THE EXTENSION OF THERAPEUTIC JURISPRUDENCE TO TESTAMENTARY COMPETENCY AND SUBSTITUTE DECISION-MAKING IN THE AUSTRALIAN CONTEXT

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ABSTRACT

Given the increasing dilemmas presented by the aging of the Australian population, the authors have undertaken the task of reassessing the approach to testamentary competency and substitute decision-making. Here they explore the question of whether therapeutic jurisprudence offers a useful theoretical framework for this task. Slobogin's critique of therapeutic jurisprudence provides the framework for a general discussion of the school of thought. The question of whether problems arise when using its insights in the Australian context is considered. The authors conclude that the principles of trust, participation and dignity promoted by therapeutic jurisprudence are highly desirable considerations in any re-examination of testamentary and substitute decision-making in Australia.

I INTRODUCTION

The authors are satisfied that in therapeutic jurisprudence they have found a theoretical framework with which to address the question of how testamentary competency and substitute decision-making could be re-assessed in the Australian context. In this article the authors set out to justify their conclusion by first assessing the current approach to therapeutic jurisprudence and the problems that arise. Subsequently, the article discusses the application of therapeutic jurisprudence to the area of Australian testamentary competency and substitute decision-making.

Therapeutic jurisprudence was first formulated in the United States of America in the early 1990s by David Wexler and Bruce Winick.[1] They were working within the mental health law milieu with a primarily law reformist and scholarly agenda.[2] The approach has since been advanced and cultivated by a group of scholars following their lead. These scholars, and indeed Winick himself, has now utilised therapeutic jurisprudence to address new legal concerns, including testamentary and surrogate decision-making instruments.[3] The extension of the doctrine to competency assessment in this context is relatively new and has not been explored in detail. Not surprisingly, although some Australian scholars

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1 Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1(1) *Psychology, Public Policy, and Law* 193, 193.

2 Bruce J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3(1) *Psychology, Public Policy, and Law* 184, 200.

3 Bruce J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key* (1996) 645, 663; Michael A Perlin, 'Dealing with Mental Disability in Trust and Estate Law Practice: "Things Have Changed:" Looking at Non-Institutional Mental Disability Law Through The Sanism Filter' (2003) 22 *New York Law School Journal of International & Comparative Law* 165, 171-5. For the purposes of this article 'surrogate decision-making' will include enduring powers of attorney and advance directives.

have found the approach beneficial, the majority of the literature adopting a therapeutic jurisprudence lens has been written in the United States of America.[4]

The subdued response of Australian legal scholars to therapeutic jurisprudence could be, in part, because of the relative youth of the doctrine. Alternatively, it could be because of any combination of the problems identified by Slobogin which will be examined in this article. It is the doctrine's promotion of the three concepts of participation, dignity and trust that has led the authors to advocate its extension to testamentary and substitute decision-making in Australia. These three concepts are vital to the maintenance of individual autonomy when competence to make legally valid and defendable testamentary and decision-making instruments is being assessed.[5] The issue of trust is a primary concern of the authors of this article. Australia is currently facing the dilemmas presented by an aging population. Such dilemmas include not only potentially escalating litigation as to the veracity of testamentary and substitute decision-making instruments but also the question of how long individual autonomy can be maintained. It is, we suggest, important to acknowledge that any assessment of an individual's competency can have curative or detrimental consequences. The adoption of therapeutic jurisprudence with its mandate that all things being equal the law should ideally have a therapeutic effect arguably achieves this.

This article contends, therefore, that therapeutic jurisprudence should be extended to testamentary and surrogate decision-making competency assessment in the Australian context. It will initially define the relevant terminology, principally involving an attempt to elucidate the imprecise concept of 'therapeutic jurisprudence' itself. An analysis of the problems existing with the doctrine will be undertaken. The extension of therapeutic jurisprudence principles to testamentary instruments and surrogate decision-making in the Australian context will then be examined and any potential difficulties will be identified. It is suggested that any review of testamentary and substitute decision-making in Australia should have recourse to therapeutic jurisprudence principles.

II THERAPEUTIC JURISPRUDENCE

Essential to the definition of *therapeutic jurisprudence* is the word therapeutic which is in common currency as meaning having or exhibiting healing powers. At its most basic, therapeutic jurisprudence is the study of the law, including legal actors (judges and lawyers), substantial as well as procedural law, and its effect, therapeutic or anti-therapeutic, upon the people that come into contact with the 'legal system'.[6] The definition is intentionally imprecise. Slobogin has attempted to define 'therapeutic' as 'the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects'.[7] Wexler concedes that this is the best general representation of his view.[8] He suggests that the ambiguous nature of the doctrine is necessary because predetermined meanings may precipitately conceal possible issues, thus narrowing the potential scope of therapeutic jurisprudence.[9] Thus, therapeutic, and accordingly, therapeutic jurisprudence must be contextually defined.[10] It is the

4 For example, Pamela R Champine, 'Dealing with Mental Disability in Trust & Estate Law Practice: A Sanist Will?' (2003) 22 *New York Law School Journal of International & Comparative Law* 177. See also Perlin, above n 3, 171-5.

