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Personal Delegations

Alexander A. Boni-Saenz[†]

INTRODUCTION

Donald and Gloria Luster married on October 5, 1963 and had four children.¹ Donald retired in 2005, and it was about this time when Jeannine Childree, his youngest daughter and a registered nurse, noticed that he was exhibiting signs of dementia.² After a number of consultations with doctors, Donald was officially diagnosed with Alzheimer's disease in 2009 due to his memory loss, disorientation, and other cognitive impairments.³ Based on these medical evaluations, a Connecticut probate court declared Donald incapable of handling his personal or financial affairs and appointed Jeannine and his other daughter, Jennifer Dearborn, as his guardians.⁴ Shortly thereafter, Gloria filed for a legal separation from Donald, and in response, the daughters counterclaimed for divorce, suspecting their mother of financial and emotional abuse.⁵ Should the guardian-daughters have the authority to sue for divorce on behalf of their father?⁶

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¹ See *Luster v. Luster*, No. FA094010779S, 2011 LEXIS 1844, at *3-4 (Conn. Super. Ct. July 20, 2011).

² See *id.* at *6-7.

³ See *id.* at *8, *10.

⁴ See *id.* at *11.

⁵ See *id.* at *1. There was in fact evidence that Gloria had dissipated marital assets, using a durable power of attorney that may have been signed after Donald lost capacity. See *id.* at *11-17. There was also some evidence of emotional abuse. See *id.* at

In 2000, Joe Thomas Garrett died after a bout with lung cancer.⁷ About a week before he died, he signed a durable power of attorney and approved a will.⁸ The power of attorney designated Joe's brother, Larry, as attorney-in-fact, and the will poured Joe's assets into a trust bearing Joe's name.⁹ Its trustees were Carolynne (Joe's wife), and Larry, and its assets would be distributed at Carolynne's death, with only two percent going to one of Joe's daughters, Joni Hart.¹⁰ Although Joni had only seen her father a handful of times since 1969, she challenged the will on several grounds, including that Joe lacked the mental capacity to execute it and that it was invalid because it was actually executed by Larry.¹¹ Assuming Joe lacked decisional capacity, should Larry have the authority to execute a will on his brother's behalf?¹²

These types of questions are more familiar in the health-care context, where the legal system has publicly grappled with the difficulties of delegating the decision to

*9 ("The defendant [Donald] reported that the plaintiff would ask him 'why are you still alive[.]'"); *id.* at *9 ("The defendant was extremely frightened of the plaintiff [Gloria] and felt unsafe in his own home.").

⁶ Gloria moved to dismiss the daughters' counterclaim, contending that guardians' powers are limited and that allowing guardians the power to divorce would allow them to "bring dissolution of another's marriage for a myriad of reasons including financial gain or personal animosity." *See Luster v. Luster*, 17 A.3d 1068, 1075 (Conn. App. Ct. 2011). Judge Klaczak of the superior court agreed, noting that the majority rule prohibited guardians from filing for divorce for their wards, as this was an "intensely personal" decision and that there was an "inherent inability to know" what Donald would have wanted in this situation. *See Luster*, 2010 Conn. Super. LEXIS 63, at *1-2. The appeals court reversed, focusing on the need for the representation of Donald's interests in court and the problem of leaving potentially abusive situations unaddressed. *See Luster*, 17 A.3d at 1077-78. Gloria appealed, and the Supreme Court of Connecticut granted certiorari on the question, but later dismissed the case for failure to file a brief. *See Luster v. Luster*, 23 A.3d 1243 (Conn. 2011); *Luster v. Luster*, SC 18820 (Conn. Apr. 13, 2012) (mem. dismissal). For a summary of the law in other states, *see infra* Part I.B.3.

⁷ *See In re Estate of Garrett*, 100 S.W.3d 72, 73-74 (Ark. Ct. App. 2003).

⁸ *See id.* at 74.

⁹ *Id.* at 73-74.

¹⁰ *See id.*

¹¹ *Id.* at 74-76.

¹² The court's answer was no. *See id.* at 76 ("Under a power of attorney, an agent is authorized to act with respect to any and all matters on behalf of the principal with the exception of those which, by their nature, by public policy, or by contract require personal performance. The decision of who, what, when, and how one's property is to be distributed upon death is clearly personal and that of the principal alone, and thus falls within the exception." (citations and internal quotation marks omitted)). The court, however, found that the will was validly executed by Joe himself and upheld it. *See id.* ("Larry merely acted as a conduit or messenger between the decedent and Neihouse [the attorney] concerning the decedent's wishes because the decedent was ill and unable to leave the hospital.").

withdraw life-sustaining treatment from individuals such as Karen Ann Quinlan,¹³ Nancy Cruzan,¹⁴ and Terri Schiavo.¹⁵ Cases like these illustrate the important question of proxy decision-making on personal matters, yet courts and legislatures are divided on whether and how to delegate personal decision-making authority for individuals who suffer from cognitive impairment. Nevertheless, this question's importance in the United States is unlikely to subside anytime soon. Millions of people lack decisional capacity due to illness or accident, and these numbers will only increase with an aging population.¹⁶ Further, the traditional lines of decision-making authority have broken down as family and caregiving structures have changed.¹⁷ Thus, society will face more and more scenarios in which people with cognitive impairments may require support or a proxy in making crucial life decisions. While this reality presents many difficult questions, it also creates an opportunity to rethink and reevaluate how the law treats people with cognitive impairments.¹⁸

The central claim of this article is that in the case of decisional incapacity, decisions that implicate fundamental human capabilities should generally be delegable. Thus, it rejects the rationale employed by courts to justify nondelegation—that these types of decisions are too personal to be made by another. This line of reasoning confuses nondelegation for nondecision, and it only serves to privilege a status quo outcome over the expression of fundamental human capabilities by individuals with cognitive impairments. The primary normative framework that guides the analysis is the

¹³ See *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

¹⁴ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

¹⁵ See *In re Schiavo*, 780 So. 2d 176 (Fla. Dist. Ct. App. 2001).

¹⁶ See Liesi E. Hebert et al., *Alzheimer Disease in the US Population: Prevalence Estimates Using the 2000 Census*, 60 ARCHIVES OF NEUROLOGY 1119, 1120 (2003) (estimating there are 4.5 million people in the United States with Alzheimer's disease and projecting that this number will increase to 13.2 million by 2050).

¹⁷ See ELAINE M. BRODY, *WOMEN IN THE MIDDLE: THEIR PARENT CARE YEARS* 7-22 (2d ed. 2004) (describing changing family structures); David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families in the United States Since 1960*, in THE FUTURE OF THE FAMILY 30-37, 49-52 (Daniel P. Moynihan et al. eds., 2004) (same).

¹⁸ These issues are not unique to the United States. Other countries also grapple with how to treat certain types of decisions in the case of decisional incapacity. See BÜRGERLICHES GESETZBUCH BGB (CIVIL CODE) §§ 1903-07 (delineating delegation or nondelegation of authority for decisions about marriage, willmaking, sterilization, and residence for those under custodianship in Germany).

capabilities approach.¹⁹ It posits that capabilities, or the freedoms or opportunities to achieve certain core functionings, are the relevant metric for social justice. Access to the capabilities that we consider fundamental to the human experience, such as the capability to live a life that is not arbitrarily cut short or the capability to have social affiliations, must be provided on an adequate basis to all, including those with cognitive impairment. Thus, most individuals who lack decisional capacity should be free to exercise their fundamental capabilities through, or with the assistance of, a surrogate. One need not adhere to the capabilities approach, however, to support some range of personal delegations. This article also explores other normative arguments—including autonomy and alternative conceptions of welfare—that might justify different types of personal delegation regimes.

As a practical matter, this means that various personal decisions, such as those involving divorce, estate planning, or health care, should be delegable to surrogates in the event of decisional incapacity. This delegation may be achieved either through a springing durable power of attorney that specifically delegates each of these decisions or through the guardianship process. Oversight of attorneys-in-fact should be limited, while advance judicial approval should be required for guardians who have cognizable conflicts of interest or who are exercising decision-making authority in a way that implies a likely conflict of interest. However, since the court may lack the institutional competence to review many of these personal decisions, its review should be deferential. In the end, ensuring equal access to such personal decisions through delegation is a crucial form of empowerment that promotes the flourishing of those living with cognitive impairment.

This article proceeds in three parts. Part I provides the background for understanding the field of personal delegations. It reviews the mechanisms of personal delegation and surveys the legal treatment of divorce, willmaking, and health care—the three areas in which these questions have been most subject to legal contestation. Part II argues for a rule that decisions that implicate fundamental human capabilities should generally be delegable. It then considers other normative arguments derived from the traditional legal standards for surrogate decision-

¹⁹ See generally MARTHA C. NUSSBAUM, *CREATING CAPABILITIES* (2011); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985).

making: substituted judgment and best interests. Part II also addresses objections based on the notion that certain decisions are too personal to be delegated to another. Part III examines how personal delegations would work in practice by discussing durable powers of attorney and guardianship, and it then briefly reexamines the areas of divorce, wills, and health care.

I. PERSONAL DELEGATIONS

Personal delegations are transfers of authority over personal decisions to others.²⁰ For the purposes of this article, I define personal decisions as those that allow us to exercise our fundamental human capabilities in meaningful ways.²¹ Examples include the decisions to marry,²² vote,²³ or travel.²⁴ Many of these

²⁰ See BLACK'S LAW DICTIONARY 491 (9th ed. 2009) (defining delegation as "[t]he act of entrusting another with authority or empowering another to act as an agent or representative").

²¹ This definition clearly links up with the primary normative theory I employ for much of my analysis: the capabilities approach. In Part II.B, I explore alternative normative arguments and vary the definition of a personal decision accordingly. While there is not a one-to-one match between the different normative theories, and thus their definitions, there is at least some overlapping consensus as to what would constitute a personal decision. See generally John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987) (applying the concept to political justice).

I draw on Martha Nussbaum's work to generate a list of fundamental human capabilities. See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 72-78 (2000) [hereinafter NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*]; see also MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 69-81 (2006) [hereinafter NUSSBAUM, *FRONTIERS*] (outlining ten core capabilities—life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment (political and material)). While one might disagree with elements on her list, the specific decisions analyzed in this article are connected to capabilities that most would likely consider fundamental. See *infra* Part I.B (connecting health care, divorce, and testamentary decisions to fundamental capabilities that are relatively uncontroversial).

²² See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (stating that prior cases characterize the right to marry as "among the personal decisions protected by the right of privacy"). The term privacy, of course, has been strained to encompass a variety of different interests that it supposedly protects. See generally Martha C. Nussbaum, *Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique*, in *INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 242 (Zoya Hasan et al. eds., 2002).

²³ See U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

types of decisions receive special protection through various constitutional mechanisms.²⁵ This article examines personal delegations made in the context of decisional incapacity, or the inability to make a specific type of decision entirely on one's own due to cognitive impairment.²⁶ In particular, this article focuses on those who once possessed decisional capacity but have since lost it, whether due to illness or accident.²⁷

This part reviews the legal architecture of delegations in the event of decisional incapacity. With that basis, it then turns to the legal treatment of personal delegations in three illustrative areas—divorce, willmaking, and health care.²⁸ While personal delegations potentially encompass a much broader set of decisions, the law is most in flux and thus open to contestation and litigation in these areas. In the first two domains, personal decisions have historically been nondelegable. The rationale for nondelegation is the personal nature of the decision, which is analyzed further in Part II.

²⁴ See *United States v. Guest*, 383 U.S. 745, 757 (1966) (“The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”); *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (including among the fundamental rights of citizens the “right of a citizen of one state to pass through, or to reside in any other state”).

²⁵ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”); Martha C. Nussbaum, *Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 56-72 (2007) (demonstrating how the U.S. Constitution actualizes many rights that contribute to various important capabilities).

²⁶ See ALLEN E. BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS* 18 (1990) (“The statement that a particular individual is (or is not) competent is incomplete. Competence is always competence *for some task*—competence *to do something* [T]he notion of decision-making capacity is itself incomplete until the nature of the choice as well as the conditions under which it is to be made are specified. Thus competence is decision-relative, not global.”). Because those who currently lack capacity could theoretically regain it, the delegations at issue are also revocable.

²⁷ This excludes, for the moment, two populations: children and those who never possessed decisional capacity.

²⁸ Other scholars have examined nondelegation in the areas of wills and divorce in isolation, but none have attempted to understand or theorize the field of personal delegations as a whole. See, e.g., Mark Schwarz, Note, *The Marriage Trap: How Guardianship Divorce Bans Abet Spousal Abuse*, 13 J.L. & FAM. STUD. 187, 196 (2011) (discussing lack of delegation in divorce cases); Ralph C. Brashier, *Policy, Perspective, and the Proxy Will*, 61 S.C. L. REV. 63, 102 (2009) (discussing state statutory delegation powers over wills); Diane Snow Mills, Comment, *“But I Love What’s-His-Name”: Inherent Dangers in the Changing Role of the Guardian in Divorce Actions on Behalf of Incompetents*, 16 J. AM. ACAD. MATRIMONIAL LAW. 527, 535-36 (2000); Kurt X. Metzmeier, Note, *The Power of the Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend*, 33 U. LOUISVILLE J. FAM. L. 949, 957-58 (1994).

A. *The Legal Architecture of Delegation*

The three primary legal mechanisms that govern the delegation of decisions in the event of decisional incapacity are the durable power of attorney, statutory surrogacy, and guardianship.²⁹ For those who plan in advance, the durable power of attorney permits the delegation of decision-making authority past the point of incapacity.³⁰ Originally used for delegation of financial decision-making, its use has now spread beyond the economic realm to the health-care arena, as all states now have statutes addressing the health-care power of attorney or its equivalent.³¹

For those who did not plan in advance, the law provides for delegation through statutory surrogacy and guardianship.³² The former represents the norm in the health-care domain; these statutes automatically empower surrogates when there is a finding, typically by a physician, that a patient lacks decisional capacity. They contain hierarchical lists of potential surrogates, starting with the spouse and proceeding to more distant familial relations.³³ These statutory schemes have an advantage

²⁹ There are, of course, informal or nonlegal delegations of personal decision-making authority as well. See Marshall B. Kapp, *Who's the Parent Here? The Family's Impact on the Autonomy of Older Persons*, 41 EMORY L. J. 773, 773-78 (1992) (outlining the domains in which the family/individual interaction plays out). For example, many caregivers for those with cognitive impairments must make proxy decisions about various personal activities of daily living, such as bathing, dressing, and eating. See S. Katz et al., *Studies of Illness in the Aged: The Index of ADL*, 185 JAMA 94, 94-99 (1964) (listing activities of daily living); see also I. Rosow & N. Breslau, *A Guttman Health Scale for the Aged*, 21 J. GERONTOLOGY 556, 556-59 (1966) (describing instrumental activities of daily living). Sometimes these decisions are codified as delegable in state statutes, but they are so uncontroversial that they almost never come up in legal cases. See FLA. STAT. ANN. § 744.3215 (West 2006) (delegating decisions about social environment to guardians). The primary allocation mechanisms for this type of labor and corresponding personal decision-making authority are gender and familial status. While these allocation mechanisms must be interrogated, to do so is outside the scope of this article.

