PROBATE LAW AND MEDIATION: A THERAPEUTIC PERSPECTIVE

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Estates in Arizona can go unresolved for four years,[1] twelve years,[2] or even seventeen years[3] after the decedent's death. Various factors can contribute to the length of time it takes to close an estate. For example, the government might be slow in providing information about taxes, or lawyers might take more time than is necessary. Most ironically, the probate code that seeks to distribute estates can itself be the source of confusion and delay.

Surprisingly, many prolonged estates are not ones in which the decedent died intestate. Rather, these decedents often have taken pains to draft wills and even appoint personal representatives[4] to ensure their wishes will be carried out. Although the statutes and case law provide many incentives for personal representatives to carry out their duties in a reasonable manner, the current laws leave gaps through which some personal representatives avoid responsibility and/or liability. In addition, it is often overlooked that the very nature of the representative's role can cause resentment between family members and introduce obstacles to the effective resolution of estates.

The purpose of this Note is to review the current status of Arizona law regarding personal representatives and to propose changes to make the resolution of some estates less destructive for the parties involved. Part I examines the portion of Arizona's probate code that deals with the duties and potential liability of personal representatives. Part II discusses the ramifications of the laws and procedures as to their impact on the parties involved in an estate based on the relatively new perspective of "therapeutic jurisprudence."[5] Finally, in Part III, this Note proposes to add mediation to the estate system so that the impact of the process on the parties may be less harmful.

I. PERSONAL REPRESENTATIVES IN ARIZONA

The Uniform Probate Code was developed as uniform laws for states to adopt and/or modify in order to make law more uniform throughout the states.[6]

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1. *See In re* Estate of Pedelty, 61 Ariz. 425, 150 P. 2d 362 (1944).
2. *See In re* Estate of Brown, 137 Ariz. 309, 670 P.2d 414 (Ct. App. 1983).
3. *See In re* Estate of Estes, 134 Ariz. 70, 654 P.2d 4 (Ct. App. 1982).
4. In Arizona, the title "personal representative" has subsumed the former categories of "administrator" and "executor" as relating to probate matters. ARIZ. REV. STAT. ANN. § 14–1201(38) (1995).
5. For a discussion of therapeutic jurisprudence, see *infra* notes 65–81 and accompanying text.
6. The uniform laws have been developed by the National Commissioners on Uniform State Laws and are intended to make the laws on various subjects uniform throughout the states. BLACK'S LAW DICTIONARY (6th ed. 1990).

Although Arizona has adopted much of the language of the Uniform Probate Code relating to the conduct of personal representatives,[7] some provisions have been changed to a limited degree.[8] Reviewing the duties for personal representatives will show some of the strengths and weaknesses of the current probate system.

A. Arizona Statutes for Personal Representatives

In Arizona, people can choose a personal representative in their will to see that their wishes are carried out, or the court may appoint such a person to distribute the estate.[9] Too often, the personal representative is blamed for any subsequent delays in the distribution and closing of the estate. Part of the reason this "finger-pointing" occurs is that the duties outlined by the statutes can hinder the expectations placed upon the personal representative by beneficiaries.[10]

The general duties assigned to personal representatives in Arizona are almost identical to those assigned by the Uniform Probate Code.[11] These duties include settling and distributing the estate as expeditiously and efficiently as possible while acting in the best interests of the estate.[12] The applicable standard of care, both for trustees and for personal representatives, is the "prudent person" standard.[13] Therefore, the standard is "that [which] would be observed by a prudent [person] dealing with the property of another."[14] In other words, the duty of the personal representative is to transmit the estate without unnecessary diminution.[15]

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7. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14–3701 (1995) as identical to UNIF. PROB. CODE § 3–701 (1990), and ARIZ. REV. STAT. ANN. § 14–3702 (1995) as identical to UNIF. PROB. CODE § 3–702 (1990). As of 1992, only 15 states had adopted the 1990 version of the Uniform Probate Code. *See also* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 639 n.1 (1993).

8. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14–3704 (1995) as compared to UNIF. PROB. CODE § 3–704 (1990), and ARIZ. REV. STAT. ANN. § 14–1714 (1995) as compared to UNIF. PROB. CODE § 3–714 (1990).

9. ARIZ. REV. STAT. ANN. § 14–3103 (1995).

10. For example, beneficiaries may expect distributions to occur sooner than is practical, or they might think greater control of the assets should be attained than actually can be. Looking to the statutes helps give some guidance as to standards for the personal representative, but not necessarily to the timeframe for estate resolution or other subjective measures of job performance. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 14–3703(A), 14–3715 (1995).

11. *See* ARIZ. REV. STAT. ANN. § 14–3703; UNIF. PROB. CODE § 3–703 (1990).

12. ARIZ. REV. STAT. ANN. § 14–3703(A).

13. ARIZ. REV. STAT. ANN. § 14–7302 (1995). This section is identical to UNIF. PROB. CODE § 7–302 (1990). Not surprisingly, the standard of care is the same for both personal representatives and trustees, as both are considered fiduciaries under ARIZ. REV. STAT. ANN. § 14–1201(18) (1995).

14. ARIZ. REV. STAT. ANN. § 14–7302. The standard of care used to be that which a prudent person would use "in dealing with his own property," but this was changed in 1965 by *In re* Sullenger's Estate, 2 Ariz. App. 326, 328, 408 P.2d 846, 848 (Ct. App. 1965), and the new formulation was subsequently adopted by the Arizona legislature with the passage of ARIZ. REV. STAT. ANN. § 14–7302 in 1973. The statute goes on to say that "if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills." *Id.*

15. *In re* Estate of Estes, 134 Ariz. 70, 76, 654 P.2d 4, 10 (Ct. App. 1982); *In re* Estate of Wiswall, 11 Ariz. App. 314, 323, 464 P.2d 634, 643 (Ct. App. 1970).

Both trustees and personal representatives must account fully and accurately for the assets of the estate.[16] This requires some degree of investigation of the assets of the decedent, which varies depending on the complexity of the estate. Related to the accounting, personal representatives are to take possession or control of the assets of the estate.[17] In controlling the assets, the personal representative is required to pay taxes on, and to take all reasonable steps to manage, protect and preserve the assets of the estate.[18]

The Arizona Revised Statutes and the Uniform Probate Code both attempt to outline relevant transactions which a personal representative is authorized to effect.[19] These transactions include retaining assets of the decedent pending distribution,[20] satisfying written charitable pledges of the decedent,[21] and abandoning property when, in the personal representative's opinion, it is valueless to the estate.[22]

There also are transactions which the personal representative is prohibited from making. One example is the prohibition from continuing any unincorporated business of the decedent for more than four months from the date of the personal representative's appointment.[23]

It appears, therefore, that the duties of a personal representative are fairly obvious and thus would be enforced on a regular basis. However, an examination of the means of enforcement shows just the opposite.