5 Tom R Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key* (1996) 3, 9-11.

6 David Finkelman and Thomas Grisso, 'Therapeutic Jurisprudence: From Idea to Application' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key* (1996) 587, 588.

7 Slobogin, above n 1, 196.

8 David B Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1(1) *Psychology, Public Policy, and Law* 220, 223-4.

9 Ibid 221.

10 Ibid 222.

malleability of the doctrine which enables it to be extended to the wide range of areas including Australian testamentary competency and substitute decision-making. Nevertheless the deliberate ambiguity of the term 'therapeutic jurisprudence'[11] attracts legitimate queries in relation to the definition and aims of the doctrine. This section will outline how the term 'therapeutic jurisprudence' has been characterized for the purposes of this article. The definitional dilemmas confronting therapeutic jurisprudence will be discussed in more detail in section III.

Therapeutic jurisprudence scrutinizes '… the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or antitherapeutic consequences …'.[12] The doctrine questions '… whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles …' and justice values.[13] That is, the law has an impact upon individuals and this impact should, ideally, be positive unless it would be necessary to subvert the principles of natural justice to achieve this. Therapeutic jurisprudence is intended to promote a multidisciplinary approach[14] which encourages pragmatic thought[15] and the use of social science research methodologies.[16] It values individual autonomy and community safety[17] which can give rise to the internal balancing dilemma identified by Slobogin.[18]

III THE PROBLEMS CONFRONTING THERAPEUTIC JURISPRUDENCE

The problems which have been identified with therapeutic jurisprudence now need to be examined. It is necessary to examine these problems generally before analysing their relevance to the purported adoption of the doctrine in the specific context being proposed by the authors. A useful approach is found in the work of Slobogin, who most clearly elucidates the dilemmas confronting therapeutic jurisprudence scholars.

A Slobogin's Five Dilemmas

Slobogin categorized five major issues confronting therapeutic jurisprudence.[19] These are the identity dilemma, the definitional dilemma which was foreshadowed in section II, the dilemma of empirical indeterminism, the rule of law dilemma and the balancing dilemma.[20] Although pinpointing the problems which exist with therapeutic jurisprudence, Slobogin sees the doctrine as 'innovative and worthwhile'. He asserts that his comments are meant to be constructive and not to 'trash' the doctrine.[21]

1 The Identity Dilemma

The first dilemma identified by Slobogin focuses upon the issue of the meaning of 'therapeutic'.[22] This was briefly addressed in section II wherein Slobogin's suggested definition and Wexler's acceptance of it were highlighted. In outlining the identity dilemma, Slobogin essentially questions whether 'therapeutic' simply means '… beneficial

11 Winick, above n 2, 192.
12 Michael L Perlin, '"Their Promises of Paradise": Will *Olmstead v L.C.* Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?' (2000) 37 *Houston Law Review* 999, 1047-8; Wexler, above n 8, 220, 231; Winick, above n 2, 185; Slobogin, above n 1, 194.
13 Perlin, above n 12, 1047-8; Wexler, above n 8, 231. See also Winick, above n 2, 185; Slobogin, above n 1, 194.
14 Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' in Marilyn McMahon and David Wexler (eds), *Therapeutic Jurisprudence* (2003) 6, 8.
15 Mark A Hall, 'Law, Medicine, and Trust' (2002-2003) 55 *Stanford Law Review* 463, 466-7.
16 Ibid 467.
17 Freiberg, above n 14, 8.
18 Slobogin, above n 1, 210. See the discussion in section III A 5.
19 Slobogin, above n 1.
20 Ibid 195.
21 Ibid 195, 218.
22 Ibid 196.

… [or] beneficial in light of what behavioural science has to say about the effect of the law and why people behave the way they do … [or] beneficial in the sense of improving the psychological or physical well-being of a person'.[23] Winick reiterates Wexler's viewpoint that the definition of therapeutic is deliberately nebulous[24] to encourage debate concerning issues that might not have been raised if the definition was prematurely determined.

More particularly, Slobogin uses this dilemma to question whether the ambiguous definitions of therapeutic jurisprudence terminology will prevent the doctrine from establishing an identity distinguishable from other modern jurisprudences such as critical legal studies and the feminist movement.[25] This is essentially the difference between the identity dilemma and the definitional dilemma which will be discussed below. Winick suggests that the differentiating factor is that therapeutic jurisprudence is normative in nature whereas these movements are not.[26] Slobogin concedes that therapeutic jurisprudence is distinguishable, but arguably '… more by way of emphasis than content'.[27]

A discussion of 'therapeutic' necessarily raises the question of therapeutic for whom? To raise the question is to recognise that a law may be therapeutic for one individual but anti-therapeutic for another.[28] Wexler's response is that the aim of therapeutic jurisprudence is not to provide a solution. Rather, it is to promote discussion of an issue which arbitrary definitions and restrictions on the identity and content of the jurisprudence may prevent.[29] That is, a narrow definition of therapeutic jurisprudence could limit its application in areas which the doctrine may not yet have been applied. For example, if therapeutic jurisprudence had been defined by and within the parameters of its origins in American mental health law its application in the fields of criminal law, family law and, as suggested here, succession law in Australia may never have been explored. The inherent definitional ambiguity lends itself towards the promotion of the discussion of new approaches to established areas of law.

