Sexual Rights

of Adults with Developmental Disabilities

Legal Authorities

publication of
Capacity to Love

https://alternativestoguardianship.com/capacity-to-love.html

Contents

Thomas F. Coleman

Jennifer Hulme

Online:

https://alternativestoguardianship.com/legal-authorities.pdf

Email:

Jennifer Hulme – jennifer@gohulme.com

Thomas F. Coleman – tomcoleman@spectruminstitute.org

Abstract

Available data suggests that about 73,000 adults with intellectual and developmental disabilities reside in Missouri. Since only 30,000 adults are in guardianships – and many if not most of them do not have I/DD – it is clear that the overwhelming majority of adults with developmental disabilities are not living under an order of guardianship.

Adults who are not in a guardianship are presumed to have the legal capacity to consent to sex. The freedom of intimate association is constitutionally protected. Unless they are restricted by a court order, adults with developmental disabilities have the same rights as adults without disabilities.

There are federal and state laws and regulations that protect the sexual rights of consenting adults, including those with developmental disabilities. State officials, agencies, and service providers are obligated to respect these rights. Reasonable restrictions as to the time, place, and manner in which sexual rights are exercised are permissible, but an outright prohibition is not – unless ordered by court and even then only after the adult has been afforded due process of law.

When an adult is targeted by a guardianship proceeding – which occurs to 3,000 adults per year in Missouri – capacity assessment experts, court-appointed attorneys, and judges, should tread carefully. The fundamental right of sexual expression should not be denied absent compelling reasons. The same caution should be used by Adult Protective Services.

Guardians of the 30,000 adults living under an order of guardianship should look to the Standards of Practice of the National Guardianship Association as they evaluate the ability of adults under their supervision to engage in consenting sexual activities.

> "To the extent that any particular individual who is a "vulnerable adult" for some purposes is nevertheless capable of consenting to sex and does consent to sex in a private place, that conduct is protected by the Due Process Clause."
>
> *State v. Hamlin*
> 156 Idaho 307
> (Idaho Ct. App. 2014)

Many adults with developmental disabilities, whether they are in a guardianship or not, would have the capacity to consent to sexual activity with a willing adult partner if they had appropriate sex education and counseling. The State of Missouri should provide comprehensive and understandable sex education and counseling to this population.

Adults with developmental disabilities – regardless of gender, marital status, or sexual orientation – deserve the same opportunity to experience sexual relationships as adults without disabilities.

This legal report on the parameters of the freedom of intimate association, along with the related bibliography of academic and professional literature, are intended to provide a better understanding of the sexual rights of adults with developmental disabilities. Such an understanding should lead to an informed and balanced approach to a sensitive topic.

Sexual Rights

of Adults with Developmental Disabilities

Legal Authorities

Background

Among the 50 states, Missouri has been one of the slowest to recognize the sexual rights of consenting adults. Today, consenting adult sex in private is legal in Missouri, regardless of the gender, sexual orientation, or marital status of the parties. Anyone 17 years of age or older is considered an adult for purposes of consent to sex.

From the time that Missouri first became a state in 1821, it took nearly 200 years for the government to recognize the sexual privacy rights of consenting adults regardless of marital status. Not all marital sex was legal. Adultery was crime as was oral or anal sex between spouses. The only form of marital sex that was legal was penile-vaginal intercourse.

Sex between a man and woman not married to each other was criminalized as "fornication." It was also a crime for an unmarried couple to "lewdly and lasciviously cohabit with each other." All forms of consenting adult homosexual sex in private was a crime.

Then, as part of a comprehensive revision of the Missouri Penal Code in 1977, all forms of consenting heterosexual sex in private were decriminalized. However, consenting homosexual sex in private remained a crime. Curiously, sex with an animal was legal. Criminal homosexual conduct was defined as any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of a person of the same sex.

A challenge to the constitutionality of the statute criminalizing consenting adult homosexual sex was rejected by the Missouri Supreme Court in *State v. Walsh*, 713 S.W.2d 508 (1976).

Attempts to repeal the law against consenting homosexual sex in private failed until the Missouri Legislature was confronted with the decision of the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). To bring state law into conformity with the United States Constitution, the legislature repealed the law in 2006. As a result, all forms of private sexual activity between consenting adults are now legal in Missouri regardless of the gender, marital status, or sexual orientation of the parties.

The legality of private sexual conduct where one or both of the adults has a developmental disability depends on whether both adults have the legal "capacity" to consent to sex.