B. Enforcement of Statutes

The probate code provides means of enforcement to give incentive for personal representatives to act appropriately or to penalize those who fail to perform their duties adequately.[24]

1. Actions to Remove the Personal Representative

If an interested party reasonably believes a personal representative is acting in a manner inconsistent with the best interests of the estate, that party may file a motion with the court to have the personal representative restrained from acting.[25] Beyond such temporary action, the court also may terminate a

16. ARIZ. REV. STAT. ANN. § 14–7303 (1995). This accounting provision is not required for personal representatives under UNIF. PROB. CODE § 3–703.

17. ARIZ. REV. STAT. ANN. § 14–3709 (1995). This statute is very similar to UNIF. PROB. CODE § 3–709 (1990). The only property that is exempt from this possession right is "any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until...possession of the property by [the personal representative] will be necessary for purposes of administration." ARIZ. REV. STAT. ANN. § 14–3709(A) (1995).

18. ARIZ. REV. STAT. ANN. § 14–3709(A).

19. *See* ARIZ. REV. STAT. ANN. § 14–3715; UNIF. PROB. CODE § 3–715.

20. ARIZ. REV. STAT. ANN. § 14–3715(1).

21. ARIZ. REV. STAT. ANN. § 14–3715(4).

22. ARIZ. REV. STAT. ANN. § 14–3715(11).

23. ARIZ. REV. STAT. ANN. § 14–3715 (24)(a).

24. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 14–3611, –3709 (1995). Unfortunately, many of the means of enforcement involve litigation. According to Professor Mark Ascher, "Everyone in the estate planning community has reason to be disheartened by estate litigation, for, with few exceptions, behind every litigating estate is an estate planner or a probate rule that has failed to do its job properly." Ascher, *supra* note 7, at 642.

25. ARIZ. REV. STAT. ANN. § 14–3709.

personal representative's appointment.[26] Generally, however, such removal is difficult to accomplish because courts rely heavily on the decedent's choice in appointment of the personal representative.[27]

Arizona statutes set forth the justifications for removal. Six reasons for removal are: 1) when the court deems removal in the best interests of the estate;[28] 2) when intentional misrepresentation led to the appointment of the personal representative;[29] 3) when the personal representative disregards a court order;[30] 4) when the personal representative is incapable of discharging his or her duties;[31] 5) when the personal representative mismanages or fails to perform a duty;[32] or 6) when the personal representative disregards the wish of the decedent regarding his or her remains.[33]

While the threat of removing a personal representative is available as a means of ensuring the performance of his or her duties, actual removal happens in only a small number of cases.[34] Removal happens so infrequently because there are penalties and consequences short of removal which may remedy the situation just as well, if not better, than actual removal.

2. Actions to Withhold Payment of Statutory Commission

One option short of removal which courts have for penalizing inappropriate behavior by personal representatives involves the commission received by personal representatives. In Arizona, a personal representative is "entitled to reasonable compensation for his services."[35] By definition, such a standard is highly discretionary, and the court may increase or decrease the commission on a case-by-case basis.

Just as extraordinary fees are allowed and have been granted in a variety of cases,[36] fees may also be reduced or disallowed altogether for services which are substandard. For example, in *In re Estate of Shattuck*[37] an executor had mismanaged the estate by utilizing estate funds and commingling them with his

26. ARIZ. REV. STAT. ANN. § 14–3611.

27. "Because courts have a duty to uphold the testator's intent, courts do not order removal of a personal representative for insubstantial reasons." John A. Hutchinson & Georgia H. Akers, *Removal of Fiduciaries*, 11 PROB. L.J. 183, 183 (1992) (footnotes omitted). This rationale would not apply directly to removal of court-appointed personal representatives, but the absence of such an issue in case law or relevant literature indicates it apparently is not a significant problem.

28. ARIZ. REV. STAT. ANN. § 14–3611(B)(1).

29. ARIZ. REV. STAT. ANN. § 14–3611(B)(2).

30. ARIZ. REV. STAT. ANN. § 14–3611(B)(3).

31. *Id.*

32. *Id.*

33. ARIZ. REV. STAT. ANN. § 14–3611(B)(4).

34. In fact, there have been few instances in recent years of removal of personal representatives in probates. One Arizona case, decided in 1938, provides an example of behavior resulting in removal. In that case, a personal representative was removed because of an existing conflict of interest between himself and the estate, and because he had failed to inventory the estate within the required time. *See* Barth v. Platt, 52 Ariz. 33, 78 P.2d 995 (1938).

35. ARIZ. REV. STAT. ANN. § 14–3719 (1995).

36. *See, e.g., In re* Estate of Wright, 132 Ariz. 555, 559, 647 P.2d 1153, 1156–57 (Ct. App. 1982) (court granted the personal representative $40,270.69 in fees out of a $330,000 estate).

37. 17 Ariz. App. 103, 495 P.2d 873 (Ct. App. 1972).

own, among other inappropriate actions.[38] The court ordered an offset of the executor's fees by approximately $15,000, even though there were no "shortages" suffered by the estate.[39]

It is clear that the commission serves as an incentive for personal representatives to act in the best interests of the estate. If the personal representative goes against those best interests, the court can and should penalize him or her. Fees may be denied if the court determines the personal representative acted against the best interests of the estate.[40] Essentially, the personal representative is expected to earn his commission by effectively carrying out his duties.[41]

3. Action to Hold Personal Representative Personally Liable to the Estate

In addition to earning a commission, personal representatives may have further economic interest in behaving appropriately. There are specific guidelines for holding a personal representative personally responsible if he or she conceals, embezzles, conveys, or improperly disposes of property of the estate.[42] To determine if such action is necessary, the courts may order the personal representative to turn over all records for examination.[43]

As the courts have interpreted the Arizona statutes, a personal representative may be held personally liable to the estate for any unnecessary diminution she may cause.[44] For example, failure to meet the prudent-person standard[45] may be the basis for holding the personal representative liable.[46] Also, the personal representative may be held accountable if she incurs a liability to the estate that was not authorized by statute.[47] Finally, the courts also have held a personal representative liable for interest when she delayed settlement of an estate.[48]

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38. *Id.* at 106, 495 P.2d at 876. Besides commingling funds, the executor had also failed to file an inventory and appraisal within the required time, and had continued the decedent's business without court authorization. *Id.* at 104, 495 P.2d at 874.