2 The Definitional Dilemma

Slobogin's definitional dilemma is used to question the meaning ascribed to the terms 'therapeutic' and 'well-being'.[30] Slobogin calls for clearly articulated definitions of relevant terms as well as of the aims of the jurisprudence, for example, does therapeutic jurisprudence aspire to '… autonomy, social adjustment, [or] psychological contentment …'.[31] *Prima facie* the definitional dilemma is not easily distinguishable from the identity dilemma. However, as stated above, the definitional dilemma calls for clear meanings of therapeutic jurisprudential terms whereas the identity dilemma is more concerned with establishing a unique place for therapeutic jurisprudence within modern legal jurisprudence.

The extension of therapeutic jurisprudence to areas outside mental health law has also been called into question by Small.[32] Wexler has responded to this critique citing the expansion of therapeutic jurisprudence to areas of law beyond mental health.[33] This is possible he argues, because '… emotional stresses and strains …' are inherent within the legal system in general, not just mental health law.[34] The authors suggest that these

23 Ibid.
24 Winick, above n 2, 192.
25 Slobogin, above n 1, 201, 218.
26 Winick, above n 2, 206.
27 Slobogin, above n 1, 200.
28 Wexler, above n 8, 224.
29 I bid.
30 Slobogin, above n 1, 201.
31 Ibid 218.
32 Mark A Small, 'Legal Psychology and Therapeutic Jurisprudence' (1993) 37 *St. Louis University Law Journal* 675, 698-9.
33 Wexler, above n 8, 227.
34 Ibid.

'emotional stresses and strains' are especially evident in the area of testamentary and substitute-decision making in which individuals face not only their own mortality but also have to contend with familial relationships, be they positive or harmful. Accordingly, it would appear that the adoption and application of therapeutic jurisprudence principles in an attempt to alleviate some of the anxiety and tension associated with testamentary and substitute decision-making in the Australian context should be commended.

Small questions whether therapeutic jurisprudence principles can cover all facets of legal psychology. Winick indicates that he is uncertain about this proposition because to be 'all-compassing' might restrict the explanatory power of therapeutic jurisprudence.[35] Further, it is improbable that a single doctrine would be able to address all possible legal issues.[36] Slobogin himself queries whether forcing an individual to make a decision is therapeutic or anti-therapeutic given that making decisions can be as stressful, or more stressful, than not making them.[37] The question he presents is whether it is a valid exercise of autonomy to choose not to make a decision. Slobogin also questions how the law's 'therapeutic' or 'anti-therapeutic' effect can be measured.[38] Arguably, this falls within the dilemma of empirical indeterminism which will be discussed next.

3 The Dilemma of Empirical Indeterminism

Empirical indeterminism is the notion that therapeutic jurisprudence relies upon social science research for a practical evaluation of the theoretical discussion.[39] Slobogin identifies two key problems with social science research. Firstly, social science research methodologies do not easily merge with legal issues and any results should be critically reviewed;[40] and secondly, therapeutic jurisprudence will identify problems that cannot always be solved and thus empirical indeterminism is not feasible.

As identified by Slobogin, legal scholarship and social science, or empirical research, are improbable collaborators. Empirical research, at best, appears sporadically in Australian and American legal scholarship. If it is conducted, this is seemingly without a comprehensive awareness of the complexities involved in undertaking a qualitative and/or quantitative research project. It has been suggested that 'the neglect of empirical work is a bad, increasingly worrisome thing for … [legal] scholarship and teaching …'.[41] However, the calls for legal scholars to undertake more social science research are not frequently heeded. Legal scholars generally lack training in empirical research methodologies. However, attention is increasingly being focused upon the law's impact upon society. This is especially relevant to Australia's aging population[42] and the legal mechanisms designed to manage this population, including testamentary and especially substitute decision-making instruments.

This is not to deny the validity of Slobogin's concern about the melding of legal and empirical research because all research should be critically reviewed. However, the authors agree with the notion that the appropriate and strategic use of empirical research strategies could augment legal scholarship.[43] For those who have mastered the analytical skills

35 Ibid.
36 Ibid.
37 Slobogin, above n 1, 201-2.
38 Ibid 202-3.
39 Ibid 204.
40 Ibid 204, 218.
41 Peter H Schuck, 'Why Don't Law Professors Do More Empirical Research' (1989) 39 *Journal of Legal Education* 323, 323.
42 The legal mechanisms to manage an aging population can include government intervention, for example, legislation, policy approaches such as those governing health and funding. Problems associated with aging, such as dementia, cannot continue to be ignored by policy makers. Alzheimer's Australia, 'Keeping Dementia Front of Mind: Incidence and Prevalence 2009 – 2050' (Final Report by Access Economics Pty Limited for Alzheimer's Australia, August 2009) 6.
43 Getman's article details the difficulties faced by the uninitiated when first attempting empirical research. Julius G Getman, 'Contributions of Empirical Data to Legal Research' (1985) 35 *Journal of Legal Education* 489, 489, 491, 493.

necessary to resolve legal theoretical and practical problems, it should be possible to successfully extend these skills to include social science research.[44] Therefore, the authors contend that in an area such as testamentary and substitute decision-making the use of social science research methodologies may be valuable. The problems experienced in employing empirical research may arise when one adopts an approach other than the therapeutic jurisprudence approach.

