Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand

Carl E. Johnson

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DUE PROCESS IN INVOLUNTARY CIVIL COMMITMENT AND INCOMPETENCY ADJUDICATION PROCEEDINGS: WHERE DOES COLORADO STAND?

CARL E. JOHNSON*

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encoachment by men of zeal, well-meaning but without understanding."

— Brandeis

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INTRODUCTION

In the past several years legal periodicals and publications throughout the nation have begun to devote a substantial amount of attention to the legal, moral, and medical problems involved in depriving a person of his freedom for the purpose
of providing him with care and treatment in a mental hospital or an institution. The purpose of this article shall be to present an overview of the problems and concerns which have emerged from this growing body of literature, and to describe and evaluate the Colorado law regarding involuntary civil commitment and its daily administration.

The exploration of Colorado law and practice will consist of two parts: (1) An analysis of the statutes and cases most relevant to considerations of due process in involuntary commitment proceedings integrated with empirical observations and comparisons of the administration of the law in Denver, Arapahoe, and Jefferson counties; and (2) Evaluations, criticisms, and recommendations based on the analysis and observation.

I. THE OVERVIEW

Today problems of mental health have become among the most serious facing the nation, and the legal process has become intimately involved with these problems. One-half of all hospital patients in the United States today are mental patients. The majority of these have been placed in institutions by the operation of some compulsory legal process based on the state’s police power and on the doctrine of parens patriae. Yet, in no other area of the law are the standards of due process so nebulously defined. For instance, the most commonly required elements of due process (in some states, the only ones) are notice and hearing. However, even the exact meaning of these minimum requirements varies considerably. In some states service of notice on a relative of the subject is sufficient notice. Under some statutes the attendance of the subject is not required at the hearing. Some states, using a “confiscation of property” rationale, require no hearing before commitment, and a habeas corpus proceeding may be the only means of challenging confinement.

One reason for the lack of uniformity in procedural standards governing the commitment process is that most procedural rights a commitment subject enjoys are not considered to be constitutional rights but merely the results of the state’s beneficence expressed in the statutes. The courts which have

5 Id.
6 Id.
7 Id.
9 See Prochuska v. Brinegar, 251 Iowa 834, 102 N.W.2d 870 (1960); State ex rel. Hussman v. Hursh, 253 Minn. 578, 92 N.W.2d 673 (1958); Ex parte Higgins v. Huctor, 352 Mo. 1022, 62 S.W. 2d 410 (1933).
reached this conclusion have relied on the "privilege" or "benefit" doctrine. Since the state, by providing treatment for an individual, is really according him a benefit, rather than taking away a right, the due process standards, which are applicable in areas where the state may deprive a citizen of some right, are lowered.  

Although some lower federal courts have held that the subject of a civil commitment proceeding must be provided the assistance of counsel as a matter of constitutional right, the United States Supreme Court has not ruled on this question. Recently the Court sidestepped the issue of the nature of due process in civil commitment proceedings by relying on equal protection grounds to overrule a New York statute which prescribed a different civil commitment procedure for prisoners whose sentences were soon to expire from that applied to other persons. The Court avoided any discussion of the question of a commitment process subject's right to counsel as a matter of procedural due process to which counsel for the petitioner had devoted ten pages of his brief.

The existence of grave procedural problems is evident from even a cursory survey of the relevant secondary literature. In Chicago a Polish immigrant discovered a sum of money missing from her apartment. Since the building janitor was the only person other than her husband who had a key to the apartment, she suspected him of taking the money and confronted him with an accusation of theft. The janitor telephoned the police and, upon their arrival, stated that the woman and her husband were insane. The police took the couple in handcuffs to the Cook County Mental Health Clinic. A "hearing" was held. The immigrants had but a rudimentary knowledge of English and were not provided with counsel. They were pronounced mentally ill and committed to the Chicago State Hospital. Bewildered, frightened, and confused by his sudden inexplicable imprisonment, the husband, who had spent time

11 Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); cf. Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957).
12 In 1940, the Supreme Court dismissed as premature due process objections to the discretionary procedural provisions of a Minnesota commitment statute which provided inter alia that the subject may be represented by counsel and that if the subject were found indigent, the court "may appoint counsel to represent him," since the law had yet to be applied to the petitioner. Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1970).
in a concentration camp during World War II, hanged himself during the sixth week of his confinement.\textsuperscript{15}

Although wantonly extreme injustices such as this one and authenticated cases of "railroading"\textsuperscript{16} may be comparatively rare, the relevant literature reveals a universal laxity in establishing and maintaining adequate procedural safeguards in the area of mental incompetency adjudication and involuntary commitment.

Even in the majority of adjudication and involuntary commitment cases, where presumably gross miscarriages of justice do not occur, hundreds of thousands of individuals are yearly subjected to a process which, at worst, is conducted with scant regard for whatever legal requirements exist, and, at best, constitutes, in its sloppy and perfunctory administration, a serious affront to the dignity of those unfortunate persons subjected to it.

In preparing his paper on the role of lawyers in the adjudication and commitment process,\textsuperscript{17} Fred Cohen spent one afternoon observing a typical Texas commitment hearing where, under the provisions of the applicable statute, forty individuals were committed for an indefinite period of time. The hearings were held before a judge in a large room at the Austin State Hospital. One local attorney had been appointed as guardian \textit{ad litem} to represent all of the individuals whose fates were to be determined that afternoon. Two staff doctors at the state hospital were sworn as witnesses as the hearing began. The judge then called the name of the first subject. He did not appear. The clerk of the court asked for his height, weight, hair, and eye color. One of the doctors supplied this information. Referring to a file in front of him, the judge again gave the name of the subject and recited the dates of the medical examinations. He then asked the doctors: "Is it your opinion that Mr. X is a mentally ill person and needs medical care and treatment in a mental hospital for his own welfare and protection or the protection of others, and is mentally incompetent?"

Most of the other cases were disposed of in a similar fashion as a parade of staff doctors filed in to perfunctorily answer the same statutorily prescribed question. The attorney remained mute and his principal activity appeared to consist of a close scrutiny of each file to insure that notice require-

\textsuperscript{16} See Annot., 145 A.L.R. 711 (1943).
\textsuperscript{17} Cohen, \textit{The Function of the Attorney and the Commitment of the Mentally Ill}, 44 TEXAS L. REV. 424 (1966).
ments had been observed. He also signed a jury trial waiver form for each subject.\textsuperscript{18}

Only two of the 40 subjects appeared in person at the hearing. One of these was a woman who had written the guardian \textit{ad litem} to protest her mental competency, but he had made no attempt to contact her before the hearing. He did proceed to briefly cross-examine the testifying doctors by asking them how long they had been practicing and if they were absolutely sure of their diagnosis. The testimony of one physician revealed that he was substituting for a doctor who had actually examined the woman and that his only direct contact with her consisted of a short conversation before the hearing. The other physician who testified stated that the woman was making progress and a furlough was imminent. The attorney spoke with the patient about the prospect of a furlough and she agreed that everything would be all right if she would be home in 3 or 4 weeks. She then left the room. At the end of an hour and a half the hearings were over. All 40 individuals had been found mentally incompetent and committed. For his services the guardian \textit{ad litem} was paid ten dollars per case.\textsuperscript{19}

A similar procedure appears to be the general rule throughout the country. In San Francisco the required examination of a subject for commitment by two doctors generally consists of nothing more than a short conversation between the individual and the doctors.\textsuperscript{20} Court reviews of medical commission decisions rarely exceed five minutes.\textsuperscript{21} Although public defenders are provided for subjects desiring court reviews, they generally become involved in a case only a half hour before a hearing and rarely speak or take any other active role in the proceeding.\textsuperscript{22}

The general sloppiness of adjudication and commitment procedure is particularly reprehensible in view of the fact that serious consequences can result from the decisions made during the process. In addition to a deprivation of liberty, a subject of a commitment proceeding frequently suffers an automatic loss of a great many personal and civil rights. These generally include the right to vote,\textsuperscript{23} to hold office,\textsuperscript{24} to contract,\textsuperscript{25} to

\begin{flushleft}
\textsuperscript{18} Id. at 428-30.
\textsuperscript{19} Id.
\textsuperscript{20} Note, \textit{The Need for Reform in the California Civil Commitment Procedure}, 19 \textit{STAN. L. REV.} 992, 995-96 (1967).
\textsuperscript{21} Id. at 996.
\textsuperscript{22} Id. at 997. See also Comment, \textit{Involuntary Commitment of the Mentally Ill in Pennsylvania}, 5 \textit{DUQUESNE L. REV.} 487 (1967).
\textsuperscript{23} \textit{AMERICAN BAR FOUNDATION}, supra note 4, table IX-D at 291-96.
\textsuperscript{24} Id.
\textsuperscript{25} Id. table IX-A at 275-79.
\end{flushleft}
make a will,26 to drive an automobile,27 to serve on a jury,28 and to engage in certain occupations.29 In most cases he will also be subject to subtle forms of economic and social discrimination when he seeks employment, attempts to establish credit, or to join an exclusive club.