39. Essentially, the court found that the estate suffered losses because of extra accounting measures necessitated by the executor's mismanagement, even though the estate had not occasioned direct losses because of such actions. *Id.* at 106, 495 P.2d at 876.

40. *See, e.g., In re* Estate of Estes, 134 Ariz. 70, 80, 654 P.2d 4, 14 (Ct. App. 1982) (denying the personal representative its fees because of its mismanagement and neglect of the estate).

41. *See* 17 Ariz. App. at 106, 495 P.2d at 876.

42. ARIZ. REV. STAT. ANN. § 14–3709.

43. ARIZ. REV. STAT. ANN. § 14–3709(B)–(D). The statute also allows for a personal representative to be jailed until the order is complied with or until he is discharged. ARIZ. REV. STAT. ANN. § 14–3709(C).

44. *In re* Estate of Estes, 134 Ariz. at 76, 654 P.2d at 10; *In re* Estate of Wiswall, 11 Ariz. App. 314, 323, 464 P.2d 634, 643 (Ct. App. 1970).

45. See discussion of standard, *supra* notes 13–15 and accompanying text.

46. The court applied this standard in *In re* Estate of Pedelty, 61 Ariz. 425, 434, 150 P.2d 362, 366 (1944), finding that the personal representative had been negligent and charging him for the consequential loss to the estate. *See also In re* Estate of Estes, 134 Ariz. 70, 654 P.2d 4 (Ct. App. 1982).

47. *See* Tootle-Campbell Dry Goods v. Knott, 43 Ariz. 210, 212, 29 P.2d 1056, 1057 (1934) (executrixes found not liable for unauthorized purchases because the court found they were acting as individuals, not as executrixes, at the time of purchases).

48. *See In re* Estate of Ford, 25 Ariz. App. 115, 116, 541 P.2d 578, 579 (Ct. App. 1975). In *Ford*, the court refused to charge the personal representative interest, but stated that the court could have charged interest for a delay in settlement if that delay had been unreasonable.

Next, a personal representative may be denied reimbursement for attorneys' fees which he may have incurred in acting on behalf of the estate.[49] Normally, a personal representative is entitled to reimbursement for such fees if he can prove they are reasonable for the benefit gained by the estate.[50] However, if the fees were incurred to protect the interest of the personal representative, no reimbursement is allowed.[51]

The final way in which a personal representative may be held liable for actions harmful to the estate is by imposing attorneys' fees on the personal representative when a successful challenge is made against him on behalf of the estate.[52] For example, if a beneficiary successfully challenges the personal representative for distributing estate funds to inappropriate parties, the attorneys' fees incurred by that beneficiary may be charged to the personal representative.[53] Such availability of fees may encourage a beneficiary to take legal action where none might otherwise be taken.

Of course, not all actions of the personal representative that result in diminution to the estate can be prevented or foreseen. If the personal representative diminishes the estate, but is not guilty of negligence or fraud, he or she should not be held liable. Honest mistakes do occur, and the courts allow for such mistakes without penalizing the personal representative.[54]

C. Alternative Methods of Enforcement

Even with the penalties that may be exacted upon personal representatives, courts and interested parties encounter difficulties in enforcing personal representatives' duties. These include the time and money involved in any litigation, as well as the courts' reluctance to act against the wishes of the decedent. Because of these difficulties, alternative methods of enforcement have been, and are being, developed.

The Internal Revenue Service ("I.R.S.") has developed an effective alternative method of enforcement.[55] Essentially, the I.R.S. has started closing estates for federal tax purposes once a reasonable time has elapsed for the

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49. For example, the court in *In re* Estate of Estes, 134 Ariz. at 80, 654 P.2d at 14, held that "[a]n executor is entitled to reimbursement for attorneys' fees only for services rendered to benefit the estate, not if the services were rendered to protect the executor's personal interest." *Id.* (citing *In re* Estate of Stephens, 117 Ariz. 579, 574 P.2d 67 (Ct. App. 1978)).

50. *Id.* at 80, 654 P.2d at 14.

51. *Id. See also In re* Estate of Stephens, 117 Ariz. 579, 585, 574 P.2d 67, 73 (Ct. App. 1978) (attorneys' fees disallowed unless the services rendered benefited the estate).

52. In *In re* Estate of Brown, 137 Ariz. 309, 312, 670 P.2d 414, 417 (Ct. App. 1983), the court found that the "common fund rule" applies in Arizona. This rule holds that, where one person employs an attorney for the preservation of a common fund, she may be entitled to attorneys' fees paid out of the fund. *Id.* at 313, 670 P.2d at 418.

53. *Id.* at 313, 670 P.2d at 418.

54. *See* O'Sullivan v. Commissioner, 1993 WL 548585 (T.C. Jan. 12, 1994) (The personal representative filed all the tax returns she honestly believed were required for the estate. When it was determined she had missed one year, the court held she was not liable because she honestly believed the decedent had filed the original.). For a summary of this case, see John B. Huffaker, *Executrix Not Liable on Decedent's Income Tax Return She Thought Was Filed,* 81 J. TAX'N 120, 120 (1994). Because it was handled by the United States Tax Court, it is reasonable to believe Arizona, or the Ninth Circuit, would look to such a case for guidance given a similar fact pattern in the interest of maintaining one standard nationally.

55. Treas. Reg. 1.641(b)–3(a) (1960) states: "the period of administration of an estate cannot be unduly prolonged. If the administration...is unreasonably prolonged, the estate is considered terminated for Federal income tax purposes...."

personal representative to perform his or her duties.[56] Utilization of this closure option by the I.R.S. gives the personal representative some added motivation to inventory and distribute the estate as quickly as possible since the beneficiaries are thereafter liable for taxes on income of the estate.[57]

At the same time, the I.R.S. recognizes that the time an estate is open is not the only significant factor in determining whether there is reason to impose sanctions on the estate and/or on the personal representative.[58] For this reason, estates open as long as twenty years have been allowed to remain open in order to administer them properly.[59]

The I.R.S. also has imposed monetary sanctions against a personal representative who failed to administer an estate properly regarding the federal taxes due for the estate.[60] For example, a representative who pays any debt before paying a claim of the government is liable to the extent of that payment for any claims unpaid to the government.[61]

Regarding the potential I.R.S. sanctions, courts have interpreted the federal statute to require that a fiduciary either have actual knowledge of a government claim or know of facts that would put a reasonably prudent person on notice of such a claim.[62] Thus, not all personal representatives who violate the federal laws will be liable if they did not know about the government claims. Despite this limitation, the potential responsibility of the personal representative is significant for both its deterrent value, and for encouraging the personal representative to determine what claims are being made against the estate.