Federal Constitution

The development of federal constitutional protections for consenting adult sexual activities was advanced when the United States Supreme Court issued a landmark ruling nearly 60 years ago. *Griswold v. Connecticut*, 381 U.S. 479 (1965). That case involved a statute in Connecticut which criminalized access to birth control medication for everyone, including married couples.

Delivering the opinion of the Court, Justice William O. Douglas concluded that the Connecticut law violated the constitutional right of privacy – a right that was not explicitly mentioned in the Constitution but which the ruling declared was implicit in several of its provisions. Thus, a constitutional right of marital privacy was recognized for the first time.

Several years later, the Court was called upon to decide whether the constitutional right of privacy extended to unmarried persons who wanted to use contraceptives. It ruled affirmatively. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). As a result, the principle of sexual privacy was extended to all adults who wanted to use contraceptives.

The Supreme Court later explained that freedom of intimate association was a matter of personal liberty protected by the United States Constitution. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Writing for the Court, Justice William J. Brennan, Jr. stated:

> "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty."

It took nearly 20 years for the Supreme Court to specifically announce that the principle of constitutionally-protected freedom of intimate association applies to consenting adult sex in private. *Lawrence v. Texas* (2003) 539 U.S. 558, 578. Endorsing a pronouncement made by a dissenting jurist in 1986, a majority of the Court in the Lawrence case declared that a Texas law criminalizing consenting adult homosexual sex was unconstitutional, stating:

> "[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

The Court later specified that its decision in *Lawrence v. Texas* confirmed that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association."

Obergefell v. Hodges, 576 U.S. 644, 667 (2015).

These federal precedents now make it clear that adults in any state, including Missouri, have a constitutional right to engage in consenting sex in private. The operative terms of this constitutional right are "adults," "consenting" and "private."

Age of Consent

Each state sets the age at which an individual is deemed to have the legal capacity to consent to sex with another person. The age of consent is generally defined in the context of a criminal statute. Sex with someone under that age is deemed to be a criminal offense.

The age of consent varies among the states. Some, such as California, set the age at 18. Others, such as New York, designate 17 as the minimum age for lawful sex. In the majority of states, the age consent for sex is 16.

Some states have enacted what is sometimes called "Romeo and Juliet" laws that set a hard-and-fast age of consent but which also have a gray area where sex between teenage "peers" is not criminal. Missouri is one of those states.

In Missouri, those 13 years old and younger cannot consent to sex with anyone (§566.067). Individuals 14, 15 and 16 years-old cannot consent to sex with someone who is more than 4 years older (§566.071) or who is 21 and older (§566.034) and persons who are at least 17 years-old can consent to sex with anyone 14 years or older (§566.034).

Disability and Incapacity

The issue of capacity to consent to sex arises in a variety of contexts for adults with developmental disabilities. For some, it becomes an issue when a petition is filed for a guardianship or conservatorship.

In a Guardianship

Under Missouri law, there is a presumption of capacity, with a corresponding burden on a petitioner in a guardianship proceeding to prove incapacity or partial incapacity by clear and convincing evidence. *In re Link*, 713 S.W.2d 487, 492, 497, fn. 10. (Mo. 1986) Furthermore, "incapacity for some purposes does not mean incapacity for all purposes." *Matter of Conserv. Estate of Moehlenpah* (Mo. Ct. App. 1989) 763 S.W.2d 249, 257.

Even when an adult is placed under an order of guardianship or conservatorship, some state courts have ruled that such an adult is not automatically deemed incapable of consenting to engage in sex with another adult. In those jurisdictions, capacity to consent to sex must be

determined on a case by case basis in which a jury would consider all circumstances.

In *Kortner v. Martise* (Conn. 2014) 91 A.3d 412, 442, the court ruled that "[T]he legislature intended for conservatorships not only to be limited in scope but also not to unnecessarily restrict the independence of the person under the conservatorship," explaining:

> "The current statutory scheme governing conservatorships and its historical development make it abundantly clear that the legislature intends for conserved persons to retain as much decision-making authority and independence as possible, and that a conservator's role should be limited so as to accomplish that objective. Indeed, the fact that a conservator is appointed does not mean that the conserved person loses all of his or her civil rights. Rather, the conservator is to manage the conserved person's affairs through the least restrictive means possible. . .
>
> "On the basis of the statutory scheme for conservatorships, we cannot conclude that any conserved person is legally unable to consent to sexual conduct. Instead, we conclude that the issue of whether a conserved person is able to consent to sexual conduct is a factual question for the jury to decide based on the nature of the particular conservatorship and the abilities of the conserved person.
>
> "In the present case, the plaintiff did not establish, or even allege, that her appointment as conservator of Kendall's person specifically included the duty to manage Kendall's interpersonal and/or romantic relationships. Indeed, as the trial court recognized, the evidence demonstrated that Kendall lived in her own apartment, spent unsupervised time there, and was able to make decisions about her household chores and carry on interpersonal relationships, including those on the computer. Instead, the plaintiff maintains that the fact that Kendall was a conserved person was sufficient by itself to demonstrate that she was unable to consent to sexual conduct. We disagree. A bright line rule on this issue, as suggested by the plaintiff, would be contrary to the clear legislative intent as exemplified by the statutory scheme. It would further affect the civil liberties of all conserved persons. Therefore, we conclude that the final determination of whether Kendall had the ability to consent to sexual conduct is a factual question that the jury must decide."