A major objection to present commitment procedures goes to the heart of the "benefit" theory long used by courts to avoid inquiry into the operation of the procedures.30 A great many individuals committed never receive any benefit in terms of treatment or therapy, but instead are subjected to an extended (perhaps even lifelong) period of custodial confinement differing little from prison incarceration.31

Once committed, an individual in many states becomes, for all practical purposes, bereft of legal remedies to challenge the conditions of his confinement or to seek release. As in the case of internal prison practices, the courts have traditionally applied a "hands off" doctrine when the internal practices of mental hospitals have been challenged.32

In seeking release a patient may face virtually insurmountable obstacles. The state bears the burden of proof in the original commitment proceeding and this burden is usually measured by the familiar civil "preponderance of the evidence" standard.33 However, in seeking release, the burden may fall totally on the patient to establish by satisfaction of the same, or an even higher, evidentiary standard that he is "sane" or "mentally competent." To do this, he must overcome several formidable hurdles. First of all, he may experience great difficulty in communicating with the outside world. This may be true even though a statute gives mental patients the right to freely communicate with people outside the institution including attorneys, judges, physicians, and friends. Since most patients are generally not in a position to enforce these rights, many institutions severely limit the opportunities of their patients to speak with persons outside and extensively censor the

26 Id. table IX-B at 282-84.
27 Id. table IX-D at 291-96.
28 Id.
29 Id. table IX-C at 285-90.
30 See text accompanying note 10 supra.
31 Due Process for All, supra note 10, at 639. See also Note, The Nascent Right to Treatment, 53 VA. L. REV. 1134 (1967).
32 Due Process for All, supra note 10, at 639. See also Haynes v. Harris, 344 F.2d 463, 465 (8th Cir. 1965); Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962).
33 Due Process for All, supra note 10, at 654.
patients' letters.\textsuperscript{34} Even if the patient is successful in reaching the appropriate judicial authority to arrange a release hearing, the cards are stacked against him. Many attorneys refuse or hesitate to represent mental patients seeking release, even in the uncommon situation where the patient can afford such assistance.\textsuperscript{35}

Should the patient succeed in obtaining adequate representation, he still faces the problem of marshalling evidence beneficial to his case. The state automatically has at its disposal a plethora of evidence to support its objection to release, principally in the form of voluminous psychiatric reports and, of course, the readily available testimony of staff psychiatrists, psychologists, and social workers. Courts generally rely on expert testimony in cases of this kind. Unless the patient is extraordinarily wealthy, an extremely rare situation in involuntary commitment cases, he will not be able to obtain independent experts to support his contention that he is ready for release or to be adjudicated as "restored to reason."\textsuperscript{36}

There are a great many factors which have led to the present loose procedural practices in civil commitment and incompetency proceedings, and which continue to militate against any effective reform in the area.

A formidable difficulty is that of solving the major policy question: What kind of person should be deprived of his liberty and, perhaps, of many of his personal and civil rights by operation of a mental health law? Opinions on this question vary widely among psychiatrists, psychologists, lawyers, legislators, and others involved with the process. Some maintain that a person should be involuntarily committed only when it is clear that he constitutes a clear danger to others.\textsuperscript{37} However, many state statutes take the other extreme and grant the power to order confinement and treatment whenever such a course of action would "help the individual" or be in "his best interest."\textsuperscript{38} The statutory provisions defining the types of individuals who may be committed take positions at every point on this spectrum, but the majority are vaguely worded, neither precisely defining the type of illness nor the type of

\textsuperscript{34} Id. at 655. See also American Bar Foundation, supra note 4, at 142-45. The authors present, in tabular fashion, various state statutes regarding correspondence and visitation. Id. table V-A at 158-60.

\textsuperscript{35} American Bar Foundation, supra note 4, at 129.

\textsuperscript{36} Due process for All, supra note 10, at 655.


behavior which could subject an individual to confinement under the law.\textsuperscript{39}

Purposely or coincidentally this statutory vagueness has contributed to use of these statutes as a catch-all to handle a wide variety of social problems. These statutes are frequently used to provide a means of caring for elderly persons without families or whose families are unable to care for them. Further, in many states, including Colorado, an order of adjudication is generally the only practical way to set up a conservatorship or guardianship for an aged individual who is no longer able to adequately manage his property.\textsuperscript{40} Individuals with alcohol problems, drug addicts, and even epileptics are frequently institutionalized under this procedure.\textsuperscript{41} Persons who somehow don't quite "fit in" are apt to become involved in the process. The statute of one state even specifies potential nonconformity to the established laws, ordinances, conventions, and morals as one basis for commitment,\textsuperscript{42} and, in the actual practice of all states, a person who has become a problem for his family or a pest to his neighbors stands a chance of becoming the subject of a commitment proceeding. Up until a few years ago the commitment procedure was frequently used in some Colorado counties to place rebellious teenagers who had become management problems for their parents in the state hospital at Pueblo.\textsuperscript{43}

In addition to offering vague definitions of the types of individuals who can be subject to commitment and/or adjudication, the statutes, whose provisions again differ widely from state to state, are often ambiguous or even silent on such basic procedural matters as: (1) notice,\textsuperscript{44} (2) attendance of the subject,\textsuperscript{45} (3) procedure for the conduct of the hearing,\textsuperscript{46} and (4) place of hearing.\textsuperscript{47} Even in those states where the right to counsel is unequivocally recognized, the statutes generally do not delineate specifically the duties and responsibilities of counsel.\textsuperscript{48}

\textsuperscript{39}American Bar Foundation, supra note 4, at 17-18.
\textsuperscript{41}American Bar Foundation, supra note 4, table II-A at 44-48.
\textsuperscript{43}This information was conveyed to the author by an official of the Jefferson County District Court clerk’s office.
\textsuperscript{44}American Bar Foundation, supra note 4, table II-D at 63-64.
\textsuperscript{45}Id. table II-E at 65.
\textsuperscript{46}Id. table II-C at 56-59.
\textsuperscript{47}Id.
\textsuperscript{48}Cohen, supra note 17, at 441.
The formulation of comprehensive, clearly articulated statutes embodying essential procedural safeguards would not by itself solve the problems in this area. In those states which have enacted model acts, whose provisions on their face seem fully adequate to protect the rights of those subject to their operation, the law is often ignored or diluted by those persons charged with their administration, partly because of a lack of the financial and human resources necessary to achieve full compliance and, in many cases, partly because the professionals closely involved with the commitment and adjudication process disagree with the legal requirements and purposely deviate from them. Thus, a statute may provide for a "full and fair hearing," but in practice a hearing will consist of cursory examination rarely exceeding ten minutes duration, frequently at a time when the subject is under sedation. The law may provide that a subject shall be informed of his statutory right to counsel, but in practice this may not be done.\textsuperscript{49}

A serious policy conflict over what constitutes proper procedure for civil commitment and incompetence adjudication has also slowed the pace of procedural reform. This conflict involves a division between what can be characterized as a "therapeutic" approach versus a strict "safeguard of rights" viewpoint. The most outspoken proponent of this latter position is Dr. Thomas Szasz. Taking a highly skeptical view, shared by some of his colleagues,\textsuperscript{50} of the ability of psychiatry to properly deal with the issues presented in commitment and adjudication proceedings, he maintains that because of the serious consequences which can result from an adjudication or commitment hearing, the subject of such a proceeding should enjoy virtually all of the formal procedural safeguards, including right to counsel and jury trial, which a suspect in a criminal case is guaranteed.\textsuperscript{51}

Advocates of the "therapeutic" viewpoint insist that procedural requirements should never be rigid and should, in every case, be subordinated to a consideration of what would be most conducive to the treatment of the commitment subject. This would necessarily be a determination only the treating doctor could make. Thus, under this view, if the doctor felt that compelling the subject's attendance at the commitment or adjudi-
cation hearing or even notifying him of such a hearing would be harmful to him, then these normal procedural requisites should not be required.\textsuperscript{52}

Although most lawyers and doctors involved with these problems would probably favor some intermediate approach, such a solution has not yet been reached and probably will not be realized until the legal profession, as a whole, becomes seriously concerned and involved with the process. Luis Kutner suggests one possible compromise solution. He maintains that jury trials should not be part of the commitment and adjudication process, both because they place the subject under great stress and are thus not therapeutically helpful, and because a jury does not possess the competence to deal with the complex issues involved in such proceedings. For therapeutic reasons all similarities between a commitment or adjudication proceeding and a criminal trial should be eliminated in order to avoid compounding the feelings of persecution a subject may already have developed. Kutner recommends an informal, basically non-adversarial hearing at which the subject is represented by counsel and during which all of the participants are actively seeking to arrive at the best possible solution for the subject's problems. The hearing should be conducted before an impartial medical panel and the subject should have the opportunity to be examined by an independent expert whose testimony would always be seriously considered. He also insists that the attendance of the subject, uncontrolled by sedation, as well as adequate notice of the hearing to the subject and his counsel, are minimum, indispensable due process requirements.\textsuperscript{53}

The general failure of lawyers to contribute meaningfully to the commitment process has also stymied reform in this area. There are several reasons why attorneys have not played a stronger, more influential role in the process. First of all, the whole format and atmosphere of the commitment proceeding is strange to them. Most states define the commitment process as a totally unique type of proceeding. It is considered to be neither a criminal nor civil action.\textsuperscript{54} Thus, unless the attorney finds an opportunity to use the jury trial provision of a commitment law (a rare occurrence), his experience in the adver-

\textsuperscript{52} Perhaps the most articulate spokesman for this point of view is Dr. Winfred Overholser, who believes the problems raised by such people as Szasz and Kutner have been grossly exaggerated. See OVERHOLSER, THE PSYCHIATRIST AND THE LAW 73-100 (1953). See also Note, Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill, 56 YALE L.J. 1178 (1947).

\textsuperscript{53} Kutner, supra note 15, at 392-99.

\textsuperscript{54} See note 114 infra.
The compulsory process which characterizes most of our legal system will be of little aid to him in determining how to play his role in the commitment process. As previously mentioned, statutes rarely define the role of counsel in any detail, and the cases have not filled this void. Furthermore, the attorney in a commitment or adjudication proceeding does not have tradition to rely on as does, for example, the criminal lawyer. There is no specific Canons of Ethics provision to which to refer for guidance, and the organized bar has done little to define a role for counsel in mental health situations. Finally, most law schools do not provide any professional training to equip the attorney for his role in the process. As a result, the attorney in a commitment or adjudication case often lacks a clear idea of the identity of his client, the loyalty owed his client, the goals desired by and desirable for his client, and what constitutes success in the area.