It must be remembered that delays in estate resolution might be in direct compliance with what the prudent-person standard demands. This is true especially because of penalties like those the I.R.S. may impose for inaccurate distributions. Though beneficiaries and creditors often are anxious to have the estate distributed, the personal representative may be acting in the estate's best interest by taking his time.[63] A personal representative must gather all relevant information and may have to consult an attorney and/or accountant while

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56. *See* John B. Huffaker, *IRS Lays to Rest Prolonged Estate Administration*, 72 J. TAX'N 249, 249 (1990) (discussing Treas. Reg. 1.641(b)–3(a) and *In re* Estate of Brown, 137 Ariz. 309, 670 P.2d 414 (1983)). In *Brown*, the Fifth Circuit upheld the I.R.S. closing of an estate. The decedent had died in 1969, and the estate could have been closed in 1971, but a 1981 audit showed the estate still open. The I.R.S. ruled the estate had closed for Federal income tax purposes as of the end of 1976, and the court upheld the finding. There is no reason to think this Fifth Circuit opinion would be interpreted differently by the Ninth Circuit.

57. *Id.*

58. *Id.*

59. *See, e.g.*, Miller v. Commissioner, 333 F.2d 400 (8th Cir. 1964).

60. *See* Jacques T. Schlenger et al., *Executor Subject to Heavy Interest and Penalties for Failure to Properly Administer Estate.* Bank of the West, 93 TC No. 37, 17 EST. PLAN. 50, 50 (1991). *See also* Mark L. Ascher, *The Fiduciary Duty to Minimize Taxes*, 20 REAL PROP. PROB. & TR. J. 663 (1985) (discussing when a fiduciary is liable for failure to pay taxes, delay in paying taxes, or for errors in the filing thereof).

61. *See* 31 U.S.C. § 3713 (1988).

62. *See* O'Sullivan v. Commissioner, 1993 WL 548585 (T.C. Jan. 12, 1994) (executrix was found to have acted reasonably in assuming her husband had paid the relevant taxes because of the copy of the tax return she found in his papers). Further, it is not enough that the fiduciary has an honest belief such a debt will be paid. The fiduciary has a duty to see to it that the debt actually is paid. Leigh v. Commissioner, 72 T.C. 1105, 1110 (T.C. 1979).

63. See discussion of the prudent-person standard, *supra* notes 13–15 and accompanying text.

making certain that all decisions made are beneficial to the estate.[64] If all of these requirements are met, the distribution of the estate can be made in the most timely manner, while preserving as much of the estate as possible for the beneficiaries.

II. PERSONAL REPRESENTATIVES AND THERAPEUTIC JURISPRUDENCE

Once the purpose, duties and potential liabilities of the personal representative are understood, they can be evaluated for their effectiveness. Therapeutic jurisprudence can be used to evaluate these roles and laws from an innovative perspective because of its focus on the physical and mental consequences of the process on all parties involved.

A. Introduction to Therapeutic Jurisprudence

In recent years, certain legal scholars have developed and begun applying therapeutic jurisprudence.[65] Generally speaking, therapeutic jurisprudence is the study of law incorporating psychology, mental health, and related study areas[66] to determine particular consequences of laws. The goal is to improve the physical and mental health consequences of law by developing and changing various aspects of the legal system.[67] Therapeutic jurisprudence initially grew out of mental-health law,[68] but has since been applied to a wide variety of areas.[69]

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64. See discussion of the prudent-person standard, *supra* notes 13–15 and accompanying text.

65. Among these scholars is Professor David Wexler, who often is referred to as the "founder" of therapeutic jurisprudence. *See* David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 244 (1994). Wexler and Professor Bruce Winick are responsible for much of the study and development of therapeutic jurisprudence in recent years.

66. According to David Wexler: "The research task is a cooperative and thoroughly interdisciplinary one (potentially involving law, philosophy, psychiatry, psychology, social work, criminal justice, public health and other fields). Such research should then usefully inform policy determinations regarding law reform." David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 3, 8 (David B. Wexler & Bruce Winick eds., 1991).

67. David Wexler notes:

> Therapeutic jurisprudence...is a vehicle for bringing mental health insights into the law's development.... Therapeutic jurisprudence proposes that we be sensitive to those consequences, rather than ignore them, and that we ask whether the law's antitherapeutic consequences can be reduced and its therapeutic consequences enhanced without subordinating due process and justice values.

David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 761–62 (1993).

68. For a discussion of the decline of traditional mental health law and the corresponding development of therapeutic jurisprudence, see Wexler, *supra* note 66, at 3–10.

69. *See, e.g.*, Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994) (therapeutic jurisprudence in labor arbitration); Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777 (1993) (therapeutic jurisprudence in prison corrections); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39 (1993) (therapeutic jurisprudence in tort law); Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817 (1993) (therapeutic jurisprudence in evaluating the competency of defendants).

The essence of therapeutic jurisprudence is that law, legal procedures, and the roles of those involved in the legal system have impacts on those they touch.[70] Further, the effects of those agents can be either therapeutic or anti-therapeutic.[71] The goal in the application of therapeutic jurisprudence, therefore, is to increase the therapeutic consequences.[72]

One psychological area that has been researched in connection with therapeutic jurisprudence is that of autonomy.[73] Basically, the idea is that people are much better off if they have a sense of freedom and control in decision-making on issues directly affecting them.[74] This focus on autonomy implies that laws and legal procedures may be altered beneficially if people are allowed to make more decisions about issues personally affecting their own lives.[75]

It may be easier to understand therapeutic jurisprudence with some examples of how it has been applied by legal scholars.[76] It is important to note that the following examples are just a few of the ever-growing number of potential applications of therapeutic jurisprudence, but they are helpful as indications of the wide reach the perspective has gained.