³⁰ The durable power of attorney is a relatively new phenomenon, having been created in the 1950s to remedy the problem that at common law, incapacity of a principal extinguished an agency relationship. See Carolyn L. Dessin, *Acting as an Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 576-78 (1996); see also Alexander M. Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law Agency*, 61 IND. L.J. 115, 119-23 (1986) (detailing how courts dealt with the durable power of attorney in the context of economic transactions).

³¹ See Dorothy D. Nachman, *Living Wills: Is It Time to Pull the Plug?*, 18 ELDER L.J. 289, 316 (2011).

³² See LAWRENCE A. FROLIK, *THE LAW OF LATER-LIFE HEALTH CARE AND DECISION MAKING* 171-75, 221-25 (2006).

³³ See, e.g., ARK. CODE ANN. § 20-17-214 (2012); LA. REV. STAT. ANN. § 40:1299.58.5 (2012); MD. CODE ANN., HEALTH-GEN. § 5-605 (West 2008); TEX. HEALTH & SAFETY CODE ANN. § 166.039 (West 2010); VA. CODE ANN. § 54.1-2986 (2012). These

over the guardianship process in that they quickly select a decision-maker. A statutory scheme, however, requires an institution, legal or nonlegal, to execute it. These statutes have been employed in the health-care context primarily because the medical profession and health-care institutions exist to serve in this role.³⁴ There is typically no judicial oversight of statutory surrogates' decision-making.

Finally, there is guardianship.³⁵ When someone petitions the court to place a person under guardianship, the court holds a hearing to determine whether that person truly lacks capacity. If so, the court determines what type of guardianship would be appropriate given the ward's decisional and functional limitations, and who should serve as guardian.³⁶ Most states provide statutory guidelines for the selection of guardians, which

statutes are modeled after the Uniform Health-Care Decisions Act or one of its predecessor model statutes. The various state statutes' priority lists do a reasonably good job of reflecting patient preferences. See Nina A. Kohn & Jeremy A. Blumenthal, *Designating Health Care Decisionmakers for Patients Without Advance Directives: A Psychological Critique*, 42 GA. L. REV. 979, 1007 (2008).

³⁴ See generally Matthew K. Wynia et al., *Medical Professionalism in Society*, 341 NEW ENG. J. MED. 1612 (1999).

³⁵ The state's authority to do this derives from the doctrine of *parens patriae*—the state's power to take care of those in society who cannot take care of themselves. See Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982) ("*Parens patriae* means literally 'parent of the country.' The *parens patriae* action has its roots in the common-law concept of the 'royal prerogative.' The royal prerogative included the right or responsibility to take care of persons who 'are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property.'" (footnotes omitted) (quoting, among others, J. CHITTY, PREROGATIVES OF THE CROWN 155 (1820))). For *parens patriae*'s origins in English common law, see generally Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978). For a critique of the doctrine, see George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 914-15 (1976) ("Unchecked, however, this power will lead to total intrusion by the state into the personal lives of its members.").

³⁶ In Roman law and English common law, the state delegated financial but not personal decisions to the guardian of the ward. See Barbara A. Venesy, Comment, *1990 Guardianship Law Safeguards Personal Rights yet Protects Vulnerable Elderly*, 24 AKRON L. REV. 161, 163 (1990). Modern guardianship law allows guardians to make personal as well as financial decisions for a ward, and the court has the option of creating one of four types of guardianship: guardianship of the person (granting authority over personal decisions), guardianship of the estate (financial decisions), plenary guardianship (both types of decisions), and limited guardianship (both types of decisions, as tailored to the specific decisional incapacities of the ward). See LAWRENCE A. FROLIK, *THE LAW OF LATER-LIFE HEALTH CARE AND DECISION MAKING* 165-81 (2006) (explaining the different types of guardianship). The terminology varies by state, with some using the term conservator for guardians of the estate or plenary guardians. The alternative of limited guardianship has unfortunately not been popular among judges. See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 752 (2002).

include a rebuttable list of preferred guardians, similar in structure to the lists used to determine statutory surrogates.³⁷

B. *Three Illustrative Areas*

This part examines the three illustrative examples of personal delegations law—divorce, willmaking, and health care. Each has its own claim to being personal, but delegations in these areas are currently treated quite differently, with decisions being readily delegable for health care but much more controversial for willmaking and divorce.

1. Divorce

Marriage is a fundamental social and, more recently, legal relation.³⁸ Therefore, the decisions to enter into marriage or exit from it through divorce implicate the fundamental human capabilities associated with affiliation.³⁹ As social beings, we make a variety of choices about who to affiliate with (or who to cease affiliating with), and our identities are generated in part through these affiliations. The marital relation is not the only important type of personal affiliation, but it is perhaps the most prominent.

While the Supreme Court has recognized a fundamental right to marry,⁴⁰ it has never explicitly recognized a fundamental

³⁷ See, e.g., ARIZ. REV. STAT. ANN. § 14-5311(B) (2012) (using a hierarchical list); but see ARK. CODE ANN. § 28-65-204 (2012) (employing a more holistic analysis). Courts typically inquire into who might be best to serve and prefer to appoint family members. See MARY JOY QUINN, *GUARDIANSHIPS OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY* 73 (2005) (noting that nearly 70 percent of guardians are family members, with adult daughters most likely to fill the role). If no family member is willing or able to serve, or if there is bad blood between family members, then the court may appoint a professional guardian or public guardian. See Pamela B. Teaster, Erica F. Wood, Susan A. Lawrence & Winsor C. Schmidt, *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 240-41 (2007); Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 STETSON L. REV. 941, 945-46 (2002). Professional guardians are typically subject to certification or screening requirements to ensure quality services. See, e.g., FLA. STAT. ANN. § 744.1083 (West 2009) (requiring credit and criminal background checks); TEX PROB. CODE § 697 (West 2009) (requiring letters of reference and professional certification).

³⁸ See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1765-66 (2005).

³⁹ See NUSSBAUM, *FRONTIERS*, *supra* note 21, at 77 (“7. *Affiliation*. A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; . . . (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation . . .)”).

⁴⁰ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (characterizing marriage as “fundamental to our very existence and survival”).

right to divorce.⁴¹ Regardless of its constitutional status, however, when considered in the context of guardian decision-making, courts have been quick to paint the right as personal, deeming it nondelegable. The cases in which this issue appears share similar fact patterns: guardians file for divorce on behalf of their wards and allege wrongdoing on the part of the spouse with capacity.⁴² These cases arise because states do not spell out the delegability of personal decisions, such as divorce, in their guardianship statutes.⁴³ This lack of guidance leaves it to the courts to determine whether the right to divorce should be implied in the general grants of authority that are given to guardians. The majority rule is that a guardian may not

⁴¹ See Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1673 n.23 (2011). Courts, however, have sometimes assumed that it is implied in the right to marry, as have legal scholars. See, e.g., *Murillo v. Bambrick*, 681 F.2d 898, 904 (3d Cir. 1982); J. Harvie Wilkinson & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 574-75 (1977).

⁴² See, e.g., *Bradford v. Abend*, 89 Ill. 78, 78-79 (1878) (wife succumbed to mental and physical sickness due to “cruelty and neglect” on the part of her husband, who later abandoned her); *Cowan v. Cowan*, 1 N.E. 152, 152 (Mass. 1885) (husband abandoned wife after six weeks and did not contribute to her support, despite being spotted in adjoining towns). Sometimes, however, it is the wife who is accused of wrongdoing. See *In re Marriage of Drews*, 503 N.E.2d 339, 340 (Ill. 1986) (wife abandoned husband to his parents’ care after he suffered a “severe and disabling head injury as a consequence of an automobile accident”); *Mohler v. Estate of Anthony Shank*, 61 N.W. 981, 982 (Iowa 1895) (wife committed adultery and birthed a “bastard child,” son of the man she married after Shank’s death). Sometimes there is a financial consideration, such as the desire to prevent the spouse with capacity from claiming an interest in marital property. See *Cowan*, 1 N.E. at 152 (noting an argument in favor of divorce “that her husband might thus be prevented from interfering with or ultimately sharing in her [considerable] property” that she “inherited from her father nearly seven years after the desertion began.”). Other times a financial interest is imputed to the parties by the court. See *In re Jennings*, 453 A.2d 572, 574-75 (N.J. Super. Ct. Ch. Div. 1981) (denying the right to divorce by proxy and noting that the case would merely be a proxy battle over inheritance).

⁴³ When states have specifically codified the power of guardians to divorce their wards, the answer is clear, and courts have enforced this power. See *Vaughan v. Guardianship of Vaughan*, 648 So. 2d 193, 195-96 (Fla. Dist. Ct. App. 1994) (interpreting FLA. STAT. § 744.3215(4)(c) to allow the initiation of a dissolution action by a guardian); *Garnett v. Garnett*, 114 Mass. 379, 379-80 (Mass. 1874) (enforcing statutory grant of authority to guardian or next friend to pursue divorce action); *Denny v. Denny*, 90 Mass. (1 Allen) 311, 313-14 (1864) (same). In other states, there is no clear statutory codification, but there are relevant provisions in either the guardianship or divorce statutes that clearly imply such a power. See *Houghton v. Keller*, 662 N.W.2d 854, 855-56 (Mich. Ct. App. 2003) (jointly interpreting guardianship and divorce statutes as permitting suit for divorce by a guardian); *Johnson v. Johnson*, 811 S.W.2d 822, 825-26 (Mo. Ct. App. 1991) (acknowledging the right of the guardian son to pursue a divorce); *but see Brockman v. Young*, No. 2010-CA-001354-MR, 2011 Ky. App. Unpub. LEXIS 834, at *3-4 (Ky. Ct. App. Nov. 10, 2011) (refusing to read the statute mentioning the possibility of an incapacitated person prosecuting a divorce action as implying the right to do so).

pursue a divorce action.⁴⁴ In fact, many states accept the argument that the decision to divorce is “strictly personal” in nature and thus cannot be delegated to another.⁴⁵ Some states

⁴⁴ This rule is exemplified by the case of *Worthy v. Worthy*, 36 Ga. 45 (1867). Mary A. Worthy married her husband, Leonard Worthy, in 1858. *Id.* at 45. By late 1865, she was “insane,” and Leonard sent her to a lunatic’s asylum near Milledgeville in central Georgia. *Id.* at 45-46. While she was confined in the asylum, her father, Nathan Respass, filed for divorce on her behalf, alleging that Leonard had committed adultery numerous times while she was away. *Id.* The court refused to see “the right to sue for a divorce in any other light than as strictly personal to the party aggrieved.” *Id.* at 46-47 (emphasis omitted). Even though Mr. Respass’s “feelings and delicacy may have been outraged,” no one could know if Mary felt the same way. *Id.* at 47. Further, the court argued, the law provided a remedy in the form of punishment for adultery, and “[d]eath only can dissolve the marriage relation without her consent.” *Id.* (emphasis omitted).

Many other states have accepted the majority rule. See *Cox v. Armstrong*, 221 P.2d 371, 373 (Colo. 1950) (recognizing rule); *Freeman v. Freeman*, 237 S.E.2d 857, 859 (N.C. Ct. App. 1977) (“The majority rule that a suit for divorce is so personal and volitional that it cannot be maintained by a guardian on behalf of an incompetent is sound.”); *Murray ex rel. Murray v. Murray*, 426 S.E.2d 781, 784 (S.C. 1993) (“We adopt the majority rule in the case of a spouse who is mentally incompetent as to his property and his person, and hold that he may not bring an action for divorce either on his own behalf or through a guardian.”); *Mills*, *supra* note 20, at 535-37 (2000) (acknowledging this majority rule but also a minority trend toward allowing such actions). In determining whether the guardian has such authority, courts are careful to note whether the guardianship implies a lack of decisional capacity with respect to the divorce decision, as guardianship over the estate does not necessarily imply the inability to make a decision about a personal matter like divorce. See *In re Marriage of Higgason*, 516 P.2d 289, 294-95 (Cal. 1973) (noting that a person under guardianship may still exercise judgment and the wish to get divorced, which would be instituted through a guardian ad litem); *Schuck v. Myers*, 43 Cal. Rptr. 215, (Cal. Ct. App. 1965) (noting that the appointment of a conservator does not per se create a judgment that the person is insane or incompetent in a broader sense); *In re Marriage of Kutchins*, 482 N.E.2d 1005, 1007-08 (Ill. App. Ct. 1985) (preserving the right of the ward to make personal decisions, even if under a guardianship of the estate, if the ward is able to express a desire to dissolve the marriage); *Boyd v. Edwards*, 446 N.E.2d 1151, 1158 (Ohio Ct. App. 1982) (noting that the mentally ill can still marry even if under guardianship); *State ex rel. Robedeaux v. Johnson*, 418 P.2d 337, 340 (Okla. 1966) (noting that the purposes of a guardianship of the estate is to look after financial matters, not personal decisions such as divorce); *Scoufos v. Fuller*, 280 P.2d 720, 724 (Okla. 1954) (comparing the capacity to divorce to testamentary capacity, and describing how neither is necessarily extinguished by a general finding of incompetence); *Murray*, 426 S.E.2d at 784 (preserving the right of the ward to make personal decisions, even if under a guardianship of the estate, if the ward “is able to express unequivocally a desire to dissolve the marriage”); *Syno v. Syno*, 594 A.2d 307, 311 (Pa. Super. Ct. 1991) (same).