Slobogin notes his concern that, irrespective of the validity of the chosen research paradigm, issues raised by therapeutic jurisprudence are often difficult, if not impossible, to satisfactorily answer.[45] The truth of this observation is undeniable. However, the problem of challenging research questions is again not confined to therapeutic jurisprudence. All legal scholars face this problem, especially those seeking to adopt multi-disciplinary research approaches which need to integrate different approaches to obtain a viable outcome. Winick admits that therapeutic jurisprudence is reliant upon the 'tools' of social science. Consequently, 'an inherent problem … [will be] that the conclusions of therapeutic jurisprudence work will be "subject to all of the vagaries that afflict social science itself"'.[46] However he further notes that the imperfect nature of social science research should not prevent its use. Instead, the results should be viewed critically.[47] The authors support this conclusion. As with any research, the results of social science methodologies must be accepted cautiously. However, this is not to deny the valuable potential input of social science research methodologies in exploring the practical application and limitations of therapeutic jurisprudence hypotheses especially as the doctrine is well suited to areas such as mental health law, family law and, as the authors contend, the assessment of testamentary competency and substitute decision-making.

4 The Rule of Law Dilemma

The rule of law dilemma as characterized by Slobogin scrutinizes what is to occur if the therapeutic impact of a rule is mixed. In this event, Slobogin states that '…an evaluation of the rule's value should consider not only the proportion of people who are likely to benefit from it but also the extent to which that proportion will be accurately identified …'.[48] Further, Slobogin notes that the issue for therapeutic jurisprudence '… is how to decide whether the greatest good to the greatest number will come from individualizing a rule or from adopting a less flexible approach'.[49] Winick's response is that therapeutic jurisprudence is not promoted at the expense of natural justice principles[50] and thus, the therapeutic aim is only to be sought when all other factors are equal. The law must be adaptable enough to meet individual circumstances, especially in a contentious area such as testamentary and surrogate decision-making competency determination. However, it is important to be aware of the cost involved in attaining therapeutic outcomes.

5 The Balancing Dilemma

The balancing dilemma examines '… how much weight should be given to showing that a legal rule or practice is therapeutic in light of countervailing considerations'.[51] Schopp has stated that maximising therapeutic success may negatively affect personal liberty[52] and that therapeutic jurisprudence does not weigh the importance of liberty and beneficial

44 Franklin E Zimring, 'Where do the New Scholars Learn New Scholarship?' (1983) 33 *Journal of Legal Education* 453, 455.
45 Slobogin, above n 1, 204, 207-8.
46 Winick, above n 3, 657.
47 Winick, above n 2, 196.
48 Slobogin, above n 1, 218.
49 Ibid 210.
50 Winick, above n 2, 203.
51 Slobogin, above n 1, 210.
52 Robert F Schopp, 'Therapeutic Jurisprudence and Conflicts among Values in Mental Health Law' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key* (1996) 723, 723.

effectiveness.[53] This is an important concern addressing autonomy, paternalism and well-being, all concepts closely aligned with assessing testamentary and substitute decision-making competency. Slobogin questions why '… an abstract desire for autonomy [should] trump individual well-being'.[54] However, it is arguable that conflict arises more often from perceived infringement upon individual autonomy than from a lack of state intervention.

Slobogin questions the ability of the framework adopted by therapeutic jurisprudence to contend with the balancing dilemma.[55] He divides the balancing dilemma into two subcategories, being internal and external. Internal balancing is concerned with finding equilibrium between therapeutic outcomes and natural justice principles. This 'problem' arguably arises from a misconception given that the very definition of therapeutic jurisprudence states that therapeutic aims should only be sought all '… *other things being equal* …'.[56] Further, therapeutic jurisprudence '… does not suggest that therapeutic considerations should outweigh other normative values that law may properly seek to further. Rather, it calls for an awareness … and … a … weighing of sometimes competing values'.[57] Additionally, and as Slobogin concedes, difficulties reflective of the internal balancing dilemma are not restricted to therapeutic jurisprudence. They confront society in general and most certainly other areas of law.[58] Therefore, although it is important to be aware of the internal balancing dilemma, it is not a major threat that would dramatically affect the application of the jurisprudence's principles when assessing testamentary and substitute decision-making competency in the Australian context.