One example directly applies to the criminal system. It has been suggested that conditional release orders might be complied with more often if

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70. It has long been realized that laws often have a greater or different impact than might initially have been intended. Today, such impacts as the economic or environmental harms of laws are frequently discussed. But other potential or real impacts should not be ignored. "Just as the law's impact on economic behavior or the quality of the environment should be assessed, its consequences for individual and social health deserve consideration." Bruce J. Winick, *Psychotropic Medications in the Criminal Trial Process: The Constitutional and Therapeutic Implications of* Riggins v. Nevada, 10 N.Y.L. SCH. J. HUM. RTS. 637, 639 (1993).

71. Although the terms may be somewhat amorphous, "therapeutic" simply means what is beneficial for the mental and/or physical health of the parties concerned, while "anti-therapeutic" would involve negative impacts on that health. Professor David Wexler has adopted the definition of therapeutic as that which promotes "the psychological or physical well-being of the people it affects." David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y & L. 220, 224 (1995). Anti-therapeutic, therefore, would be those laws or policies which decrease the well-being of the people they affect.

72. Wexler, *supra* note 67, at 759, 762. Also, according to Wexler, "Therapeutic jurisprudence leads us to raise questions, the answers to which are empirical and normative. The key task is to determine how the law can use behavioral science information to improve therapeutic functioning without impinging upon concerns about justice." David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280 (1993).

73. *See* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992).

74. According to Winick, "allowing individuals to make voluntary choices in matters vitally affecting them is developmentally beneficial and may be essential to their psychological well-being." *Id.* at 1707.

75. Autonomy has become an important value to be respected regardless of legal capacity. For a discussion, see Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989/1990).

76. In evaluating a particular situation or procedure for its therapeutic consequences, there are a number of areas to examine. "Therapeutic jurisprudence can itself be divided into four overlapping areas of inquiry. These involve (1) the role of the law in producing psychological dysfunction, (2) therapeutic aspects of legal rules, (3) therapeutic aspects of legal procedures, and (4) therapeutic aspects of judicial and legal roles." David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE, *supra* note 66, at 17, 19.

the acquittee is involved in the drafting of the order.[77] This idea is based upon the psychology of contracts—those who enter into a behavioral contract are more likely to comply than if they are simply ordered to behave in a certain way by others.[78] Therefore, the suggestion has been made that direct involvement by the acquittee be initiated and encouraged.[79]

Another example comes from tort law, where therapeutic jurisprudence questions have been asked regarding the compensation schemes in personal injury cases.[80] The issues revolve around which recovery system will most likely result in faster or better outcomes given different sets of circumstances. For example, one author has suggested that an apology given by the wrongdoer, probably in conjunction with a monetary award, may be helpful in validating the victim's experience and promoting recovery.[81]

B. Therapeutic Jurisprudence and Probate Generally

To this point, there has been only limited mention of any potential application of therapeutic jurisprudence to estate planning or probate,[82] but it is easily adapted to this substantive area. Because of the unusually intense emotions often experienced during probates, analyzing and promoting therapeutic results seems an intuitive goal.

Therapeutic jurisprudence scholars have indicated that all parties involved in a legal process should be kept in mind when developing law, not simply those immediately affected.[83] Thus, focusing on the impact of probate procedures on the personal representative as well as on the beneficiaries is an essential consideration. Further, it is not a surprise that the concept of autonomy is a factor in probates, since writing a will is the mechanism by which an individual determines how and to whom his property will be

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77. David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE, *supra* note 66, at 199.

78. In other words, entering into a contract is more effective than mandating a person behave in a specified manner, because the person involved in the contract experiences more of a sense of choice. This same contract notion was applied by another scholar to the idea of defendants having the right to refuse medication when they are standing trial. According to Winick, "[Giving defendants] the right to refuse treatment, by permitting patients to make voluntary choices in favor of treatment, and by effecting a restructuring of the therapist-patient relationship, may actually advance the therapeutic interests of patients." Winick, *supra* note 70, at 708.

79. Wexler, *supra* note 77.

80. One scholar, for instance, examined the consequences of a no-fault versus a fault-based recovery scheme. *See* Daniel W. Shuman, *Making the World a Better Place Through Tort Law?: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739 (1993); Shuman, *supra* note 69.

81. "An apology simultaneously explicates the injurer's role in causing the harm and responds to the indignity of the harmful conduct by offering the injured an important showing of respect. There is good reason for tort law to encourage apology, or at least to avoid discouraging it." Shuman, *supra* note 69, at 68.

82. Among other areas examined, trusts and estates are mentioned in an article by Bruce Winick discussing the connection of therapeutic jurisprudence with the importance of individual autonomy. *See* Winick, *supra* note 73, at 1754.

83. Professor Wexler, for instance, has invited extending the focus of therapeutic jurisprudence beyond the single individual. "Of course, there is no need for the focus to be so constrained; it could relate to the family, the community, and society in general." Wexler, *supra* note 71, at 224.

distributed.[84] Therefore, potential consequences to the testator, personal representative, beneficiaries and creditors[85] should always be kept in mind in creating and interpreting probate law in order to avoid exacerbating the emotional stress inherent in the situation. Also, the autonomy of all the parties, not just the testator, should be maximized.[86]

Another important consideration in probate is the method of compensation. Compensating the personal representative is significant as an incentive for him or her to do the best job possible. Therefore, the statutes provide for reasonable reimbursement of expenses[87] and reasonable compensation for the work performed.[88]

Because it is important to understand the rationale for current laws before thoroughly evaluating the role of the personal representative in terms of therapeutic jurisprudence, it is important to consider why the law might have developed as it has.[89] It is most logical to assume the probate procedures chosen by the legislature reflect the desire to give peace of mind to those writing wills by ensuring that their wishes will be carried out to the greatest extent possible.[90] Giving power to a personal representative is the most practical way to do this.

Compliance with the wishes of the decedent is, perhaps, the most therapeutic goal of probate law. Such a result is likely to put at ease anyone taking the time and money to create a will.[91] Moreover, it is also easier for beneficiaries to accept a proposed distribution if it comports with the will, thus

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84. *See* Winick, *supra* note 73, at 1754.

85. Although testators and creditors obviously are important to probates and their closing, full consideration of the therapeutic potential of both positions is beyond the scope of this Note.

86. Just as it is important to keep all the parties in mind when developing law, it is important to keep in mind that therapeutic concerns are just one factor to be balanced with other considerations.

> Therapeutic jurisprudence in no way suggests that therapeutic considerations should trump other concerns; they represent but one category of important considerations which include autonomy, integrity of the fact-finding process, and community safety, to name only a few. Therapeutic jurisprudence suggests that, other things being equal, the law should be restructured to better accomplish therapeutic goals.

Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, *supra* note 72, at 280.

87. ARIZ. REV. STAT. ANN. § 14–3720.

88. ARIZ. REV. STAT. ANN. § 14–3719.

89. Michael L. Perlin, *What is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 631 (1993). According to Perlin, "unless we determine *why* the law has developed as it has, it will make little difference if we determine whether it is developing in a 'therapeutically correct' way." *Id.* (emphasis in original). Although Perlin was writing essentially about mental health law, his analysis can be applied to any therapeutic jurisprudential issue. He emphasized the importance of therapeutic jurisprudence, but indicated that "we must not fail to place it within the social/political context of why and how...law has developed, and what conscious and unconscious motivations have contributed to the law's development in order for it to truly illuminate the underlying system." *Id.*

90. Ensuring the wishes of the decedent are carried out is the goal of both the courts and the legislature. "The basic rule for the interpretation of all wills and trusts is to ascertain the intent of the settlor or testator." *In re* Estate of Gardiner, 5 Ariz. App. 239, 240, 425 P.2d 427, 428 (Ct. App. 1967).

91. "Whatever its provisions, a will provides great comfort to a testator; he is secure in the knowledge that his affairs are in order." Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scrivener's Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 1 (1990).

easing family tensions and lowering the potential for any squabbling amongst beneficiaries.

Fortunately, a therapeutic result happens in the majority of cases. Generally, the personal representative is someone trusted and respected by the beneficiaries as much as he or she was trusted by the testator.[92] In such a case, the estate can be settled in a manner acceptable to all parties. This minimizes any bad feelings above and beyond the expected emotional stress of a death of a loved one.[93]

In less fortunate situations, where bad feelings develop between the personal representative and the beneficiaries, the role of the personal representative may be considered anti-therapeutic, though practical and necessary. The personal representative has autonomy over his or her actions, but this leaves the beneficiaries with little or no control over the estate.[94] In the usual case, the beneficiaries do not choose the personal representative, nor do they have significant control over how the estate subsequently is managed. This lack of control can lead to frustration, fighting within a family, or financial hardship.[95] Each of these results can be considered anti-therapeutic.

Because of this lack of autonomy on the part of the beneficiaries, the law and legal procedures governing the estate and behavior of the personal representative are essential to beneficiaries' mental states. Knowing that the personal representative must comply with particular legal standards and duties can help put beneficiaries at ease despite their personal lack of control.[96]

In addition to this general evaluation of probate procedures and roles, it is helpful to evaluate the Arizona probate law discussed in Part I. When the Arizona code is reviewed with regard to its therapeutic potential, suggestions for improvement are evident.

C. Evaluation of Arizona Statutes Regarding Personal Representatives

For the most part, the laws and legal procedures set forth in the Arizona probate code regarding the duties of the personal representative, and enforcement thereof, may be considered therapeutic.[97] These statutes are

92. This is especially true because the personal representative is often a family member or close friend, or a neutral party, such as a bank.

93. Unfortunately, even the best intentions of the testator can be foiled. For instance, see *In re* Estate of Stephens, 117 Ariz. 579, 574 P.2d 67 (Ct. App. 1978), where the testator appointed his bank as executor, but the bank refused to assume the role after the decedent's death. Decedent's daughters were thus appointed as co-administratrices of the estate. The discord between the daughters resulted in heightened tension and bad feelings, however, and the court removed the women in favor of the decedent's widow.

94. For a brief discussion of the effects of lack of autonomy, see *supra* notes 73–75 and accompanying text.

95. The same problems can also occur among co-personal representatives. *See In re* Estate of Stephens, 117 Ariz. at 580, 574 P.2d at 68 (co-executrices were removed by the court because they could not agree on estate matters and resorted to such actions as locking each other off the estate property).

96. Essentially, the increase in the control of the beneficiaries with the use of mediation gives them a sense of autonomy in matters personally affecting them, which is important to their psychological well-being. *See* Winick, *supra* note 73, at 1706.

97. While the personal representative's role is somewhat antitherapeutic, it is perceived as such by the beneficiaries who lack the control. In the overall picture of an estate, however, the

therapeutic because they set forth guidelines that, when followed and enforced, generally result in timely and accurate distributions in accordance with the wishes of the decedent.[98]

If the statute requiring that estates be settled expeditiously and efficiently[99] is complied with, the number of complaints about the performance of the personal representative should decrease.[100] Of course, the difficulty with the statute lies in its inherently vague and unspecific nature.[101] How is the typical beneficiary to know what time is needed to compile all of the assets accurately? The number of complaints about the duration of an estate proceeding, therefore, is probably not going to decrease significantly, even in the best of circumstances, because too many of the actions are subjective.

The same ambiguity is present for most of the duties assigned to the personal representative. Making a full and accurate accounting[102] represents a somewhat vague duty, as does possessing or controlling the assets of an estate.[103] Especially given the litigious nature of today's society, the duties are difficult to carry out without complaint from some party involved.

It may seem surprising, therefore, that the probate code may be considered therapeutic. It is therapeutic, however, because the code attempts to outline the duties which are expected of the personal representative.[104] Thus, when the duties are not fulfilled, the beneficiaries will be aware of the expectations and they will have an opportunity to take action to enforce the duties.[105]

Therefore, the enforcement provisions of the probate procedures are the truly therapeutic part of the probate code.[106] For example, the courts must sometimes evaluate and enforce the statutes to see that the wishes of the decedent are carried out as much as possible.[107] At the same time, the courts provide an avenue for the beneficiaries to ensure their interests are considered by the court as well, especially if the personal representative has not attended to those interests.[108]

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personal representative is given the opportunity to act in a manner that is therapeutic for the most parties possible.

98. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 14–3703, –3709, –3715.

99. ARIZ. REV. STAT. ANN. § 14–3703(A).

100. Theoretically, this should occur because the testator's wishes have been fulfilled.

101. ARIZ. REV. STAT. ANN. § 14–3703(A) vaguely states: "A personal representative is under a duty to settle and distribute the estate...as expeditiously and efficiently as is consistent with the best interests of the estate."

102. *See* ARIZ. REV. STAT. ANN. §14–7303.

103. *See* ARIZ. REV. STAT. ANN. §14–3709.

