

Consent Laws Delaware

Last Updated: March 2020

Question	Answer
At what age is a person able to consent?	<p>16 years old, if the defendant is more than 4 years older, otherwise 18 years old. 11 Delaware Code §§ 761; 762; 765; 770; 771; 778.</p> <p>If the victim is at least 12 years old and the defendant is no more than 4 years older than the victim, it is an affirmative defense if the victim consented to the act “knowingly”.</p>
How is consent defined?	<p>“Without consent” means any of the following:</p> <ul style="list-style-type: none"> • The defendant compelled the victim to submit by an act of coercion as defined in §§ 791 and 792, or by force, by gesture, or by threat of death, physical injury, pain or kidnapping to be inflicted upon the victim or a third party, or by any other means which would compel a reasonable person under the circumstances to submit. The victim need resist only to the extent that it is reasonably necessary to make the victim’s refusal to consent known to the defendant, unless such resistance would be futile or foolhardy. • The defendant knew the victim was unconscious, asleep or otherwise unaware that a sexual act was being performed. • The defendant knew the victim suffered from a cognitive disability, mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct or incapable of consenting. • Where the defendant is a health professional, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling, the commission of acts of sexual contact, sexual penetration or sexual intercourse by such person shall be deemed to be without consent of the victim where such acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested. • The defendant had substantially impaired the victim’s power to appraise or control the victim’s own conduct by administering or employing without the other person’s knowledge or against the other person’s will, drugs, intoxicants or other means for the purpose of preventing resistance. <p>Note: “health professional” includes all individuals who are licensed or who hold themselves out to be licensed or who otherwise provide professional physical or mental health services, diagnosis, treatment or counseling and shall include, but not be limited to, doctors of medicine and osteopathy, dentists, nurses, physical therapists, chiropractors, psychologists, social workers, medical technicians, mental health counselors, substance abuse counselors, marriage and family counselors or therapists and</p>

	<p>hypnotherapists.</p> <p>11 Delaware Code § 761.</p>
Is consent a defense to sex crimes?	Yes, consent is a defense to unlawful sexual contact in the third degree for sexual contact without consent under section 767 and rape for sexual penetration without consent under sections 770, 771, 772, and 773. 11 Delaware Code §§ 767; 770(a)(3); 771; 772; 773.
Is voluntary intoxication a defense to sex crimes?	Maybe. There is a possible affirmative defense that the perpetrator, at the time of the conduct constituting the criminal offense, did not know the victim was unconscious or asleep. 11 Delaware Code § 761. It is possible that the perpetrator could argue that, due to being intoxicated, he could not know the victim's condition.
Does the definition require "freely given consent" or "affirmative consent"?	No.
Does difference in age between the victim and actor impact the victim's ability to consent?	<p>Yes:</p> <ul style="list-style-type: none"> • As to sexual offenses in which the victim's age is an element of the offense because the victim has not yet reached that victim's 16th birthday, it is no defense that the actor did not know the person's age, or that the actor reasonably believed that the person had reached that person's sixteenth birthday; provided that, where the person committing the sexual act is no more than 4 years older than the victim (and the victim is at least 12 years old), it is an affirmative defense that the victim consented to the act "knowingly" as defined in § 231. 11 Delaware Code § 762(d). • A person that is 30 years of age or older may not have sexual intercourse with a victim that has not yet reached 18 years old, except if the victim and person are married at the time of intercourse. 11 Delaware Code § 770(a)(2). <p>A person that is at least 4 years older than a child who has reached 16 years old but has not yet reached 18 years old and stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over a child, may not engage in sexual intercourse or penetration with that child. 11 Delaware Code § 778.</p>
Does elderly age impact the victim's ability to consent?	No.
Does developmental disability and/or mental incapacity impact the victim's ability to consent?	<p>Yes.</p> <p>A person can be incapable of consenting or appraising the nature of the sexual conduct if the victim suffered from a cognitive disability, mental illness or mental defect and the defendant knew of such condition.</p>