The second of the problems identified by Slobogin, external balancing,[59] is basically concerned with protecting the credibility of the doctrine. Slobogin suggests that to accomplish this, therapeutic jurisprudence proponents cannot ignore the core problem that therapeutic outcomes for some do not necessarily equate to therapeutic outcomes for others. A way must be found to address this unavoidable quandary.[60] However, as with a lot of criticisms directed towards therapeutic jurisprudence, the same criticism can be aimed at all legal areas irrespective of the context and law reform agenda. Again, this would not affect the adoption of the doctrine within Australian jurisprudence. These are criticisms for which a universal answer cannot be given. Rather, they are situation specific with each circumstance demanding a distinctive response to adequately address the particular balancing dilemma.

Slobogin's evaluation of therapeutic jurisprudence raises important issues. Arguably, however, his criticisms are defensible in both the American and Australian contexts, as both Wexler and Winick have demonstrated. Admittedly, Wexler and Winick's comments are strongly conditioned by their American context but these comments can be extended to apply to the Australian legal environment generally and to testamentary and substitute decision-making competency assessment specifically. As Slobogin states, 'therapeutic jurisprudence, carefully pursued, will help produce a critical psychology that will force policymakers to pay more attention to the actual, rather than the assumed, impact of the law and those who implement it'.[61]

53 Ibid 725.
54 Slobogin, above n 1, 213.
55 Ibid 211.
56 Winick, above n 2, 188 [emphasis in original].
57 Ibid 191.
58 Slobogin, above n 1, 212.
59 Ibid 216.
60 Ibid.
61 Ibid 219.

IV APPLICATION TO TESTAMENTARY COMPETENCY AND SURROGATE DECISION MAKING IN AUSTRALIA

Therapeutic jurisprudence is arguably accepted within American legal circles. Further, it has been established that its principles apply beyond the traditional mental health law field.[62] In Australia, it has been theorised that the impact of the law upon society has historically been ignored.[63] Therapeutic jurisprudence is not widely acknowledged as an appropriate response to legal problems and the identification of areas to which its principles might extend is ad hoc. The authors suggest that therapeutic jurisprudence has the potential to be valuable in the context of Australian testamentary and substitute decision-making competency assessment and that Australians can gain from, participate in and contribute to the development of the doctrine.[64]

The preparation and ramification of testamentary instruments and surrogate decision-making may produce therapeutic and/or anti-therapeutic effects.[65] Perlin has argued that therapeutic jurisprudence principles should apply to trust and estate law because not to do so would be to miss the proverbial boat.[66] Winick has written extensively about promoting individual autonomy, noting that '…self-determination is therapeutically advantageous'[67] and a 'basic human need' which can benefit a person's 'psychological health'.[68] While, on the other hand, denial of individual autonomy can produce 'feelings of powerlessness, dependence, incompetence, and depression'.[69] Denial and distress are concerns of therapeutic jurisprudence scholars,[70] who seek to analyse their consequences for individuals. In the proposed context this would involve assessing the impact of denial and distress on individuals who wish to execute testamentary and/or surrogate decision-making instruments and how anti-therapeutic outcomes may be rectified through the application of therapeutic jurisprudence principles.

The concepts of knowledge, intelligence and voluntariness[71] are also relevant when considering extending therapeutic jurisprudence principles to testamentary and substitute decision-making competency assessment in Australia. Generally, it is relevant to such assessment whether testators know their rights; whether they can make intelligent choices based upon rational reasoning; and whether they are acting voluntarily without coercion.[72] In the proposed context, the totality of circumstances could mean knowledge of the importance and significance of the testamentary and/or surrogate decision-making instrument which is being signed as the result of a rational reasoning process in the absence of undue influence or coercive factors. This adaptation of the 'totality of

62 It has '… been applied to analyse issues in correctional law, criminal law, family law and juvenile law, sexual orientation law, disability law, health law, evidence law, personal injury law, labor arbitration law, contract and commercial law, workers' compensation law, probate law, and the legal profession'. Winick, above n 2, 201.

63 Eilis S Magner, 'Therapeutic Jurisprudence: Its Potential in Australia' (1998) 67 *Revista Juridica de la Universidad de Puerto Rico* 121, 123.

64 Ibid 125.

65 Winick, above n 2, 186.

66 Perlin, above n 3, 171.

67 Winick, above n 2, 195.

68 Bruce J Winick, 'The MacArthur Treatment Competence Study: Legal and Therapeutic Implications' (1996) 2(1) *Psychology, Public Policy, and Law* 137, 160-161.

69 Bruce J Winick, 'Advance Directive Instruments for Those with Mental Illness' (1996-1997) 51 *University of Miami Law Review* 57, 84.

70 Denial is defined as a '… defense mechanism that operates unconsciously … [and is] a conscious or unconscious repudiation of the meaning, or even occurrence, of an event to avoid anxiety or other unpleasant effects'. Bruce J Winick, 'Client Denial and Resistance in the Advance Directive Context Reflections on How Attorneys Can Identify and Deal With A Psychological Soft Spot' (1998) 4(3) *Psychology, Public Policy, and Law* 901, 904.