104. See discussion of the personal representatives' duties, *supra* notes 11–23 and accompanying text.

105. See discussion of the enforcement of personal representatives' duties, *supra* notes 24–64 and accompanying text.

106. See discussion of the enforcement of personal representatives' duties, *supra* notes 24–64 and accompanying text.

107. To this end, efforts to remove a personal representative require a court hearing, as do actions to hold a personal representative personally liable for losses to the estate or the beneficiaries.

108. For an example of a court needing to take action in order to evoke action on the part of a personal representative, see *In re* Estate of Shattuck, 17 Ariz. App. 103, 495 P.2d 873 (Ct. App. 1972).

Perhaps the most therapeutic methods of enforcement used by the courts are the monetary penalties that may be imposed upon personal representatives who act inappropriately.[109] This incentive to account for and distribute the estate appropriately is a strong one. Money is arguably one of the strongest motivating factors available in today's society, and can therefore be used as a positive motivator for appropriate action on behalf of the estate.[110]

In the same way, the alternative methods of enforcing the duties of the personal representative can be therapeutic.[111] The I.R.S. has the same power as courts to impose monetary penalties.[112] As discussed in Part I, this authority to sanction personal representatives is an incentive for the personal representatives to act in the best interests of the estates and themselves. If the necessity arises for sanctions to be imposed, it is to the estate's and the beneficiaries' benefit that such options be available.

Despite these incentives, however, probates of too many estates have resulted in bad feelings among family members and close friends[113]—and these feelings can last a lifetime. With the insights of therapeutic jurisprudence, a more "carrot-like" system could improve the status of estates and provide more therapeutic consequences for everyone concerned.

III. PROPOSAL FOR THERAPEUTIC IMPROVEMENTS IN THE PROBATE/PERSONAL REPRESENTATIVE SYSTEM

Even though, overall, the probate system has been successful, improvements can be made to make the system more beneficial in the long run to a greater majority of parties. Using the ideas of therapeutic jurisprudence, the system described in Part I regarding personal representatives in probate cases can be made more therapeutic without losing the advantages it already has.

The following proposal would not apply to the majority of estates in which any problems are resolved easily due to the cooperation of parties. It would apply, however, to estates in which there are problems encountered in assessing and/or distributing the assets of an estate due to the failure of communication or cooperation between the personal representatives and beneficiaries.

The first step would be to give the parties of an estate (i.e., the writer of the will, the personal representative or the beneficiaries) the option of mediation to help resolve disputes,[114] either potential or real.[115] The parties

109. Just as important, therefore, would be the economic incentive to do the best job possible as personal representative so the court may increase the commission received.

110. Some may argue that money should not be considered an incentive because of the negative associations often attached to money (i.e., greed, deceit, etc.). Also, some might argue that money should not be used as an incentive because of the importance of other variables involved, such as maintaining good familial relations, etc. However, it is difficult to deny the influence money can have, either as a "carrot" to encourage certain behavior or as a "stick" to punish other behavior.

111. See discussion, *supra* notes 55–64 and accompanying text.

112. Schlenger et al., *supra* note 60, at 50.

113. Perhaps one of the most unfortunate examples of this is found in the case *In re* Estate of Stephens, 117 Ariz. 579, 574 P.2d 67 (Ct. App. 1978), discussed *supra* notes 93 and 95.

114. Many advantages have been considered peculiar to mediation as compared to traditional adjudication, including giving the parties more control, greater flexibility, the

would thus sit down together with a neutral party, and without attorneys present, to determine what the problems are and how they might best be resolved.[116] The advantages of using such alternative methods are widely accepted. Generally they cost less, require less time, have more flexibility for constructing a satisfactory result, and reduce emotional conflict.[117]

The proposed mediation process for estates would occur before, and hopefully instead of, any court proceedings. It could be requested by either the beneficiaries or the personal representative.[118] Further, it could be explicitly included in a person's will as his or her choice of resolution for any problems with the estate. The courts could also be given the authority to order the parties to attempt resolution of their differences through mediation. The neutral party involved in this conference would be a mediator who has some knowledge of probate and tax matters.[119] With a background in the substantive legal areas,

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cooperative nature, higher compliance rates, and greater opportunity to deal with underlying issues. For a discussion of the advantages of mediation, see Joel Haycock et al., *Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 280 (1994).

115. According to some legal thought, mandating alternative dispute resolution methods such as mediation can be ineffective. *See, e.g.*, Jonathon Brock, *Mandated Mediation: A Contradiction in Terms—Lessons from Recent Attempts to Institutionalize Alternative Dispute Resolution Practices*, 2 VILL. ENVTL. L.J. 57 (1991). Brock concludes that "the institutionalization of alternate dispute resolution mechanisms has certain inherent barriers.... It is probably more important and more fruitful (1) to find other means to make mediation more easily available and (2) to create a greater understanding and acceptance of negotiations and mediation processes in public policy arenas." *Id.* at 60.

116. Such a mediation has been established in other legal arenas. *See, e.g.*, Steven C. Bowman, *Idaho's Decision on Divorce Mediation*, 26 IDAHO L. REV. 547 (1989/1990) (recommending mediation for divorce proceedings in Idaho based on a review of material on mediation); Anita R. White, *Mediation in Child Custody Disputes and a Look at Louisiana*, 50 LA. L. REV. 1111 (1990) (reviewing divorce and child custody procedures and proposing mediation as better for the family).

117. Kenneth J. Thygerson, *Alternative Dispute Resolution—Mediation*, 455 PRAC. L. INST./LITIG. 591, *available in* WL PLI, at *6 (1993). Thygerson goes on to evaluate why he believes alternative dispute resolution methods are superior, but why they have not been used more often. "[T]oo few people are aware of ADR and have experience using it. Another reason is simple fear of the unknown.... [I]nadequate training and experience, lawyer resistance, difficulty in finding skilled facilitators...and lack of support from the top are the main reasons for not using ADR." *Id.*, at *8.

118. If there were multiple beneficiaries, as there almost always are, or multiple personal representatives, any one of them could request such a mediation. This would overcome any potential of collusion to prevent the meeting of the parties.

