

THE RIGHT OF PRIVACY AND AMERICA'S AGING POPULATION

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INTRODUCTION

"Justice O'Connor's Husband Finds New Love," reported CBS News in 2007.¹ John O'Connor, who married the Justice in 1952, was diagnosed with Alzheimer's disease in 1990. The Justice resigned from the Supreme Court in 2005 to move him to an assisted living facility, where he soon fell in love with another Alzheimer's patient.² Justice O'Connor's response to news of the romance was to be glad that her husband was happy, but many spouses and families are not so emotionally generous.³ Other news stories report that families are horrified to find their elderly spouses or parents in new relationships and insistent that the romance be terminated. In one case, the son of an elderly man with dementia required the facility to keep his father's girlfriend away from him, and eventually moved his father to another facility, insisting that neither his father nor his girlfriend be told in advance of the change.⁴ In another case, once the family learned that their seventy-two-year-old mother was having sex with a sixty-eight-year-old man, they became irate "and threatened to sue because they didn't picture their mom having sex while she had grandkids running around the nursing home."⁵

The human need for intimacy and physical contact has been well established in various studies, but until recently such research often ignored the elderly. Newer articles attempt to fill that gap, arguing that "life-long sexual function . . . [has come to be seen as] a primary compo-

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1. *Justice O'Connor's Husband Finds New Love: Retired Supreme Court Justice's Spouse Forms Romance with Fellow Alzheimer's Patient*, CBS NEWS, Nov. 13, 2007, http://www.cbsnews.com/stories/2007/11/13/national/mail3494982.shtml?source=search_story.

2. Suzanne McCarroll, *Sandra Day O'Connor Makes Alzheimer's Plea*, CBS4DENVER, May 14, 2008, <http://cbs4denver.com/health/Sandra.Day.O.2.724461.html>.

3. Kate Zernike, *STILL MANY SPLENDORED; Love In the Time of Dementia*, N.Y. TIMES, November 18, 2007, § 4, available at <http://query.nytimes.com/gst/fullpage.html?res=9D01E2D91030F93BA25752C1A9619C8B63&scp=2&sq=LOVE%20IN%20THE%20TIME%20OF%20DEMENTIA&st=cse> (quoting Dr. Thomas R. Cole, director of the McGovern Center for Health, Humanities and the Human Spirit at the University of Texas).

4. Melinda Henneberger, *An Affair to Remember*, SLATE, June 10, 2008, <http://www.slate.com/id/2192178/> (last visited Jan. 3, 2009).

5. *Sex In Nursing Homes*, THE KENTUCKY POST, July 12, 2003, at A1, available at <http://www.cincinnati.com/text/kypost/2003/07/12/sex071203.html>.

ment of achieving successful ageing in general.”⁶ The need for intimate relationships, rather than disappearing as one grows older, may actually increase as one copes with loss: the loss of family members, declining health, dislocation from a long-time home, and other factors.⁷ The benefits of intimacy have been well established, contributing to a better quality of life and health.⁸ The United States Supreme Court has recognized the importance of intimate association by protecting individuals from government intrusion into their private lives. The term “freedom of intimate association” was first used by the Court in *Roberts v. United States Jaycees*, in which Justice Brennan spoke of a “line of decisions [in which] the Court has concluded that choices to enter into and maintain certain 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.”⁹ More recently, the Court struck down a statute that forbade persons of the same sex from engaging in certain types of private sexual conduct.¹⁰ “Liberty,” declared Justice Kennedy, “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹¹ This liberty goes beyond the right of a married couple to choose whether to use contraceptives¹² or to marry someone of another race;¹³ it also protects unmarried individuals in exercising their personal rights.¹⁴ While no law prohibits the elderly or residents of nursing homes from engaging in intimate conduct, and thus the freedom of intimate association is not directly involved, the practice at such facilities is to actively discourage such conduct. In doing so, facilities may be violating federal and state statutes enumerating patient rights.

For elderly living in their own homes, the freedom of intimate association may have gone to the opposite extreme. Eager to support an in-

6. Merryn Gott, *Sexual Health and the New Ageing*, 35 *AGE & AGEING* 106, 106 (2006), available at <http://ageing.oxfordjournals.org/cgi/content/full/35/2/106> (citing Stephen Katz and Barbara Marshall, *New Sex For Old: Lifestyles, Consumerism, and the Ethics of Aging Well*, 17 *J. AGING STUDIES* 3, 12 (2003), available at http://www.trentu.ca/academic/sociology/faculty/documents/NewSexForOld_000.pdf, and Merryn Gott and Sharron Hinchliff, *How Important is Sex in Later Life? The Views of Older People*, 56 *SOC. SCI. MED.* 8, 1617, 1626 (2003)).

7. Jennifer Sisk, *Sexuality in Nursing Homes: Preserving Rights, Promoting Well-being*, *AGING WELL*, Sept. 2007, available at <http://www.agingwellmag.com/septstory3.shtml>.

8. *Id.*; Steven H. Miles & Kara Parker, *Sexuality in the Nursing Home: Iatrogenic Loneliness*, 23 *GENERATIONS* 36, 36 (1999).

9. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-618 (1984). In contrast, the other line of decisions recognize “a right to associate for the purpose of engaging in those activities protected by the *First Amendment*—speech, assembly, petition for redress of grievances, and the exercise of religion.” *Id.* at 618.

10. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

11. *Id.* at 562.

12. See *Griswold v. Connecticut*, 381 U.S. 479, 515-16 (1965).

13. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

14. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating a statute prohibiting the distribution of contraceptives to unmarried persons); see also *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977) (invalidating a New York law forbidding the distribution of contraceptives to persons under sixteen years of age).

dividual's right to marry, and loathe to allow any third person to interfere with that relationship, states have adopted policies and statutes that may leave some elderly persons vulnerable to fraud and abuse. Thus, elderly people who lack family to care for them at home face two tough choices. They can either stay in their homes and retain a great deal of freedom over their personal affairs, or they can go to a facility, where they may find their freedom severely restricted. Is there a solution between these two extremes?