71 Solomon M Fulero and Caroline Everington, 'Assessing the Capacity of Persons With Mental Retardation to Waive Miranda Rights: A Jurisprudent Therapy Approach' (2004) 28 *Law & Psychology Review* 53, 56.

72 Ibid.

circumstances' principle also reflects the three elements of competence required to make valid treatment decisions and to stand trial, which are understanding, reasoning and appreciation.[73] Thus, the 'totality of circumstances' would imply competency, recognise the importance of eliminating undue influence[74] and promote salutary outcomes when assessing competency for testamentary and surrogate decision-making instruments. The remainder of this section will independently examine the application of therapeutic jurisprudence principles to testamentary competency and substitute decision-making.

A Testamentary Acts

Given the authors' interest in competency and capacity, the question arises as to whether therapeutic jurisprudence principles will advance our inquiry into the need to review the doctrine of testamentary competency. It is arguable that societal concern for the autonomy of the living could or should override respect for testamentary wishes.[75] However, Ellis suggests that there is an increasing respect for property so that this value may soon rival the value of individual liberty.[76] In the narrower context of competency assessment, Ellis takes this further stating that '… in essence, it is our liberty and independence that are at stake when our voiceless wishes contained in a will are disregarded on the assumption of diminished capacity'.[77] She is suggesting the law can have anti-therapeutic consequences irrespective of whether an individual is alive when the law is applied.

Champine also writes quite extensively on the application of therapeutic jurisprudence principles in this context, noting that such reflection will raise unanswered and possibly unanswerable questions,[78] which reflects the empirical indeterminism dilemma. She asserts that her discussion should not promote therapeutic jurisprudence as the answer to any and all problems facing the doctrine of testamentary competency. Rather, the potential for paternalism inherent in therapeutic jurisprudence may counteract the autonomy of the testator. However, Champine opines that the potential importance of the currently unheralded factor of 'therapeutic value' must be acknowledged when revisiting testamentary competency.[79] Therefore, she appears to promote the application of the doctrine because the discussion generated would prove indispensable to this area.[80]

Therapeutic jurisprudence principles can enhance testamentary competency assessment in Australia and should be considered in any review of that doctrine. The jurisprudence would, as Champine identifies, encourage discussion which may not otherwise arise. The law in this context has significant potential to be either therapeutic or anti-therapeutic, effects which should be acknowledged and addressed. A collaborative approach to testamentary competency assessment utilising the skills and experience of legal, health and allied professionals could provide a more salutary and satisfactory outcome than the imposition of a court ordered directive upon disputing parties. Mediation would be one such solution for providing a more satisfactory outcome acceptable to the parties. Its utilisation can increase the possibility of parties respecting a decision because it is a process in which they feel they have participated rather than resenting a court order which can enforce the win/loss mentality. Thus, mediation can be favourably compared to litigation on the basis that it is a therapeutic rather than an anti-therapeutic experience. This can be extrapolated to the competency assessment context and is an especially relevant

73 Allison D Redlich, 'Voluntary, But Knowing and Intelligent? Comprehension in Mental Health Courts' (2005) 11(4) *Psychology, Public Policy, and Law* 605, 612.

74 Susan N Gary, 'Adapting Intestacy Laws to Changing Families' (2000) 18 *Law & Inequality* 1, 70, 69-70 as cited in Heather S Ellis, 'Dealing with Mental Disability in Trust & Estate Law Practice: "Strengthen the Things that Remain:" The Sanist Will' (2003) 22 *New York Law School Journal of International & Comparative Law* 195, 198 and footnote 17.

75 Ellis, above n 74, 195.

76 Ibid.

77 Ibid.

78 Champine, above n 4, 191.

79 Ibid 192.

80 Ibid 191.

consideration as testamentary competency assessment, and potential litigation, is only going to increase with Australia's aging demographic.

B Surrogate Decision-Making

Winick canvasses issues with surrogate decision-making and says that there '… is considerable psychological value in allowing individuals to exercise choice concerning … decisions affecting their health'.[81] For the purposes of this article, surrogate decision-making occurs when a competent individual (the principal) empowers another person(s) to make financial and/or lifestyle and health decisions when the principal is unable or incapable of making those decisions.[82] The law, and consequently, the formalities and titles, differ in each Australian State and Territory, but essentially an appointment of a surrogate can be achieved through an enduring power of attorney document for financial matters. Where the decisions to be controlled relate to lifestyle and/or health matters, the document is referred to generally as either an advance directive or an appointment of enduring guardian.[83] For the purposes of this article it will be referred to as an advance directive. These documents are not confined to naming the surrogate decision-maker. They can also contain restrictions on the powers able to be exercised and/or express the principal's wishes on how these powers are to be implemented. The authors contend that therapeutic jurisprudence appears to organically complement surrogate decision-making. It would follow that as there is a current focus on this area as a result of Australia's aging population, therapeutic jurisprudence principles should be at the forefront of any legal reform.

