

The opinions expressed in this document, which includes two appendices, are those of the Board on Aging and Long Term Care – Ombudsman Program. Wisconsin state statutes and case law were researched to assist in developing the four guidelines for the ability to consent to a sexual relationship. For facilities that are not located in Wisconsin, it is recommended to research your state’s statutes for guidance on determining a person’s ability to consent to a sexual relationship.

This appendix is not legal advice nor is it mandated, but is intended to provide practical suggestions and guidance in how to begin to assess a resident’s ability to consent to physical sexual expression. Facilities may want to use this as a basis for developing their own policies as it relates to a resident’s ability to consent to a sexual relationship.

Appendix 2- Recommendations for Addressing Resident Relationships Assessment for Consent to Physical Sexual Expressions

Wisconsin has not specifically defined what an individual must understand in order to consent to sexual contact. However, discussion in the “Guardianship of Adults” (<http://www.dhs.wisconsin.gov/publications/P2/p20460.pdf>), implies that there may be indications that the following four guidelines could be used as the basis for an assessment to determine a person’s ability to consent to sexual contact. Depending on the uniqueness of each situation, additional considerations might be appropriate. Assessment efforts should focus on the resident revealing his/her understanding of the following four guidelines:

- 1. The person understands the distinctively sexual nature of the conduct. That is, that the acts have a special status as “sexual”.**
- 2. The person understands that their body is private and they have the right to refuse, or say “no”. They should also understand the other person should respect their right of refusal.**
- 3. The person understands there may be health risks associated with the sexual act. (pregnancy, STD’s, cardiac, other health risks)**
- 4. The person understands there may be negative societal response to the conduct. (Gossip, name calling, social fallout, stigmatized.)**

As in any good assessment process, a skilled, multi-disciplinary team must be involved. The focus must, at all times, be on the individual resident, and should not include the opinions or comfort levels of staff, family members or surrogate decision-makers. Assessments are ongoing and documentation of the assessment and review of the assessment shall occur as part of the care planning process. Assessment protocols include:

- History
- Observations
- Interviewing
- Analysis
- Care Planning
- Re-Assessment

Through the assessment process, the resident reveals her or his ability or inability to consent to a sexual relationship at that point in time.

➤ **KNOW THE RESIDENT BY GATHERING HISTORY**

Staff can utilize Appendix 1 as a guide in their attempt to gather an intimacy and sexuality history. A social history should also be completed.

➤ **OBSERVATIONS**

All staff members (nurses, CNA's, social worker, housekeeping, dietary, laundry, maintenance, activities, management) will make unobtrusive observations of the resident in a variety of situations. It is recommended that the facility utilize a behavior flow sheet to track such observations. The following is a list of possible observations the facility might consider making:

- Resident interactions – how does resident interact with male and female residents, staff, family and visitors
- Body Language – is the resident showing signs of fearfulness, happiness, feeling troubled, agitated, calm? Are there facial grimaces, posturing that indicate discomfort or pain? Are they pushing away or waving hands in a defensive manner?
- Verbalizations – Does the resident sound angry, fearful, friendly, reserved or shouting?
- Response to care – Is the resident accepting, refusing of cares? What are their specific cares? How do they respond to staff? Does time of day make a difference in acceptance of care?
- Changes – any changes in medical condition, cognition, social circle or environment?

➤ **INTERVIEWING**

Utilizing professional interviewing techniques adapted for the abilities of the resident involved, is essential in the assessment process. Below are examples of questions a facility may ask a resident during the interview process. Answering the questions is voluntary. This is not an all-inclusive list or in any particular order. As the interview progresses, the interviewer may ask other pertinent questions not listed below. It may be helpful to write down verbatim what the resident verbally states following each question. The actual verbal response reveals valuable information about the person's level of understanding of the topic. It should also be noted the resident has the right to refuse participation in this assessment, and refusal should not be the sole basis for determining the ability of a resident to consent to an intimate or sexual relationship.