⁴⁵ See *Iago v. Iago*, 48 N.E. 30, 31 (Ill. 1897) (defining the right to divorce as a personal right that requires intelligent action by the ward); *State ex rel. Quear v. Madison Circuit Court*, 229 Ind. 503, 506 (1951) (claiming that the insane cannot consent to the filing of a complaint); *Birdzell v. Birdzell*, 33 Kan. 433, 435 (1885) (noting that marriage is a “a personal status and relation assumed for the joint lives of the parties” that cannot be dissolved without “free and voluntary consent of the parties”); *Johnson v. Johnson*, 170 S.W.2d 889, 889 (Ky. 1943) (concluding that divorce is “so strictly personal and volitional” that it cannot be maintained, even if this leaves wards as un-divorceable); *In re Babushkin*, 29 N.Y.S.2d 162, 163-64 (Sup. Ct. 1941) (putting the decision to divorce “wholly at the volition” of the ward); *Freeman*, 237

have analogized the guardian–ward relationship to the parent–child relationship, noting that, in that context, parents have no power to divorce on their child’s behalf.⁴⁶ Others have acknowledged a public policy of safeguarding marriage, which they interpret as continuing marriage in light of the possible threats of divorce.⁴⁷

The minority trend is to allow guardians to divorce their wards,⁴⁸ although the rationales in support of this rule vary. Some courts compare the decision to divorce to other decisions that are already deemed delegable⁴⁹ or treat divorce like any other civil action.⁵⁰ Alternatively, other courts focus on the ward’s experience, proclaiming a judicial duty to protect the ward from abuse⁵¹ or taking note of evidence of the incapacitated

S.E.2d at 859; *Shenk v. Shenk*, 135 N.E.2d 436, 438 (Ohio Ct. App. 1954) (noting that a guardian cannot know “the real will and decision” of a ward, as that is “personal”).

⁴⁶ See *Phillips v. Phillips*, 45 S.E.2d 621, 623 (Ga. 1947) (“While under our statutes the power of such a guardian over the person of his ward is the same as that of a father over his child, yet even a father cannot make decisions for his child as to questions of marriage and divorce.”); *Mohler v. Estate of Shank*, 61 N.W. 981, 983 (Iowa 1895) (“No guardian or parent or next friend can, by any means known to the law, effectuate a marriage between his ward or child and another And it appears to us that a guardian of an insane person has no more right to maintain an action to dissolve the marriage relation of his ward than he has to manage and control his will in the matter of entering into the relation.”).

⁴⁷ See *Mohrmann v. Kob*, 51 N.E.2d 921, 923-24 (N.Y. 1943) (“The State has a vital interest in the preservation of the marriage status—an interest which the Legislature has guarded jealously by the enactment of those statutes which govern divorce.”).

⁴⁸ The case of *Ruvalcaba v. Ruvalcaba* presents such a scenario. 850 P.2d 674 (Ariz. Ct. App. 1993). Peggy and Francisco Ruvalcaba were married in 1979 and had a child in 1984. *Id.* at 676. In 1989, Peggy suffered a traumatic head injury after falling off of a horse. *Id.* She was in a coma for several months, and when she emerged from it, she had several cognitive difficulties, which led to the appointment of her mother, Betty Stubblefield, as her guardian. *Id.* Betty filed a petition for divorce as well as a restraining order against Francisco, alleging that he had physically abused Peggy on several occasions, had threatened Betty, and had said that he would abscond to Mexico with their child if Betty filed for divorce on behalf of Peggy. *Id.* at 676-77. The trial court dismissed the petition, but the appeals court reversed. *Id.* at 677. In its opinion, the court noted the breadth of guardian powers, compared the divorce action to medical decision-making (noting that the latter was delegable), and warned of the possibilities of abuse if the divorce decision were not delegable. *Id.* at 683-84.

⁴⁹ See *Karbin v. Karbin*, 977 N.E.2d 154, 157-58, 162 (Ill. 2012) (“With the concept of ‘injury’ removed from divorce in Illinois, it is difficult for us to accept the view that the decision to divorce is qualitatively different from any other deeply personal decision, such as the decision to refuse life-support treatment or the decision to undergo involuntary sterilization.”).

⁵⁰ See *Luster v. Luster*, 17 A.3d 1068, 1078-79 (Conn. App. Ct. 2011); *In re Marriage of Ballard & Ballard*, 762 P.2d 1051, 1052 (Or. Ct. App. 1988) (allowing divorce through a guardian *ad litem*); *Wahlenmaier v. Wahlenmaier*, 762 S.W.2d 575, 575 (Tex. 1988) (per curiam) (same); *In re Marriage of Gannon*, 702 P.2d 465, 467 (Wash. 1985).

⁵¹ See *Campbell v. Campbell*, 5 So. 2d 401, 402 (Ala. 1941) (“The court has ample power to protect the interest of the incompetent complainant, and the equity of

person's desire for divorce prior to incapacity.⁵² Regardless of the rationale employed, the trend toward delegability is likely part of a more general trend toward no-fault divorce.⁵³ The presumption that marriage would continue indefinitely, even possibly in the presence of extensive abuse, was given force through several legal barriers to initiating and succeeding in a divorce action.⁵⁴ But with the institution of no-fault divorce in all fifty states in 2010,⁵⁵ one generally need not have a reason for divorcing and may do so under one of the catchall grounds such as irreconcilable differences or irremediable breakdown.⁵⁶ This trend has served to remove the fault system as a barrier to divorce in general, with likely spillover effects into guardian divorce.

2. Wills

The will is an instrument that serves multiple functions. It disposes of property,⁵⁷ expresses the testator's wishes,⁵⁸ and

the bill must be determined on its averments, independent of the state of the complainant's mind as if he were suing of his own volition."); *Kronberg v. Kronberg*, 623 A.2d 806, 810 (N.J. Super. Ct. Ch. Div. 1993); *McRae v. McRae*, 250 N.Y.S.2d 778, 780-81 (Sup. Ct. 1964) ("It cannot be presumed that the Legislature intended to leave an insane spouse completely at the mercy of the other party to the marriage contract, who might then with impunity disregard marital obligations or successfully assert marital rights lost by misconduct."); *Carver Estate*, 5 Pa. D. & C.3d 743, 754-55 (C.P., Orphans' Ct. Div. 1977) (noting that access to the courts to procure or apply for divorce is guaranteed by the Due Process Clause).

⁵² See *Nelson v. Nelson*, 878 P.2d 335, 339, 341 (N.M. Ct. App. 1994) (recognizing the ward's desire to end her marriage prior to incapacity as a factor in finding there is "no public policy or equitable justification for barring the ward's guardian from bringing an action for divorce on behalf of the ward").

⁵³ The recent case of *Karbin v. Karbin* explicitly employs this logic, noting that its previous rule barring guardian divorce took root in Illinois in the earlier case of *In re Marriage of Drews*, which was governed by the fault regime. See *Karbin*, 977 N.E.2d at 162 (noting how the policy objectives of the divorce regime as a whole had changed).

⁵⁴ See Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 702 (1994) ("Traditional marriage, supported by a legal rule that allowed divorce only for grievous offense, was a relationship that involved a lifelong commitment between spouses and a status with legal attributes independent of the parties' preferences.") (footnote omitted). For instance, some demonstration of fault, such as abandonment, cruelty, or adultery, on behalf of one of the parties was necessary. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1387-88 (2000). In addition, there were several defenses to divorce claims, such as condonation or recrimination. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1508 (2000).

⁵⁵ See Joslin, *supra* note 41, at 1676 n.41, 1704. New York passed no-fault divorce in 2010. 2010 N.Y. Laws ch. 384, § 1 (Aug. 13, 2010); see also *Paterson Signs No-Fault Divorce Bill*, N.Y. TIMES, Aug. 16, 2010, at A14.

⁵⁶ See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 188-89 (1989).

⁵⁷ The Supreme Court has indicated that disposal of property after death implicates one of the fundamental sticks in the bundle of property rights—to pass on

represents the final statement of the testator's social relationships.⁵⁹ The act of making a will is thus a personal decision because it relates to multiple fundamental human capabilities, including the capabilities to have control over one's property, expression, and affiliation.⁶⁰

Courts and legislatures have generally designated willmaking as nondelegable, viewing that decision as too personal to be made by another.⁶¹ Before 1998, the Uniform Probate Code (UPC) permitted delegations of almost every financial decision-making task to guardians, with the exception of willmaking.⁶² Various states incorporated this language into

one's bounty to those one deems worthy. *See* *Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.").

⁵⁸ *See* David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 61 (2012) (noting the ways in which wills and trusts are "speech acts").

⁵⁹ *See* Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 384 (2011) (arguing that "encouraging a testator to express herself in her will can strengthen the testator's connection to her personal identity and her community, an important step in furthering the ultimate goal of having her property pass as she intends and desires.").

⁶⁰ *See* NUSSBAUM, *FRONTIERS*, *supra* note 21, at 76-77 ("4. *Senses, Imagination, Thought*. . . . Being able to use one's own mind in ways protected by guarantees of freedom of expression 7. *Affiliation*. A. Being able to live with and toward others 10. *Control over One's Environment*. . . . B. *Material*. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others[.]").

⁶¹ *See, e.g., In re Estate of Nagle*, 317 N.E.2d 242, 245 (Ohio Ct. App. 1974) ("It is an inalienable right of a testator to make a will and, as long as it is not unlawful and the testator is competent, it is an abuse of discretion to alter his will."); *In re Estate of Runals*, 328 N.Y.S.2d 966, 976 (Sur. Ct. 1972) (noting that "the right to make a will is personal to a decedent. It is not alienable or descendable. It dies with the decedent."). Several wills doctrines hinge on or support this conception of the will as being a personal right or expression. For example, every will must be personally signed by the testator. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (2003) ("A will is validly executed if it is in writing and is signed by the testator and by a specified number of attesting witnesses under procedures provided by applicable law."). Many states also recognize the validity of holographic wills, or wills executed without attestation of witnesses, so long as they are in the testator's personal handwriting. *See id.* § 3.2 ("Statutes in many states provide that a will, though unwitnessed, is validly executed if it is written in the testator's handwriting and signed by the testator, and, under some statutes, dated in the testator's handwriting."). Finally, the doctrine of undue influence also supports this personal understanding of willmaking, since it requires a showing that the will or volition of the testator was overcome in order to succeed. *See, e.g., Caudill v. Smith*, 450 S.E.2d 8, 10 (N.C. Ct. App. 1994) ("To prove undue influence in the execution of a document, a party must show that something operated upon the mind of the person allegedly unduly influenced which had a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or others."); *Schmidt v. Schwear*, 424 N.E.2d 401, 405 (Ill. App. Ct. 1981) (same).

⁶² UNIF. PROBATE CODE § 5-407(b)(3) (2010) ("[T]he Court, for the benefit of the person and members of the person's immediate family, has all the powers over the

their statutes.⁶³ In 1998, the UPC was revised to enable conservators to write or modify the will of a ward with court approval,⁶⁴ but only five states have enacted reforms in line with the most recent version of the UPC.⁶⁵ Thus, the domain of wills prohibits personal delegations, even though the right concerned is primarily statutory rather than constitutional in nature.⁶⁶

The general nondelegation rule with respect to willmaking is not only curious when compared to health care,⁶⁷ but it is also inconsistent within the field of trusts and estates more generally. Individuals can already delegate decision-making over the financial aspects of willmaking through a variety of mechanisms, including durable powers of attorney,⁶⁸ powers of appointment,⁶⁹ and various other nonprobate mechanisms, such as joint bank accounts, pension accounts with designated beneficiaries, and trusts.⁷⁰ And, as noted earlier, a guardian of the estate has the ability to manipulate the ward's assets in various ways during life, which likely has a more profound impact on the ward's well-being than the additional power to dispose of assets at death.

It seems surprising, then, that the willmaking power is nondelegable in most states. One possible explanation is that courts wish to safeguard the expressive function of wills, since the financial aspects are already delegable by other means. This, however, does not cure the inconsistency. First, much estate planning in practice is done through the use of form wills and other instruments, which has reduced the importance

estate and business affairs which the person could exercise if present and not under disability, except the power to make a will.”)

⁶³ See, e.g., MICH. COMP. LAWS ANN. § 700.5407(2)(c) (West 2010); N.J. STAT. ANN. § 3B:12-49 (West 2006); Brashier, *supra* note 28, at 83-85 n.72 (compiling statutes).

⁶⁴ See UNIF. PROBATE CODE § 5-411(a)(7) (2010).

⁶⁵ See Brashier, *supra* note 28, at 69 n.23. Other states only allow delegation of the power to modify a will for certain narrow tax purposes. See 755 ILL. COMP. STAT. ANN. 5/11a-18 (West 2007) (allowing a delegation for general tax purposes); FLA. STAT. ANN. § 744.441(18) (West 2011) (allowing a delegation only in the case of an estate tax charitable deduction).

⁶⁶ See *United States v. Perkins*, 163 U.S. 625, 627 (1896) (noting that the right to dispose of property by will is within legislative control).

⁶⁷ See *infra* Part I.B.3.

⁶⁸ See *infra* Part III.A.

⁶⁹ See RESTATEMENT (THIRD) OF TRUSTS § 17.1(c) (2003) (“[A] power of appointment traditionally confers the authority to designate recipients of beneficial ownership interests in or powers of appointment over property that the donee does not own.”).

⁷⁰ See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

of the testator's voice in the construction of wills.⁷¹ More importantly, trustmaking can be an equally expressive endeavor, yet it remains readily delegable.⁷²

While the trend is toward making various aspects of willmaking delegable, the historical rule has been one of prohibition, which seems odd in light of estate planning's overall shift toward delegability of financial decision-making.

3. Health Care

Health-care decisions facilitate good health and improve life expectancy. As discrete decisions, they have perhaps the most direct impact on the fundamental capabilities of life and bodily health.⁷³ In the American jurisprudential scheme, decisions about bodily integrity, which include health-care decisions, are considered to lie at the root of personal autonomy.⁷⁴ In constitutional law, several theories support this

⁷¹ Some commentators have argued that willmaking should become even more standardized. See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 920-37 (2012) (arguing for the attachment of a "testamentary schedule" to tax returns as a way of promoting willmaking and avoiding intestacy). Others have urged the opposite. See Gordon, *supra* note 59, at 383-84.

⁷² The *Restatement (Third) of Trusts* specifically notes how a general policy of prohibition of delegations could indeed apply to trusts as well:

[T]he will-making prohibition may instead manifest a more general, substantive policy against post-death dispositions by these fiduciaries that would alter the plan of disposition established by intestate succession or by an existing will executed by a person who has subsequently become incompetent.

The breadth and generality of the latter policy would ordinarily apply by analogy to limit the post-death distributive provisions of a revocable inter vivos trust created by a legal representative or agent to dispositions that conform to the disposition of the affected property that would result, as the case may be, by operation of law or under the incompetent person's existing estate plan.

RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. f (2003) (citation omitted). The Restatement diffuses the difficulty by concluding that a narrower policy, based on "efficiency and tradition," justifies the proxy willmaking prohibition, though it is unclear what efficiencies result from authorizing guardians to make dispositions through will substitutes but not by will.