The number of people facing this choice in the near future is potentially vast. The population of Americans sixty-five years and older doubled from seventeen million in 1960 to thirty-five million in 2000,¹⁵ and is expected to double again to more than seventy million in 2030.¹⁶ A recent study found that 48% of people over age sixty are sexually active.¹⁷ Many people maintain sexual interest into their nineties.¹⁸ Those in assisted living facilities or nursing homes may also be sexually active, as evidenced by articles in professional publications and the popular press.¹⁹

While the issue of freedom of intimate association is a problem for elderly people in general, it is especially acute for those with dementia. Over five million Americans have been diagnosed with Alzheimer's disease, and the number is expected to increase dramatically, with as many as sixteen million by 2050.²⁰ A recent study published in *Neuroepidemiology* estimated that 13.9% of Americans age seventy-one and over, or about 3.4 million people, have some form of dementia.²¹ Alzheimer's disease accounted for over two-thirds (69.9%) of all dementia diagnoses.²² Dementia does not end the need for intimacy; while sexual intimacy where one partner has Alzheimer's may decrease it can still be a valued aspect of the relationship.²³

15. John D. DeLamater & Morgan Sill, *Sexual Desire in Later Life*, 42 THE JOURNAL OF SEX RESEARCH, 138 (2005).

16. *Id.* at 125.

17. Janet K. Feldkamp, *Navigating the Uncertain Legal Waters of Resident Sexuality: Residents' Rights to Sexual Expression Can Create Complicated Issues for Facilities and Family Members*, NURSING HOMES, Feb. 2003, at 62.

18. Michael Bauer et al., *Sexuality, Health Care and the Older Person: An Overview of the Literature*, 2 INT'L J. OF OLDER PEOPLE NURSING, 63, 64 (2007); Stacy Lindau et al., *A Study of Sexuality and Health Among Older Adults in the United States*, 357 NEW ENG. J. MED. 762, 772 (2007).

19. See, e.g., Sisk, *supra* note 7; Miles & Parker, *supra* note 8; *Sex In Nursing Homes*, *supra* note 5.

20. McCarroll, *supra* note 2.

21. Brenda Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 125, 125 (2007).

22. *Id.* at 128. Vascular dementia, usually caused by a stroke, accounted for 17.4%; the remaining 12.7% of cases included "dementia, undetermined etiology," Parkinson's dementia, alcoholic dementia, and traumatic brain injury, among others. *Id.*

23. Christian Derousene et al., *Sexual Behavior and Changes in Alzheimer's Disease*, 10 ALZHEIMER'S DISEASE & RELATED DISORDERS 86, 92 (1996).

This article will explore two critical issues facing the elderly: the lack of personal freedom suffered by those who move into large assisted living facilities and nursing homes, versus the lack of social support for those who remain in their own homes. Part I discusses those in institutions, and contrasts the federal and state laws that attempt to secure personal privacy for the elderly with the actual practice in some facilities. In many cases, especially if the elderly person has some cognitive impairment, institutions assume that the person is incapable of consenting to physical contact, thus reversing traditional rape law. Part II compares these restrictions with the virtual absence of any oversight of elderly in their own homes, and the almost conclusive presumption that a marriage is valid. The result in some cases is that the elderly are being taken advantage of by unscrupulous caregivers, even in states that have legislation attempting to protect them. Part III looks at innovative solutions to these problems, including education, new legislation, better living conditions for seniors, and a more assertive role for the judiciary.

I. ASSISTED LIVING FACILITIES AND NURSING HOMES

In 1987 Congress enacted the Federal Nursing Home Reform Act as part of the Omnibus Budget Reconciliation Act, ensuring that residents of nursing facilities would have a right of privacy and immediate access by family and other visitors.²⁴ The Act requires the nursing home to give notice of a transfer and explain why it is necessary before moving the patient.²⁵ Federal law also grants residents of a Medicare or Medicaid certified nursing facility the right to privacy, including full visual and auditory privacy.²⁶

Many states have enacted a Patient's or Nursing Home Bill of Rights purporting to give residents a right of privacy and a right to associate.²⁷ An Alaska law declares that "a resident of an assisted living home has the right to . . . close the door of the resident's room at any time, including during visits in the room with guests or other residents"²⁸ Arkansas and Florida laws give residents "the right to private and uncensored communication, including . . . visiting with any person of the resident's choice during visiting hours"²⁹ Statutes allow residents "to close room doors and to have facility personnel knock before entering the room, except in the case of an emergency or unless medically

24. Omnibus Budget Reconciliation Act of 1987, 42 U.S.C. § 1396r(c)(1)(A)(iii) (privacy), (c)(3) (access and visitation rights) (2008).

25. *Id.* § (c)(2)(B)(i)(I).

26. Feldkamp, *supra* note 17.

27. Jeffrey Spitzer-Resnick & Maya Krajcinovic, *Protecting the Rights of Nursing Home Residents: How Tort Liability Interacts with Statutory Protections*, 19 NOVA L. REV. 629, 633-34 (1995).

28. ALASKA STAT. § 47.33.300(a)(5) (2008).

29. ARK. CODE ANN. § 20-10-1204(a)(16)(A)(i) (2008); FLA. STAT. ANN. § 400.022(1)(b) (2008).

contraindicated.”³⁰ New York has regulations to ensure that “[r]esident rooms shall be designed and equipped for adequate nursing care, comfort and privacy of residents.”³¹ California law requires each person admitted to a residential care facility for the elderly to sign a document that he or she has received a statement of “Personal Rights” including a right “to have his/her visitors . . . permitted to visit privately during reasonable hours and without prior notice, provided that the rights of other residents are not infringed upon.”³² A joint publication of AARP Tennessee and the Legal Aid Society of Middle Tennessee declares, “You have the right to visit in private with anyone during reasonable hours. The nursing home can keep you from having such visits only if: it would harm the health and safety of a resident or staff member; or it could harm the property of a resident, staff member, or the nursing home.”³³

The practice, however, is altogether different. Many nursing homes and assisted living facilities do not allow residents to lock their doors, and staff use a “knock and enter” policy without waiting for a response.³⁴ Many facilities have no private rooms, and use curtains to separate roommates, not walls. Sexual intimacy among residents is actively discouraged by staff; published studies indicate that married and single residents who wish to be intimate “have been deprived of privacy, have been restrained, have had clothes put on backwards, and have been put in zipperless jumpsuits, separated, or forced to resort to subterfuge such as locking themselves in bathrooms.”³⁵ Many nursing homes have a framework of “supervised informed consent” in which nurses or social workers meet with the residents individually and together to discuss the sexual activity.³⁶ Nursing home staff may prohibit sexual activity directly, or discourage it indirectly by harassing and ridiculing residents about their relationships.³⁷ Even at facilities known for their progressive policies toward residents’ intimate affairs, staff will notify the family as well as social workers and other staff when a relationship comes to their attention.³⁸

If both parties are fully competent, there seems to be no legal or medical justification for an intervention by the nursing home or by the

30. FLA. STAT. ANN. § 400.022(1)(m) (2008).

31. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.29(c) (2008).