Equally important as a factor limiting the effectiveness of counsel in the commitment process is the low rate of compensation paid for their services. Most commitment subjects who are represented have court-appointed counsel who receive a set fee of between ten and twenty-five dollars per case. Although this rate of compensation may seem adequate, or even exorbitant, for the job attorneys are presently performing in the process, it obviously does not constitute a sufficient incentive for an attorney to invest the time necessary for a thorough preparation of each case.

A serious lack of financial and human resources obviously pervades the whole mental health field. The adjudication and commitment processes suffer substantially from this deficiency. In fact, many of the defects noted so far, such as the predominance of perfunctory hearings and examinations, the ineffectiveness of counsel, and the general inability of a commitment subject to receive the benefit of an independent expert's services and testimony, can be traced to the failure of legislatures to allocate a sufficient amount of money to insure a fair and humane commitment process.

II. COLORADO LAW AND PRACTICE

This section consists of a description and analysis of the Colorado statutes and cases dealing with the compulsory hos-
pitalization and commitment of the mentally ill, integrated with a series of empirical observations of the actual everyday administration of these laws in the Denver metropolitan area. The purpose of this undertaking was threefold: (1) to attempt a comparison between the formal law — as set forth in the statutes and court opinions — and the law as it is administered in day-to-day practice; (2) to attempt to gain an insight into and evaluate the standards of "due process" inherent in the practices under the present formal law with a view to suggesting changes and improvements in the present commitment and adjudication procedures; and (3) to attempt to provide the practicing attorney with a basic rudimentary description of the present commitment and adjudication procedures in Colorado and their administration.

Although the empirical portions of this paper are based upon relatively few random observations of a continually ongoing process gathered over a comparatively short period of time (February, March, and April, 1969), I have been assured by those involved with the process for several years that the events I have witnessed are typical of what has happened and continues to happen every day in the administration of Colorado's present commitment laws. 89

A. The Compulsory Hospitalization, Commitment, and Adjudication Procedures

There are basically four ways in which an individual may be confined under the mental health statutes: (1) by voluntarily entering any hospital, 60 (2) pursuant to the emergency procedure, 61 (3) pursuant to the short term involuntarily hospitalization procedure, 62 and (4) pursuant to the indefinite term involuntary commitment procedure. 63

89 My observations focused on aspects of the involuntary commitment and hospitalization process in Denver, Arapahoe and Jefferson counties. In each of the counties, I received the willing cooperation of the judges, the court clerks, and their staffs. They assisted in arranging to view court files, interviews of petitioners seeking to have someone hospitalized or adjudicated, medical commission hearings, and court reviews of hospitalization orders. In addition they provided insights into the process which could never have been obtained from observation alone. At no time was it felt that anyone was attempting to conceal anything or to misrepresent in any way the true operation of the process. Thus, any criticisms, express or implied, of the current administration of the laws of involuntary commitment are not meant to reflect on the integrity of those charged with administering the law, nor are they meant to imply that these persons are not seeking conscientiously to perform a thorough job in what is frequently a difficult and frustrating area. These criticisms simply reflect the honest opinions of a newcomer to the process, based on approximately three months observation.

61 Id. § 71-1-3(2) (Supp. 1965).
62 Id. § 71-1-4 (1963), as amended (Supp. 1969).
63 Id. § 71-1-5(3) (Supp. 1965), as amended (Supp. 1969).
B. Five Day "Hold" Under Voluntary Hospitalization Statute

It seems contradictory that an individual can at one and the same time be a voluntary and an involuntary hospital patient. The voluntary hospitalization statute, however, allows any hospital to detain a voluntarily admitted patient who is mentally ill, mentally deficient, or displays symptoms of mental illness or mental deficiency. Such detention comprises a period of five days after a required written request for release has been filed with the administrative office of the hospital by the patient himself, his legal guardian, parent, spouse, or adult next of kin. This, could, in practice, exceed five days, since Saturdays, Sundays, and holidays are exempted from the computation of days.\(^6\)

C. The Emergency Detention Procedure

The emergency procedure permits any sheriff or peace officer to take into protective custody and place in a suitable place of confinement any individual whom the sheriff or officer believes, in good faith, to be mentally ill or mentally deficient and apt to injure or endanger himself or others if allowed to remain at liberty.\(^6\) Immediately after taking such a person into custody, the detaining officer is required to file a statement with the district or probate court of the county where the person is taken into custody setting forth the circumstances of the detention and giving the reasons for his belief about

\(^{64}\) Id. § 71-1-2(3)(a) (1963).

\(^{65}\) The terms "mentally ill" and "mentally deficient" recur throughout chapter 71 of the Colorado statutes and are crucial terms in the involuntary commitment statute, COLO. REV. STAT. ANN. § 71-1-5 (1963). They are defined in section 1:

(b) "Mentally ill person" shall mean a person afflicted with disease, infirmity, old age, or disorder, which impairs his mental or emotional functions to a degree sufficient to require protection, supervision, treatment, or confinement, for his own welfare or for the welfare or safety of others, or who, by reason thereof, lacks sufficient control, judgment, and discretion to manage his own property or affairs. The terms, "insane person," "mental incompetent" or "lunatic," shall hereafter be deemed to mean and be included within the words, "mentally ill person," within the present statutes of the state of Colorado, unless context otherwise indicates a mentally deficient person.

(c) "Mentally deficient person" shall mean a person whose intellectual functions have been deficient since birth or whose intellectual development has been arrested or impaired by disease, or physical injury to such an extent that he lacks sufficient control, judgment, and discretion to manage his property or affairs, or who by reason of this deficiency, for his own welfare, or the welfare or safety of others, requires protection, supervision, guidance, training, control, or care. The terms, "idiot," "feebleminded person," "mental incompetent," or "weak-minded person," shall hereafter be deemed to mean and be included within the words "mentally deficient person," within the present statutes of the state of Colorado, unless the context otherwise indicates a mentally ill person.

COLO. REV. STAT. ANN. § 71-1-1(b) & (c) (1963).

\(^{66}\) Id. § 71-1-3(1) (1963).
the individual's condition. Failure to file a timely and proper report has formed the basis for civil liability for false arrest in at least one case.

Within 24 hours (excluding Saturdays, Sundays and legal holidays) after the filing of the report, the court is required to issue a written order either discharging the individual, confining him for observation, diagnosis, or treatment in accordance with the terms of the short term involuntary hospitalization statute, or referring the matter to a medical commission as though a petition had been filed under the indefinite term involuntary commitment and adjudication statute.

D. Short Term Involuntary Hospitalization

1. In General

The short term hospitalization statute allows the court to order an individual to be confined for observation, diagnosis, and treatment of mental illness for three months, a period which can be extended by the court for an additional three months whenever it appears from the written statements of the attending physician or the director of the hospital that the original three month period is insufficient to accomplish the purposes of the hospitalization. Notice of such extension must be given the respondent and his guardian ad litem. The total period of confinement cannot exceed six months from the date of the original hospitalization order.

2. Initiation of Proceeding by Petition, Physician's Statement and District Attorney's Statement of Probable Cause

Any reputable person may institute a short term hospitalization proceeding against another individual, who under the terms of the statute is called the "respondent." He can do so by submitting a verified petition to the court of jurisdiction in the county where the respondent resides or is physically present, alleging that it would be in the respondent's best interest to be hospitalized for the previously mentioned statu-

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67 Id. § 71-1-3(2) (1963).
70 Id. § 71-1-4(4) (Supp. 1965).
71 Id. § 71-1-4(8) (Supp. 1965).
72 Id.
73 Id.
74 Id. § 71-1-20 (1963).
torily prescribed purposes. The petition must be accompanied by a statement from a licensed physician also alleging that such observation, diagnosis, and treatment would be in the best interest of the respondent, giving the doctor's reasons for the allegation and also giving the dates when he has examined the respondent. Finally, a statement of probable cause for the issuance of an order of hospitalization must be supplied by the district attorney or, in counties exceeding three hundred thousand in population, by the county attorney or by their assistants.\textsuperscript{75}

In practice, the physician's letter and the statement of probable cause required by this statute serve an extremely perfunctory purpose. In Denver, petitions and physicians' letters generally receive careful scrutiny by either of two veteran city attorneys assigned to the mental health division of the city attorney's office to insure that the statutorily prescribed contents are present. If these contents are present, the attorneys believe that the requirement of "probable cause" is satisfied. They do not appear to conduct a more extensive investigation, such as telephoning the physician submitting the letter before issuing a statement of probable cause — one stated reason being that they are not psychiatrists, and therefore should concern themselves only with the statutory requirements.

In Arapahoe and Jefferson Counties, the district attorney's offices, perhaps because of a lack of sufficient personnel and resources, pay scant attention to mental health matters. District attorneys seldom see a petition or physician's statement, but the district attorney's offices routinely issue a statement of probable cause on the advice of the clerks who handle mental health matters in the district court clerk's offices. In Jefferson County, the clerk further facilitates and standardizes the prehospitalization process by issuing uniform printed statement forms to physicians.