119. Consistent with the tenets of therapeutic jurisprudence, the mediator involved would be just that—a mediator. He or she would not make substantive decisions for the parties involved, nor act against reasonable requests or decisions of those involved. According to Professor Wexler, "Therapeutic jurisprudence in no way supports paternalism, coercion, or a therapeutic state. It in no way suggests that therapeutic considerations should trump other considerations such as autonomy, integrity of the fact-finding process, community safety, and many more." Wexler, *supra* note 67, at 762.

and a desire to resolve conflicts,[120] the mediator could play a role different from a judge or a lawyer,[121] and improve the probate process in that role.[122]

Essentially, the mediation process would be an open forum. The mediator would ask each of the parties involved to describe their role in the probate, as well as any problems or concerns they have in terms of the process of distribution, and any ideas for satisfactory resolution of the estate. The mediator would control the discussion, to ensure each person has an opportunity to speak and be heard. Finally, the mediator would discuss the various aspects and assist in developing a plan for distribution and resolution of the estate.

There would be many therapeutic advantages to this mediation alternative. Developing a face-to-face, non-confrontational setting has direct benefits. It allows the parties to put into their own words their perspectives and problems and not rely on attorneys or piecemeal methods to communicate.[123] Such opportunity to put forth their positions could lead to admissions or negotiation that might not happen in a more adversarial setting.[124]

Of course, therapeutic jurisprudence relies on empirical evidence.[125] It may be found, therefore, that the absence of attorneys for each party in the mediations is a disadvantage because the parties themselves may not have the requisite knowledge to know what actions would benefit their own interests. In

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120. It would be helpful, perhaps, if the mediator had some background in psychology or social work, in addition to the substantive legal background, in order to facilitate a resolution. For commitment hearings, several authors propose that the mediator be trained appropriately. "Persons whose original background and training was in either mental health or the law could serve as mediators, as long as they had the requisite knowledge and interest." Haycock et al., *supra* note 114, at 286.

121. Of course, the presence of judge and lawyer in traditional proceedings can have benefits since there is both advocacy and neutrality built into the process. However, there has been study and criticism of the overall benefits of such presence in certain proceedings. *See* David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, *in* THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3, 16–19 (1990) (referring critically to the roles played by judges and lawyers in mental health commitment proceedings in particular).

122. Like any program, the mediation process would cost money. The cost of the mediation could be distributed in any number of ways. One option is to have the costs be borne by the government, as any court proceeding is. Because of the potential of mediation to negate the necessity for court hearings, resolving problems without lengthy court proceedings through mediation would likely be more cost-effective overall to the government than judicial proceedings are.

The program also could be private in nature. In that case, the costs could be borne by whichever party or parties requested the mediation. This, however, would encourage parties to hold out and free-ride on others who would request the mediation to protect their interests. Finally, the costs could be borne by the estate. This would, perhaps, make the most sense because the mediation would hopefully offset additional attorneys' fees to the estate that would be earned in challenges to proposed distributions.

123. The issue of legal representation in mediated civil commitment hearings was discussed and resolved in much the same manner as proposed here for probates. *See* Haycock et al., *supra* note 114, at 287.

124. Such a benefit is analogous to a criminal setting where a defendant is encouraged to tell his own story at a plea hearing, rather than let the judge or his attorney summarize it for him. According to Susan Philips, a legal anthropologist, allowing such a "confession" can benefit the legal system as a whole. Susan U. Philips, Criminal Defendants' Resistance to Confession in the Guilty Plea 4 (May 31–June 3, 1990) (paper presented at Law and Society Association Meetings, Berkeley, California) (on file with the *Arizona Law Review*), *as discussed in* Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, *supra* note 72, at 288–89.

125. Wexler, *supra* note 66, at 3, 8.

that case, the mediation process would not have to be abandoned; the parties could present their own interests and goals in the absence of attorneys, but allow attorneys to participate in any discussion of options for future actions.

Using the mediation process, the personal representative would hear directly what the concerns, interests and needs of the beneficiaries are. If there were some reason the personal representative had not been responsive previously, he or she might recognize the issues from the beneficiaries' perspective and be able to rectify at least some aspects of the situation.[126]

The beneficiaries would also get input from the personal representative as to the status of the estate, possibilities for the future, and a breakdown of any problems encountered. This would further communication and provide both the beneficiaries and the mediator with helpful information toward determining how the estate's interests may be attained. Also, the mediator could have a significant therapeutic impact. Just as a judge in a criminal case can benefit the judicial system by asking questions that might otherwise go unasked, the mediator can ask questions that might not otherwise arise.[127] Further, if the mediator is not an attorney,[128] he or she is more likely able to make unbiased suggestions and attempt to arrive at a compromise once the parties have stated their different positions.

Of course, such a mediation would not resolve all problems for all estates. Some parties may be too hostile to approach the mediation in a non-confrontational manner. Other parties may require that resolutions be mandated, as a judge in court is more likely to do. In these situations, the estate would revert back to the traditional process of court hearings and attorney-guided procedures.[129] But if even a small percentage of estates could be resolved more therapeutically, the option should not be dismissed just because it may not be completely successful in all situations.

IV. CONCLUSION

After reviewing the Arizona statutes for personal representatives, it is clear that personal representatives have many incentives to act in accordance with the best interests of the estate. These incentives range from fulfilling the wishes of the decedent to avoiding monetary penalties imposed for misbehavior.

126. This benefit might be a form of "cognitive restructuring"—a therapeutic change. It is somewhat analogous to the argument put forth by Wexler regarding trying to help sex offenders get past their usual denial by forcing them to judge their own situation as if they were a juror. This sort of role reversal has the potential to lead to a cognitive restructuring more beneficial to the parties concerned. *See* Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, *supra* note 72, at 286.

127. For a discussion of the potential therapeutic impact of judges in criminal cases, see Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, *supra* note 72, at 286–87.

128. Actually, as long as they had no conflicts of interest, such a mediator could easily be an attorney or judge. In some cases, a legal background could benefit the estate because of knowledge of the relevant law and tax ramifications. The mediator would not have to be a judge or attorney, however, to attain therapeutic resolutions to estates, and this proposal does not require such legal experience.

129. The option would still be available, of course, to attempt making the traditional procedures more therapeutic. Such an attempt could be made with the assistance of lawyers and judges acting in more therapeutic fashions by expressing honest and direct ideas without creating additional, unnecessary confusion. *See* Wexler, *supra* note 76, at 33–37.

Each of these incentives is therapeutic in nature, and each promotes behavior beneficial to estates as well as to society in general.

Fortunately for many, therefore, the proposal for mediation will not need to be used in the majority of situations. The probate and personal-representative system has been developed and refined over a number of years, and most estates can be resolved satisfactorily within a very reasonable period of time. Considering the therapeutic benefits of supplementing the probate system, however, the mediation option can only provide more alternatives and fewer bitter feelings at the closure of difficult estates.