⁷³ See NUSSBAUM, *FRONTIERS*, *supra* note 21, at 76 ("1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living. 2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.")

⁷⁴ See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.")

understanding, including a positive right to privacy,⁷⁵ a protected liberty interest,⁷⁶ and a dignitary interest in being free from governmental intrusion into one's body.⁷⁷ Informed consent in medical tort law is also based on the idea that patients possess the ultimate right of decision with regard to questions of bodily integrity.⁷⁸

Given the sacrosanct nature of these decisions, it is somewhat surprising that the large majority of them are also readily delegable. In fact, because most states have enacted statutory surrogacy laws, health-care decision-makers need not go through the cumbersome guardianship process to acquire decision-making authority.⁷⁹ If there is a serious dispute between family members, the issue might end up in court; but generally, these proxy decisions are not subject to judicial approval or oversight. Instead, they are constrained by the medical profession's standard of care and code of ethics.⁸⁰ As a result, the whole decision-making process is taken outside the realm of the law and instead is relocated in the physician-family relationship.⁸¹

⁷⁵ See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing a sphere of personal privacy that protected a variety of autonomous decisions); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (protecting a right to the use of contraception, regardless of marital status).

⁷⁶ See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing a constitutionally protected liberty interest in the refusal of medical treatment).

⁷⁷ See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that forcibly pumping a suspect's stomach for evidence "shocks the conscience" and violates his right to privacy).

⁷⁸ See *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."), *abrogated by Bing v. Thunig*, 143 N.E.2d 3 (1957).

⁷⁹ Prior to the passage of such laws, physicians relied informally on family decision-makers without involvement of the law or the courts. See LAWRENCE A. FROLIK, *THE LAW OF LATER-LIFE HEALTH CARE AND DECISION MAKING* 219-21 (2006) ("The natural and customary reliance upon next of kin to make medical decisions for the mentally incapacitated is so deeply ingrained that it is rarely challenged.")

⁸⁰ See, e.g., *Woods v. Commonwealth*, 142 S.W.3d 24, 49 (Ky. 2004) ("[J]udicial intervention into private decision-making of this sort is expensive and intrusive. It is both impossibly cumbersome and a gratuitous encroachment upon the medical profession's field of competence. Thus, unless the interested parties disagree, resort to the courts is unwarranted." (internal citations and quotation marks omitted)); John A. Robertson, *Schiavo and Its (In)Significance*, 35 STETSON L. REV. 101, 106-07 (2005) ("The few disputes that have percolated up to the courts have been of two types. One type has involved cases in which doctors or hospitals refused to follow advance directives or proxy requests for or against treatment. The second type, of which *Schiavo* is an example, involves disputes between family members over a course of action.")

⁸¹ See PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *DECIDING TO FOREGO LIFE-*

While most health-care decisions fall within the scheme outlined above, some decisions are regulated more closely. These decisions arise in areas where the state has a perceived interest to protect, such as the preservation of life.⁸² For example, many states require guardians to demonstrate the previous wishes of the ward by clear and convincing evidence, a higher evidentiary standard, before permitting them to make a decision to withdraw life-sustaining treatment.⁸³ The Supreme Court has ratified such evidentiary hurdles, rejecting arguments that they represent unconstitutional infringements on the ward's right to refuse medical treatment through their guardians.⁸⁴ Another example arises in the area of transplantation of a ward's organs for the benefit of a third party, which typically requires judicial approval.⁸⁵

Thus, health-care decisions—those at the root of multiple fundamental capabilities—are readily delegable to others, oftentimes without judicial intervention or oversight.

* * *

The law has developed several mechanisms for dealing with the delegation of decision-making when incapacity strikes, but it has limited the use of these mechanisms for certain classes of decisions. While this part was primarily descriptive in exploring the mechanisms and how they are employed

SUSTAINING TREATMENT 128 (1983), available at http://bioethics.georgetown.edu/pcebe/reports/past_commissions/deciding_to_forego_tx.pdf (offering five reasons for deferring to the family). If a ward has gone through the guardianship process and has a guardian, then the guardian will be in the same role as the statutory surrogate. See *id.* at 128-30.

⁸² See John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1140-41 (1991) (discussing the policy of "vitalism").

⁸³ See Alicia Ouellette, *When Vitalism is Dead Wrong: The Discrimination Against and Torture of Incompetent Patients by Compulsory Life-Sustaining Treatment*, 79 IND. L.J. 1, 48-55 (2004) (compiling statutes).

⁸⁴ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 284-85 (1990).

⁸⁵ See *Strunk v. Strunk*, 445 S.W.2d 145, 145 (Ky. 1969) (authorizing transplant of kidney to brother based on a best interests standard and justifying it by noting the relationship the incapacitated person had with his brother); *In re Doe*, 481 N.Y.S.2d 932, 932 (App. Div. 1984) (authorizing bone marrow donation as the record had demonstrated clear and convincing evidence that it was in the ward's best interests); *In re Pescinski*, 266 N.W.2d 180, 182 (Wis. 1975) (not authorizing kidney transplant to sister, finding that the ward had not consented and that the transplant was not in the ward's best interests). For analysis of these types of cases, see generally Michael T. Morley, Note, *Proxy Consent to Organ Donation by Incompetents*, 111 YALE L.J. 1215 (2002); John A. Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 48 (1976).

inconsistently in three particular domains, the next part examines the normative arguments justifying access to these mechanisms.

II. DELEGATION RATIONALES

This part examines the rationales for delegation of personal decision-making authority. First, it examines how the capabilities approach applies to the cognitive-impairment context, arguing that it requires equal access to personal decisions for those lacking decisional capacity. This, in turn, requires that they be able to make the decisions through a surrogate. This part then considers alternative normative arguments for delegation that derive from the legal standards governing the decision-making of surrogates: the substituted judgment and best interests approaches. Finally, this part examines the rationale courts use to justify a nondelegation rule—that certain decisions are too personal to be delegated to another—concluding that it is unavailing.

A. *Capability, Dignity, and Disability*

The capabilities approach posits that a life worthy of human dignity is one in which a person has the capability to achieve certain functionings that society considers central to the human experience. These functionings might embrace the ability to do certain things (for example, to worship the faith of one's choice) or the ability to achieve certain states of being (for example, having good health).⁸⁶ A given person's capabilities are a "product of her internal endowments, her external resources, and the social and physical environment in which she lives."⁸⁷ Thus, in order to respect the inherent worth of individuals, a just society must provide the means through which individuals can exercise their capabilities. This can be accomplished by developing the internal endowments an individual possesses, altering the external resources afforded to her, restructuring the physical or social environment in which she lives, or allowing access to decisions that inhere in those

⁸⁶ See NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 21, at 86-96.

⁸⁷ See Elizabeth Anderson, *Justifying the Capabilities Approach to Justice*, in *MEASURING JUSTICE: PRIMARY GOODS AND CAPABILITIES* 96 (Harry Brighouse & Ingrid Robeyns eds., 2010).

fundamental capabilities.⁸⁸ These steps ensure that individuals flourish and lead lives worthy of human dignity.⁸⁹

For certain types of capabilities, this simply means that society must provide them at an adequate level. For example, while a just society may require that individuals have access to adequate shelter, that society need not ensure that each citizen's housing be equal in size or quality.⁹⁰ But for other types of capabilities, the only way to ensure their adequacy is to ensure that they are provided on an equal basis. For example, political, religious, or civil liberties must be provided equally in order to be provided adequately.⁹¹ Moreover, personal decisions fall in the same category—individuals must have equal access to them in order for their provision to be adequate.⁹²

All citizens belonging to the human community are entitled to achieve these capabilities, and those with cognitive impairment should not be excluded from this human community simply because they lack the capacity to engage in certain forms of practical reasoning.⁹³ While rationality may be what separates us from some other animals in a descriptive sense, it is not the sole defining feature of a life worthy of human

⁸⁸ Decision-making is built in to the capabilities approach, as personal decisions must be available to allow one to achieve certain functionings. Not all decision-making is per se fundamental though—it needs to be connected to some other fundamental capability to achieve that status and to be subject to the analysis of this article. For example, it would be difficult to characterize the decision to use a plate or a bowl to eat a routine meal as connected to some fundamental human capability. Thus, it is not a personal decision, and would not be subject to the same analysis.

⁸⁹ *See id.*

⁹⁰ Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, in *COGNITIVE DISABILITIES AND ITS CHALLENGE TO MORAL PHILOSOPHY* 79-80 (Eva Feder Kittay & Licia Carlson eds., 2010).

⁹¹ *Id.*; see also Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 312-15 (1999) (arguing for a democratic conception of equality that justifies this understanding of adequacy as meaning equality in this instance).

⁹² Nussbaum, *supra* note 90, at 79-80. As noted in Part I, personal decisions are defined in terms of the relevant normative theory. Here, it is the capabilities approach, so personal decisions are defined as those that are implicated in fundamental human capabilities. Equal access can, of course, come in different forms (e.g. making a personal decision oneself versus relying on a surrogate to assist in making a personal decision), so long as access is achieved in a meaningful way.

⁹³ While psychologically this may impact our *perceptions* of people with cognitive impairment as persons in some moral sense, this should not necessarily control the moral value we attribute to this population. See generally Heikki Ikäheimo, *Personhood and the Social Inclusion of People with Disabilities: A Recognition-Theoretical Approach*, in *ARGUING ABOUT DISABILITY: PHILOSOPHICAL PERSPECTIVES* 77-92 (Kristjana Kristiansen et al. eds., 2009) (examining how our recognition of people with disabilities as persons informs our judgments of personhood).

dignity.⁹⁴ Indeed, our humanity is also defined by, among other things, our capabilities to live in good health, experience things with our senses, form social attachments, and enjoy recreational activities. Only if an individual's capacity to exercise a significant cluster of these capabilities were cut off—for instance, in the case of someone in a permanent coma or persistent vegetative state—might we think that a person had perhaps stopped being part of the human community.⁹⁵

Some might note that the loss of decisional capacity, a biological and perhaps unchangeable fact, causes the lack of capabilities. But a deeper analysis would see it as a combination of both the loss of capacity and the imposition of barriers that prevent guardians or other surrogates from making these types of decisions on behalf of their wards. These barriers, which manifest themselves in the form of nondelegation doctrines, serve to disempower those who lack decisional capacity, cutting them off from the capabilities to achieve functionings consistent with a life worthy of human dignity. As a symbolic matter, this is disconcerting because it sends the message that those with cognitive impairment are not worthy of the capabilities that inhere in the concept of human dignity. As a practical matter, it is troubling because those with cognitive impairment may still have preferences or interests that could be expressed through such surrogate decision-making.

The reality for those living with cognitive impairment is that they must have access to someone who can assist them or act in their stead in order to realize equal access to personal decisions. For those who lack decisional capacity but can still communicate some form of preference, the task of the surrogate decision-maker or guardian is to elicit those preferences and transform them into a decision. For those who cannot even communicate any form of preference, the surrogate must be able to stand in for them, following a ward's preexisting life plan or making the decisions based on the ward's present best interests.⁹⁶

It might at first seem strange to suggest that having a surrogate assist in making decisions for a cognitively impaired

⁹⁴ See NUSSBAUM, *FRONTIERS*, *supra* note 21, at 179-95. This is not to downplay the importance of practical reason in facilitating the other fundamental human capabilities. It is, in fact, central. Being able to form one's conception of the good life and plan one's life accordingly is what gives much of the content to the personal decisions that are actualizations of the various fundamental capabilities.

⁹⁵ See *id.* In these cases, we might still support delegation of certain types of decisions for other reasons, but the rationale would need to come from some other theory.

⁹⁶ See Nussbaum, *supra* note 90, at 79-80.

person actually realizes that person's capabilities. Personal assistants and assistive technologies, however, do not signal dependency or inauthentic autonomy. The disability rights movement has long argued that assistance is a form of empowerment and a guarantee of control over one's life and environment.⁹⁷ Feminist analyses of dependency also clarify the difference between "socially necessary dependence" and "surplus dependence." The former is an "inescapable feature of the human condition," while the latter is "rooted in unjust and potentially remediable social institutions."⁹⁸ Declines in cognitive abilities may be inescapable for many individuals as they age, but being disempowered by those cognitive deficits is, in fact, an unjust and remediable social institution.

This principle is best illustrated by an analogy to mobility impairments. A person without functioning legs lacks the capacity to travel freely from place to place without assistance; however, it would be incorrect to view this solely as the product of the physical impairment.⁹⁹ It may also be the product of the lack of resources to purchase a wheelchair or the absence of a physical environment designed to enable access to streets and buildings with said wheelchair. If society were to provide the person with mobility impairments a wheelchair and an accessible environment, it could not then be said that that person is not truly experiencing movement or travel. Clearly, it is a *different* experience, but that person is still experiencing movement and travel, despite the fact that it is facilitated through alternative mechanisms that most people need not use.

Similarly, society should allow those with cognitive impairments to plan ahead and select surrogates who will act

⁹⁷ See, e.g., Alan Roulstone, *Researching a Disabling Society: The Case of Employment and New Technology*, in *THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES* 110-28 (Tom Shakespeare ed., 1998) (describing the role and importance of assistive technology in the employment context); Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 999-1000 (2003) (describing the philosophy of the independent living movement). The experiences of those with physical and mental impairments are not entirely parallel, however. Another crucial component of the independent living philosophy is the idea of consumer control over personal assistants, which may not be realizable to the same degree for people with cognitive impairments. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 75-81 (2004) (describing the role of consumer control).

⁹⁸ See Nancy Fraser & Linda Gordon, "Dependency" *Demystified: Inscriptions of Power in a Keyword of the Welfare State*, 1 SOC. POL. 4-31 (1994).

⁹⁹ This is an area where the capabilities approach converges with and complements the social model of disability. See generally MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* (1990).

on their behalf if they lose decisional capacity, and it should create a set of default mechanisms to govern those who do not have such foresight. If society provides legal mechanisms to enable an individual to make personal decisions with the assistance of a surrogate, this does not mean that that person is not truly experiencing the capabilities facilitated by such decision-making. Again, the experience or outcome is certainly different, and that difference is a necessary byproduct of the cognitive impairment. But that difference alone, however, is not sufficient to deprive an individual of an aspect of the human experience that provides access to many of the other fundamental human capabilities that she might still be able to enjoy.¹⁰⁰

There is a final point to address before moving on. Mere provision of fundamental capabilities does not mean that one is required to exercise them to achieve the functionings they facilitate.¹⁰¹ The same holds true with respect to the personal decisions that are the subject of this analysis. No one is required to divorce, make a will, or seek health care in order to lead a life worthy of human dignity, even if equal access to these opportunities is part of having the capabilities that we deem integral to a life worthy of human dignity. Similarly, surrogates would not be required to make these decisions either, provided that opting not to do so did not indicate some lack of capability or breach of fiduciary duty.¹⁰² The next subpart examines the standards for decision-making once a surrogate is empowered and suggests that other normative arguments for personal delegations might be derived from them.