3. Five Day Waiver of Physician's Statement and Statement of Probable Cause

If the court receives a satisfactory showing that emergency circumstances make it essential for the respondent to be immediately hospitalized and that it would be unsafe or dangerous for the respondent himself or others if he were to remain at large, the court is empowered to waive the requirement of a physician's and district attorney's statement

\textsuperscript{75} Id. § 71-1-4(1) (Supp. 1965).
for a period not exceeding five days after the issuance of the order of hospitalization. 76

4. Alternative Ways of Instituting a Short Term Proceeding

a. By a hospital administrator proceeding under either short term or long term statute

Short term hospitalization proceeding may be initiated by the officer or attending physician of a hospital in the case of a voluntarily admitted patient whose release would, in the written opinion of the doctor or administrator, be unsafe or dangerous for himself or others. This written opinion must be submitted to the court of jurisdiction in the county where the hospital is located within five days (Saturdays, Sundays and holidays excluded) after the patient files a written request for release with the administrative office of the hospital. Upon receiving such an opinion the court may proceed either under the provisions of the short term hospitalization statute or the indefinite term involuntary commitment statute. 77

b. By a medical commission

Short term hospitalization proceedings may also be commenced by a medical commission. The commission, which is entrusted with the responsibility of deciding the merits of petitions filed under the involuntary commitment statute, is empowered to recommend short term hospitalization as one of its three options (the others are discharge or adjudication), when considering the case of a respondent in an involuntary commitment proceeding. 78

I learned of only one medical commission hearing which exercised this option. In this case, the recommendation of short term hospitalization appeared to be the result of a compromise between the commission and the legal aid attorney representing the respondent.

Describing the hearing an hour later at his office, the legal aid attorney stated that the respondent's small three room house in which the hearing was held was continuously filled with cacophony as a half dozen conversations raged simultaneously. Finally, after everyone had strolled through the rooms cluttered with books and knick-knacks, the member of the commission who was a psychiatrist announced, "He's obvi-
ously paranoic." The aged doctor then turned to the respondent's attorney and asked, "What will you do if we adjudicate [the respondent]?"

"We'll probably demand a jury trial."

"O.K., well, in that case we'll recommend short term hospitalization." The hearing then ended.

c. By a court pursuant to emergency detention procedure provisions and on its own motion.

As previously mentioned, the court can institute a short term hospitalization proceeding as one of its three options in dealing with a person held pursuant to the emergency detention statute.也正是，虽然法律不具体规定这一程序，但丹佛孤儿院法院和阿帕哈奥县法院也会在某些情况下根据法院的申请签发短期住院令，如果可以证明这对一个特定的人是最佳利益，但出于某种原因无法让申请人或医生提供必要的陈述。医院令法院在自己的动议下，通常是在福利部或其他公共机构的请求下签发的。

5. Guardian Ad Litem and His Duties

The court is required to appoint an attorney to serve as guardian ad litem for the respondent whenever a request for an order of short term hospitalization is filed. The guardian ad litem must be furnished with a copy of the hospitalization order within two days after its entry. He is charged with three duties: (1) to make such investigation as may be necessary to protect the interests of the respondent; (2) to make certain that the respondent is advised of his right to a hearing either by a medical commission or by a court; and (3) to report the results of his investigation to the court as soon as possible, but no later than five days after the entry of the hospitalization order, unless the court extends the time.

Guardians ad litem in short term hospitalization cases are theoretically chosen from the entire rosters of the respective county bar associations. In practice, the attorneys appointed are generally those who have informed the court clerks of their desire to receive court appointments. These are frequently lawyers recently admitted to practice.

79 Id. § 71-1-4(7) (Supp. 1965).
80 Id. § 71-1-4(3). A reasonable extension of time is generally granted as a matter of course.
In Denver, guardians *ad litem* in short term hospitalization cases are paid a flat fee of twenty-five dollars per case, plus twenty-five dollars per hour for additional work performed of an extraordinary nature, as reflected in the case record. If a court review is requested, the attorney appointed as guardian *ad litem* in the short term hospitalization may represent the respondent in court. If review by a medical commission is requested, however, the guardian *ad litem* appointed to serve with the medical commission assigned to conduct the review represents the respondent. Medical commissions frequently review "hold and treat" orders81 as part of a normal afternoon caseload.

In Jefferson County I was permitted to view some representative files in both short term hospitalization and involuntary commitment cases. The required forms and reports were all present and were neatly filled in.

The reports of the guardians *ad litem* in short term hospitalization cases were particularly interesting. Most of these were exceedingly brief statements simply showing that the minimum statutory duties had been performed. They indicated that the attorney had spoken with the respondent, checked for proper service of process, and had advised the respondent of his right to a hearing. A few such reports indicated that the respondent contemplated a request for a hearing. The files did not indicate whether a hearing had ever subsequently been held.

In only a few cases had a guardian *ad litem* filed a demand for a court review on behalf of a respondent. A young attorney who had served several times as a guardian *ad litem* in short term hospitalization cases informed me that most attorneys he knew felt that the guardian *ad litem* fee did not justify going beyond the bare statutory requirements.

A court clerk informed me that if a guardian *ad litem* did perform work beyond the minimum specified duties, he could petition the court for additional compensation. The attorney stated, however, that he had never been informed of this practice by anyone in the court, and that he believed that the mental health division and the court itself generally looked with disfavor on an attorney who worked beyond the statutory requirements minimum. The attorney's viewpoint was confirmed by

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81 The hospitalization order entered pursuant to the provisions of the short term involuntary hospitalization statute is referred to by those professionally involved with the process as a "hold and treat" order.
the court clerk who stated that judges for whom she had served had generally considered the simple compliance with the statutory duties, not extensive investigation and frequent requests for hearings, to be the proper role of the guardian ad litem.

6. Place of Hospitalization

If the requirements for short term involuntary hospitalization are met, the court is empowered to issue an order committing the respondent to the department of institutions for placement in a state institution, or an order committing him to some other hospital, including a federal hospital, if he is administratively certified to be eligible by an appropriate federal agency for a period of three months. As previously mentioned, this time period can, under appropriate circumstances, be extended for an additional three month period. The department of institutions is required to inform the court of the specific institution to which respondents committed to its charge shall be sent. Fort Logan Mental Health Center is the facility to which all respondents, except those requiring maximum security conditions, in Denver, Arapahoe and Jefferson Counties are sent.

7. Hospitalization Order

The hospitalization order (referred to as a “hold and treat” order by those professionally involved with the process), must direct the sheriff or some responsible person to deliver the respondent to the designated hospital. The person taking the respondent to the hospital must personally serve a copy of the order on the respondent. The respondent must also be given a written notice of his right to a hearing concerning his hospitalization before a medical commission or the court. In case the respondent is already a patient in the hospital of confinement specified in the order, the court must appoint an appropriate person to serve the order and notice of the right to hearing on the respondent within two days after the issuance of the order. Whoever serves the order and notice is required to make a written return to the court that the duties have been performed.

For the requirements for short term involuntary hospitalization, see text accompanying notes 74 and 75 supra. Upon a "satisfactory showing" that it would be in the respondent's best interest to be confined in an institution, the court is empowered to issue the hospitalization order. COLO. REV. STAT. ANN. § 71-1-4(1) (Supp. 1965).

Id. § 71-1-4(4) (Supp. 1965).

Id. § 71-1-4(5) (Supp. 1965).

Id.
8. Review of Hospitalization Order by Court or Medical Commission

The respondent or his guardian *ad litem* may file a written request for review of the hospitalization order either by a medical commission or by the court. They may also in like manner request that the observation and treatment be conducted on an outpatient basis or in a nursing home. If the hospitalization order was made upon the recommendation of a medical commission, review of this order must be by the court. If a court review is requested or mandatory, the court must provide a hearing within ten days of the request, and must give notice of the time and place of the hearing to the respondent, the guardian *ad litem* and the district attorney. At the conclusion of the hearing the court may exercise any of the following options: (1) enter or confirm a hospitalization order; (2) discharge the respondent; (3) refer the matter to a medical commission; or (4) enter any other suitable order.86

There appears to be substantial constitutional objections to the third alternative. In asking for a court review of his hospitalization order, the respondent wants to test the validity of the hospitalization order and the validity of his confinement under the order. He is certainly not seeking to have himself adjudicated mentally incompetent and committed for an indefinite term. By requesting a court review, the respondent does in fact subject himself to the possibility of this latter fate under the provisions of the statute allowing the court to refer the matter to a medical commission. A medical commission seems to have the statutorily prescribed power to recommend adjudication and commitment for an indefinite term.87 The court appears to be bound to follow medical commission recommendations.88 The option is thus violative of due process in that a greater deprivation can ultimately result from review than from the original hospitalization order itself. This makes a review an extremely hazardous venture for a respondent under a "hold and treat" order.

Two court hearings reviewing short term hospitalization orders were observed — one in Arapahoe, the other in Jefferson County. Both hearings were conducted in a highly orderly

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86 *Id.* § 71-1-4(6) (Supp. 1965).
87 *Id.* § 71-1-7(3) (Supp. 1965). The Denver Probate Court, however, takes the position that the medical commission does not have the power to adjudicate. *See* text, p. 551 *infra.*
88 *Id.* § 71-1-11(1) (Supp. 1965). The relevant section of the statute is quoted in note 130 *infra.*
and dignified manner, and the judges showed genuine concern and displayed great courtesy toward the respondents.

Still, I could not escape the feeling that the hearings (in essence the laws) were weighted against the respondents from the start—that they stood virtually no chance of being released from the hospitalization orders and that the hearings offered them simply a forum in which to "speak out" without any real possibility of gaining the relief requested.

One facet of the hearings, in particular, contributed to this feeling. In both hearings, the psychiatrists appearing on behalf of Fort Logan testified that neither of the respondents constituted a physical danger either to others or to themselves. Of course, the short term hospitalization statute does not require a showing that the respondent present such a danger but merely requires that it be "in the best interest" of the respondent to be hospitalized. But who should be the judge of "best interest?" What criteria should be followed in determining the nature of a respondent's "best interest?"