Surrogate decision-making laws can enhance the law's therapeutic effect through the promotion of individual autonomy.[84] Anecdotally, legal and medical professionals seem divided over whether advance directives should be binding upon the medical profession. Winick contends that '… lawyers should become aware of their potential, and [advance directives] … should become an important stock in trade of the preventative lawyer'.[85] Medical professionals, especially, seem reluctant to accept them. This reluctance stems from a number of factors, primarily, the possibility of liability, both legal and ethical. For example, a medical professional may be reluctant to adhere to the terms of an advance directive when they have never treated the patient previously[86] because they are unfamiliar with the patient, their circumstances and familial environment.

The controversial issue of the right to refuse treatment arises.[87] Medical professionals appear to consider that, if there is an available treatment, they have an ethical duty to administer it.[88] This 'treatment' driven approach can appear to conflict with the individual's right to refuse treatment and in essence oppose the 'rights-driven approach' which promotes an individual's autonomy.[89] There is legal authority in the United States of America for the proposition that an individual's right to refuse treatment is constitutionally protected if it is unmistakably contained within the relevant advance directive instrument.[90] Australia does not offer constitutional protection for surrogate decision-making. Different State and Territory laws result in an unpredictable system in which to determine whether

81 Winick, above n 68, 158.
82 See for example Robin Creyke, *Who Can Decide? Legal Decision-Making for Others* (Aged and Community Care Service Development and Evaluation Reports No 19, Department of Human Services and Health, 1995) 2.
83 Guardianship provisions also exist.
84 Winick, above n 69, 61.
85 Winick, above n 70, 901; Bruce A Arrigo and Jeffrey J Tasca, 'Right to Refuse Treatment, Competency to be Executed, and Therapeutic Jurisprudence: Toward a Systematic Analysis' (1999) 23 *Law & Psychology Review* 1, 5.
86 Winick, above n 69, 71.
87 This is outside the scope of this discussion.
88 Arrigo and Tasca, above n 85, 5
89 Ibid.
90 *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990) in Winick, above n 69, 59.

an individual has competency and thus retains autonomy to make their own decisions. Surrogate decision-making is one way in which the law can have a therapeutic effect because the actual act of planning for the future is an unqualified exercise of control and therefore, autonomy.[91]

C Trust and Individual Autonomy

Trust is important in the legal and the medical realms. Individuals must trust in both their lawyers and doctors and that each profession is acting in their best interests. Arguably, however, trust in professionals, especially legal and medical professionals, has receded as the concept of personal autonomy has grown. Notwithstanding this, the process of trust appears to have therapeutic benefits. For example, the absence of trust may prevent individuals from seeking out legal and/or medical advice[92] which could lead to anti-therapeutic consequences.

Therapeutic jurisprudence scholars have argued that melding the principles of therapeutic jurisprudence with preventative lawyering would promote an individual's psychological and emotional needs whilst advancing constructive interaction between individuals and the legal profession,[93] thus having the therapeutic effect of increasing trust. This is because while therapeutic jurisprudence seeks to ensure the therapeutic effects of the law and its actors, preventative lawyering promotes the benefits of strategic planning and drafting[94] concepts which clearly complement the purpose of surrogate decision-making legislation. The rights based approach of modern society should not be allowed to completely undermine the concept of trust. Therapeutic jurisprudence offers a framework in which legal and medical professionals can adopt an inter-disciplinary approach designed to enhance trust, not only between the professions and individuals but also between the professions themselves. This can then augment the assessment of testamentary and/or substitute decision-making competency. For the assessment process to work effectively, the individual being assessed needs to have an understanding of the competency assessment process. Fostering a relationship of trust is essential to achieving this.

D Problems Applying Therapeutic Jurisprudence in Australia

The problems outlined in section III could affect the potential application of therapeutic jurisprudence in Australia. Magner, Carney and King, among others, have all written on the adaptability of therapeutic jurisprudence to Australian legal jurisprudence.[95] This literature, however, has not been substantial, nor focused upon testamentary instruments and surrogate decision-making. This section will address the specific problems of promoting therapeutic jurisprudence principles in the context of testamentary and substitute decision-making competency assessment in Australia. Three main problems have been identified. First is the 'Americanism' of therapeutic jurisprudence; second, is the

91 Justine A Dunlap, 'Mental Health Advance Directives: Having One's Say?' (2000-2001) 89 *Kentucky Law Journal* 327, 386.