A similar, but more explicit ruling, was issued in California in the case of Virgie Foy. She was adjudicated to be a gravely disabled and incompetent person under California's mental health conservatorship law and was confined in a locked mental health facility . The order specifically denied her the right to make or refuse consent for medical treatment.

An appellate court ruled that the mere fact that Virgie was confined in a mental health facility under an order of conservatorship did not override her constitutionally protected sexual rights. *Foy v. Greenblott*, 141 Cal.App.3d , 10 (1983).

> "Every institutionalized person is entitled to individualized treatment under the 'least restrictive' conditions feasible — the institution should minimize interference with a patient's individual autonomy, including her personal 'privacy' and 'social interaction.' . . . Obviously, effective hospital policing of patients would not only deprive them of the freedom to engage in consensual sexual relations, which they would enjoy outside the institution, but would also compromise the privacy and dignity of all residents. . .
>
> "Congress has also declared that all state mental health programs should provide treatment in the least restrictive environment. (Mental Health Systems Act, 42 U.S.C. § 9501(1)(A), (F), (G), (J).) Numerous courts have found a federal constitutional right to the least restrictive conditions of institutional treatment. . .
>
> "Within the considerable range of discretion left to them, mental health professionals are expected to opt for the treatments and conditions of confinement least restrictive of patients' personal liberties."

Under Missouri law, every protected person has the right to the least restrictive form of guardianship assistance, taking into consideration the ward's functional limitations, personal needs, and preferences. They also have the right to a guardian who acts in their best interests. (RSM §475.361)

The Standards of Practice of the National Guardianship Association (NGA) provide guidance on what a guardian should do to act in the best interests of a protected person. The standards specifically address the issue of sexuality. A court may refer to these standards when evaluates the duties of a guardian. *O'Hare v. Hamric*, 868 So. 2d 687, 697, fn. 3 (Fla. Dist. Ct. App. 2004)

NGA Standard 10 – The Guardian's Duties Regarding Diversity and Personal Preferences of the Person – states:

> "The guardian shall acknowledge the person's right to interpersonal relationships and sexual expression. The guardian shall take steps to ensure that a person's sexual expression is consensual, that the person is not victimized, and that an environment conducive to this expression in privacy is provided."

Standard 10 adds:

> A. The guardian shall ensure that the person has information about and access to accommodations necessary to permit sexual expression to the extent the person desires and to the extent the person possesses the capacity to consent to the specific activity.
>
> B. The guardian shall take reasonable measures to protect the health and well being of the person.
>
> C. The guardian shall ensure that the person is informed of birth control methods. The guardian shall consider birth control options and choose the option that provides the person the level of protection appropriate to the person's lifestyle and ability, while considering the preferences of the person. The guardian shall encourage the person, where possible and appropriate, to participate in the choice of a birth control method.
>
> D. The guardian shall protect the rights of the person with regard to sexual expression and preference. A review of ethnic, religious, and cultural values may be necessary to uphold the person's values and customs.

Not in a Guardianship

"(1) All individuals served by the Division of DD shall be entitled to the following rights and privileges without limitation, unless otherwise provided by law . . . (B) To have the same legal rights and responsibilities as any other citizen; . . . (3) An individual's rights as outlined in section one (1) may not be restricted, including, but not limited to, by a provider of targeted case management or home and community based services, without due process. 9 CSR 45-3.030 – Individual Rights. The Division has a booklet explaining these rights.

Unless adjudicated to be incapacitated by a court of law, every person is presumed to be competent to make decisions. Missouri Probate Code Sec. 475.078. A presumption of capacity is a longstanding rule of law. *Norton v. Paxton*, 110 Mo. 456 (1892). The burden of proof is on the party who seeks to show incapacity. *Masoner v. Bates County Nat. Bank*, 781 S.W.2d 235, 239 (Mo. Ct. App. 1989).