In both hearings, it was clear that the judges decided these questions by relying almost entirely on the testimony of the psychiatrists in reaching their decisions. The Jefferson County Judge made this fact explicit in rendering his decision: "I have now heard all the testimony and am required to render a decision. Although not legally bound to do so, as a practical matter, I must follow the opinion of the experts in cases like this. The hospitalization order will be continued." Psychiatrists testifying in hearings reviewing hospitalization orders often represent, whether directly or indirectly, Fort Logan or some other receiving institution. If they did not favor continuance of hospitalization, they wouldn't appear. They would instead petition the court to release the respondent. This procedure affords the respondent little opportunity to procure independent psychiatric examination and testimony on his behalf.

9. Attending Physician's Report

Upon the motion of the guardian ad litem the court must issue an order requiring the doctor attending the respondent to submit a report to the court within ten days thereafter detailing the results of his examination to that date. The court may also order this on its own motion. Upon receipt of such a report the court has three options: (1) to continue the original hospitalization; (2) to discharge the respondent, if the examining doctor so recommends; or (3) to institute involun-
tary commitment proceedings pursuant to the involuntary commitment statute. 89

10. Release from Hospitalization

Whenever the court receives a satisfactory showing (such as by medical reports) that the respondent has received maximum benefit from treatment, that he is mentally competent, and that it would be in his best interest to be released, the court is required to immediately enter an order releasing him from hospitalization. The court clerk must notify the guardian ad litem of this order. 90 The provision for this statute requiring "mental competency" as a condition for release from a short term hospitalization order is curious, since "mental incompetency" is not required for short term involuntary hospitalization. In Colorado "mental incompetency" means that a medical commission has recommended that an individual be adjudicated "mentally ill" or "mentally deficient" and that the court has done so. 91 Without such an adjudication, no presumption of "mental incompetency" can arise 92 and consequently a respondent in a short term hospitalization proceeding would be presumed to be "mentally competent" at every stage of such a proceeding. Thus, the provision appears to be devoid of meaning.

11. Records

Records in short term proceedings must be maintained separately by the court clerk. If the respondent is released from the hospitalization order, his file must be sealed and his name omitted from the indices of the court until the court orders it opened upon a showing of good cause or until the respondent has been adjudicated pursuant to the involuntary commitment statute. If a petition is filed under the latter statute, the file

89 Id. § 71-1-4(7) (Supp. 1965).
90 Id. § 71-1-4(10) (Supp. 1965).
91 See COLO. REV. STAT. ANN. § 71-1-1(b) (1963); § 71-1-5 (Supp. 1965); § 71-1-7 (Supp. 1965); § 71-1-11 (1963), as amended (Supp. 1965); § 71-1-23 (1963), as amended (Supp. 1965); and § 153-1-1(7) (1963). The precise meaning of mental incompetency is somewhat unclear. Section 71-1-23(1) seems to imply that an individual can only be considered to be a mental incompetent if he has been adjudicated mentally ill or mentally deficient. Section 153-1-1(7), part of the definitional section in the chapter and article dealing with wills, estates, and heirship, defines a mental incompetent in the following manner:

"Mental incompetent," "incompetent person," "incompetent," or "mentally ill person" denotes a person who has been adjudicated mentally ill or mentally deficient, or who by the laws of this state is designated as a lunatic, insane person, incompetent, mental incompetent, incapable or feebleminded, or who has been found in an appropriate proceeding to be unable or unfit to manage his own property.

92 Id. § 71-1-23(1) (1963).
may be opened and made part of the long term commitment case, and the respondent's name may be indexed.\textsuperscript{93}

E. Involuntary Civil Commitment for an Indefinite Term

The involuntary commitment process (often referred to by those involved with it as "long term adjudication" as opposed to the short term hospitalization's informal label "hold and treat") presents the most serious consequences for a respondent. Under the relevant statutory provisions he may be confined (or at a minimum, subjected to confinement) for an indefinite, perhaps interminable, period of time and can lose several rights under the law which he would otherwise enjoy.\textsuperscript{94}

1. Initiation of Proceeding by Petition and Physician's Statement

Any reputable person can institute involuntary commitment proceedings by filing with the court of jurisdiction a verified petition alleging that any person, then physically present in the county, is mentally ill or deficient, and requesting that a hearing be held before a medical commission. This petition must be accompanied by a statement from a licensed physician which says that the respondent is mentally ill or mentally deficient, states whether the physician has examined the respondent, and gives the date of any examination.\textsuperscript{95}

2. Custody of Respondent Pending Medical Commission Hearing

Upon receipt of the petition and physician's statement, the court may issue an order directing any person to take the respondent into custody, pending determination of his mental condition by the commission. The court can also issue such an order on its own motion if it has good cause to believe that a person is mentally ill or deficient.\textsuperscript{96} Orders on the court's own motion are frequently entered in response to requests by the welfare department or some other public agency.

Pending determination of a respondent's mental condition, the court must place him in the custody of some relative or other proper person, or the department of institutions for placement in a state hospital or some hospital or suitable place not under the supervision of the department of institutions. No

\textsuperscript{93} Id. § 71-1-4(12) (Supp. 1965).
\textsuperscript{94} See Id. § 71-1-11(1) & (2) (Supp. 1965). See also Appendix.
\textsuperscript{95} Id. § 71-1-5(1) (Supp. 1965).
\textsuperscript{96} Id.
person held pursuant to an involuntary commitment proceeding may be confined in a jail unless a satisfactory showing is made that he is violent and dangerous to himself or others, or that there is no other adequate place of custody in the county.\textsuperscript{97}

3. Jurisdiction and Venue

Normally the court in which the petition is filed has jurisdiction over the proceeding and appoints the medical commission. The court of original jurisdiction, however, may order the matter to be transferred to a court of another jurisdiction. If the respondent or his guardian \textit{ad litem} files a written petition any time before the first hearing of the medical commission, requesting that the hearing be held in the county of respondent's residence, the court is required to enter an order transferring the case to the county of the respondent's residence. In such a case, the court must enter a further order returning the respondent to his county of residence for confinement in a suitable place pending further proceedings.\textsuperscript{98}

4. Guardian \textit{Ad Litem}

Whenever involuntary commitment proceedings are instituted, the court is required to appoint an attorney as guardian \textit{ad litem} for the respondent.\textsuperscript{99} A copy of the petition and any order detaining the respondent pending inquiry by the medical commission must be personally served upon the guardian \textit{ad litem} at least two days prior to any hearing before the medical commission and within five days after issuance of the order.\textsuperscript{100} He also must be given at least two days notice of the time and place of the first meeting of the medical commission.\textsuperscript{101} Interpreting a prior statute containing a notice provision identical to this present one, the Colorado Supreme Court held in the case of \textit{Hultquist v. People} that the giving of this notice was mandatory and couldn't be waived by the guardian \textit{ad litem}.\textsuperscript{102}

5. Duties of Guardian \textit{Ad Litem}

The guardian \textit{ad litem} is charged with two duties in an involuntary commitment proceeding. He is required to attend all meetings of the medical commission,\textsuperscript{103} and he is required to file a written report with the court within five days after

\textsuperscript{97} \textit{Id.} § 71-1-5(2) (Supp. 1965).
\textsuperscript{98} \textit{Id.} § 71-1-10 (Supp. 1965).
\textsuperscript{99} \textit{Id.} § 71-1-8(1) (1963).
\textsuperscript{100} \textit{Id.} § 71-1-5(1) (Supp. 1965).
\textsuperscript{101} \textit{Id.} § 71-1-8(1) (Supp. 1963).
\textsuperscript{102} 77 Colo. 310, 236 P. 997 (1925).
the medical commission files its report. The report must show
the occupation, citizenship and residence of the respondent, his
length of residence in Colorado, and his previous place of resi-
dence, if known. It must also give the petitioner's name and
address and state his relationship to the respondent. The names
of any witnesses examined at the hearing must also be in-
cluded.104 If the medical commission finds a respondent to be
mentally ill or deficient, the guardian ad litem must include
the following additional items of information in his report:

(1) an inventory of any real or personal property be-
lieved to be owned by the respondent;
(2) the respondent's social security number;
(3) a list of any social security or other benefits to which
the respondent is entitled;
(4) the names and addresses of the respondent's next of
kin, if known;
(5) a recommendation as to whether a conservator should
be appointed.

The court must forward a copy of this report to the hos-
pital where the respondent may be confined.105 In Hulquist,
the Colorado Supreme Court elaborated somewhat on the statu-
torily prescribed duties of the guardian ad litem by declaring
that the purpose of the two day notice was to enable the attor-
ney to make an adequate investigation and preparation to pro-
tect the interests of the respondent at the medical commission
hearing.106

In Arapahoe and Jefferson Counties, guardians ad litem
for involuntary commitment proceedings, like those in short
term hospitalization cases, are selected from the entire roster
of the respective county bar associations. In Denver, however,
guardians ad litem for involuntary civil commitment proceed-
ings are generally chosen from a list of only about six attorneys.
Most of these lawyers have been serving continuously in this
capacity for the past two decades or longer, and are sixty years
of age or older. They are paid ten dollars for each case and
are guaranteed fifty dollars for an afternoon's work regardless
of the number of cases.

6. Appointment of a Medical Commission

Whenever an involuntary commitment petition is filed,
the court is required to appoint a medical commission to deter-

104 Id. § 71-1-8(2) (1963).
105 Id. § 71-1-8(3) (1963).
mine whether the respondent is mentally ill or deficient. A commission must be comprised of two medical doctors licensed to practice medicine in Colorado. They are not required to be residents of the county of appointment, but they cannot be related to the respondent or petitioner, nor are they allowed to have any financial interest in the outcome of the proceeding. In Denver the judge of the court has generally been making his appointments from the same panel of physicians for the past two decades or longer. The panel from which medical commissioners are appointed consists of about twelve physicians most of whom are psychiatrists (there is one neurologist), and most range in age from about sixty-five to eighty.