Tell me about your friends.
Do you have a special friend?
What do you do with your friend?
Does this friend touch you? How? Where on your body?
Do you like being touched this way?
Are you having sex with your friend?
Where do you have sex?

Do people here gossip? About what?
Does this concern you? Why?
Have you ever been the target of gossip?
What was it about? Did that upset you?
Have you noticed people being excluded from groups? Have you ever been excluded?

Do you understand what sexual contact means?
Will you continue this relationship if your family and/or friends disapprove?
Do you feel comfortable & safe living here?
Is there anyone you are afraid of? Anyone who makes you feel uncomfortable?
Has anyone ever hurt you?
Did you tell them to stop?
What was their response?
If you do not like something, how do you say no?
Do you tell someone? Who?
Do you understand you have the right to say no?

Has anyone scolded you, called you names, judged your behavior, etc? How did that make you feel?
Do you have concerns that your family or friends would treat you differently because of this relationship? What are your concerns?
Do you have any health issues that limit your activity?
What are they?
How do they limit you?
Is having sex a health concern for you?
Do you know what a STD is?
Do you know anyone with a STD?
Is pregnancy a concern?

➤ **ANALYSIS**

In analyzing all the information gathered it is vital that participants not make assumptions, nor interject personally held values, and not reach erroneous subjective conclusions. The process of analysis must focus on the four consent guidelines and the facts, values and preferences as revealed by the resident.

➤ **CARE PLANNING**

Care planning to address a resident's sexual expression should be based on the information gathered in the assessment process. The care plan should state the needs and wants of the resident, how those needs and wants will be met, and who will be responsible. The resident should be a part of the care planning process and approve all aspects of the care plan. Content of that care plan will depend heavily on the individual's ability, or lack of ability, to consent to sexual contact. It should be noted that resident choice should be a part of the care plan at all times, including those residents who have guardians or activated powers of attorney for health care.

If it is determined that two residents are capable of consenting to sexual contact, the care plan focus will be on the rights associated with that relationship.

If one or both residents are not capable of consenting to a sexual relationship, care planning needs to focus on balancing the rights of the residents to associate and have a friendship, while protecting them from sexual contact that could be exploitive or abusive.

When it has been determined, through assessment, that one or both residents is/are unable to consent, and if the two residents are happy and comfortable with each other, the following are some approaches staff should take to ensure the residents are allowed to have a "friendship" but also protect them from sexual abuse/exploitation:

- Early identification of the relationship – it is imperative that staff know their residents, that they observe how they interact with other residents, how relationships develop. Talk with other team members.
- Offer socialization in public, supervised area – provide frequent checks to ensure that contact does not become sexual or that the affection does not become unwanted.
- Offer activities that the two residents can participate in together while staff is involved.

If staff have assessed the residents and find that one or both of the residents' sexual behavior is inappropriate or unwanted, staff should use the following approaches. These interventions need to occur before the sexual contact takes place.

- Address the real need – this should be identified in the assessment. Do residents need to be toileted, are they lonely or bored?
- Use distraction, redirection and activities – knowing the resident will help figure out what is going to socially and appropriately distract her or him. The resident is more likely to be redirected if it is something they are interested in. A good Social History is critical.
- Supervision – frequent checks, including 1:1 during times when the sexual activity is a pattern
- Use of the facility environment to separate residents, when necessary – the assessment will help determine if this is the only way to keep the two non-consenting residents safe. Rooms could be located on opposite wings, one resident on a secured unit, different floors, etc. This should be used as a last resort.

➤ **RE-ASSESSMENT**

Assessments are ongoing. Facilities should be performing assessments for the ability to consent to physical sexual expression at least quarterly, and/or when there is a change in condition or resident behavior. Documentation of the assessments shall occur as part of the care planning process.

These recommendations try to address instances of intimacy and sexuality in long term care in an understandable manner. If you have further questions or specific situations regarding intimacy and sexuality in long term care, please contact the Wisconsin Board on Aging and Long Term Care – Ombudsman Program at:

1 800 815-0015

EMAIL: BOALTC@Wisconsin.Gov