32. CA. CODE OF REGS. tit. 22, § 87468(a)(11) (2008).

33. AARP TENNESSEE AND LEGAL AID SOCIETY OF MIDDLE TENNESSEE, YOU HAVE RIGHTS IN A NURSING HOME 10 (2001).

34. Madonna H. Meyer & Carrie Roseamelia, *Emerging Issues for Older Couples: Protecting Income and Assets, Right to Intimacy, and End-of-Life Decisions*, GENERATIONS, Fall 2007, at 66, 68.

35. Miles & Parker, *supra* note 8, at 39.

36. *Id.*

37. Meyer & Roseamelia, *supra* note 34, at 68.

38. Douglas J. Edwards, *Sex and Intimacy in the Nursing Home*, NURSING HOMES: LONG TERM CARE MANAGEMENT, Feb. 2003, at 18; Dirk Johnson & Julie Scelfo, *Sex, Love, and Nursing Homes*, NEWSWEEK, Jan. 19, 2004, available at <http://www.newsweek.com/id/52779/output/print>.

families, although such interventions regularly occur.³⁹ The issue becomes complicated when a resident has a cognitive impairment such as dementia. Does someone with advanced Alzheimer's disease have the requisite capacity to consent to sex? What if the resident mistakenly believes that her partner is her spouse, or does not understand that her spouse is still alive? Administrators may feel compelled to inform family members when their relative with dementia is involved with another person, and may agree to take steps to terminate the relationship.⁴⁰ Curiously, in none of the cited articles is there any indication that the elderly person was in distress or felt pressured to engage in the activity.⁴¹ Instead, silence has somehow been interpreted as the equivalent of lack of consent. Even in cases where the couple is married, nursing homes have refused visitation rights to a spouse on the grounds that the resident is incapable of consent. In one case, Drake nursing home in Ohio refused a husband's request for an overnight visit with his wife, who had suffered a stroke which rendered her incompetent.⁴² The nursing home explained that "if he were to molest his wife, she might later regain her competence and sue Drake."⁴³ Mr. Belinky sued the nursing home for permission to have overnight visits with his wife. The court determined that Mr. Belinky had no standing to sue on his own behalf, because the law only protected the rights of nursing home residents, but he could sue on behalf of his wife. Ohio law states that one member of a patient's family may visit the patient at any time, provided, however, the operator may make reasonable rules to insure that such visit will not unduly disturb other patients or residents or interfere with the operation of the home.⁴⁴ The court remanded on the question of whether the center had reasonable rules that precluded an overnight visit.⁴⁵ The fact that Mrs. Belinky may have lacked competence to consent to the visit was never discussed by the court.

Is it reasonable, or legal, for a nursing home to assume that an elderly patient is incapable of consenting to sex? The Ohio court in *Belinky* thought not, but many nursing home administrators, fearful of suits alleging sexual assault, believe otherwise, especially where one or both partners is not fully competent. American rape law has changed a great deal from its seventeenth-century origins, but perhaps this change goes too

39. Feldkamp, *supra* note 17; Johnson & Scelfo, *supra* note 38 (quoting a 65-year-old resident who "wanted some privacy with a lady friend: 'But we knew we'd be evicted from the facility if we got caught'").

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

41. *Id.*; see also *Sex In Nursing Homes*, *supra* note 5.

42. *Belinky v. Drake Ctr., Inc.*, 690 N.E.2d 1302, 1305-06 (Ohio Ct. App. 1996).

43. *Id.* Mrs. Belinky would not be able to sue her husband, however, as Ohio exempts spouses from sexual battery. OHIO REV. CODE ANN. § 2907.03(A) (2008) ("No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply").

44. OHIO ADMIN. CODE 3701-17-09(d).

45. *Belinky*, 690 N.E.2d at 1309.

far. Early American law made rape a difficult crime to prove. Rape could not be committed by one's spouse.⁴⁶ Three theories once formed the bases of marital immunity: first, wives were characterized as the property of their husbands; second, the husband and wife were unified in marriage as one entity and thus one could not be charged with assaulting oneself; or third, by marrying, a woman gave her consent to sex with her husband. All three have been attacked as outdated and sexist.⁴⁷ While some jurisdictions still retain marital immunity in some form and thus presume consent to sexual activity, at least twenty-four states have abolished marital immunity to rape.⁴⁸

In cases where rape charges could be brought, what evidence suffices to show lack of consent? In early American law, for parties not married to each other, the law presumed consent unless the victim earnestly or reasonably resisted, even questioning whether mere words were enough to overcome a presumption of consent.⁴⁹ Thus, at one time some states required "utmost resistance" to prove lack of consent.⁵⁰ Today most states have dropped the necessity of showing physical resistance by the victim, holding that words or conduct may be sufficient to show lack of consent.⁵¹ Nursing home staff have now taken this a step further by presuming the complete inability of a patient with dementia to consent.⁵² Staff may regard intimacy as something to be ridiculed or actively discouraged in residents, rather than as a part of healthy human behavior.⁵³ This assumption arguably violates the Patient's Bill of Rights and is far too broad. Even those with severe Alzheimer's may retain the ability to consent in certain circumstances.⁵⁴

The most difficult problem may be the situation where one partner mistakenly believes the other is her spouse. The Model Penal Code defines the crime of "gross sexual imposition" as occurring when a man has sexual intercourse with a woman not his wife if "he knows that . . . she submits because she mistakenly supposes that he is her husband."⁵⁵ If the man is capable of recognizing her mistake, he may be committing a crime.