In Jefferson County non-psychiatrists alone are chosen to serve on medical commissions. A clerk in charge of mental health proceedings stated that the psychiatrists in the county are generally unwilling to serve, considering such service to be an intolerably unremunerative interference with private practice. Thus, she had simply stopped asking psychiatrists to serve. Until several months ago medical commissioners received fifteen dollars per case for their services. Now they receive twenty-five dollars per case. Rarely is more than one case considered in a single day.

Medical commissioners in Arapahoe County are chosen supposedly from the entire roster of the county medical association. The list, as a practical matter, has been narrowed to about two dozen physicians, since a great many doctors have repeatedly refused to serve as commissioners or otherwise indicated their lack of desire to serve. Few physicians, even of those who consent to serve, are eager to serve, considering such service to be an intolerably unremunerative interference with private practice. Usually the deputy clerk attempts to obtain one psychiatrist and one general practitioner or specialist in some other field for each commission. They are paid twenty-five dollars per case for their services and rarely will see more than one respondent on one day.

7. Notice of Medical Commission Hearing

Upon appointment of the commission the judge must immediately fix by written order a time and place for the first hearing of the commission. Notice of this hearing must be personally served on the respondent at least five days (including Saturdays, Sundays and holidays) before the hearing.

108 Id. § 71-1-6(2) (Supp. 1965).
commission hearings must be held in the county where the petition is filed unless the court orders the commission to sit at some other place in the state.  

Although no cases have arisen involving the notice requirements of the present hospitalization and commitment statutes, in dealing with the predecessors to the current statutes, the court has repeatedly reiterated the position that:

1. The court receives its jurisdiction exclusively from the statutory provisions;
2. Since the statutes are in derogation of the common law, the requirements of the statutes must be strictly construed;
3. The court exercises valid jurisdiction only when the statutory requirements are strictly followed; otherwise its orders are void.

Thus, an alteration of a court order by a sheriff so that it showed a place of confinement and a time and place for the first meeting of the medical commission different from those specified in the order of the court was held to nullify a subsequent order of adjudication. The failure to clearly prove proper service of notice on the respondent has also resulted in reversal of an order of adjudication.

8. District Attorney to Conduct Proceedings

The law requires that all commitment proceedings be conducted by the district attorney or by the county attorney, if the county's population exceeds 300,000, or by a qualified attorney acting for these officials who is appointed for that purpose by the court of jurisdiction. This provision would seem to encompass medical commission hearings. The Arapahoe County District Court and District Attorney's office, however, apparently take the view that this provision does not apply to such hearings. No representative from the district attorney's office was present at the two medical commissions I attended in Arapahoe County, and, according to an official who deals with mental health matters in the district court clerk's office, the court policy is not to require the presence of the district attor-

109 Id. § 71-1-6(3) (1963).
ney or his appointed representative at commission hearings.

9. Medical Commission Procedure

a. Hearing

The medical commission is empowered to administer oaths. It is required to receive evidence, as well as any statements offered by the respondent, his own attorney, or his guardian ad litem. The commission may examine hospital and medical reports and records. It may examine witnesses. At the request of the medical commission, the guardian ad litem, the respondent's privately retained counsel, or the attorney acting for the county, the court is required to issue subpoenas compelling in the presence of witnesses or the production of records before the commission at its hearings.

b. Report

The commission is required to make such investigation and inquiry as it deems fit, and may adjourn the hearing to a time and place certain. Unless the court grants an extension of time, the commission is required to file a verified report of its findings, based upon the facts considered, with the court within 48 hours after the conclusion of the hearing. These findings are to be made in answer to the following questions:

(1) Is the respondent afflicted with a disease, infirmity, old age, or disorder, which impairs his mental or emotional functions to a degree sufficient to require protection, supervision, treatment, or confinement for his own welfare or the welfare or safety of others?

(2) Does the respondent, by reason of mental illness, lack sufficient control, judgment and discretion to manage his own property or affairs?

(3) Are the respondent's intellectual functions so deficient, arrested, or impaired by disease or physical injury that he lacks sufficient control, judgment, and discretion to manage his property or affairs?

(4) Are the respondent's intellectual functions so deficient, arrested, or impaired that for his own welfare,

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114 Id. § 71-1-7(1) (1963). The Supreme Court of Colorado has stressed that a proceeding under the commitment laws is a special statutory proceeding neither criminal nor civil in nature Kendall v. People, 126 Colo. 573, 252 P.2d 91 (1952); Hultquist v. People, 77 Colo. 310, 236 P. 995 (1925). Because of their special nature, their sole aim being to benefit the respondent, the court has held the testimonial privilege statutes to be inapplicable to commitment proceedings. See Hawkyard v. People, 115 Colo. 35, 169 P.2d 178 (1946).


116 Id.
or the welfare or safety of others, he requires protection, supervision, guidance, training, control, or care?\(^{117}\)

Although not free from ambiguity, the first two questions are generally interpreted by the attorneys for the counties and the medical commissioners as referring to mental illness and the last two as referring to mental deficiency. Thus, if a commission finds a respondent to be mentally ill, it will answer one or, in most cases, both of the first two questions in the affirmative and the last two in the negative. Some commissioners, apparently uninstructed in the distinction between the two pairs of questions, answer all questions in the affirmative.

If any of the questions are answered affirmatively, the commission report must also give the following information: (1) name, age, sex, and nativity of the respondent; and (2) names and addresses of his parents, spouse and children to the extent these are ascertainable. The commission is further required to recommend a suitable place for commitment and can recommend conditions applying to such commitment.\(^{118}\)

In Denver and Jefferson Counties, I was allowed to view a great number of medical commission reports filed over the past several years. The standardized form reports were generally filled out in a perfunctory manner. The first two questions were generally answered "yes," and the last two, "no." The diagnosis would generally be given in two or three words. Generally, the space after the word "recommendations" was left totally blank. In cases where some recommendation was made, it consisted of a terse statement such as, "keep at nursing home."

c. Cases concerning medical commission procedure

The Colorado Supreme Court has directed no real scrutiny at the functioning of a medical commission, and hence no judicial standards have evolved to expand on or to clarify the vague statutory provisions regarding medical commission procedure. In a pair of cases arising under earlier statutes with different provisions for medical commission findings, the court, in dictum, criticized medical commission reports as being ambiguous and contradictory.\(^{119}\)

In the Kendall case, the court, after finding the report of the medical commission to be contradictory, stated: "A finding

\(^{117}\) Id. § 71-1-7(2) (1963).

\(^{118}\) Id. § 71-1-7(3) (Supp. 1965).

by the commission should be for the protection of the respondent as well as society, specific, and not be an all-inclusive finding that could leave its stigma upon respondent throughout life." This language, which is at the same time both bold and puzzling, has not been developed in any other cases. The typical approach toward commission action is represented by Hawkyard v. People. In this case the court refused to consider an allegation of error charging defects in a medical commission hearing because the record was silent concerning such a defect, and the trial court had found the hearing to be regular. The court stated that in such a case it would presume the regularity of a commission hearing.

d. Medical commission procedure in practice

When a medical commission is convened, it is provided with three alternative courses of action. It may recommend (1) discharge, (2) short term hospitalization or (3) adjudication. If a medical commission finds a respondent mentally ill or deficient and recommends adjudication and commitment, the court seems to be bound by statute to follow the commission's findings and recommendations and enter an order adjudicating the respondent mentally ill or deficient and providing for his commitment or custody.

Medical commissions for a variety of reasons, are rarely appointed in Jefferson County. I sensed in my interview with a clerk who dealt with mental health matters that the court and the district attorney's office have a strong aversion to medical commission hearings. In their view, the hearings deplete the court's budget and waste the time of the district attorney's staff. A member of the district attorney's staff indicated that such hearings are generally quite perfunctory in nature.

A clerk of the court stated that she believed that a medical commission should be convened only as a last resort. The court has the power by order to temporarily hospitalize a person, although it may not affect his assets in this procedure. The clerk stated that if a respondent's difficulty consisted exclusively of a mental problem, therefore, and did not involve the

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121 115 Colo. 35, 169 P.2d 178 (1946).
122 Id. at 38, 169 P.2d at 179.
123 Id.
125 Id. §§ 71-1-7(3) and 71-1-4 (Supp. 1965).
126 Id. § 71-1-11 (Supp. 1965).
127 Id.
conservation of his assets, he is never ordered to appear before a medical commission as a first step. Instead, short term hospitalization is ordered. In most cases, she reported, further compulsory care beyond that permitted under a "hold and treat" order is unnecessary.

Where the major problem involves the necessity of providing someone to manage the respondent's estate, the clerk stated that she initially counseled prospective petitioners to investigate the possibility of petitioning the court for the appointment of a voluntary guardian.\textsuperscript{128} In many cases this course has provided a satisfactory solution.

In Denver, the city attorneys seem less eager to seek voluntary guardianship for a prospective respondent. They reason that if an individual needs a guardian it generally won't be long before he will require some form of compulsory care. Thus, they believe that it is better to handle the matter in a single proceeding.

When a medical commission is convened, the actual internal hearing procedure is apparently left to the discretion of the commission itself.\textsuperscript{129} In order to gain an insight into medical commission procedure in actual practice, I observed several medical commission hearings in each of the three counties studied. A few of these observations will be detailed here.

One or two afternoons every week, an unusual group of men makes its way to several Denver area hospitals, nursing homes, and sanitoriums. The group consists of two psychiatrists, a city attorney, an attorney in private practice, and their chauffeur (who is the court baliff). The two psychiatrists comprise a medical commission duly appointed by the judge of the probate court. The psychiatrists have served on many such commissions during the past two or three decades.

The city attorney is one of the two city attorneys assigned to the mental health division. According to law, he is supposed to conduct the hearings of the commission. The private practitioner has been appointed, as he was on countless previous occasions during his legal career, to serve as guardian \textit{ad litem} for all of the respondents in the hearings to be conducted by the commission that day.

