida was seventy-one percent.<sup>126</sup> The rise in STDs has been attributed to increased longevity and medications like erectile dysfunction aids that make sex possible longer into people's lives.<sup>127</sup> Many older adults do not use condoms because they were not exposed to the sex education and safe sex promotion with which younger generations are

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119. *Free*, 397 So. 2d at 48.

120. *See Henneberger, supra* note 4.

121. *See, e.g., Frantz, supra* note 110, at § 2(b).

122. *See id.*

123. *See id.*; *Dunahoo v. Brooks*, 128 So. 2d 485, 486, 490 (results favorable to plaintiff); *Facey v. Merkle*, 148 A.2d 261, 263, 266 (Conn. 1959) (results favorable to plaintiff); *Gunn v. Hi-C-Home*, 490 P.2d 999, 1001 (Or. 1971) (results favorable to defendant); *Dusine v. Golden Shores Convalescent Ctr.* 249 So. 2d 40, 40–41 (Fla. Dist. Ct. App. 1971) (remanding for new trial); *Marotte v. Whitehall of St. Petersburg, Inc.*, 195 So. 2d 225, 226–27 (Fla. Dist. Ct. App. 1967) (results favorable to plaintiff); *Russell ex rel. Wunstell v. Kossover*, 634 So. 2d 72, 73, 75 (La. Ct. App. 1994) (results favorable to plaintiff); *Powell v. Parkview Estate Nursing Home*, 240 So. 2d 53, 54, 57 (La. Ct. App. 1970) (results favorable to plaintiff); *Smith v. Gravois Rest Haven, Inc.*, 662 S.W.2d 880, 881, 885 (Mo. Ct. App. 1983) (results favorable to plaintiff); *see also Ferguson v. Belmont Convalescent Hosp.*, 343 P.2d 243, 256 (Or. 1959) (results favorable to defendant); *Ericson v. Petersen*, 253 P.2d 99, 99, 102 (Cal. Dist. Ct. App. 1953) (results favorable to defendant); *Ivy Manor Nursing Home, Inc. v. Brown*, 488 P.2d 246 (Colo. App. 1971) (results favorable to plaintiff); *Tait v. W. World Ins. Co.*, 220 So. 2d 226, 229 (La. Dist. Ct. App. 1969) (results favorable to defendant); *Clarke v. Gowen Sanatorium, Inc.*, 160 So. 2d 426, 427–28 (La. Ct. App. 1964) (results favorable to defendant).

124. *See Frantz, supra* note 110, at § 2(b).

125. Marni Jameson, *Seniors' Sex Lives Are Up—and So Are STD Rates*, ORLANDO SENTINEL (Apr. 16, 2011), [http://articles.orlandosentinel.com/2011-04-16/news/os-seniors-sex-life-std-increase\\_1\\_syphilis-and-chlamydia-stds-seniors](http://articles.orlandosentinel.com/2011-04-16/news/os-seniors-sex-life-std-increase_1_syphilis-and-chlamydia-stds-seniors).

126. *See id.*

127. *See id.*



familiar.<sup>128</sup> Furthermore, many STDs have no symptoms and thus go untreated.<sup>129</sup> This can make seniors more likely to develop other conditions, and it can exacerbate existing conditions such as heart disease and diabetes.<sup>130</sup> In response to the rising STD rate and lack of education, medical professionals have launched campaigns to promote protection and safe sex among seniors.<sup>131</sup> For now, nursing homes may wish to avoid the potential liability issues altogether.

Finally, nursing homes carry liability insurance to help to cover losses incurred as a result of injuries or damages.<sup>132</sup> Insurance is vital to the operation of facilities and has increased in cost in some states in recent years.<sup>133</sup> Obtaining a liability policy that covers losses arising from sexual activity may be cost-prohibitive for many facilities.

#### IV. NURSING HOME REGULATIONS

Healthcare is the second most regulated industry next to nuclear power, but none of the nursing home regulations address consensual sexuality.<sup>134</sup> Though older adults living in the community can and do enjoy freedom of sexual expression in their own homes, freedom of sexual expression is often denied in residential settings.<sup>135</sup> Facilities have denied this freedom of sexual expression despite federal and state laws that promote the dignity and social and emotional welfare of residents.<sup>136</sup>

In 1987, the Federal Nursing Home Reform Act amended the Civil Rights of Institutionalized Persons Act of 1980 and added a Residents' Bill of Rights.<sup>137</sup> A codified right to privacy includes the

128. *See id.*

129. *See id.*

130. *See id.*

131. One website that provides resources to seniors has sections dedicated to condom use and STDs, desire and pleasure, long-term care, health issues, LGTBQ issues, talking to partners, and talking to health professionals. The group even created a video featuring randy seniors simulating a number of explorative sexual positions. SAFER SEX FOR SENIORS, <http://safersex4seniors.org> (last visited Jan. 10, 2014).