For those with no cognitive impairments, simply making them aware that they have the right to privacy and to sexual intimacy in the

46. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1456 (2003).

47. *Id.* at 1478-84.

48. *Id.* at 1470-71.

49. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §17.4 (2d ed. 2008).

50. *Id.*

51. *Id.*

52. Johnson & Scelfo, *supra* note 38.

53. Miles & Parker, *supra* note 8, at 23, 38.

54. Daniel Kuhn, *Intimacy, Sexuality, and Residents with Dementia*, 3 ALZHEIMER'S CARE QUARTERLY 165, 167 (2002).

55. MODEL PENAL CODE § 213.1(2)(c) (1962).

nursing home may be enough. Statutes like California's notification law⁵⁶ are a start; articles in popular publications, and training for staff, may also help. For elderly with cognitive impairments, much more will be needed to reverse the current assumption that sex is nonconsensual and must always be prohibited.

II. ELDERLY WITH DEMENTIA AND IN-HOME CARE

Freedom of intimate association is not generally an issue for elderly who live alone. The problem may instead be too much freedom, which can leave them prey to unscrupulous persons. Realizing the vulnerability of some elderly, California and Idaho have enacted statutes raising a presumption of undue influence in cases where a caregiver is named in a will or other donative instrument.⁵⁷ Long-time friends of the elderly person who provide care without pay are included in the definition of "care custodians" in California;⁵⁸ Idaho includes those working in the testator's own home.⁵⁹ To receive the donative transfer, the caregiver must rebut the presumption of undue influence by clear and convincing evidence.⁶⁰ The California Supreme Court noted that California's statute was originally enacted in 1993 in response to reports that an Orange County attorney who represented a large number of Leisure World residents had drafted numerous wills and trusts under which he was a major or exclusive beneficiary, and had abused his position as trustee or conservator in many cases to benefit himself or his law partners.⁶¹

The law was amended in 1997 to add care custodians as presumptively prohibited transferees.⁶² But the California statute continues to exempt spouses, relatives, and domestic partners of transferors,⁶³ thus leaving an opening exploited by unscrupulous caregivers. As long as the caregiver can marry the dependent elderly person, in most states it is almost impossible to invalidate the marriage, even in cases where the elderly person has no idea he or she is married.

Challenging the validity of a marriage has traditionally been difficult, given the presumption of ceremonial validity, a presumption of sanity, and restrictions on challenges to a marriage. At common law, a marriage to a person who lacked competence to understand that he or she

56. CAL. CODE REGS. 22, § 72527(a)(11) (West 2008).

57. CAL. PROB. CODE § 21350(a)(6) (West 2008); Idaho Code Ann. § 15-2-616 (2008).

58. *Bernard v. Foley*, 139 P.3d 1196, 1207-08 (2006).

59. IDAHO CODE ANN. § 15-2-616.

60. CAL. PROB. CODE § 21351(d). Another way to provide for the caregiver under California law is to have the instrument reviewed by an independent attorney who counsels the transferor and also executes a "Certificate of Independent Review." *Id.* § 21351(b). The Idaho statute simply says the presumption is "rebuttable by clear and convincing evidence." IDAHO CODE ANN. § 15-2-616.

61. *Rice v. Clark*, 47 P.3d 300, 304 (2002).

62. *Bernard*, 139 P.3d at 1205.

63. CAL. PROB. CODE § 21351(a) states that no presumption of undue influence is raised if "the transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner of the transferee," among other exceptions.

was getting married was void and could be attacked after the incompetent spouse's death, although attacks rarely succeeded.⁶⁴ Today, given the fundamental right to marry, states have proceeded cautiously in restricting the rights of incompetent people to marry, and are wary of allowing termination of the marriage by third parties, whether before or after the spouse's death. Even an insane person or one who has been declared incompetent may still have the capacity to marry.⁶⁵ As a North Dakota court stated, "the best accepted test as to whether there is a mental capacity sufficient to contract a valid marriage is whether there is a capacity to understand the nature of the contract and the duties and responsibilities which it creates,"⁶⁶ and thus "mere weakness or imbecility of mind is not sufficient, nor is eccentricity or partial dementia."⁶⁷ A recent Alaska case is illustrative of the difficulties of overcoming the presumption of sanity and the presumption of validity of the marriage. Lillie Rahm-Riddell already suffered from Alzheimer's disease from 1993 when she met Robert Riddell, a man thirty years her junior.⁶⁸ Her daughter petitioned for an appointment of a conservator in April 1995, but while that proceeding was pending, Lillie and Robert married.⁶⁹ A conservator was appointed for Lillie; a court also found that Robert had attacked Lillie and enjoined him from contacting her. Despite that, Robert removed Lillie from an assisted living home and moved her to Oregon, refusing to reveal Lillie's location even after a court order.⁷⁰ Lillie died in Oregon in 1997.⁷¹ A court held that Lillie's 1997 will leaving her entire estate to Robert was invalid due to lack of testamentary capacity.⁷² Still, the court found that the marriage was valid and thus Robert was entitled as a surviving spouse to receive his homestead allowance, family allowance, and elective share.⁷³ The Alaska Supreme Court refused to impose a constructive trust despite clear and convincing evidence of Robert's fraudulent conduct, his physical abuse, and his isolation of Lillie so that she was "utterly dependent on him for all her needs."⁷⁴ The fact that Robert spirited Lillie away while the conservancy petition was pending was not sufficient to establish that Lillie failed to understand that she was getting married. Courts generally have recognized that someone who needs a conservator might still be competent in certain matters, such as marriage. The Supreme Court of Illinois, for example, has held that the appointment of a guardian is not conclusive of

64. In re Estate of Romano, 246 P. 2d 501, 505 (1952); Terry Turnipseed, *How Do I Love Thee, Let Me Count The Days: Deathbed Marriages in America*, 96 KY. L.J. 275, 287 (2007-2008).

65. *Geitner v. Townsend*, 312 S.E.2d 236, 238 (N.C. Ct. App. 1984).