B. *Autonomy, Preferences, and Welfare*

The capabilities approach requires equal access to decisions that implicate fundamental human capabilities, both

¹⁰⁰ The analogy between physical and cognitive impairments exposes a tension in the field of disability studies about the role of guardianship as an empowering or disempowering institution. See Michael Bérubé, *Equality, Freedom, and/or Justice for All: A Response to Martha Nussbaum*, in *COGNITIVE DISABILITIES AND ITS CHALLENGE TO MORAL PHILOSOPHY*, *supra* note 90, at 97, 102-03.

¹⁰¹ See NUSSBAUM, *FRONTIERS*, *supra* note 21, at 171-73. Thus, the argument from the capabilities approach does not rely on a particular theory of what the *content* of surrogate decision-making should be; it merely posits that such surrogate decision-making should be allowed to occur.

¹⁰² At the same time, as a practical matter we might suspect that capabilities are not present if there is no exercise of the decisions that inhere in those capabilities. It may not be the result of choice, but instead of some undeveloped endowment, lack of material resources, or environmental barriers. See *id.*

to recognize the dignity of people with cognitive impairments and as a matter of social justice.¹⁰³ There are other justifications for permitting or opposing personal delegations, which rely on alternative normative intuitions. This subpart sketches out some of these justifications by exploring the two legal decision-making standards that govern surrogate decision-making: substituted judgment and best interests. In other words, by understanding what surrogates should be doing once empowered, we can better understand why they should be empowered in the first place. It is important to note that there is a sizable literature about which decision-making standard to prefer,¹⁰⁴ but this article does not seek to resolve that particular debate. The narrower task is to tease out the normative intuitions that underlie these models of surrogate decision-making and examine how they might apply to the question of personal delegations.

1. Substituted Judgment

When a surrogate decision-maker finds herself empowered to make decisions, in many states she lacks any guidance about the legal standards that govern her decision-making.¹⁰⁵ But for those states that have addressed the issue, the

¹⁰³ It does not, however, specify a conception of the self over time (pre- and post-incapacity), nor does it suggest what legal standard of decision-making should govern a guardian or attorney-in-fact once empowered.

¹⁰⁴ See, e.g., BUCHANAN & BROCK, *supra* note 26, at 10-12 (taking the middle-ground on appropriate approach for surrogate decision-making for the incapacitated); RONALD DWORKIN, *LIFE'S DOMINION* 190-96 (1993) (describing the three issues of autonomy, best interests, and sanctity that run through this type of decision-making); ROBERT S. OLICK, *TAKING ADVANCE DIRECTIVES SERIOUSLY: PROSPECTIVE AUTONOMY AND DECISIONS NEAR THE END OF LIFE* xvii (2001) (advocating for prospective decisional autonomy); Norman L. Cantor, *Discarding Substituted Judgment and Best Interests: Toward a Constructive Preference Standard for Dying, Previously Competent Patients Without Advance Instructions*, 48 RUTGERS L. REV. 1193, 1197 (1996) (arguing for a dignity-based approach); Rebecca Dresser, *Precommitment: A Misguided Strategy for Securing Death with Dignity*, 81 TEX. L. REV. 1823, 1823 (2003) (arguing for a best interests approach that addresses the present interests of the ward); Leslie Pickering Francis, *Decisionmaking at the End of Life: Patients with Alzheimer's or Other Dementias*, 35 GA. L. REV. 539, 540, 591-92 (2001) (arguing for the precedence of autonomy-based decision-making procedures, so long as they do not result in pain to the incapacitated ward); Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739, 739, 741 (2012); Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CALIF. L. REV. 857, 888 (1992) (arguing for a best interests test when the patient did not express a prior preference).

¹⁰⁵ See Carolyn Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 587-88 (1996) (calling for clarity on the attorney-in-fact's duty to act); Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV.

common view is that the surrogate must employ a substituted judgment standard.¹⁰⁶ When a surrogate exercises substituted judgment, she must mimic, to the extent possible, the decisions the ward would make if the ward had capacity.¹⁰⁷ Originating in the common law of lunacy, the theory behind this subjective test is that it safeguards the ward's autonomy and preserves a state of the world that the ward would find desirable if she were to regain capacity.¹⁰⁸

Central to this standard is an understanding of the individual as an autonomous actor with preferences that survive incapacity. As such, the preferences a person had in the past should presumptively govern the future incapacitated self as well.¹⁰⁹ When examined in the context of personal decisions and delegations, carrying these preferences through time takes on special importance, given that they are heavily involved in the process of self-definition and reflect certain core commitments, life plans, or ideals about the good life. Philosophers have devised many terms to describe these types of

1491, 1495 (2012) (noting that out of fifty-two jurisdictions considered (the fifty states, Washington D.C., and the Virgin Islands), twenty-eight had no legal standard for guardian decision-making).

¹⁰⁶ See Whitton & Frolik, *supra* note 105 (noting that eighteen jurisdictions adhere to a substituted judgment standard, usually in combination with a best interests standard, while six jurisdictions adhere simply to a best interests standard).

¹⁰⁷ See *Curran v. Bosze*, 566 N.E.2d 1319, 1322 (Ill. 1990) (“The doctrine of substituted judgment requires a surrogate decisionmaker to attempt to establish, with as much accuracy as possible, what decision the patient would make if [the patient] were competent to do so.” (alteration in original) (internal quotation marks omitted)).

¹⁰⁸ See Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990). The lunatic was someone who previously had capacity, but now either lacks it completely or has interludes of lucidity. The lunatic was contrasted with the “idiot,” who was never competent. *Id.* at 17-18. This standard raises evidentiary issues, specifically what is required to establish the ward's past preferences. Some states have required public statements of preference on the specific decision at issue. See, e.g., *In re Westchester Cty. Med. Ctr. ex rel. O'Connor*, 531 N.E.2d 607, 607 (N.Y. 1988); *In re Storar*, 420 N.E.2d 64, 67-68 (N.Y. 1981) (involving a Brother of the Society of Mary who had publically declared that he did not wish life-sustaining treatment during conversations about the case of Karen Ann Quinlan). Other states have accepted a more holistic analysis, examining the ward's religious beliefs or general values. See *In re Jobes*, 529 N.E.2d 434, 444 (N.J. 1987) (requiring surrogate decision-makers to consult the ward's “relevant philosophical, theological, and ethical values”); see also *DeGrella v. Elston*, 858 S.W.2d 698, 708-09 (Ky. 1993); *Mack v. Mack*, 618 A.2d 744, 758 (Md. 1993).

¹⁰⁹ See OLICK, *supra* note 104, at 45-112 (laying out the ethical argument for prospective decisional autonomy); see also JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 11 (1986) (describing harm as a “setback [to] interests”). This approach rejects the notion that incapacity creates a new self that is disconnected from a former self that might have inhabited the same body. See OLICK, *supra* note 104, at 127-51.

commitments—“critical interests,”¹¹⁰ “second-order desires,”¹¹¹ “ulterior interests,”¹¹² or simply “projects”¹¹³—but the key point is that they are important to maintaining a sense of self and are heavily interwoven with identity. Some of these projects might be interpersonal in nature (for example, devotion to family or maintenance of important relationships), while others may be quite unique to the individual (for example, being known for having a particular quality, such as fashion sense, or for achieving fame in a particular sport or game, such as online poker). If we presume that the same person exists before and after incapacity, then maintaining these life plans after incapacity is of fundamental importance.

Whereas under the capabilities approach we would define personal decisions as those that implicate fundamental capabilities, under a substituted judgment approach we might define personal decisions as those that are implicated in especially important commitments that have some identity-forming function. Under this approach, delegating decision-making authority or maintaining a status quo outcome by prohibiting personal delegations could both be viewed as ways of exercising prospective decisional autonomy. Moreover, many personal decisions taken while a person still has capacity create a status quo outcome that is likely preferred by the individual through time. This fact alone, however, is not a reason to prohibit delegation of personal decisions to a surrogate.¹¹⁴ First, altering the status quo outcome may be the

¹¹⁰ See DWORKIN, *supra* note 104, at 201-02 (characterizing critical interests as fundamental to making sense of one’s existence, and contrasting them with simple experiential interests).

¹¹¹ See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 6-7 (1971) (“Besides wanting and choosing and being moved to do this and that, men may also want to have (or not to have) certain desires or motives.”).

¹¹² See FEINBERG, *supra* note 109, at 36-45 (describing these as interests that we value as ends in themselves).

¹¹³ See BERNARD WILLIAMS, MORAL LUCK 5 (1981) (describing our projects as those enterprises that shape our character); see also GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 16-20 (1988).

¹¹⁴ For example, one could argue that one might best approximate what most wards’ preferences are by favoring a status quo outcome, if certain conditions are met. The argument would be strongest if the status quo outcome would be favored by a large majority of wards, if circumstances would be relatively stable in that decisional domain such that the expression of the preference would not run counter to some other higher-order preference of the ward, and if delegation to a surrogate would for some reason result in a substantial level of abuse, leading to outcomes that a ward would not favor. It is not clear that these conditions hold strongly in many of the decisional domains considered here, but the argument can certainly be made for a prohibition of personal delegations on this basis.

best way of safeguarding an individual's life plan if circumstances change. This is clearest in the case of health care, where changing health conditions and treatment options might dictate a different way of honoring a person's preexisting preferences. Second, the status quo outcome is not necessarily always reflective of a decision made by the individual. This is clearest in the case of voting, where the status quo outcome would represent nonparticipation in the political system, which may or may not reflect the individual's prior political participation.

Thus, if one adheres to the ideas of prospective decisional autonomy, continuous personal identity, and the importance of preserving preexisting life plans, then one might find the rationale behind the substituted judgment standard to be an attractive reason to permit delegation of at least some personal decisions.

2. Best Interests

Sometimes it is impossible to know what the ward would have wanted, either because she did not express a concrete opinion on a subject or because her other known values are indeterminate in their application to a specific factual situation. Alternatively, one might believe that the ward's incapacity so alters the self that it has created a new person, who should not be bound by the ward's previously expressed wishes.¹¹⁵ In either case, the guardian must shift to a best interests test.¹¹⁶ Under this standard, the guardian must do what is objectively best for the ward.¹¹⁷

The application of the best interests analysis depends on the measure of welfare one adopts. In the same way, the definition of a personal decision also varies according to the normative theory one selects. Under the best interests analysis,

¹¹⁵ For the strongest proponent of this type of view in philosophy, see generally DEREK PARFIT, *REASONS AND PERSONS* (1984). For an application of this work to the law, see Rebecca S. Dresser & John A. Robertson, *Quality of Life and Non-Treatment Decisions for Incompetent Patients: A Critique of the Orthodox Approach*, 17 L., MED., & HEALTH CARE 234, 240-41 (1989) (arguing for a present interests approach).

¹¹⁶ See Allen E. Buchanan, *The Limits of Proxy Decisionmaking for Incompetents*, 29 UCLA L. REV. 386, 407-08 ("In some of the cases where the substituted judgment standard yields no defensible result, the courts should retreat to the traditional doctrine of *parens patriae* and act in the incompetent's best interests.").

¹¹⁷ See *In re C.E.*, 641 N.E.2d 345, 354 (Ill. 1994) ("Under the 'best interests' test, the court is guided by an objective standard of what a reasonable person would prefer under the circumstances of the particular case."). This test originates in the law of child custody. See Harmon, *supra* note 108, at 30 n.170, 32-33.

personal decisions would be defined as those likely to affect welfare, however defined, in substantial ways.¹¹⁸ Subjective measures of welfare, such as preference satisfaction,¹¹⁹ might be difficult to implement in the case of decisional incapacity. Indeed, if a court has determined that a person lacks decisional capacity, then a judgment exists that the ward's cognitive processes governing preference formation or reasoning are impaired. If an individual can no longer form preferences, then it is not clear that preference satisfaction functions well as a measure of welfare in this context. On the other hand, if an individual can still formulate preferences that should be honored but needs assistance converting those preferences into a set of decisions or a coherent life plan, then a guardian or attorney-in-fact may be best positioned to assist in doing so. This suggests that personal delegations should be permitted to allow this process to take place.¹²⁰

The best interests of the ward could also be measured according to some objective criteria, such as whether a given decision reflects the preferences of a reasonable person in the ward's circumstances or promotes certain virtues.¹²¹ If the objective criteria in question are easily connected to a status quo outcome, then a bar on personal delegations (to maintain said status quo outcome) would be preferable to individualized decision-making by a surrogate. For example, if one believed that the continuation of life through the use of feeding tubes represented a positive outcome for the individual and society in most instances, or if a consensus existed in society that this was the case, then a default rule requiring that outcome would be superior to personal delegations that might allow a surrogate to deviate from that outcome. But absent an argument for this outcome or a societal consensus on the topic, it is not clear that

¹¹⁸ Again, the definition of personal decisions in the best interests approach will overlap significantly with other normative approaches, though it of course depends on the theory of welfare one selects.

¹¹⁹ See MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 28-35 (2006) (discussing this welfarist approach).

¹²⁰ Some scholars have revived the classic hedonic conception of subjective welfare. See generally John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583, 1593-1600 (2010). Applying this formulation of welfare to the case of decisional incapacity raises a host of empirical questions. So long as a person lacking decisional capacity is capable of experiencing pleasure or pain, we would need to know whether allowing personal delegations would increase or decrease aggregate happiness measured at moments in time, including those moments that occur post-incapacity. *Id.*

¹²¹ See generally PHILLIPA FOOT, *NATURAL GOODNESS* (2001) (promoting such a virtue ethics approach); Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65 (2006) (applying this approach to judging and justice more generally).

barring personal delegations would lead to fulfillment of the ward's best interests in a given decisional domain. The rise of personalized default rules may make it possible to tailor status quo outcomes to particular populations, but these rules are still in their infancy, and it is not clear that they would apply to personal decisions as well as they apply to financial ones.¹²²

The normative intuitions underlying the substituted judgment and best interests standards of decision-making help us understand alternative rationales for personal delegations. Having briefly considered them, the next subpart critiques the primary argument courts use to justify a nondelegation rule for personal decision-making authority, namely that some decisions are too personal to delegate to another.