Therefore, adults with developmental disabilities who are not under an order of guardianship are presumed to be competent to consent to sex until the contrary is proved in a court of law.

Capacity may become an issue in any number of settings, such a civil proceeding challenging the validity of a will or a contract. A judge or jury also may be called upon to decide the issue in a criminal prosecution of a defendant charged with committing a sexual act with an

adult who, because of his or her mental disability, allegedly lacked the capacity to consent.

U.S. Supreme Court rulings affirming that consenting adult sex in private is constitutionally protected do not undermine the authority of the state to criminalize sex with an adult who lacks the legal capacity to consent. *Hopkins v. State*, 615 S.W.2d 530 (Tex.App.2020).

"The Lawrence Court held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct. The holding does not affect a state's legitimate interest and indeed, duty, to interpose when consent is in doubt." *Anderson v. Morrow*, 371 F.3d 1027, 1032-1033 (9th Cir. 2004)

Evidence that an adult had a mental disability when sexual conduct occurred is not sufficient to support a finding that the person lacked the capacity to consent. *State v. Frost*, 141 N.H. 493 (N.H. 1996). In a criminal case, the state must prove the defendant knew that the alleged victim did not understand the nature of the act or could not resist it due to a mental disability. Such judicial pronouncements do not create an unconstitutional rule of law that adults with intellectual disabilities categorically cannot consent to sex. *Hopkins v. State*, at p. 552. It is not unconstitutional for the state to criminalize sexual acts where consent is lacking because the victim is incapable of either giving or withholding actual consent.

"Consent and the capacity to consent are two wholly separate concepts." *State v. Davie* (Mo. Ct. App. 2021) 638 S.W.3d 514, 521. "[T]he ability to experience certain sexual feelings and urges does not necessarily mean that the person experiencing those has the capacity to consent to specific sexual activity with another person." *State v. Davie*, at p. 522.

The issue of capacity to consent to sex for adults not in a guardianship may be called into question by third parties who provide services to adults with developmental disabilities. If those services are provided by or through the Division of Developmental Disabilities of the Missouri Department of Mental Health (DMH), departmental policy requires that "Any proposed limitation of rights must be reviewed by DMH Regional Office or State Operated Programs Human Rights Committee to ensure that a person's rights are adequately protected." The policy statement was issued pursuant to a legislative directive that the department "shall promulgate reasonable rules relative to the implementation of patient, resident and client rights . . ." Revised Statutes of Missouri Section 630.135.

Service providers operating long-term care facilities must also comply with licensing rules regarding residents rights. Those rules require the facility to encourage residents to exercise their rights as a citizen. Freedom of intimate association is a constitutional right of consenting adults. The rules also require that the privacy of residents be respected. This would include sexual privacy. The rules specify that residents have the right to associate freely with persons of their choice so long as it does not infringe on the rights of others.

Adult Protective Services may also investigate when the suspected incapacity of a sexually active adult is brought to its attention. In those situations, APS workers should tread lightly, keeping in mind the legal presumption that an adult has the capacity to engage in constitutionally protected sexual activity with another adult, as well as the right of vulnerable adults to be free sexual abuse or undue influence.

Federal Statutory Protections

State agencies and service providers, especially those who receive federal funding, should keep in mind various federal statutes and regulations on client rights as they evaluate the sexual rights of adults with developmental disabilities.

Developmental Disabilities Assistance and Bill of Rights Act of 2000 (link)

Congress declared that the nation has a goal of providing individuals with developmental disabilities with the information, skills, opportunities, and support to:

* make informed choices and decisions about their lives;
* live in homes and communities in which such individuals can exercise their full rights and responsibilities as citizens;
* have interdependent friendships and relationships with other persons;
* have friendships and relationships with individuals of their own choice.

With this goal in mind, Congress created protection and advocacy systems in each state to protect the legal and human rights of individuals with developmental disabilities, The Missouri Protection and Advocacy agency is available to assist adults with developmental disabilities who believe their sexual rights are being denied.

Americans with Disabilities Act (link)

When it adopted the ADA in 1990, Congress recognized the need to protect the social rights of people with disabilities. Congress declared that, despite their right to participate fully in all aspects of society:

* many people with physical or mental disabilities have been precluded from doing so because of discrimination;
* people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially; and
* physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

To remedy these and other problems identified by Congress, the ADA was enacted to prohibit state and local governments and private business establishments from discriminating against people with physical and mental disabilities.