92 Hall, above n 15, 478.

93 Winick, above n 70, 909.

94 Ibid.

95 See for example Magner, above n 63, 127; Terry Carney et al, 'Mental Health Tribunals: 'TJ' Implications of Weighing Fairness, Freedom, Protection and Treatment' (2007) 17(1) *Journal of Judicial Administration* 46-59; Terry Carney and Dominique Saunders, 'Therapeutic Jurisprudence and Anorexia: A Synergy?' in Marilyn McMahon and David Wexler (eds), *Therapeutic Jurisprudence* (2003) 54; Michael S King, 'Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic Restorative, Problem-Solving Model' (2008) 16(3) *Journal of Law and Medicine* 442-57; Michael S King 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *elaw Journal: Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v10n2/king102.html>; Rob Guthrie and Michael S King, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' (2008) 89 *Precedent* 39-41; and Michael S King, 'Therapeutic Jurisprudence, Leadership and the Role of Appeal Courts' (2008) 30(2) *Australian Bar Review* 201-13.

ambiguity of the doctrine's title to an Australian audience; and third, is the predominantly micro-analytical approach of therapeutic jurisprudence.[96]

For Australian scholars one of the most significant problems with therapeutic jurisprudence is that it is overpoweringly American.[97] As stated above, therapeutic jurisprudence developed approximately twenty years ago within the constitutional framework of American mental health law. However, Australia does not face the constitutional constraints presented by the American Constitution. This is actually encouraging when examining its potential application in Australia because therapeutic jurisprudence can develop free from constitutional restrictions. As Winick acknowledges, the

> … law in America functions within a constitutional framework that often limits the potential for legal change … [t]his is not always true in other countries, with the result that legal practices in other countries may shed considerable light on our understanding of the law's impact on therapeutic values. Moreover, in other respects, the potential of legal change to accomplish therapeutic objectives may exist in other legal regimes that are not possible or are not thought to be possible under American law. [98]

Winick's comments demonstrate that American scholars of therapeutic jurisprudence welcome and promote the exploration of therapeutic jurisprudence principles by scholars from other legal systems.

The second potential problem again focuses attention on the ambiguous nature of the doctrine as discussed above in relation to both the identity and definitional dilemmas. In the Australian context, the doctrine's title is likely to cause confusion and possibly regenerate the first criticism, that it is 'typically American'.[99] The title can be bewildering and subject to unpredictable and individual interpretation. It is disadvantageous when attempting to raise awareness of the doctrine within Australia, an environment essentially foreign to the constitutional mental health law regime in which therapeutic jurisprudence originally developed. However, it is the flexibility inherent in the ambiguous nature of the doctrine which is one of the main advantages of therapeutic jurisprudence. Additionally, as with the definitional and identity dilemmas, these are not problems which should restrict or prevent the application of the doctrine within the Australian context but should, instead, encourage Australian therapeutic jurisprudence scholarship.

The third problem centres on the micro-analytical approach predominantly adopted by therapeutic jurisprudence scholars. This methodology, however, is the result of the consequentialist approach of therapeutic jurisprudence[100] rather than a deliberate rejection of a macro-analytical approach.[101] That is, it is the micro-analytic approach which generally best represents the tenets of therapeutic jurisprudence, being the assessment of the therapeutic or anti-therapeutic impacts of the law, but it is not the exclusive methodology adopted by the doctrine. Therefore, problems additional to those identified by Slobogin exist in the Australian context. Despite all the 'dilemmas', therapeutic jurisprudence has a place within Australian legal jurisprudence. This is because the doctrine enables Australian scholars to build upon American scholarship and adapt the germane principles to the Australian legal system.[102] This would be especially beneficial when assessing competency in the context of testamentary and substitute decision-making.

96 Magner, above n 63, 127-9.
97 Ibid 127.
98 Winick, above n 2, 204. For instance, Dawson and Kämpf have examined the incapacity principles in mental health laws in Europe. John Dawson and Annegret Kämpf, 'Incapacity Principles in Mental Health Laws in Europe' (2006) 12(3) *Psychology, Public Policy, and Law* 310.
99 Magner, above n 63, 127-8.
100 Ibid 128-9.
101 Wexler, above n 8, 229.
102 Magner, above n 63, 134.

V CONCLUSION

Law and legal scholarship do not exist within a vacuum. The appeal of therapeutic jurisprudence lies in its promotion of an interdisciplinary approach to offer evaluative theoretical solutions to be tested by empirical research analysing the impact of the law.[103] This could be especially beneficial when applied to competency assessment in the testamentary and substitute decision-making context, an area upon which increasing attention is being placed as Australia's population continues to age. Admittedly, the dilemma of empirical indeterminism is probably the most challenging of the problems facing therapeutic jurisprudence. However, as discussed above, this problem is not unique to therapeutic jurisprudence. The jurisprudence's promotion of debate and quality discussion is to be applauded,[104] as is its endorsement of an ethic of care[105] which is especially important in competency assessment. That therapeutic jurisprudence has been relatively untested, free from American constitutional constraints, only serves to increase its possible appeal to the Australian environment which is not hampered by similar considerations. Therefore, therapeutic jurisprudence readily lends itself to the Australian legal environment, especially within the context of testamentary and surrogate decision-making competency assessment. Australian scholars could and should make a valuable contribution to the doctrine in this relatively untested milieu.

103 Winick, above n 70, 919.
104 Winick, above n 2, 195, 196.
105 Marilyn McMahon and David Wexler, 'Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand' in Marilyn McMahon and David Wexler (eds), *Therapeutic Jurisprudence* (2003) 1, 3.