C. *The Personal in Personal Decisions*

Having examined the case for delegating personal decisions, I turn now to potential objections. These objections derive from courts' justifications of nondelegation rules—specifically, the classification of a decision as personal. The *Luster* court suggested two possible rationales underlying the concept of the personal that justify a nondelegation rule, and these are echoed throughout the case law.¹²³ The first refers to personal preferences that are idiosyncratic, such as certain tastes.¹²⁴ Some people abhor bitter drinks, while others find them to be a refreshing palate cleanser. These preferences are not easily predictable, even if they are occasionally expressed publicly. In fact, the reasons for these preferences, whatever they may be, may have comprehensible meaning only to the original decision-maker, if at all.

¹²² See Cass R. Sunstein, *Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych*, 1, 4-5 (Nov. 5, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171343 (discussing the tradeoffs between different types of default rules (societal or personalized) and active choices and exploring the points at which it might make sense to favor one strategy over another).

¹²³ See *supra* Part I.B.

¹²⁴ See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2122-23 (1996) (discussing how unstable preferences can complicate otherwise straightforward law and economics analyses); Mark Kelman, *Law and Behavioral Science: Conceptual Overviews*, 97 NW. U. L. REV. 1347, 1363 (2003) (“[T]he idea that we can speak intelligibly about developing institutions that effectively respond to ‘tastes’ depends on the notion that there are stable tastes to respond to, rather than on the notion that there are far more shifting, unstable preferences that appear or disappear, depending upon how we elicit them.”).

The second is that the preferences underlying personal decisions may be particularly private or unrevealed to others.¹²⁵ Part of this rationale stems from the fact that personal decisions occur in private and thus cannot be observed by others. For example, most people have sex only in the presence of their sexual partners. Without knowing what particular decision was made in the privacy of the home, it is difficult for others to theorize about the preferences underlying the decision. Moreover, if the decision occurs only rarely, then the possibility of observation will be even more difficult. For example, many people do not repeatedly divorce or make decisions about their own end-of-life health care, meaning that opportunities to observe the decision before incapacity strikes may be very limited. Finally, even if the decision is observed, unless the ward has explained her reasoning behind the decision, it may not be possible to decipher her underlying preferences and how they might apply to a novel situation.¹²⁶

In short, both of these characterizations of personal preferences point to the same conclusion: a surrogate decision-maker is likely to get the decision wrong because the ward's preferences are unpredictable or unknowable. Even if these accounts have merit, they are not an indictment of personal delegations per se but rather of the application of the substituted judgment standard for surrogate decision-making in personal domains. If there were no other workable decision-making standard, then a simple nondelegation rule might be prudent. But that is not the case. The best interests standard can guide surrogate decision-making in the place of the substituted judgment standard, and it has proven at least workable in the context of children.¹²⁷

¹²⁵ See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1488 n.46 (1998) (noting how economists consider preferences "revealed" when choices are made); Bailey Kuklin, *The Gaps Between the Fingers of the Invisible Hand*, 58 BROOK. L. REV. 835, 853-55 (1992) (noting the difficulties that economics have in predicting preferences that are unstable or unrevealed); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 932 (1996) (noting how economists consider preferences "revealed" when choices are made).

¹²⁶ Various types of personal preferences may not even be operative in the situation of incapacity. If a ward previously bought and read books on her iPad, and now does not have the ability to process such text, it would not make sense to continue buying books and giving her an iPad to play with. The preference has no meaning in the new context.

¹²⁷ See Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1242-43 (2011); but see Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 4-5 (1987). There is some literature developing what might constitute "best interests" for a person lacking decisional capacity.

Thus, there needs to be some additional argument why personal delegations are inherently invalid. One might argue that prohibiting personal delegations serves a useful function in protecting personhood, as personal delegations may violate the inalienable nature of personal decisions.¹²⁸ Those favoring inalienability of certain goods claim that making them alienable through a market mechanism constitutes a type of violence to personhood that inhibits human flourishing.¹²⁹ Proponents argue that if certain goods are even partially transformed into commodities, market rhetoric will inappropriately come to dominate our understanding of them.¹³⁰ But is delegation of personal decisions subject to the same sort of argument? Perhaps certain decisions are so intimately associated with personal identity or a person's social relationships that allowing those decisions to be made by another would do violence to personhood or human flourishing. In the context of marriage, many individuals view their

See Bruce Jennings, *Agency and Moral Relationship in Dementia*, in COGNITIVE DISABILITIES AND ITS CHALLENGE TO MORAL PHILOSOPHY, *supra* note 90, at 171.

¹²⁸ Delegation of personal decisions deems the right of decision over personal matters alienable. *See* Donald Van de Veer, *Are Human Rights Alienable?*, 37 PHIL. STUD. 165, 168 (1980) (“[S]o long as A by some act or omission ceases to have a right formerly possessed, *whether or not* that right is acquired by another, A alienates that right. So, if a right is transferable, waivable, or forfeitable, the right is alienable.”). This type of argument is familiar in property law and acts as a justification for prohibiting the transfer of body parts for monetary gain. The classic take on inalienability rules in the law comes from Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972) (“[R]ules of inalienability not only ‘protect’ the entitlement; they may also be viewed as limiting or regulating the grant of the entitlement itself.”). Inalienability rules can take many forms. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852-55 (1987) (noting that separation from the self is the key to the concept of inalienability, and differentiating nonforfeatability, nonwaivability, nongivability, nonsalability, and nontransferability); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 933-37 (1985) (recognizing three dimensions to property rights—who may hold the entitlement, what actions must be taken or not taken to maintain the entitlement, and what kinds of transfers are permitted).

¹²⁹ *See* MARGARET JANE RADIN, *CONTESTED COMMODITIES* 88 (1996) (“Systematically conceiving of personal attributes as fungible objects is threatening to personhood because it detaches from the person that which is integral to the person.”). Radin admits that “[t]here is no algorithm or abstract formula to tell us which items are (justifiably) personal. A moral judgment is required in each case.” Radin, *supra* note 128, at 1908. For a contrary view, see Richard A. Epstein, *The Human and Economic Dimensions of Altruism: The Case of Organ Transplantation*, 37 J. LEGAL STUD. 459 (2008) (arguing for a market in kidneys).

¹³⁰ To demonstrate how this might be the case, Radin uses the example of how some theorists of law and economics try to understand prohibitions on rape in terms of market logic. RADIN, *supra* note 129, at 87 (“[F]or all but the deepest enthusiast [of law and economics], market rhetoric seems intuitively out of place here, so inappropriate that it is either silly, or somehow insulting to the value being discussed, or both.”).

decisions to stay married as intimately intertwined with their identity as a married person.¹³¹ Similarly, a will often represents an individual's final statement about her relationships and her conception of how her property should be distributed to her heirs.¹³² In the health-care context, a decision to refuse life-sustaining treatment or donate an organ to a relative might reflect intimate religious beliefs.¹³³ The alleged danger lies in the notion that delegation may come to dominate our understanding of these types of decisions. If the law can simply designate another to make these decisions for us, the argument goes, then we may lose the exclusive sphere of personal decision-making that allows us to construct our identities and relationships with others.

In the context of personal decisions and incapacity, this argument is unpersuasive. Invoking the personal nature of a decision to justify a nondelegation rule confuses nondelegability for nondecision. If a surrogate is prohibited from making a decision for an incapacitated ward, this does not mean that a personal decision is not being made. To the contrary, nondelegation merely makes a decision in favor of a status quo outcome, whatever that may be.¹³⁴ The decision being made may be obscured by the language courts use, but it is relatively easy to identify upon closer inspection. In the case of divorce, the status quo is the continuance of marriage, and thus the default rule is anti-divorce. Likewise, prohibitions on delegation of the decision to marry would maintain the status quo of being single. In the case of wills, where the individual did not make a will, the status quo is distribution of the estate by the state's rules of intestacy, and the default rule incorporates all the values embedded in those rules.¹³⁵

¹³¹ See Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1213 (2005) (discussing how rituals such as marriage can come to transform identities).

¹³² See *supra* Part I.B.2.

¹³³ See Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1132 (1993) (discussing the difficulties of a one-size-fits all organ transplantation regime, given the diversity of religious belief).

¹³⁴ The concept of default rules is pervasive in the law. See, e.g., Adrienne Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (family law); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031 (2004) (inheritance law); Melanie B. Leslie, *Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L. REV. 67 (2005) (trust law); Nathalie Martin, *Consumer Scams and the Elderly: Preserving Independence Through Shifting Default Rules*, 17 ELDER L.J. 1 (2009) (elder law).

¹³⁵ The status quo could also change. Intestacy rules could be altered so that all property escheats to the state upon death. The rule on withdrawal of life-sustaining treatment might specify that medical intervention will cease after \$500,000 of public

Whatever the status quo outcome might be, a flat prohibition based on the personal nature of the decision obscures the decision being made—and its associated circumstances—from public inquiry. There is reason to be suspicious of this approach, or at least to interrogate the status quo outcomes in more depth. The personal nature of a decision or situation is typically invoked as part of an exercise in drawing a line between the public and private spheres, with the personal located on the private side of the line. This practice is not new, and the public-private distinction has a storied history in the law.¹³⁶ Several scholars have vigorously attacked it, however, and for good reason. Legal realists point out that the public and private are interconnected, and thus many of the areas of law thought to be private in nature are in fact regulated by publicly promulgated rules.¹³⁷ Feminist legal theorists emphasize that the distinction runs along gendered lines, and that the private sphere is the site of various injustices visited upon women, including domestic violence.¹³⁸ Prohibiting regulation of, or court involvement in, the private condones these injustices.¹³⁹

Further, we can actually identify concrete harms that might arise from a nondelegation rule. These dangers are most salient in the health-care domain. Health-care decisions represent exercises of capabilities to lead lives of length and

monies have been spent on the ward. Marriage could require that the marriage contract be renegotiated every five years.

¹³⁶ See generally Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982) (describing the historical evolution of the public/private distinction in legal thought).

¹³⁷ See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585-86 (1930) (noting how ostensibly private contractual law is actually regulated through public rules); Robert L. Hale, *Force and the State: A Comparison of Political and Economic Compulsion*, 35 COLUM. L. REV. 149, 168-69 (1935) (noting that the government can induce private conduct through public policies such as taxation); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 484-85 (1909) (noting how ostensibly private contractual law is actually regulated through public rules).

¹³⁸ See generally Catherine MacKinnon, *Privacy v. Equality*, in FEMINISM UNMODIFIED 100 (1989).

¹³⁹ See, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 95 (1989) (“[S]ince a woman’s problems are not hers individually but those of women as a whole, they cannot be addressed except as a whole. In this analysis of gender as a nonnatural characteristic of a division of power in society, the personal becomes political.”); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 110-33 (1989) (analyzing the idea of separate spheres); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1563-70 (1983) (critiquing the dichotomy between family and market). For a summary of the different feminist critiques, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 10-43 (1992).

good health. Imagine the harm that could befall wards who are at the mercy of a prohibition on guardian decision-making in health-care affairs. This would favor the status quo of nontreatment (or existing treatment at the point of decisional incapacity). While this might be salutary in some circumstances (for instance, in preventing overmedication),¹⁴⁰ more often it would have disastrous consequences if the ward suffered from a serious but treatable illness and was not already in a health-care institution.¹⁴¹

Thus, the argument fails on its own terms. If the damage is done simply by the decision being made by someone who did not initially possess the right of decision, then nondelegation fails to eliminate the harm. Nondelegation has merely shifted the decision to the status quo outcome created by the background legal framework. Indeed, it is more injurious to personhood to allow a decision to be made by an impersonal default rule, representing the majoritarian impulses of a given society, rather than by a guardian, who is likely a family member who knew the ward well and could express her wishes more faithfully. In other words, capabilities are meant to be individual expressions, not paternalistic defaults.

Even if there is some damage to personhood, however conceived, the damage is minimized or eliminated by the fact that such personal delegations take place in the context of decisional incapacity. The individual lacking decisional capacity cannot make, or needs assistance in making, the decision herself, which requires that a surrogate assist in doing so.¹⁴² Thus, personal delegations could actually be viewed as

¹⁴⁰ See Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives*, 60 GEO. WASH. L. REV. 1818, 1871-72 (1992) ("Wards are frequently relegated to institutional settings where they suffer from overmedication, physical restraints, and sensory deprivation for the convenience of the staff and for the sake of minimizing costs.").

¹⁴¹ Of course, we can also identify concrete harms that could flow from nondelegation regimes in the areas of divorce and wills. For divorce, an abusive spouse could continue to dissipate marital assets (leaving the ward destitute), while in wills, inheritance could flow to an insolvent heir (frustrating the ward's desire for her money to go to family members and not creditors).

¹⁴² See Arthur Kuflik, *The Inalienability of Autonomy*, 13 PHIL. & PUB. AFF. 271, 275 (1984) ("[T]o say that autonomy cannot be alienated is not to deny that one human being can be legitimately subject to the guardianship of another Individuals who altogether lack, or have lost, the relevant capacities are prime candidates for paternalistic intervention."). In addition, delegations are revocable transfers of decision-making authority, though failure to reacquire decisional capacity makes them irrevocable for this set of individuals.

promoting personhood, since they preserve the capabilities of the person lacking decisional capacity.

III. LEGAL REFORM

The proposal that flows from the analysis above is simple but broad in scope. If a decision implicates fundamental human capabilities and must be provided on an equal basis in order to be provided adequately to all, it should be delegable.¹⁴³ This proposal will almost certainly trouble those who are aware of high-profile instances of agent and guardian abuse.¹⁴⁴ Such abuse undoubtedly exists and must be taken seriously, for in many cases it may threaten the fundamental human capabilities of those lacking decisional capacity.

This issue is not new, however, and we must be on guard against instituting legal reforms on the basis of anecdotal horror stories, as emotionally compelling as they might be.¹⁴⁵ While cases of abuse surely exist, we should not presume that a surrogate would make decisions that would be harmful to the ward's interests in all, or even most, cases. As these are often weighty decisions, surrogate decision-makers—

¹⁴³ There may be cases in which permitting personal delegations for those with cognitive impairments threatens the capabilities of others who are similarly situated. See János Fiala-Butora, Michael Ashley Stein & Janet E. Lord, *The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities*, 55 HARV. INT'L L.J. (forthcoming 2014) (noting this potential dynamic with respect to the delegation of voting). This important point reminds us that we must pursue a careful analysis of the theoretical and practical tradeoffs involved in constructing a personal delegations regime, particularly for different subgroups of individuals with cognitive impairments. In other words, there might be decisional domains in which personal delegations in practice do not achieve the normative goals for which they are put in place.