The psychiatrists, the attorneys, and their driver know each other well. During their rounds they converse amiably, frequently kid each other, and, in general, exude a team feeling.

\textsuperscript{128} Id. § 71-1-8 (1963).

\textsuperscript{129} The commission is required to make such inquiry as it deems fit and is noticeably silent as to internal procedural matters. Id. § 71-1-7(1) (1963).
The commission meets at noon prior to commission hearings to review all records in cases heard that afternoon.

On my first day of observation, the first of the four hearings was scheduled at Veterans Hospital. The second was to be held at Mt. Airy Sanitorium and the final hearings were to take place at Fort Logan. The hearings were scheduled one-half hour apart. This period included time for a hearing as well as travel time.

The first hearing at Fort Logan involved a large, heavily bejeweled woman of about forty who, through the guardian ad litem appointed pursuant to the short term hospitalization statute, had requested a medical commission review of her temporary hospitalization order. We gathered around a long narrow table in a conference room.

The respondent and a staff psychiatrist, a middle-aged woman, entered and set down near the middle of the table facing the commission and the attorneys. A young man and woman, later identified as staff social workers, seated themselves at one end of the table near the door.

One of the psychiatrist commissioners began the hearing.

"What's your diagnosis?"

The staff psychiatrist gave her diagnosis and the medical commission members began filling in the forms in front of them.

The other psychiatrist commissioner lifted his head and inquired, "Should we take her driver's license away?" Although, the Ft. Logan staff members stated that the patient did not have a license, he repeated the question twice during the remainder of the hearing.

The patient, who was visibly angry, attempted to speak. The commission members remained oblivious to her strongly expressed protests. They were engaged in a discussion with the city attorney concerning the proper method of filling in the required forms. Finally, the staff psychiatrist asked, "Doesn't she get a chance to say why she feels she shouldn't be under our care? She requested this hearing. I thought she'd get a chance to speak."

The guardian ad litem, who had been virtually silent up to this point, then began to question the respondent intensely, primarily concerning the number of her relatives living in the Denver area and the way she got along with them. The members of the medical commission, the city attorney, and the driver ignored the interrogation. They had become involved in a loud dispute over the question of the commission's power to adjudi-
cate the woman mentally ill. The commission members favored adjudicating the woman. Their voices became louder.

Soon the guardian *ad litem* became perturbed, abruptly stopped his questioning and faced his colleagues. "Dammit, give me a chance to do my job, will you? I didn't bother you when you were talking," he said forcefully.

"Well, hurry up," the medical commissioner replied, visibly annoyed by the interruption, "it's clear she doesn't have an estate."

The guardian *ad litem* resumed his questioning and the legal dispute continued for a few more minutes in a subdued tone. It was finally conclusively settled by the city attorney. "It's the judge's interpretation of the statute that a person seeking a review of his hospitalization order shouldn't be adjudicated at this hearing."

The hearing then ended. The medical commission recommended continuation of the order of hospitalization. The patient, a somewhat befuddled look on her face, was gently ushered out by the staff psychiatrist.

I attended a medical commission hearing in a small town near Denver. The respondent was a sixty-four year old woman. I rode to the hearing with a county welfare worker who moonlighted at night as a coroner's investigator. He had become involved in the case when the respondent's seventy-five year old husband, who was the petitioner in the matter, had become severely ill a few months earlier and had been placed in a Denver nursing home.

Upon arriving in the town we went to the office of the respondent's physician, who had submitted the letter supporting the petition for involuntary hospitalization. Here we were joined by the medical commission, composed of two psychiatrists and the guardian *ad litem*.

The respondent's doctor proceeded to give us a background report on the respondent. He reported that she had grown up in an orphanage, had been married twice and was sixty-four years old. He believed that the woman was mentally retarded and probably had always been so. He also stated that she had become troublesome to the community, particularly since her husband left. She pestered bank tellers, and the doctor had heard reports that she had on one occasion attempted to direct traffic while in the nude. He also heard that she had threatened some school children with a shotgun the previous summer.

A discussion ensued regarding the best place — the doctor's office or the respondent's home — to see the respondent
and the appropriate manner in which to approach her. It was
decided that her physician should accompany us to the respon-
dent's home and make an introduction. The members of the
commission would then talk to her briefly at home, make a
tour of the premises and then ask the respondent to accompany
them to the office of the doctor, where they would conduct a
more intensive examination.

The medical commission, the guardian ad litem, the physi-
cian, the welfare worker, and I drove about five blocks to an
old wood structure which had at one time obviously been a
gas station and garage. We approached a large sliding door
on the side of the building. The guardian ad litem knocked.
In a few minutes the door opened and a slight, wrinkled old
woman neatly clad in a blue dress appeared. Her eyes moved
quickly over us and she exclaimed, "My, what a handsome
group of men! I've never seen the like of it in all my life."

"My, don't you look pretty yourself, Ann [not her real
name]," the guardian ad litem, who had never seen her before
responded cheerfully.

The psychiatrists introduced themselves as doctors, and
the guardian ad litem identified himself as an attorney. They
stated that they had come to see how she was doing. The re-
spondent, who according to her physician had been served with
an order requiring her to appear before a medical commission
on the previous day, replied that she had been expecting us
and invited us inside.

The interior of this portion of the building had at one
time been the garage. The room appeared to be free of grease
and oil, but was dusty and dirty. The respondent pointed out
that she lived in a silver trailer which was parked on one side of
the room. She invited us to enter. Straight inside lay a tiny
alcove housing a small, made bed. To the left was a narrow
compartment containing a tiny gas-burning stove, a sink, some
cupboards, and a kerosene heater. It was quite warm inside.
The interior of the trailer, however, appeared to be neat and
clean.

After viewing the inside of the trailer, Ann escorted the
group to the front of the building where a clean bathroom
was located.

Outside, one of the medical commissioners said that he
had "seen enough." "The place is a public menace. No venti-
ilation. She could asphyxiate in there. The stuffiness could well
be the cause of some of her mental problems." He then sniffed
the air immediately inside and outside the building, claiming
to detect some foul odors. Although the building did not convey the antiseptic quality of, for example, a middle-class suburban home, its odors seemed to be well within the limits of human toleration. The welfare worker informed me that Ann and her husband had lived in the trailer inside the garage for many years.

A few minutes later the guardian *ad litem* and Ann came walking out of the building. "Now you don't mind coming with us over to your doctor's office, do you Ann?" the guardian *ad litem* asked.

"No, I reckon not. I'll have to be back before noon — have a lot of work to do."

The attorney continued talking light-heartedly with the respondent as we travelled the few short blocks to the physician's office.

At her doctor's office we were ushered to a large examination room in the back. The commissioners seated themselves on the left side of the room. Using their attaché cases for backing, they began to arrange and fill in their report forms. The guardian *ad litem* placed a tape recorder on a small table near the commission. Ann sat about 10 feet away facing the attorney and commission. The welfare worker and I sat on a small bed behind and to one side of the medical commission.

"Ann, we just want to ask you a few questions," began one of the commissioners bringing his ballpoint pen to readiness. The doctors took turns asking the respondent questions. She didn't know the date, nor could she identify the President of the United States or the Governor of Colorado. On the other hand, she recalled details of her personal life quite vividly. She knew the name of the town where she lived, her birthdate, and birthplace. She knew that she had been married twice, that her first husband was dead, and that her present husband was in a Denver nursing home. After willingly responding to the psychiatrists' continual questioning for about twenty minutes the woman became irritated.

"Is is true that you threatened some of the school kids with a gun last summer?" one commissioner asked sweetly.

"What are you asking all these damn fool questions for?" she exploded, stirring briskly in the chair, her eyes glistening.

The doctor's ballpoint moved quickly and wrote "paranoic" under the heading "Diagnosis." "We just want to help you," he replied soothingly.

"I'll bet you're a tryin' to send me to one o' them awful
homes in the city. No sir, you ain't going to do it. I never done what you just said; I don't have a gun."

The questioning stopped momentarily when respondent's doctor came in and showed a chart to one commissioner. He glanced briefly at the chart and said, "Hm, this clearly indicates cerebral arteriosclerosis." He made another notation on the report form.

Resuming the questioning, the psychiatrists asked Ann if she had any friends in the town.

"Well, my caretaker and his wife come by once a day. They're my best friends. Of course, I've lived here for 20 years and know all of the folks. I don't have a single enemy, I'll tell you that."

The psychiatrists left the room to ask her doctor a few questions. "Does Ann have a caretaker for her place?" they asked.

The doctor informed them that Ann did not have a caretaker, but a couple did visit her and offer her some assistance almost daily.

"I thought if there was someone who could take care of her . . . but they're not here. If they cared, they would've been here," one commissioner said pensively to no one in particular.

"She's got to be taken out of that place. It's a firetrap. It's inhuman," the other commissioner commented emphatically.

The guardian ad litem then proceeded to question Ann closely about her financial condition, and soon learned the location of her bank accounts.

At this point a uniformed sheriff's sergeant entered the front door of the office followed by a plainclothes officer.

"Is Ann here?" he asked. "We've got an order to take her to the sheriff's department pending transfer to Fort Logan. She has been adjudicated, hasn't she?"

The three doctors nodded affirmatively and directed the officers toward the back room. The welfare worker and the guardian ad litem attempted to coax Ann to enter the marked sheriff's car which was already parked by the back door of the office. The guardian ad litem repeatedly importuned: "We're just going over to make sure your money is all right in the bank." She angrily refused and attempted to walk toward the front of the building. The stocky welfare worker and the tall, husky sergeant grabbed her by her elbows and pulled her firmly out the back door, her rigidly held feet bumping lightly on the floor.
During this time, the psychiatrists were busy completing the medical commission report form. After completing this task, one commissioner walked out into the sunlight and stood beside me as we watched the struggle to place Ann in the back seat of the sheriff's automobile.