66. *Johnson v. Johnson*, 104 N.W.2d 8, 14 (N.D. 1960).

67. *Fischer v. Adams*, 38 N.W.2d 337, 340 (Neb. 1949).

68. *Riddell v. Edwards*, 32 P.3d 4, 6, 16 (Alaska 2001).

69. *Id.* at 6.

70. *Id.*

71. *Id.*

72. *Id.* at 19.

73. *Riddell v. Edwards*, 76 P.3d 847, 853 (Alaska 2003).

74. *Id.* at 849.

the capacity to understand the nature, effect, duties, and obligations of marriage, “although the former fact is strong evidence of the latter.”⁷⁵

A few states still follow the common law rule and allow a third party to challenge the marriage after one spouse’s death. Courts in Alabama and Florida, for example, have voided marriages on grounds of lack of competence. For example, a daughter sued to annul her mother’s marriage in Alabama on the grounds of insanity and intoxication at the time of the marriage that continued without interruption until the mother’s death three months later.⁷⁶ While the allegation of intoxication, if proven, would render the marriage merely voidable, insanity would make the marriage invalid from the time it was entered.⁷⁷ Florida has allowed heirs of a woman who alleged that her marriage took place while she was insane and in a diabetic coma to challenge its validity after her death.⁷⁸

Some states have codified the common law into statutes that declare a marriage of a person who lacks mental capacity is void.⁷⁹ Cases in a few of these states have allowed a challenge to the marriage after the death of one spouse. New Jersey has allowed such suits on the grounds of lack of capacity to consent, fraud, or simply based on a court’s general powers in equity.⁸⁰ Similarly, Kentucky has held that a marriage of a mentally incompetent person is void and thus can be set aside after the incompetent’s death; in contrast, a marriage procured by fraud or duress is voidable, and can only be annulled while the parties are alive.⁸¹ A court in Pennsylvania invalidated the marriage of an Alzheimer’s patient even though his family had not raised an objection to the validity of the marriage.⁸²

Louisiana allows the suit to be brought after a spouse’s death, despite language in the statute that appears to be to the contrary. Louisiana law states: “A marriage is relatively null when the consent of one of the parties to marry is not freely given. Such a marriage may be declared null upon application of the party whose consent was not free.”⁸³ This right to nullify the marriage, a court held, may be brought by the succession representative, interpreting broad language giving the representative

75. Pape v. Byrd, 582 N.E.2d 164, 168 (Ill. 1991).

76. Abel v. Waters, 373 So. 2d 1125, 1127 (Ala. Civ. App. 1979).

77. *Id.* at 1128.

78. Kuehmsted v. Turnwall, 103 Fla. 1180, 1184 (Fla. 1932).

79. KY. REV. STAT. ANN. § 402.020(1)(a)(2008); MO. ANN. STAT. § 451.020 (2008); NEB. REV. ST. § 42-103(2) (2008); N.J. STAT. ANN. § 2A:34-1(d) (2008); 23 PA. CON. STAT. ANN. § 3304(a)(3) (2008); R.I. GEN. LAWS 1956 § 15-1-5; TEX. PROB. CODE ANN. § 47A(a) (Vernon 2008).

80. *In re Estate of Santolino*, 895 A.2d 506, 514-17 (N.J. Super. Ct. Ch. Div. 2005).

81. Johnson v. Sands, 53 S.W.2d 929, 930 (Ky. 1932). The case was remanded for trial on the merits; in a subsequent decision, the court determined the husband was not in fact insane, and the marriage was valid. Johnson v. Sands, 276 Ky. 492 (1939).

82. *In re Acker*, 48 Pa. D. & C. 4th 489 (Pa. Ct. Com. Pl. 2000).

83. LA. CIV. CODE art. 95 (effective Jan. 1, 1988).

the right to sue to enforce a right of the deceased, whether the action is personal, real, or mixed.⁸⁴ Conversely, although a North Carolina statute appears to codify the common law,⁸⁵ case law in that state speaks of such marriages being voidable, rather than void.⁸⁶

The Uniform Marriage and Divorce Act (UMDA) Section 208 changed the common law, and now the majority rule in the United States is that such a marriage is voidable, and thus cannot be challenged after the death of either spouse.⁸⁷ Commentary to the UMDA explains why the law was changed:

The underlying policy reasons for this principle are clear: the traditional “void marriage” doctrine often imposed unwise and unfair penalties on innocent “spouses” in stable family situations long after the questioned marriage occurred. The penalties serve no effective deterrent purpose, but cause severe economic dislocations; a spouse may be denied . . . a share in a spouse’s estate, after the marriage has been terminated by the death of the other spouse, despite the fact that the surviving spouse had no reason to suspect the invalidity of the marriage.⁸⁸

Should we return to the common law and void the marriage of an incompetent elderly person? Alternatively, should courts be bolder in asserting their equitable powers? Consider the Washington case of *Estate of Romano*.⁸⁹ The decedent, age sixty-four, was nearly blind and in poor physical condition when he married his housekeeper Mary Alice Sauve.⁹⁰ The court found that, at the time of the wedding ceremony, “Romano was mentally incompetent. He did not realize what he was doing and was incapable of entering into a contract or consenting to marriage. The trip to Reno [for the wedding] and his participation in the marriage ceremony were procured by fraud and duress practiced by Mary Alice Sauve.”⁹¹ Sauve conceded that the marriage did not comply with the law of Nevada due to lack of capacity and fraud.⁹² Still, the court held that the marriage could not be attacked after Romano’s death absent

84. Succession of Ricks, 893 So. 2d 98, 100 (La. Ct. App. 2004) (citing LA. CODE CIV. PROC. art. 685 (2008) (enacted in 1960)).

85. N.C. GEN. STAT. § 51-3 (2008).

86. See, e.g., Geitner v. Townsend, 312 S.E.2d 236, 238 (N.C. Ct. App. 1984) (“a marriage of a person incapable of contracting for want of understanding is not void, but voidable,” (citing Ivery v. Ivery, 258 N.C. 721, 730 (1963))).