132. BERNADETTE WRIGHT, AARP PUB. POLICY INST., NURSING HOME LIABILITY INSURANCE: AN OVERVIEW 1 (2003).

133. *See id.* at 2.

134. Christopher Burrell, *Alzheimer's Experts Believe New Mass. Law Will Improve Nursing Home Care*, PATRIOT LEDGER (July 10, 2012, 5:41 AM), <http://www.patriotledger.com/topstories/x1062470242/Alzheimers-experts-believe-new-Mass-law-will-improve-nursing-home-care>.

135. McAuliffe et al., *supra* note 39, at 193.

136. *See, e.g.*, 42 C.F.R. § 483.10 (2013); CAL. HEALTH & SAFETY CODE § 1771.7 (West 2012).

137. *See* Martin Klauber & Bernadette Wright, *The 1987 Nursing Home Reform Act*, AM. ASS'N RETIRED PERS., [http://www.aarp.org/home-garden/livable-communities/info-2001/the\\_1987\\_nursing\\_home\\_reform\\_act.html](http://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html) (last visited Jan. 10, 2014).

right to share a room with one's spouse if both live in the same facility.<sup>138</sup> A right to be treated with dignity requires staff to carry out the activities that assist the resident to maintain and enhance his or her self-esteem and self-worth, such as grooming and respecting private space and property.<sup>139</sup> A third relevant right is that to exercise self-determination.<sup>140</sup> In order to receive Medicare and Medicaid payments, facilities must receive state certification attesting that they are in substantial compliance with the Patients' Bill of Rights.<sup>141</sup> The Patient Self-Determination Act of 1990 includes the right to facilitate one's own healthcare decisions, the right to accept or refuse medical treatment, and the right to make an advance healthcare directive.<sup>142</sup>

Nursing homes are also heavily regulated at the state level.<sup>143</sup> Many have some statement of rights similar to the federal version.<sup>144</sup> For example, California nursing home residents have the right to "live in an environment that enhances personal dignity, maintains independence, and encourages self-determination," and to "participate in activities that meet individual physical, intellectual, social, and spiritual needs."<sup>145</sup>

Nursing home floors were once segregated by sex, and married couples were not allowed to share rooms.<sup>146</sup> Co-ed floors were later introduced, spurred by the belief that older people were "not sexual at all."<sup>147</sup> Federal law now requires facilities to allow spouses to share a room if possible.<sup>148</sup> There is no requirement regarding unmarried residents who wish to avail themselves of privacy in order to be intimate.

Nursing homes' policies on sexual activity vary. Some facilities, particularly those with religious affiliations, prohibit sexual contact between residents.<sup>149</sup>

Most nursing homes have no formal policy governing residents' sexual expression.<sup>150</sup> Instead, they handle the issue as it arises and create guidelines and policies on a case-by-case basis.<sup>151</sup> The policies

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138. 42 C.F.R. § 483.10 (2013).

139. *Id.* § 483.15.

140. *Id.* § 483.10.

141. *Id.* § 483.1.

142. *Position Statement: Nursing And the Patient Self-Determination Acts*, AM. NURSES ASS'N (Nov. 18, 1991), available at <http://ana.nursingworld.org/MainMenuCategories/EthicsStandards/Ethics-Position-Statements/prtetsdet14455.aspx> (last visited Jan. 10, 2014).

143. See Burrell, *supra* note 134.

144. See CAL. HEALTH & SAFETY CODE § 1771.7 (West 2012).

145. See *id.*

146. DICKINSON & VOSEN, *supra* note 2, at 238–39.

147. *Id.* at 239.

148. 42 C.F.R. § 483.10 (2013).

149. See Morris, *supra* note 9.

150. See Brown, *supra* note 17.

151. See Engber, *supra* note 9.

may differ depending on marital status and competency.<sup>152</sup> Policies that encourage sexual expression are the exception.<sup>153</sup> Staff at the Hebrew Home at Riverdale in New York City recognize and appreciate residents' need for intimacy.<sup>154</sup> The Hebrew Home was the first facility of its kind to develop a policy to recognize and protect the sexual rights of nursing home residents, while distinguishing between intimacy and sexually inappropriate relations.<sup>155</sup> There, residents have access to private rooms, and staff carefully read cues to ensure that sexual relationships are consensual.<sup>156</sup>

#### V. LEGAL PROXY MECHANISMS FOR PRESERVING SEXUAL AUTONOMY

States have *parens patriae* authority to intervene or to empower parties to intervene in the lives of nonautonomous persons without their consent.<sup>157</sup> Legal tools states have created under this authority include involuntary commitment, guardianship, adult protective services, representative payees, and both ordinary and durable power of attorney.<sup>158</sup> The specifics of each are the products of state and local legislation, regulation, and common law decisions and accordingly vary by jurisdiction.<sup>159</sup>

Power of attorney is one legal device that might provide an avenue for incompetent, elderly residents to retain their sexual autonomy.<sup>160</sup> Assigning a durable, sexual power of attorney to be used in conjunction with an advance healthcare directive could allow nursing home residents to engage in sexual relationships while shielding nursing homes from the barriers that make administrators unwilling to allow such activity.

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152. *See id.*

153. *See id.*

154. Moisse, *supra* note 23 (“‘Older adults need to have pleasures, because that’s what helps counterbalance the challenges they face when they become infirmed and move into a nursing home,’ said [director of memory care services and sexual rights educator] [Robin] Dressel, who in 1995 helped draft the home’s policies on sexual expression. ‘Our general philosophy is that this is still a life to be lived. Your rights carry with you throughout your lifetime. It’s not as though you arrive at a nursing home and you vacate those rights.’”).

155. *See* HEBREW HOME AT RIVERDALE, *A Human Right: Sexual Intimacy*, <http://www.hebrewhome.org/se.asp> (last visited Jan. 10, 2014).

156. Moisse, *supra* note 23.

157. Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, in *LAW OF THE ELDERLY* 227, 233 (Jonathan A. Weiss ed., 1977).

158. *Id.*

159. *Id.*

160. *See* Robert D. Dinerstein, *Sexual Expression for Adults with Disabilities: The Role of Guardianship*, 23 *IMPACT* 12, 12 (2010).

### A. Power of Attorney

Power of attorney is a document that creates an agency relationship in which a principal empowers an agent, or attorney-in-fact, to act on his behalf.<sup>161</sup> Depending on the jurisdiction, the agent agrees to act in accordance with the principal's reasonable expectations, if known, or in the principal's best interest otherwise.<sup>162</sup> The tool is created and governed by state statute,<sup>163</sup> and all states permit the use of power of attorney.<sup>164</sup> The principal must be competent at the time power of attorney is created, and an agreement must generally be in writing and be signed by the principal.<sup>165</sup>

Under common law, power of attorney terminates upon the principal's incapacitation.<sup>166</sup> A durable power of attorney continues even after the principal is incapacitated.<sup>167</sup> Some states require that a document be drafted so as to specifically include this power.<sup>168</sup> In others, the power is durable by default.<sup>169</sup> Two types of power of attorney

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161. KAPP, *supra* note 24, at 107. A durable power of attorney is by default immediate, that is, it takes effect upon execution unless the principal requests that the drafting attorney retain the document until a later date. PETER J. STRAUSS, ROBERT WOLF & DANA SHILLING, *AGING AND THE LAW* 806 (1990). Many states allow for the creation of a "springing" power of attorney, which takes effect only after the principal becomes incapacitated. *Id.* This allows the principal to retain his autonomy for as long as possible. *Id.*

162. *E.g.*, VA. CODE ANN. § 64.2-1612 (West 2012). There are two commonly used surrogate decision-making models: the best interests model and a substituted judgment standard. KAPP, *supra* note 24, at 108. The best interests model is paternalistic and sometimes criticized because it is "functionally akin to a parent-child relationship." *Id.* The more modern trend is toward a substituted judgment standard, which obligates an agent to make those decisions that a principal would make personally, "according to the principal's own preferences and values to the extent those preferences and values can be accurately ascertained, if the patient were able . . . to make and express his or her own competent decisions." *Id.*

163. Peter J. Strauss, *Durable Power of Attorney*, STRENGTH FOR CARING, <http://www.strengthforcaring.com/money-insurance/legal-power-of-attorney/durable-power-of-attorney> (last visited Jan. 10, 2014).

164. STRAUSS ET AL., *supra* note 161, at 441.

165. *E.g.*, VA. CODE ANN. § 64.2-1603 (West 2012).

166. STRAUSS ET AL., *supra* note 161, at 805.

167. A. KIMBERLEY DAYTON ET AL., *ADVISING THE ELDERLY CLIENT*, § 33:2 (West 2012).

168. *Id.* § 33:3 ("A durable power of attorney must be embodied in a written document. Most state statutes provide for creation of a durable power of attorney under the same circumstances as an ordinary (non-durable) power, through the inclusion of language similar to the following (derived from the Uniform Durable Power of Attorney Act): 'This power of attorney shall not be affected by the disability, incompetency, or incapacity of the principal.' Such language might be supplemented by the phrase 'or lapse of time' to clarify that the DPOA is intended to be of indefinite duration. Language to the effect that 'This power of attorney shall be effective upon the disability, incompetency, or incapacity of the principal [or upon the occurrence of some other condition or contingency]' will render the DPOA 'springing' in those jurisdictions that recognize this form of a power of attorney.") (footnote omitted).

169. *E.g.*, VA. CODE ANN. § 64.2-1602 (West 2012).

currently exist: the power of an agent to manage a principal's financial affairs and the power of an agent to make healthcare decisions on the principal's behalf.<sup>170</sup>

### *B. Sexual Power of Attorney*

In theory, with minor adjustments to state laws governing power of attorney, a nursing home resident could execute a sexual power of attorney as an independent document or as part of a broader power of attorney for healthcare. The document would authorize a trusted agent to make decisions about the principal's sexual activities.

#### *1. Benefits—Involvement of Principal*

Power of attorney differs from other surrogate decision-making tools commonly employed in elder law, such as guardianship and conservatorship,<sup>171</sup> in that the principal chooses his agent.<sup>172</sup> A judge may appoint a guardian or conservator, or a certain person might be given priority because of a state statute.<sup>173</sup> Assigning a power of attorney would allow a principal to choose an agent who shares the principal's preferences and values and supports the prospect of the principal becoming involved in a sexual relationship in the future.<sup>174</sup> The principal may also set his own requirements as to how the power will be triggered.<sup>175</sup> Utilizing power of attorney in this sense could allow principals to retain their personal autonomy, dignity, integrity, and self-esteem, something more severe alternatives like guardianship often do not.<sup>176</sup>

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170. See KAPP, *supra* note 24, at 107.

171. See John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 602 (1972).

172. See KAPP, *supra* note 24, at 107.

173. See STRAUSS ET AL., *supra* note 161, at 805 "States . . . vary in the degree to which individuals are permitted to designate their own future fiduciaries. Where no valid designation has been made, the usual rule is that the spouse (or a person designated by a deceased spouse) has first priority as a guardian; if there is no spouse, or he or she is unable or unwilling to serve, the grown children of the impaired person have next priority, followed by the surviving parents (or designees of deceased parents) of the impaired person; they any "six-month relative" (a relative with whom the impaired person has resided for six months or more), then the designee of the person caring for the incapacitated person, or paying for his or her care. The statutory scheme for conservators is usually a little different: first priority normally goes to a conservator or guardian of property already appointed in another state; then the nominee of the potential conservatee, . . . then the people in the order provided for guardians." *Id.* at 389.

174. See KAPP, *supra* note 24, at 108.

175. See DAYTON ET AL., *supra* note 167. For example, a principal could make the power effective upon a court's determination of legal incapacity or he could, more simply, require testimonials from physicians and other nursing home staff as to his inability to make consequential decisions. *Id.*

176. Horstman, *supra* note 157, at 229.

## 2. *Scope, Low Cost, and Other Considerations*

The durable power of attorney is a flexible but powerful tool.<sup>177</sup> Power of attorney can be of broad or narrow scope<sup>178</sup> and terminates upon the principal's death.<sup>179</sup> A durable power of attorney is typically simple to produce and execute, and doing so might not even require a lawyer. Many state statutes include model forms for healthcare powers of attorney, healthcare proxies, and advance directives.<sup>180</sup> Some statutes specify that any form that is substantially similar to the statutory form will suffice.<sup>181</sup> Nursing home residents could work with nursing home staff and a lawyer to draft a satisfactory provision that addresses the resident's sexuality. Some states require that the document be registered or filed in the probate court or elsewhere to provide for accountability on the part of the agent and protect the principal from potential abuse.<sup>182</sup> Certain states require formalities associated with the execution of a will or deed.<sup>183</sup> Such requirements can still easily be met with the aid of an attorney.

## 3. *Challenges*

Surrogate decision making can present prickly ethical issues.<sup>184</sup> In many ways, deciding whether your mother would consent to a sexual relationship with another resident if she were capable is more difficult than deciding whether she would want to sell her car if she becomes physically impaired or even whether she would wish to remain on life support after a debilitating stroke.<sup>185</sup> In many situations it might also be difficult to assess whether a sexual relationship would be in her best interest. Executing an advance directive could help prevent and manage some of these difficulties.

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177. STRAUSS ET AL., *supra* note 161, at 805.

178. DAYTON ET AL., *supra* note 167. For example, a principal could empower his agent to handle almost all of his financial and proprietary affairs, or he could limit the agent's power to do certain things, such as sell a house or withdraw money from a certain bank account on one occasion. See HEGLAND & FLEMING, *supra* note 42, at 163.

179. STRAUSS ET AL., *supra* note 161, at 805.

180. DAYTON ET AL., *supra* note 167, at § 33:45.

181. *Id.*

182. *Id.* § 33:5.

183. *Id.*

184. See Elias S. Cohen, *Resolving Ethical Dilemmas Arising from Diminished Decision-Making Capacity of the Elderly*, in OLDER ADULTS' DECISION-MAKING AND THE LAW 162, 168–69 (Michael Smyer, K. Warner Schaie & Marshall B. Kapp eds., 1996).

185. See *id.* at 171–72 (“Probing preferences, values and perceptions requires something different from collecting facts. Finding out what people believe, what people hold dear, their notions of justice and fairness, and how they may have operationalized those notions during the lifetime yields understanding about how people exercise autonomy, and measure their relationships and their self value.”).

### C. Advance Directives

In order to retain as much autonomy as possible after decision-making power transfers from principal to agent, the principal should also have an advance directive in place to aid or instruct the agent with regard to sexual decisions. The term “advance directive” does not have a technical meaning unless it is defined by state law.<sup>186</sup> “In many states, an ‘advance directive’ is statutorily defined as a planning document that combines a declaration relating to a person’s preferences regarding healthcare treatment with language appointing a healthcare proxy, listing surrogate decision-makers in a particular order, and addresses other matters that frequently arise near or after death.”<sup>187</sup> Depending on context and the relevant state statutes, an advance directive might be: a statement or declaration expressing the patient’s desires concerning medical treatment should he be unable to make decisions for himself due to incapacity, a “do not resuscitate” order, or some other planning tool or written instruction.<sup>188</sup>

An advance directive could help fill gaps that remain after a resident executes a durable power of attorney.<sup>189</sup> She could provide instructions about her wishes in certain situations, such as the continuation of sexual intimacy with a current partner or entry into new sexual relationships with other nursing home residents.<sup>190</sup> The instructions would aid the resident’s surrogate decision maker make a final determination in a complex situation.<sup>191</sup>

### CONCLUSION

The end of life can be a lonely time for people, and living in a nursing home can augment that loneliness. A lucky few find joy and comfort in romantic relationships with fellow nursing home residents, and sometimes those relationships become sexual. Issues surrounding

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186. DAYTON ET AL., *supra* note 167, at § 33:11.

187. *Id.*

188. *Id.*

189. Lisa Brodoff, *Planning for Alzheimer’s Disease with Mental Health Advance Directives*, 17 ELDER L.J. 239, 278–80 (2010).

190. *Id.* at 285 (“Clients can state . . . whether or not they would ever agree to a relationship with another resident, and if so, under what circumstances. For example, one person’s religious or moral code might dictate that he or she would never consent to any other relationship while married, even if he or she appeared to be happier when the other person was with them. Another might say that a relationship with another patient would be fine as long as the client did not appear to be coerced in any way.”).

191. *Id.* (“[M]ost would agree that having advance knowledge of [a resident’s] values and wishes around the issue, prior to the onset of late-stage dementia, would help in determining how to approach handling a resident’s sexual desires.”).



consent, state and federal regulations, criminal and civil liability, and personal values can induce nursing home staff and residents' families to intervene and prevent residents from engaging in sexual activity.

With changes to state law to expand the tool of power of attorney, residents who want to retain autonomy in decisions about their bodies and relationships could employ surrogate decision-making tools like durable powers of attorney and advance healthcare directives to ensure that they are able to participate in and enjoy sexual activity even after they have lost the capacity to consent and even if their families disapprove of the activity. Perhaps the most difficult aspect of adopting such a mechanism would be putting aside our personal and pre-conceived notions about sexual conduct in order to allow others to experience a little happiness in an otherwise gloomy setting.

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