In the process of struggling, the respondent's purse opened and fell out of her hands into those of the plainclothes officer. The officer and the guardian ad litem began examining the contents of the purse and soon discovered some money. The commissioner turned and said: "I hear that ambulance drivers often make out real well in cases like this."

"About two hundred dollars here," the attorney exclaimed as he counted. "Lord, I thought you didn’t have any money with you."

The plainclothes officer and welfare worker had succeeded in placing Ann in the back seat by this time. The guardian ad litem got out and the car sped away.

10. Order of Adjudication

The recommendation that a respondent be adjudicated mentally ill or mentally deficient and be committed for an indefinite term does not, by itself, operate as an adjudication and commitment. A court order of adjudication is necessary to achieve this result. However, the court order appears to be little more than a formality because the statute appears to require the court to follow the findings and recommendations of the medical commission. This is in sharp contrast with the role of the court in a proceeding to determine whether an incompetent should be adjudicated competent. Even though the restoration law requires that the respondent is examined by two doctors and that they submit a report of their findings to the court, the statute speaks of the court making its own findings. The case law interpreting an earlier restoration

\[130\textit{Id. § 71-1-11(1)}\textsuperscript{(Supp. 1965).} "If the report of the medical commission finds that the respondent is mentally ill or mentally deficient, and recommends indefinite commitment and adjudication, the court \textit{shall}, within six days after the return of said report, enter an order adjudicating the respondent mentally ill or mentally deficient." \textit{Id.} (Emphasis added).\]

\[131\textit{Id. § 71-1-26 (1963).} \]

If any reputable person shall file in the court by which a person has been adjudicated mentally ill or mentally deficient, a written petition setting forth the adjudicated respondent is no longer mentally ill or mentally deficient, supported by the certificate of a doctor... said court shall immediately appoint two reputable doctors... to examine the respondent... and to report their findings to the court... If from such examination it shall be found by the court that the respondent... is no longer mentally ill or mentally deficient, the court shall forthwith enter an order of competency...
statute containing an identical "findings by the court" provision makes it clear that the court has the power to make its own findings in a restoration proceeding and that the findings of the doctors are only advisory.\textsuperscript{132}

11. Trial by Court or Jury

The questions considered by the medical commission must be tried by the court or by jury if the respondent, his attorney, the guardian \textit{ad litem}, his legal guardian, parent, spouse, or adult next of kin files a written demand for such a trial within five days after the entry of the order of adjudication or commitment.\textsuperscript{137} If any of these specified persons demands a trial, the judge has no discretion and must grant the request.\textsuperscript{134}

\textbf{a. Adjudication order interlocutory during trial demand period}

The adjudication order remains interlocutory during the five day period when a trial can be demanded, and, if a demand is made, the order remains interlocutory pending the outcome of the trial.\textsuperscript{135} Even though the order is interlocutory under these circumstances, the court still possesses the power to appoint a conservator and to authorize the conservator to take appropriate action on behalf of his ward.\textsuperscript{138}

\textbf{b. Longer trial demand period if respondent removed from county}

If the respondent is removed from the county during that five day period he is allowed an additional fifteen days (or a total of twenty days after the entry of the adjudication order) to file a demand.\textsuperscript{136} If a jury trial demand is made before the respondent is removed from the county, the judge of the court is required to issue an order detaining the respondent in the county for a period not exceeding five days.\textsuperscript{138}

\textsuperscript{132} Hill v. People, 118 Colo. 571, 577, 198 P.2d 450, 452 (1948).
\textsuperscript{133} COLO. REV. STAT. ANN. § 71-1-13(1) (Supp. 1965).
\textsuperscript{136} Id.
\textsuperscript{137} COLO. REV. STAT. ANN. § 71-1-13(1) (Supp. 1965). Prior to the 1960 amendment allowing the respondent fifteen additional days to file a demand for a jury trial if removed from the county of commitment, the supreme court had reversed two adjudication orders in cases where the respondent had been removed from the county of commitment before the five-day trial demand period had expired. Hultquist v. People, 77 Colo. 310, 236 P. 995 (1925) and Watkins v. People, 140 Colo. 228, 344 P.2d 682 (1959).
\textsuperscript{138} COLO. REV. STAT. ANN. § 71-1-13(1) (Supp. 1965).
c. Jury trial

If a jury is requested, the court is required to order a jury of six to be summoned within one month.\(^{139}\) Trial procedure is governed by the law pertaining to civil jury trials.\(^{140}\) The findings of the medical commission are admissible as evidence, if identified by the person or persons who have verified the commission report\(^{141}\) and who are subject to examination and cross examination the same as a witness in other civil actions.\(^{142}\)

The judge is required to instruct the jury that the medical commission findings may be overcome by a preponderance of the evidence.\(^{143}\) However, the Colorado Supreme Court has held that this provision is merely a redundant reiteration of a fundamental rule of law which exists without aid of the statute.\(^{144}\) It declared that the county has the burden of proof by a preponderance of evidence throughout a hearing or trial on commitment and that this burden could not be shifted to the respondent.\(^{145}\) Furthermore, the court found that a jury instruction stating that "the report of the medical commission can only be overcome by a preponderance of the evidence" was improper in that it gave undue evidentiary strength to the report of the medical commission and appeared to limit the ways in which the report could be overcome.\(^{146}\) The court declared that a respondent was under no obligation to present any evidence, and, if he desired, could overcome whatever evidentiary weight the commission report possessed in several ways not involving the presentation of evidence.\(^{147}\) He could, for example, attack the veracity of the report or the credibility of the medical commissioners on cross examination.\(^{148}\) Although the failure of the court to give a jury instruction concerning expert (psychiatric) testimony was not raised by the appellants, the court specifically found that the trial court should always tender such an instruction on its own motion if not requested to do so by counsel.\(^{149}\)

The jury in rendering its verdict, is required to answer the same questions which the medical commission is required to

\(^{139}\) *Id.* § 71-1-13(2) (1963).

\(^{140}\) *Id.*

\(^{141}\) *Id.*

\(^{142}\) *Id.*

\(^{143}\) *Id.*


\(^{145}\) *Id.* at 325, 350 P.2d at 577.

\(^{146}\) *Id.*

\(^{147}\) *Id.* at 325-26, 350 P.2d at 578.

\(^{148}\) *Id.*

\(^{149}\) *Id.* at 329, 350 P.2d at 579.
answer. The judge is required to enter a decree in accordance with the jury findings, unless it is his opinion that the findings are contrary to the weight of the applicable law and evidence. If the court so finds, the judge may set aside the jury finding and enter an order notwithstanding the findings of the jury. Otherwise, the court must enter an order discharging the respondent if all questions are answered in the negative.

According to court officials in the Denver metropolitan area, the right to a trial is seldom exercised. Often a substantial estate is involved in those few cases where a trial is demanded. The fact that the law does not require anyone to inform an adjudicated respondent of his right to trial could well be a major reason that trial demands are infrequent. In Hawkyard, the Colorado Supreme Court said: "In the motion for a new trial it is alleged that defendant was not advised of his right to a jury trial. Conceding this as a fact, our attention is not directed to any statute requiring the court or the county attorney or the guardian ad litem to impart this information to a defendant."

F. Restoration, Partial Restoration and Administrative Discharge

There are three ways in which a respondent may be released from the confinement imposed by an order of adjudication and commitment. He may be adjudicated competent and be immediately released from confinement and relieved of all legal disabilities resulting from incompetency. The respondent may also be restored to competency and released by the court on its own motion if the superintendent or chief medical officer of a hospital files a verified statement with the court stating that a respondent in his custody is no longer mentally ill or deficient. The hospital officer is required to file this statement whenever he has reason to believe that the respondent is no longer mentally ill or deficient. The Colorado Supreme Court has held, in interpreting earlier statutes, that the hospital administrator has authority to discharge a respon-
dent only if he is restored to reason.\textsuperscript{157} If the administrator discharges a respondent not restored to reason, the court can return him to confinement without a new hearing.\textsuperscript{158}

1. Administrative Discharge

A respondent may be freed by an administrative discharge. If the statutory conditions are fulfilled, an administrative discharge follows a conditional release, granted by the head of a state hospital or training home or the chief officer of a veterans administration hospital, who believes that a conditional release is in the best interest of the respondent or society.\textsuperscript{159} The court which committed the respondent must be notified in writing of this release.\textsuperscript{160} If a conditionally released respondent is not returned to the institution within two years after his release, his name must be stricken from the rolls of the institution, and he must be administratively discharged.\textsuperscript{161} This discharge must be entered on the records of the institution, and written notice must be filed with the court which committed the respondent.\textsuperscript{162} The benefit of administrative discharge is also made available to a respondent who escapes from an institution and is not returned within a period of one year after his escape.\textsuperscript{163}

The effect of an administrative discharge is limited. An administratively discharged respondent may be compelled to return to the institution only by an order of court issued after proof of need for further institutional care is produced.\textsuperscript{164}

An administrative discharge does not operate as an adjudication of competency.\textsuperscript{165}

2. Competency Restoration Adjudication

Any reputable person may institute a restoration proceeding by filing a written petition with the court which has adjudicated the respondent's competency, stating that the respondent is no longer mentally ill or deficient.\textsuperscript{166} This petition must be accompanied by the certificate of a doctor licensed to practice

\textsuperscript{157} Metuxos v. People, 76 Colo. 264, 230 P. 608 (1924).
\textsuperscript{158} Id.
\textsuperscript{159} COLO. REV. STAT. ANN. § 71-1-28(1) (Supp. 1965).
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. § 71-1-28(4) (1963).
\textsuperscript{165} Id. § 71-1-28(3) (1963).
\textsuperscript{166} