

# Expanding Surrogate Decisionmaking

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Alexander A. Boni-Saenz, [Personal Delegations](#), 78 Brook. L. Rev. 1231 (2013).

There are certain decisions that most individuals would agree are deeply personal and should be made by the individual, not the state, or a third party. The decision to marry, divorce, relocate, execute a will, or donate one's organs are among those decisions. But what if an individual has lost the cognitive capacity, due to accident or illness, to make these decisions? In the health care context, individuals increasingly delegate decisions about medical treatment to a representative. States encourage individuals to delegate these decisions by making durable power of attorney for health care forms readily available on their websites. When individuals fail to plan for loss of decisional capacity, states often rely on a statutory list of potential surrogates (such as a spouse, an adult child, a parent, etc.) or court-appointed guardians to make health care decisions on their behalf.

Health care decisions are as personal as any decision can be. Yet, while delegation is increasingly accepted in the health care context, the law generally does not allow individuals to delegate other personal decisions such as the decision to marry, divorce, or execute a will. Why not? What are the harms, if any, of not allowing delegation of personal decisions? Should a person who lacks decisional capacity be doomed to remain in an unhealthy marriage? Should he be bound by his state's intestate succession scheme even if it is contrary to his values and preferences? These are the questions that [Alexander A. Boni-Saenz](#) tackles in *Personal Delegations*.

Boni-Saenz argues that social justice and respect for the inherent worth of human beings require that all individuals be able to exercise fundamental capabilities such as the decision to marry, divorce, or make a will. He concludes that society must allow individuals who lack decisional capacity to exercise their fundamental capabilities and must also provide the means to do so, either through a surrogate appointed by the individual or, for those individuals who did not plan ahead, by a guardian appointed by the state.

Decisions to marry, divorce, travel, or execute a will are so personal and specific to the individual that it may be difficult to imagine how they could be delegated without destroying individual autonomy. These decisions are idiosyncratic, unpredictable, and do not lend themselves to objective assessments. One person's definition of an ideal marriage or estate plan might be another's prison or nightmare. Boni-Saenz argues that where an individual has delegated specific personal decisions to a surrogate, the surrogate empowers the individual by helping her exercise her capabilities. He analogizes the assistance provided by a surrogate to that provided by a wheelchair and accessible environments to a person with mobility impairments. While the individual may not be able to move about in the same way as one who is able to walk, he is nevertheless experiencing travel (albeit with assistance). Similarly, the cognitively-impaired individual who relies on a surrogate to make personal decisions is experiencing decisionmaking capabilities even though his experience will be different from that of a person with decisional capacity.

Boni-Saenz's arguments are most persuasive when the cognitively-impaired individual planned ahead and delegated specific decisions to a surrogate who is aware of her wishes, values, and life plan. However, when a person did not plan for loss of decisional capacity, how is a court-appointed surrogate

supposed to make decisions on his behalf without any guidance or knowledge of his preferences? Might it be preferable to leave in place the decisions she made before she lost decisional capacity? Boni-Saenz persuasively argues that nondelegation of personal decisions does not mean that a decision is not being made but rather constitutes a decision to maintain the status quo without regard to the potential harm or benefit to the cognitively-impaired individual. For example, not allowing delegation of the decision to divorce is a decision to continue the marriage. Not allowing delegation of the decision to make a will is a decision in favor of the state's intestate succession plan.

Boni-Saenz argues that making decisions by default rules that do not take into account the individual's wishes and circumstances cause greater harm to her personhood than delegating these decisions to a guardian who most likely knew her well and could carry out her wishes. This point is likely to cause many readers pause. We are all too familiar with cases of surrogates who have made decisions that are contrary to the ward's wishes or interests. Surrogates make wrong decisions because they have no way of knowing what the ward would want. People do not often discuss (or even contemplate) in advance the scenarios that would lead them to seek a divorce. Even if they do, preferences often change when the person is confronted with the situation. If the individual does not know in advance what he might do, how would a surrogate?

Surrogates sometimes make decisions that are not in the ward's best interests. As Boni-Saenz acknowledges, a guardian may also be a caregiver. As a result, the decisions the guardian makes on behalf of the ward may affect the guardian's burdens—both financial and caregiving—thereby creating a potential conflict of interest. Professional guardians may have profit incentives that similarly create conflicts of interests.

Boni-Saenz acknowledges these concerns but argues that they are not caused by delegation of personal decisions but rather by the lack of guidance and oversight provided to surrogates. He proposes a number of reforms to guide guardians and limit their powers. He would preserve the current minimal capacity requirement for many personal decisions such as the decision to marry or make a will. He also suggests that we follow other countries' approaches to guardianship and treat surrogates as assistants or mentors rather than as substantive decisionmakers. In cases where it is not possible to determine what the cognitively-impaired individual would decide, Boni-Saenz would direct the surrogate to make decisions based on the individual's best interests. Finally, when it appears that a guardian has a conflict of interest, he would require that the guardian obtain judicial approval before making any personal decisions for the ward.

Boni-Saenz's proposed reforms do not entirely eliminate the risk that surrogates will make wrong or harmful decisions. In the context of personal decisions it is often impossible to determine a person's wishes or what is in her best interests. Despite these challenges, Boni-Saenz's proposal is the best option available to enable those who have lost decisional capacity to exercise their fundamental capabilities.

Boni-Saenz focuses on individuals who possessed decisional capacity at some point and have since lost it as a result of accident or illness. As our population ages and life expectancy increases, many of us will experience loss of decisional capacity. However, society has a responsibility to ensure that individuals who never had decisional capacity in the first place (those who were born with cognitive impairments) are also able to exercise their capabilities. I hope Boni-Saenz and others will take up that issue next.

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