	<p>“cognitive disability” means a developmental disability that substantially impairs an individual's cognitive abilities including, but not limited to, delirium, dementia and other organic brain disorders for which there is an identifiable pathologic condition, as well as nonorganic brain disorders commonly called functional disorders. “Cognitive disability” also includes conditions of mental retardation, severe cerebral palsy, and any other condition found to be closely related to mental retardation because such condition results in the impairment of general intellectual functioning or adaptive behavior similar to that of persons who have been diagnosed with mental retardation, or such condition requires treatment and services similar to those required for persons who have been diagnosed with mental retardation.</p> <p>11 Delaware Code § 761(k)(3).</p>
<p>Does physical disability, incapacity or helplessness impact the victim’s ability to consent?</p>	<p>No.</p>
<p>Does consciousness impact the victim’s ability to consent?</p>	<p>Yes, there is no consent if the defendant knew the victim was unconscious, asleep or otherwise unaware that a sexual act was being performed. 11 Delaware Code § 761(k)(2)</p>
<p>Does intoxication impact the victim’s ability to consent?</p>	<p>It can, but not in all circumstances. There is no consent if the defendant has substantially impaired the victim’s power to appraise or control the victim’s own conduct by administering or employing without the other person’s knowledge or against the other person’s will, drugs, intoxicants or other means for the purpose of preventing resistance. 11 Delaware Code § 761(k)(5). There is also no consent if “an individual who was able to communicate her consent or lack thereof at the beginning of the sexual encounter later becomes unable to do so and the defendant continues to engage that person in sexual activity.” <i>State v. Davis</i>, 180 Conn.App. 799, 185 A.3d 654 (Conn. 2018).</p>
<p>Does the relationship between the victim and actor impact the victim’s ability to consent?</p>	<p>Yes.</p> <ul style="list-style-type: none"> • If victim and perpetrator are married: <ul style="list-style-type: none"> • There is a marital exception to rape in the fourth degree which criminalizes sexual intercourse between another person who has not yet reached his or her eighteenth birthday, and a person who is 30 years of age or older. Such intercourse will not be unlawful if the victim and person are married at the time of such intercourse. 11 Delaware Code § 770. • When the perpetrator is in a position of trust over the victim: <ul style="list-style-type: none"> • A person is guilty of sexual abuse of a child by a person in a position of trust, authority or supervision in the first degree when such person: <ul style="list-style-type: none"> • Intentionally engages in sexual intercourse or sexual penetration with a child under the age of 16 and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778(1)-(2)); • Intentionally engages in sexual intercourse or sexual penetration with a child over the

- age of 16 and under the age of 18, when the person is at least 4 years older than the child and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778(3));
- Intentionally engages in sexual intercourse or sexual penetration with a child over the age of 16 and under the age of 18, and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778(4));
 - Engages in an act of sexual extortion, as defined in § 774, against a child under the age of 16 and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778(5)).
- A person is guilty of sexual abuse of a child by a person in a position of trust, authority or supervision in the **second** degree when such person:
- Intentionally has sexual contact with a child under the age of 16 or causes the child to have sexual contact with the person or a third person and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778A(1));
 - Is a male who intentionally exposes his genitals or buttocks to a child under the age of 16 under circumstances in which he knows his conduct is likely to cause annoyance, affront, offense or alarm when the person is at least 4 years older than the child and he stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778A(2)(a));
 - Is a female who intentionally exposes her genitals, breast or buttocks to a child under the age of 16 under circumstances in which she knows her conduct is likely to cause annoyance, affront, offense or alarm when the person is at least 4 years older than the child and she stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778A(2)(b));
 - Suggests, solicits, requests, commands, importunes or otherwise attempts to induce a child under the age of 16 to have sexual contact or sexual intercourse or unlawful sexual penetration with the person or a third person, knowing that the person is thereby likely to cause annoyance, affront, offense or alarm to the child or another when the person is at least 4 years older than the child and the person stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child (11 Delaware Code § 778A(3)).
- **“Position of trust, authority or supervision over a child”** includes, but is not limited to:

- Familial or custodial authority or supervision;
 - A teacher, coach, counselor, advisor, mentor or any other person providing instruction or educational services to a child or children, whether such person is compensated or acting as a volunteer;
 - A babysitter, child care provider, or child care aide, whether such person is compensated or acting as a volunteer;
 - Any healthcare professional as defined above;
 - Clergy, including but not limited to any minister, pastor, rabbi, lay religious leader, pastoral counselor or any other person having regular direct contact with children through affiliation with a church or religious institution, whether such person is compensated or acting as a volunteer;
 - Any law-enforcement officer, as that term is defined in [§ 222](#), and including any person acting as an officer or counselor at a correctional or counseling institution, facility or organization, whether such person is compensated or acting as a volunteer; or
 - Any other person who because of that person's familial relationship, profession, employment, vocation, avocation or volunteer service has regular direct contact with a child or children and in the course thereof assumes responsibility, whether temporarily or permanently, for the care or supervision of a child or children. 11 Delaware Code § 761(e).
- Health Professional or Religious Figure
 - Where the defendant is a health professional, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling, the commission of acts of sexual contact, sexual penetration or sexual intercourse by such person shall be deemed to be without consent of the victim where such acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested. 11 Delaware Code § 761(k)(4).

11 Delaware Code § 761(e) and § 761(e)(4).