87. Turnipseed, *supra* note 64, at 287-289. See, e.g., ALASKA STAT. § 25.05.031; ARK. CODE ANN. § 9-12-201; Vance v. Hinch, 222 Ark. 494, 497(1953) (marriage which involves party lacking mental capacity is voidable but not absolutely void); CAL. FAM. CODE § 2210 (West 2008); Husted v. Husted, 35 Cal. Rptr. 698 (1963); COLO. REV. STAT. § 14-10-111(1)(a).

88. UNIFORM MARRIAGE AND DIVORCE ACT § 208 cmt. 1998 Main Volume (1970) (amended 1971 and 1973), 9A U.L.A. 188 (1998).

89. *In re Estate of Romano*, 246 P.2d 501 (Wash. 1952).

90. *Id.* at 502-03.

91. *Id.* at 503.

92. *Id.*

“fraud of the grossest kind.”⁹³ Such fraud was absent in this case because the incompetent spouse lived for almost two years after the marriage, giving ample time for a challenge to the validity of the marriage while Romano was alive.⁹⁴

The New Hampshire Supreme Court wrote of a “Hobson’s choice” in the Legislature’s decision that marriage by an incompetent person is either void or voidable: “The former method [declaring that the marriage is void] may allow the heirs to step forward after death and claim the fruit of their own neglect. The latter method [declaring that the marriage is voidable] may allow a scheming suitor to marry for money.”⁹⁵ Still, the court concluded that it was the Legislature’s decision, not the court’s, and the Legislature had declared marriage of an incompetent to be voidable, and thus impossible to attack after the death of one spouse.⁹⁶

Even if a state is willing to annul the marriage, this may not eliminate the financial incentive. New York, for example, allows the marriage to be annulled after one party has died,⁹⁷ but the spouse who exercised undue influence or fraud is still entitled to his or her elective share.⁹⁸ Bigamy is treated differently in New York: not only can the marriage be declared void after one party’s death, but the survivor is not treated as a spouse and thus gets no elective share.⁹⁹ If a person with dementia enters into a marriage ceremony with no understanding of its significance, shouldn’t that marriage be treated the same as a bigamous marriage, and annulled?

In contrast, the Washington Supreme Court invalidated a marriage in *Estate of Lint* when it found that the wedding had not been properly solemnized and, as an alternative ground, that fraud of the grossest kind was practiced on the wife.¹⁰⁰ A woman seriously ill with cancer of the lung and brain was systematically isolated from her friends and family by a man, Christian Lint, eighteen years her junior.¹⁰¹ A will making Christian the primary beneficiary of her estate was declared invalid by the trial court on the grounds that it was procured by fraud and undue influence.¹⁰² Citing *Romano*, the court noted that ordinarily a marriage cannot be set aside after one spouse’s death due to lack of capacity, but also held that, because the Washington statute does not include lack of solemnization or gross fraud as reasons to invalidate a marriage, “the

93. *Id.* at 506.

94. *Id.* at 507.

95. *Patey v. Peaslee*, 111 A.2d 194, 197 (N.H. 1955).

96. *Id.* at 196.

97. *See, e.g., Levine v. Dumbra*, 604 N.Y.S.2d 207 (N.Y. App. Div. 1993).

98. *See, e.g., Parente v. Wenger*, 464 N.Y.S.2d 341 (N.Y. Sup. Ct. 1983); *Bennett v. Thomas*, 327 N.Y.S.2d 139 (N.Y. App. Div. 1971).

99. *Estate of Dominguez*, 2002 N.Y. Misc. LEXIS 1596, 26-27 (N.Y. Sur. Ct. Nov. 18, 2002).

100. *In re Estate of Lint*, 957 P.2d 755, 757 (Wash. 1998).

101. *Id.* at 757-58.

102. *Id.* at 765.

Legislature did not intend to entirely occupy the field.”¹⁰³ Thus, a path was left open to the courts to annul the marriage.

Even while the incompetent spouse is alive, it may be difficult for others to end the marriage on his or her behalf. A majority of states have adopted the rule that, absent specific statutory authorization for a third party to sue for annulment on behalf of the incompetent, only the competent spouse may sue to end the marriage.¹⁰⁴ South Carolina, for example, has held that a person “who is mentally incompetent as to his property *and* his person . . . may not bring an action for divorce either on his own behalf or through a guardian.”¹⁰⁵ The rationale often cited by such courts is that marriage is such a personal commitment that only a spouse can decide when to end it.¹⁰⁶ Other courts have adopted the minority view to allow a guardian to sue to terminate the marriage.¹⁰⁷ A few states have statutes specifically authorizing the spouse’s representative to bring suit, but generally have a short statute of limitations and do not allow suit to be brought after the spouse’s death.¹⁰⁸

The statutes and the case law confound two very different issues. The first occurs when a valid marriage is entered into, but later one spouse becomes incompetent. Can a third party sue to end the marriage, either on behalf of the incompetent while he or she is alive, or on behalf of the heirs or family once the incompetent is dead? Courts are understandably reluctant to terminate such a marriage without evidence of what the incompetent spouse would have wanted. Our scenario is quite different: the spouse is unable to understand that he or she is entering into a marriage at the time of the ceremony. Should the same restrictions on terminating the marriage apply? Some courts are willing to declare such a marriage void on the grounds that the requirements for a valid marriage have not been met. Illinois, for example, requires solemnization of a marriage by going before a duly authorized officiate and consenting to marry.¹⁰⁹ David Crockett’s children sought to annul the marriage after their father’s death on the grounds that the decedent, suffering from an inoperable malignant brain tumor, did not say anything at the ceremony and thus failed to give his consent.¹¹⁰ After investigating whether Illinois law allowed proxy marriages and concluding it did not,

103. *Id.* at 766.

104. See J.A. Connelly, Annotation, *Power of Incompetent Spouse’s Guardian, Committee, or Next Friend to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make a Compromise or Settlement in Such Suit*, 6 A.L.R.3d 681, § 5(a)-(b) (1966 & Supp. 1993).

105. *Murray v. Murray*, 426 S.E.2d 781, 784 (S.C. 1993).

106. *Nelson v. Nelson*, 878 P.2d 335, 338 (N.M. Ct. App. 1994); *Murray*, 426 S.E.2d at 784. Both *Nelson* and *Murray* involve a spouse who was competent at the time of the marriage but later became incompetent.