¹⁴⁴ See, e.g., MERYL GORDON, *MRS. ASTOR REGRETS* (2008) (detailing the abuses Brooke Astor, wealthy philanthropist, suffered at the hands of her son during the final years of her life).

¹⁴⁵ Lawrence Frolik put it particularly well:

In the absence of “hard” data, both reformers and counter-reformers are free to rally support for their positions by pointing to horror stories of individual injustices. While emotionally compelling, these individual cases do not add up to a sound policy argument. No guardianship system will operate flawlessly and dispense justice to all at affordable prices. No particular outcome nor even a series of bad outcomes can automatically be interpreted as evidence of systemic problems. As with any system dependent on the actions, judgment, and discretion of numerous actors, the guardianship system will always fail some individuals. No matter how many reforms or counter-reforms are enacted, no matter how the system is modified, there is no perfection on this side of paradise.

Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 351 (1998).

who are often family members with interests that are aligned with their wards—would not take them lightly. In other words, there is no reason to believe that surrogates would necessarily divorce their wards or cut off life support on a whim. More importantly, these stories alone certainly do not compel us to disempower the class of individuals with cognitive impairment.¹⁴⁶

The essential question for the design of legal institutions is whether these types of decisions are relevantly different from those decisions already delegated, and thus, whether they require different institutions or legal rules to manage them. This part fleshes out how broader personal delegations would work in the context of durable powers of attorney and guardianship. It then provides a preliminary analysis of the areas of divorce, willmaking, and health care.

A. *Durable Powers of Attorney*

The background principle of agency law is that any lawful act may be delegated to another.¹⁴⁷ Nevertheless, agency law has recognized an exception for a class of acts that require “personal performance” because of public policy, statute, or contract.¹⁴⁸ While the requirement of personal performance of

¹⁴⁶ It is, of course, an empirical question whether personal delegations would lead to widespread abuse or not. If it was demonstrated that surrogate decision-makers were consistently refusing to take personal decisions to allow their wards to actualize their capabilities, not respecting their wards’ wishes, or expressly harming their wards’ interests through the use of personal decision-making authority, this would call into question whether permitting personal delegations actually serves to promote the capabilities, dignity, and human flourishing of people with cognitive impairments.

¹⁴⁷ See FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 80 (2d ed. 1914) (“General rule—For any lawful purpose.—It is the general rule that an agency may be created for the performance of any lawful act, and that whatever a person may lawfully do, if acting in his own right and in his own behalf, he may lawfully delegate to an agent.”).

¹⁴⁸ This exception has taken different forms, although the content has remained the same. For instance, the *Restatement (Third) of Agency* lists this exception under the heading “Capacity to Act as a Principal”:

(3) If performance of an act is not delegable, its performance by an agent does not constitute performance by the principal.

....

Comment:

c. Delegability. A person may delegate performance of an act if its legal consequences for that person are the same whether the act is performed personally or by another. If personal performance is required, performance by an agent does not constitute performance by the principal.

contractual terms should not be disturbed, statutes and judicial interpretations of public policy should permit an individual to delegate personal decision-making authority to an agent (or co-agents) in advance through a springing durable power of attorney.¹⁴⁹ Such advance planning is desirable because the principal is in the best position to select a trustworthy agent who is knowledgeable about the principal's beliefs and preferences. In addition, it will avoid the more cumbersome guardianship process, as a probate court will generally refuse to appoint a guardian if it appears that a ward's needs are well-served by an attorney-in-fact.¹⁵⁰

The current trend in crafting durable powers of attorney is to require that particular "hot powers" be specifically delegated in the instrument. Examples include the creation of a trust,¹⁵¹ revocation of a trust,¹⁵² changing a life insurance

RESTATEMENT (THIRD) OF AGENCY § 3.04(3) & cmt. c (2006). Thus, the definition hinges on "personal performance," which is left undefined, except by way of an example following the comment of a lawyer who is personally required to read certain documents. Older Restatements were more explicit about what constituted nondelegable acts. The first and second Restatements have identical language on this point:

§ 17. What Acts are Delegable

A person privileged, or subject to a duty, to perform an act or accomplish a result can properly appoint an agent to perform the act or accomplish the result, unless public policy or the agreement with another requires personal performance; if personal performance is required, the doing of the act by another on his behalf does not constitute performance by him.

Comment:

a. For most purposes, a person can properly create a power in an agent to achieve the same legal consequences by the performance of an act as if he himself had personally acted.

RESTATEMENT (SECOND) OF AGENCY § 17 (1958); RESTATEMENT (FIRST) OF AGENCY § 17 (1933).

¹⁴⁹ The springing condition is decisional incapacity, and the durable power of attorney would have to specify an acceptable method of such a determination, such as certification by a physician. The question of whether delegation should be permitted while an individual still has capacity is a question beyond the scope of this article. That being said, immediately effective durable powers of attorney have several advantages over the springing version. See Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 19-23 (2007).

¹⁵⁰ See *McCallie v. McCallie*, 660 So. 2d 584, 586-87 (Ala. 1995); *In re Isadora R.*, 773 N.Y.S.2d 96, 97 (App. Div. 2004); *In re Peery*, 727 A.2d 539, 540 (Pa. 1999). *But see In re Guardianship & Conservatorship of Blare*, 589 N.W.2d 211, 214 (S.D. 1999).

¹⁵¹ See *In re Estate of Kurrelmeyer*, 895 A.2d 207, 211-12 (Vt. 2006).

¹⁵² See *Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. Ct. App. 2000); *First Union Nat'l Bank of Virginia v. Thomas*, 37 Va. Cir. 35 (1995).

beneficiary designation,¹⁵³ or gifting away property.¹⁵⁴ These powers are considered “hot” because of their potential to alter an existing estate plan or dissipate the property of the estate.¹⁵⁵ The requirement that these powers be specifically delegated acts both to protect principals from the inadvertent granting of such powers but also to clarify that such powers are indeed delegable.¹⁵⁶ To assist principals in determining which powers must be specifically delegated, one need only add to the list of powers that require specific delegation contained in the Uniform Statutory Form Power of Attorney Act.¹⁵⁷

The personal decisions at issue here could certainly be considered “hot,” although perhaps in a slightly different sense. They may in some circumstances have the ability to affect the principal’s estate plan, but they also have the potential to alter the principal’s life plan, changing significant objectives or social relationships that the ward had come to value. Given the importance of these personal decisions, it is imperative that an agent consult with the ward to discern whether there are any preferences she might express that would inform surrogate decision-making. Some commentators have suggested that this be required of all “fundamental transactions” that occur under a durable power of attorney, before or after the loss of decisional capacity, and this approach is consistent with the proposal here as well.¹⁵⁸

Most states give attorneys-in-fact wider berth than guardians, due to the fact that the principal has selected the agent in advance and specifically delegated controversial

¹⁵³ See *Weaver v. Deverell*, 2011 Tenn. App. LEXIS 579, at *17-18 (Tenn. Ct. App. Oct. 26, 2011).

¹⁵⁴ See *King v. Bankerd*, 492 A.2d 608, 612-13 (Md. 1985).

¹⁵⁵ See Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 348 (2008).

¹⁵⁶ See *id.*

¹⁵⁷ See UNIF. STATUTORY FORM POWER ATT’Y ACT § 1 (1988), 8b U.L.A. 191, 201(a) (2001) (requiring specific delegation for the creation, revocation, amendment, or termination of a trust, making a gift, creating or changing a right of survivorship, creating or changing a beneficiary designation, authorizing another person to exercise authority granted to an agent, waiving the principal’s right to be a beneficiary of a joint and survivor annuity, exercising fiduciary powers that the principal has authority to delegate, and disclaiming or refusing an interest in property).

¹⁵⁸ See Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 42-51 (2006) (outlining such a proposal); see also Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 237-39 (2010) (discussing “representation agreements” in Canada, which have a similar flavor).

powers.¹⁵⁹ Regardless of the specific regime a state might adopt for attorneys-in-fact as a whole, it is imperative that the nature of the fiduciary relationship be clear, so as to provide guidance to those agents and provide guidelines for evaluating potential abuse.¹⁶⁰

B. Guardianship

1. Guardianship Regimes

For those who have not planned in advance, the state should be permitted to delegate personal decision-making authority to a guardian. This system of expanded personal delegations should be accompanied by other reforms, however, to ensure that these delegations do not serve to aggrandize the power of guardians at the expense of wards. This is a real problem, especially because the United States relies too heavily on a plenary model of guardianship, where there is little tailoring of guardianship to specific decisional incapacities. This concern might be addressed, in part, by preserving (or explicitly adopting by statute) the current capacity requirement for many types of personal decisions, which is relatively low.¹⁶¹ Thus, an individual retains the capacity to make these decisions after losing other types of decisional capacity, and despite being placed under plenary guardianship.¹⁶² This protects the ward's control over this important class of decisions, though it most

¹⁵⁹ Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 42-48 (2001) (discussing reforms in various states, which range from requiring that a durable power of attorney be recorded to enabling third parties to police attorneys-in-fact in various ways).

¹⁶⁰ See *id.*; Carolyn Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 587 (1996) (calling for clarity on the attorney-in-fact's duty to act).

¹⁶¹ While there are certainly cases in which it is clear that a person lacks capacity for a decision, there is often a large grey area as well. This is especially true for progressive conditions, in which a person's capacity may vary day to day or for whom there may be periods of lucidity alternating with periods of clear incapacity.

¹⁶² See *In re Estate of Romero*, 126 P.3d 228, 231 (Colo. Ct. App. 2005) ("The appointment of a conservator or guardian is not a determination of testamentary incapacity of the protected person."); *Hoffman v. Kohns*, 385 So. 2d 1064, 1068-69 (Fla. Dist. Ct. App. 1980) (nullifying will while upholding marriage of senile man who married his housekeeper and then wrote a will a day later); *In re Nelson*, 891 S.W.2d 181, 188 (Mo. Ct. App. 1995) ("The existence of a conservatorship does not necessarily preclude the capacity to make a will."); see also Lawrence A. Frolik & Mary F. Radford, "Sufficient" Capacity: *The Contrasting Capacity Requirements for Different Documents*, 2 NAT'L ACAD. ELDER L. ATT'YS J. 303, 305 (2006) ("If legal capacity lies along a spectrum, testamentary capacity is at the lower end."); Warren F. Gorman, *Testamentary Capacity in Alzheimer's Disease*, 4 ELDER L.J. 225, 234-35 (1996) (noting that one may retain testamentary capacity in the early stages of Alzheimer's disease).

certainly does not eliminate the situations in which a ward has clearly lost decisional capacity and cannot make those decisions for herself.

The other way to address this concern would be to shift to a guardianship system that is more supportive of ward decision-making and is less totalizing.¹⁶³ Other countries, such as Sweden and Japan, have structured their guardianship systems to make the surrogate more of a mentor or assistant, rather than a substitute decision-maker.¹⁶⁴ These approaches best safeguard the capabilities of those with cognitive impairments, as they try to facilitate choice in various life domains. Nevertheless, while this type of reform would be ideal, several intermediate and perhaps more attainable steps would still enhance the capabilities of people with disabilities under guardianship in the United States. There have been a host of proposals over the past thirty years, some of which have enjoyed modest success in various states. These include continuing to foster limited guardianships and defining incapacity in a domain-specific way (so as not to infringe on areas in which wards still retain decisional capacity),¹⁶⁵ instituting mediation techniques to adjudicate guardianship petitions (which may allow more flexible and creative solutions to problems of decisional incapacity within families),¹⁶⁶ and restricting emergency guardianships.¹⁶⁷

2. Guarding the Guardians

While guardianship reforms and increased personal delegations address the basic need to recognize the dignity of

¹⁶³ See Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. STATE L. REV. 1111, 1120-28 (2013) (proposing such a system).

¹⁶⁴ See Stanley S. Herr, *Self-Determination, Autonomy, and Alternatives for Guardianship*, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 431-35 (Stanley S. Herr et al. eds., 2003) (describing the “god man,” who acts more as an assistant than a plenary guardian); Israel Doron, *Elder Guardianship Kaleidoscope—A Comparative Perspective*, 16 INT’L J.L., POL’Y & FAM. 368, 376 (2002) (describing the “hojolin,” or helper, for those who suffer from milder forms of intellectual disability, and with whom various decisions are jointly made with the ward).

¹⁶⁵ See generally Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 654-55 (1981).

¹⁶⁶ See Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611 (2002).

¹⁶⁷ See Jamie L. Leary, Note, *A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves Against the Need to Guard Individual Autonomy*, 5 VA. J. SOC. POL’Y & L. 245, 259 (1997).

people with disabilities and facilitate their decisions, the following question still remains: what degree of oversight should govern the individuals or entities to whom personal decision-making authority is delegated? In other words, how do we guard the guardians? The guardian is the ward's agent, subject to the requirements of fiduciary law as well as monitoring by the appointing court.¹⁶⁸ She must file initial and annual reports about the ward, and she is subject to removal for mismanagement or breach of fiduciary duty.¹⁶⁹ Any interested person, including the ward, may petition the court for removal of the guardian or modification of the guardian's powers.¹⁷⁰

This level of oversight represents the baseline, and it is not particularly stringent.¹⁷¹ The court can also require an additional layer of oversight—namely, by requiring that the guardian receive advance judicial approval for certain types of actions.¹⁷² This type of oversight is generally compulsory for “hot powers” in the financial realm whenever there is a high likelihood of decisional error. This risk of decisional error, combined with the importance of these decisions, justifies further oversight because of the potential harm to the ward. One way to recognize the potential risk of error is where a conflict of interest arises between the guardian and her ward. In fact, this is the operating principle for oversight in the law of trusts, where a trustee must secure advance judicial approval

¹⁶⁸ See Lawrence A. Frolik, *Is the Guardian the Alter Ego of the Ward?*, 37 STETSON L. REV. 53, 85-86 (2007) (noting that the guardians, statutory surrogates, and agents acting under a durable power of attorney have the same responsibilities and fiduciary requirements).

¹⁶⁹ See, e.g., GA. CODE ANN. § 29-4-22 (West 2012) (requiring the filing of an initial report within 60 days); N.D. CENT. CODE § 30.1-28-12 (2011) (requiring an annual report). These reports are generally read by judges, court staff, or outside experts, though sometimes they are not read at all due to poor funding of the guardianship system. See Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 904-11 (2002).