HCBS Rule (link)

The Home and Community Based Services Rule (HCBS) is a Medicaid regulation that defines person-centered planning (PCP) standards for those receiving Home and Community Based Services which are an array of long-term care services funded by Medicaid.

The website of the federal Administration for Community Living explains: "The PCP approach identifies the person's strengths, goals, medical needs, needs for home-and community-based services, and desired outcomes. The approach also identifies the person's preferences in areas such as recreation, transportation, friendships, therapies and treatments, housing, vocational training and employment, family relationships, and social activities. Unique factors such as culture and language also are addressed." (Emphasis added)

These elements are included in a written plan for supporting the person, which is developed based on those considerations. The use of the phrase "such as" indicates that this list of activity areas is intended to be illustrative and not restrictive. Although not specifically listed, sexual activities would be a part of person-centered planning.

Any private or public entity providing HCBS to an adult with a developmental disability must help the individual develop and implement a plan that respects their sexual rights, including sexual activities within the context of recreation, friendships, family relationships, and social activities. Missouri has a wide range of HCBS programs.

The passage of these federal laws and regulations establish a clear national policy that adults with developmental disabilities should have the same rights as adults without such disabilities. This would include the right to exercise their freedom of intimate association.

Conclusion

No freedom is absolute. A fundamental right may be restricted to serve a compelling state interest so long it is accomplished in the least intrusive manner necessary to achieve that objective. Regulations as to the time, place, and manner in which a constitutional right may be exercised may be permissible. In the case of sexual activity, such regulations may require that the activity be done in a private setting and that it does not interfere with the rights of others or legitimate concerns regarding security and safety. A blanket prohibition against sexual activity by an adult, however, should require a court order and even then only after the individual is afforded due process of law.

Post Script

No "Bright Line" Test for Capacity

"[T]he mere fact that a person is intellectually disabled does not mean that the person cannot lawfully consent to sex."

– *State v. Inzunza* (Ariz. Ct. App. 2014) 316 P.3d 1266, 1272-73

"[A] mentally disabled person's capacity to consent to sex depends on several variables and is not subject to bright-line determinations. . . . The social science literature appears to indicate that, "although IQ can be related to sexual knowledge, relying heavily upon IQ as an `overall determinant' of capacity to consent is unwise" because "[r]eliance on IQ disregards adaptive functioning, a key definitional component of [intellectual disability], and it also does not take into account the effect that sex education might have on consensual ability." Id. at 821 (citing American Psychiatric Ass'n, Diagnostic Statistical Manual of Mental Disorders 39-40 (4th ed. 1994)). Although the well-recognized concept of "mental age" may be a "better predictor of sexual knowledge than IQ," it "is subject to the same criticisms" as IQ. Id. (citing Marita P. McCabe, Sex Education Programs for People with Mental Retardation, 31 Mental Retardation 377, 382 (1993))."

"The nature of the factual inquiry also means that [a current finding of incapacity] does not necessarily preclude a finding, at some time in the future, that [a disabled adult] has the capacity to consent to sex. "

– *State v. Ash* (Minn. Ct. App., Aug. 5, 2008, No. A07-0761)

"[The ability of a developmentally disabled adult to] 'appraise the nature of his or her conduct,' in order to be found legally capable of consenting, is limited to whether the [adult] had the capacity to understand the immediate physical consequences of the . . . sexual conduct, including the sexual nature of that conduct and its potential for causing pregnancy or disease."

– *State v. Frost* (N.H. 1996) 141 N.H. 493, 497

"The requisite degree of intelligence necessary to give consent may be found to exist in a person of very limited intellect. Crucial to a determination may be how such a person actually functions in society."

– *People v. Easley* (N.Y. 1977) 42 N.Y.2d 50, 54-55

Survey of Psychologists

Criteria for Capacity

In an effort to try and operationalize criteria for capacity to consent, a United States study conducted by Kennedy and Niederbuhl (2001) examined the views of over 300 randomly selected psychologists on the criteria required for determining capacity to consent to sexual relationships.

The survey identified basic sexual knowledge, knowledge of the consequences of sexual behaviour, and abilities related to self-protection as integral to sexual consent capacity.

The following eight abilities were considered necessary to demonstrate capacity to consent to sex:

* Individual can say or demonstrate 'no'.

* Individual knows that having intercourse can result in pregnancy.

* Individual can make an informed choice when given options.

* Individual knows that having intercourse or other sexual relations can result in obtaining a disease.

* Individual can differentiate between appropriate and inappropriate times and places to engage in intimate relations.

* Individual can recognise individuals or situations which might be a threat to him or her.

* Individual will stop behaviour if another person tells him or her 'no'.