107. See, e.g., *Nelson*, 878 P.2d at 338.

108. See, e.g., COLO. REV. STAT. § 14-10-111(2)-(3) (2008) (six months); DEL. CODE ANN. tit. 13, § 1506(b) (2008) (ninety days).

109. *In re Estate of Crockett*, 728 N.E.2d 765, 767 (Ill. App. Ct. 2000).

110. *Id.* at 766.

the court held that the children could challenge the validity of the marriage after the death of one of the parties.¹¹¹

III. SOLUTIONS

Can we find a middle ground, where a person does not need to choose between giving up intimacy to enter a nursing home, or staying in his or her own home and thus forfeiting legal protection? Education of seniors and those who work with them is a good start, but legislation may be necessary as well. Finally, courts may need to exercise their equitable powers more frequently.

A. Education

For those in facilities who wish to have more privacy, informing them of the Patient's Bill of Rights and providing some mechanism for enforcement will help, at least for those with no cognitive impairments. Staff training is key to reversing widely held beliefs that residents of such facilities should not be sexually active,¹¹² and to help medical personnel understand that intimacy and close relationships are important for better health. An example of comprehensive staff training can be found in the video produced by the Hebrew Home in Riverdale, New York, "Freedom of Sexual Expression: Dementia and Resident Rights in Long-Term Care Facilities."¹¹³ As for seniors in their own homes, training of those issuing marriage licenses and conducting marriage ceremonies may need to be improved, and existing laws enforced. Why would a clerk issue a marriage license to a person in a coma?¹¹⁴ Several states have statutes declaring it a misdemeanor to knowingly join a couple who should not lawfully marry, or issue a license to them for a marriage ceremony, but no reported case describes an attempt to prosecute anyone under these statutes.¹¹⁵

B. Reconsider Void Versus Voidable Marriages

States are understandably reluctant to allow longstanding marriages to be attacked, especially when one spouse has died and thus is unavailable to testify, consent, or object to the proceedings. The legitimacy of children born to the couple should not be put into doubt years later, but

111. *Id.* at 771-72. Other irregularities occurred in the marriage ceremony. For example, although Illinois law requires both parties to appear and sign in the presence of the county clerk—*id.* at 766 (citing 750 ILL. COMP. STAT. 5/203 (1996))—only Laverne Crockett was present at the clerk's office to obtain the license. The court did not seem to regard this as a reason to invalidate the marriage.

112. Hosam K. Kamel & Ramzi R. Hajjar, *Sexuality in the Nursing Home, Part 2: Managing Abnormal Behavior—Legal and Ethical Issues*, 4 J. AM. MED. DIR. ASSOC. 203, 205 (2003).

113. The Hebrew Home at Riverdale, <http://www.hebrewhome.org/nursinghome.asp> (last visited Dec. 18, 2008).

114. *Kuehmsted v. Turnwall*, 138 So. 775, 778 (Fla. 1932).

115. *See, e.g.*, TENN. CODE ANN. § 36-3-305 (2008); WIS. STAT. §§ 765.30(2)(b)-(c), (3)(a) (2008).

most states already have statutes declaring that such children are legitimate even if the marriage is later annulled.¹¹⁶ Courts are likewise reluctant to inquire into the reasons for a marriage, which cases involving fraud or undue influence often require.

Treating the marriage of an incompetent person in the same way courts have long treated void marriages might be an effective solution. Even states that do not allow a marriage to be annulled after one spouse's death have recognized that a marriage can be declared null and void.¹¹⁷ Thus, a Wisconsin court allowed a post-death challenge to a Texas marriage that violated Wisconsin law imposing a six-month waiting period after a divorce, and held that the Full Faith and Credit Clause did not require Wisconsin to recognize a Texas marriage just thirty days after the divorce decree.¹¹⁸ A New York court invalidated a bigamous marriage and held that the husband was not a surviving spouse.¹¹⁹ In our case, the family of the incompetent person could seek to have the marriage nullified. The family's best argument to void the marriage may be to establish that the technical requirements of the ceremony were not met: the incompetent person did not appear before the clerk, or did not indicate consent, as required.

Alternatively, states may want to rewrite their statutes of limitations to void a marriage. Some statutes give no recourse to the family, even where there is fraud or undue influence, because the incompetent person has died shortly after the wedding, and thus there was no realistic opportunity to challenge its validity. Delaware's statute of limitations is just ninety days,¹²⁰ Colorado's is six months,¹²¹ and in neither state can the action be brought after the death of one spouse. Is it necessary to have such a short time period to sue, and for both spouses to be alive when the suit is brought? Legislatures must balance recognizing a marriage contracted by one who failed to understand that he or she was getting married, against unseemly challenges brought long after the incompetent spouse's death. One way to balance the two concerns is with a statute of limitations that survives the spouse's death. A statute could allow a suit to annul the marriage within a year of the ceremony or when the challenger discovered the marriage, for example, without regard to whether both spouses were still alive.

116. See, e.g., MONT. CODE ANN. § 40-1-402(4) ("Children born of a marriage declared invalid are legitimate."). The statute is based on the UNIFORM MARRIAGE AND DIVORCE ACT § 208.

117. *In re Estate of Toutant*, 633 N.W.2d 692, 697 (Wis. Ct. App. 2001).

118. *Id.* at 699-700.

119. *Estate of Dominguez*, 2002 N.Y. Misc. LEXIS 1596, 26-27 (N.Y. Sup. Ct., Nov. 18, 2002).