¹⁷⁰ See, e.g., UTAH CODE ANN. § 75-5-307(1) (West 2012) (“On petition of the ward or any person interested in the ward's welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward.”). However, many states have still not implemented standards for guardian conduct and ethics, and many that have do not apply these standards to family guardians, making it difficult to know or punish breaches of fiduciary duty. See generally Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207 (2012).

¹⁷¹ But see Hurme & Wood, *supra* note 169, at 901 (arguing that the requirement of filling out reports can have a “sentinel effect” by making guardians aware that the court will hold them accountable).

¹⁷² See, e.g., FLA. STAT. ANN. § 744.3725 (West 2012) (outlining the procedure for authorization of “extraordinary authority”).

to engage in a conflicted transaction.¹⁷³ The presence of a conflict of interest is concerning because it suggests that the decision being made could harm the ward. That is, the decisions will represent the interests of the surrogate decision-maker rather than the ward, which may be problematic because it ignores the past preferences or present interests of the ward. Thus, the presence of a conflict serves as a red flag that a bad decision might be coming down the pipeline.¹⁷⁴

In one sense, family guardians making surrogate decisions are likely to be free from serious conflicts. Familial ties will often (although not always) create an alignment of interests between the family guardian and the ward. In other words, the family guardian will benefit psychologically when the ward's known preferences are satisfied or when the ward is doing well. At the same time, family guardians may find themselves in conflicted positions. For example, their financial position may change through the exercise of a personal decision that impacts how the ward's resources will be distributed at death. Similarly, family guardians are also caregivers and may view their duties as imposing a cost more than bestowing a benefit. As a result, they may exercise personal decision-making authority to minimize their care duties rather than implement the ward's preferences or safeguard the ward's interests. Finally, family guardians may have preexisting opinions or resentments about the ward's personal decisions about her body, identity, or intimate associations, and they may wish to reverse those decisions if given the power to do so. On the other hand, professional guardians are unlikely to be conflicted in the same way, although they may have incentives to make personal decisions in a manner that maximizes profits or implements their social missions. The presence of these incentives may also put them at odds with the ward's preferences or interests.

A standard conflict-of-interest analysis may not capture the entire universe of decisions that should be subject to

¹⁷³ See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 965-67 (2005) (explaining how the judicial approval mechanism derives from the equitable "petition for instructions").

¹⁷⁴ The presence of a conflict does not necessarily mean that a particular decision-maker should be disqualified or is a poor choice for the job. See Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L. J. 384, 389-90 (2012) (arguing that conflicts of interest should not immediately foreclose delegation of decision-making authority and must be balanced against the benefits of delegating to that particular entity).

judicial review in a personal delegations regime. This stems from the fact that conflicts are more likely to take nonpecuniary forms in the context of surrogate decision-making on personal matters. Thus, they are harder to detect and regulate. Courts should try to detect these hidden conflicts by examining the exercise of decision-making authority under the substituted judgment or best interests standards. For example, a surrogate's decision may imply a preference for an outcome that is unlikely to have been held by the ward because a strong consensus favors a status quo outcome in a wide range of likely circumstances.¹⁷⁵ Under substituted judgment, this should be a red flag that a hidden conflict of interest might be at work. In other words, because it is highly unlikely that a ward would have exercised decision-making authority in the same way herself, the surrogate's exercise of authority is suspect. Alternatively, under a best interests analysis, a court should suspect the exercise of personal decision-making authority by a surrogate when there are few situations one can imagine in which taking such a decision would advance the ward's interests.

Consider the decision to marry. In normal circumstances, most wards probably would not wish for their guardians to marry them off to someone while they lacked capacity. Assuming that marriage is more of an individual as opposed to a familial or cultural choice, it is difficult to imagine circumstances in which it would advance the objective interests

¹⁷⁵ The range of likely circumstances must include possible changed circumstances, which can take many forms. Something might change in the ward's immediate situation that might lead to a need for a decision to be made. This is clearest in the health-care arena, as it is difficult to predict one's health status in advance, given unknown genetics and environmental factors. See Einer Elhauge, *Allocating Health Care Morally*, 82 CALIF. L. REV. 1449, 1479 (1994) ("[I]n contrast to other needs, the need for health care is unpredictable."). Something might change about the situations of persons for whom the ward cared or would care that could be considered under an expanded best interests analysis. In fact, this is the type of situation that birthed the substituted judgment doctrine. *Ex parte Whitbread* involved a wealthy but decisionally incapable man, and his niece who requested some portion of his estate to which she was not legally entitled. [1816] 35 Eng. Rep. 878 (Ch.) 878-79. The Chancellor decided to give her some portion of the estate, reasoning that the man would not have wanted his relations to be beggars and bring disrepute to his family. See *id.* at 879-80; see also Harmon, *supra* note 108, at 19. Finally, something might change about the context in which the ward operates that would create a desire to make a decision in a given personal domain. A state legislature or Congress may alter one of the default rules in a decisional domain, or the legal effect of a preexisting decision. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 712-24 (2004) (describing the debates over means-tested public benefits programs, which often lead to changes in eligibility criteria). Alternatively, a technological change may alter the option set for wards, which is a common occurrence in the health-care arena.

of a ward to marry another person. Thus, the court should review this exercise of surrogate decision-making authority with suspicion, although there may be scenarios where a surrogate's exercise of the right to marry would be justified.¹⁷⁶

While conflicts of interest or suspect exercises of decision-making authority call for judicial review, the question whether courts have the institutional competence to review such decisions remains.¹⁷⁷ For financial transactions that require advance judicial approval, the court has some ability to sort through the evidence to determine whether an action is appropriate. For instance, a judge is fully competent to determine whether giving gifts out of the estate is consistent with practices before incapacity or if it will have positive benefits from a tax law perspective. The same is not necessarily true of many of these personal decisions, since the preferences underlying them may be idiosyncratic or unrevealed, and the objective interests of the ward may be difficult to ascertain. This is not to say that courts lack all evaluative capacity, but it does suggest that a more deferential posture might be appropriate when evaluating petitions for advance judicial approval of most types of personal decision-making.¹⁷⁸

¹⁷⁶ For example, an individual who is on the way to her wedding might suffer an accident. It is quite possible that such a ward would desire her incapacitated self to be married off by her guardian to her intended spouse, if the spouse was still willing. Thus, the decision to marry, even taken by a surrogate, would be justified under a substituted judgment approach. It may even be justifiable under a broader best interests test. See Whitton & Frolik, *supra* note 105, at 1512 (describing how an expanded best interests model “may include consideration of consequences for significant others if a reasonable person might ordinarily consider such consequences.”). In this type of analysis, it would be appropriate to take into account the spouse-to-be's interests in fulfilling the promise of marriage. Another scenario might involve a same-sex couple that desired to get married but did not live in a state that allowed same-sex marriage until one member of the couple lacked decisional capacity. Having a guardian authorize such a marriage would be justified using the same reasoning described above. The factual circumstances that would justify the exercise of marital decision-making authority are certainly rare though. Not many people suffer from accidents on their wedding day or become cognitively impaired before they acquire the right to marry.

¹⁷⁷ The institutional competence literature traditionally compares courts to other governmental institutions, such as administrative agencies or the elected branches. See, e.g., Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999); Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993). The comparator here is different—a surrogate decision-maker who is usually a family member—but such a surrogate may have distinct advantages over judges in knowledge of the ward's preferences and the ward's current situation.

¹⁷⁸ See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 53-54 (2007) (discussing deference in the context of agency action and inaction); Kathryn Kovacs, *Leveling the Deference Playing*

C. Preliminary Applications

This subpart will examine personal delegations in the three illustrative areas discussed earlier. The aim is to establish a process for evaluating different decisional domains and sketch out the contours of personal delegations regimes in the domains of divorce, wills, and health care in particular.

The first step in assessing a decisional domain is to evaluate whether the decision falls into the set of those deemed personal by the particular normative theory being applied. This article employs the capabilities approach as its primary normative theory, and the three decisions at issue are connected to fundamental human capabilities.¹⁷⁹ The second step is to evaluate which delegation mechanisms would be appropriate and, specifically, whether the mechanism of statutory surrogacy is warranted because emergency decisions must be made. The third step is to evaluate the likelihood that conflicts will arise for common decision-makers in each domain, who will most often be family members although increasingly may be nonprofit, private, or public guardians. Finally, one must take into account any special features of the domain that might impact the analysis.

1. Divorce

While there are certainly harms that might be associated with continuing marriage, they are not necessarily of a type that would require an emergency divorce. This is because several legal mechanisms exist to deal with the most harmful of abusive situations, at least on a temporary basis.¹⁸⁰ Thus, statutory surrogacy is unnecessary in the divorce domain, as surrogate decision-making can be handled through durable powers of attorney and guardianship.

Field, 90 OR. L. REV. 583 (2011) (same). Another way of preventing abuse would be to change the burden of proof for the surrogate decision-maker who desired to make a personal decision for the ward. As noted earlier, this has been the strategy in some states with regard to withdrawals of life-sustaining treatment. *See supra* Part I.B.3.

¹⁷⁹ *See generally supra* Part I.B. It is likely that all three decisions would be considered personal under a substituted judgment approach, but the best interests approach might encompass a narrower range of personal decisions, depending on the theory of welfare used.

¹⁸⁰ *See generally* Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303 (discussing the advantages and disadvantages of civil protection orders to prevent domestic violence).

An advance delegation through a durable power of attorney should specifically authorize the divorce decision as well as the ability to self-deal. Surrogates may benefit from a divorce action, especially if they are adult children who would be entitled to a larger inheritance if their parents were divorced. On the other hand, if no conflicts are present, judicial approval is likely unnecessary since various factual situations might justify divorce, such as abuse or the need to segregate assets in order to qualify for certain public benefits programs.¹⁸¹ These circumstances sometimes lead individuals with decisional capacity to seek a strategic “Medicaid divorce” to separate assets from their spouse and establish eligibility for Medicaid or other public assistance programs.¹⁸² Moreover, advance judicial approval is superfluous because a divorce action already takes place within the context of a legal proceeding, where the other party most affected by the divorce decision—namely, the spouse—is already involved. As such, the spouse will be on notice and can raise arguments about the guardian’s impropriety with the probate court if necessary.

2. Wills

As with divorce, there is likely no situation that would require an emergency willmaking, so delegation should be permitted only in advance by durable power of attorney or through guardianship after decisional incapacity strikes. If a durable power of attorney specifically granted the power to craft a will and permitted self-dealing with respect to willmaking, then no advance judicial approval should be required.

Guardianship, however, presents a different scenario. Many family guardians will have conflicts of interest by virtue

¹⁸¹ For example, consider Medicaid, which funds a substantial amount of the country’s long-term health care. See LAURA SUMMER, GEORGETOWN UNIV. LONG-TERM CARE FIN. PROJECT, *MEDICAID & LONG-TERM CARE* (Jan. 2007), available at <http://ltc.georgetown.edu/pdfs/medicaid2006.pdf>. As a means-tested program, Medicaid takes account of an individual’s income and assets to see if they qualify for assistance. *Id.* As recently as 2005, Congress changed the eligibility criteria for Medicaid, making its provisions more stringent for those who gave away assets in order to qualify. See Monica J. Franklin, *How the Deficit Reduction Act of 2005 Affects Medicaid Recipients*, 42 TENN. B.J., May 2006, at 18-19 (describing how the Deficit Reduction Act of 2005 increased the Medicaid look-back period for gift-giving to sixty months).

¹⁸² See Lee Anne Fennell, *Relative Burdens: Family Ties and the Safety Net*, 45 WM. & MARY L. REV. 1453, 1457-58 (2004) (describing the phenomenon of Medicaid divorce as a strategic choice for managing caregiving burdens); Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians the Power to Do Medicaid Planning*, 32 WAKE FOREST L. REV. 341, 359-61, 364 (1997) (same).

of their status as potential heirs, suggesting that advance judicial approval should be required. Despite this, a guardian's exercise of willmaking authority is not inherently suspect because a nontrivial number of testators may have preferences for disposition of assets that vary from the intestacy rules, and certain circumstances may warrant willmaking for estate planning purposes. Moreover, the court likely possesses sufficient competence to review evidence of the ward's prior wishes and assess the tax or other legal advantages to crafting a will. Accordingly, no particular deference is owed to the guardian decision-maker.

Delegation of authority in the willmaking context would also have the benefit of harmonizing the peculiar situation that currently exists within trusts and estates law, where wills and will substitutes are treated differently for purposes of delegation despite being functionally identical. Indeed, the creation of a trust arguably has a more immediate effect on an estate, since it transfers assets from the probate estate during the ward's lifetime, whereas the will's power is only exercised at the death of the ward. If guardians have access to the former tool, then providing access to the latter for estate planning purposes would not mark a revolutionary change.

3. Health Care

Health care is a broad domain that encompasses a wide variety of decisions regarding medical care and treatment. Medical emergencies are common enough that this domain requires a mechanism for the clear and rapid designation of a surrogate decision-maker. This feature explains and justifies why surrogacy statutes arose in the health-care domain, although these statutes can also be complemented by other legal delegation mechanisms, such as the health-care power of attorney or guardianship.

For most of the decisions in this domain, family guardians are unlikely to be conflicted because they lack incentives to restrict ward treatment and likely wish to extend the life and health of the ward. There is also nothing inherently suspect about the exercise of decision-making authority in this domain, since most wards would actually prefer treatment to nontreatment. Conflicts may arise, however, in the case of life-or-death decisions, since death triggers a series of legal consequences, such as inheritance. Normally, this would imply that advance judicial approval should be required for these

decisions. The health-care domain is unique, however, in that the decisions that compose it are already subject to oversight by the medical profession. It is therefore unclear that adding an additional layer of judicial review would add anything except additional process. On the other hand, if there is reason to believe that the medical profession is insufficiently protective of the ward's capabilities for certain decisions, then judicial intervention may be appropriate. In addition, if there is a conflict among family members, or if members of the medical profession request judicial intervention, then the court should adjudicate the matter, with proper deference to the designated decision-maker.

CONCLUSION

Many of us will have personal experience with decisional incapacity during our lifetime, either by acquiring cognitive impairments as we age or serving as a surrogate for someone who needs assistance. These abilities to receive and provides care are currently inhibited by legal doctrines that sever people with cognitive impairments from decisions that inhere in their fundamental human capabilities. This article has critiqued the use of the concept of the personal to justify a nondelegation rule in the case of decisional incapacity. Personal delegations should be permitted through private or public mechanisms, accompanied by reforms of guardianship and judicial review in cases where conflicts of interest are present or the exercise of decision-making authority is inherently suspect. These issues cannot be avoided or ignored, and our institutional legal structures must adapt to the socio-legal changes inherent in personal delegations law.