120. DEL. CODE ANN. tit. 13, § 1506(b)(1) (2008).

121. COLO. REV. STAT. § 14-10-111(2)(a) (2008).

C. Better Living Conditions for Seniors

Giving seniors a third option—other than large institutions or staying at home alone—may help obviate the need for lawsuits to secure the right to intimacy or to annul a marriage. Florida, for example, encourages the establishment of housing for a small number of seniors by subsidizing some of the costs.¹²² Geriatrician Dr. William Thomas conceived Green Houses, facilities for eight to ten elderly people with private rooms and bathrooms in a home-like setting.¹²³ These communal housing arrangements can make seniors less isolated, and thus less vulnerable to an unscrupulous caregiver. At the same time, because the facilities are so small, they are more flexible in allowing privacy to the occupants. The Robert Wood Johnson Foundation is supporting the building of Green Houses across the country.¹²⁴ The U.S. Administration on Aging has encouraged the establishment of Naturally Occurring Retirement Communities, or NORCs, by first identifying neighborhoods or buildings in which a large proportion of the residents are elderly, and then working to organize resources in the community to help the elderly remain in their own homes.¹²⁵ AARP estimates that about five thousand NORCs now exist across the country, allowing people to stay in their own homes by providing health care, food, transportation, and other services.¹²⁶ In a few communities, elderly with substantial resources are designing their own community housing. The first such example of “elderhoods” was founded in Davis, California, by twelve residents who designed their own units and common areas, including a unit to rent to a nurse at below-market rates.¹²⁷ ElderSpirit works on a similar concept of allowing residents to design the development; ElderSpirit communities are planned in Virginia, Florida, Kansas, and other places in the United States.¹²⁸

D. Equity

Finally, a court can use its equitable powers more often, especially in dealing with the marriage of someone who lacks understanding or competence. Courts have for a long time been willing to assess the equi-

122. See FLA. STAT. ANN. §§ 430.600-606 (West 2008).

123. Judith Rabig et al., *Radical Redesign of Nursing Homes: Applying the Green House Concept in Tupelo, Mississippi*, 46 GERONTOLOGIST 533, 533 (2006).

124. Alice Dembner, ‘Green Houses’ For Golden Years, BOSTON GLOBE, Sept. 30, 2006, at A1.

125. Athan Bezaitis, *Changing Choices—Aging in Place in the 21st Century*, AGING WELL, Spring 2008, at 30, available at <http://www.agingwellmag.com/071708p30.shtml>. See also Nell Bernstein, “Aging in Place” Communities Offer Seniors Independence and Support, Caring.com, July 9, 2008, available at <http://www.caring.com/articles/aging-in-place>.

126. *Id.*

127. *Id.*; see also The Elder Cohousing Network, <http://www.abrahampais.com/ElderCohousing/GlacierCircle.htm> (last visited Dec. 18, 2008).

128. Patricia Leigh Brown, *Growing Old Together, in New Kind of Commune*, N.Y. TIMES, Feb. 27, 2006, at A1, available at <http://www.nytimes.com/2006/02/27/national/27commune.html?adxnml=1&pagewanted=print&adxnml=1222286447-bRdrFtmo2OqQN8jBGIDkPg>.

ties in bigamous marriages; why not do so here? A spouse who believed his mate was competent to consent to their wedding would not be deprived of his statutory share. California, Louisiana, and Texas recognize the concept of “putative spouse” in bigamous marriages; a good faith spouse might still take a share.¹²⁹ In the case where a decedent is survived by more than one “spouse,” the Uniform Marriage and Divorce Act allows courts to apportion property “as appropriate in the circumstances and in the interests of justice.”¹³⁰ Courts could decline to treat a spouse acting in bad faith as entitled to a statutory share, on the grounds of unclean hands.¹³¹ The bad faith spouse could be treated in the same way as the bigamist was treated at common law, and take nothing by operation of law.¹³²

CONCLUSION

Current law and practice force seniors to make a difficult choice, especially for those with some cognitive impairments who lack family who can care for them. The senior can choose to live in a facility and give up much of his or her privacy, or can hire someone to provide in-home help. A number of surveys have found that most elderly want to stay in their own homes, but may feel compelled to move into a nursing home for health reasons.¹³³ Facilitating innovative solutions to allow seniors to live at home, such as NORCs, or to allow seniors to design housing that fits their needs, is an important step toward giving seniors more attractive living options. These new forms of housing, however, do not address the underlying problems for the many seniors who live in nursing homes, or who are isolated at home.

For elderly in nursing homes and assisted living facilities, two important shifts need to occur. One is a change in the attitude of family members and staff regarding the value and importance of relationships with others. Education and training will help. If both elderly parties are fully competent, there seems no reason to justify nursing home policies

129. CAL. FAM. CODE § 2251 (West 2008); LA. CIV. CODE ANN. art.96 (2008); *Lee v. Lee*, 247 S.W. 828, 830 (Tex. Comm’n App. 1923).

130. UNIFORM MARRIAGE AND DIVORCE ACT § 209 (1970) (amended 1971 and 1973), 9A U.L.A. 192 (1998); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2, cmt. e (2008).

131. *See, e.g.*, *Estate of Hafner*, 229 Cal. Rptr. 676, 681 (Cal. Ct. App. 1986) (stating that the status of the putative spouse “belongs only to the party or parties to a void marriage who the trial court finds to have believed in good faith in the validity of the void marriage”).

132. A bigamist might still inherit under the putative spouse’s will; courts carefully examine whether the testator bequest “was founded on her supposed legal relation with [her husband] and not primarily on their long and intimate association.” *In re Estate of Carson*, 194 P. 5 (Cal. 1920).

133. Lucette Lagnado, *Foundation Places Big Bet on ‘Green Houses’ for Elderly*, PITTSBURGH POST-GAZETTE, June 29, 2008 at A-2 (citing a 2003 AARP survey that 1% of Americans over age fifty with a disability wanted to move to a nursing home); Bob Moos, *Boomer Home-Bodies: Wanting To Stay Put Isn’t New—What’s New is the 76 Million Baby Boomers Approaching Golden Pond*, DALLAS MORNING NEWS, Nov. 28, 2004, at 1H (citing an AARP survey that about 8 out of 10 elderly want to stay in their own homes).

requiring that the families be informed of a new friendship with another resident. Second, existing federal and state laws need to be enforced. Both already require privacy and a right to associate, including the right to have visitors, but these laws are often ignored. For elderly living at home, existing laws may be the obstacle rather than the solution, at least in cases where an unscrupulous caregiver has tricked the elderly person into marriage. Short statutes of limitation to invalidate the marriage have allowed caregivers to inherit, even in cases where the elderly person had no idea a marriage had taken place. A more caring and creative society should provide much better alternatives.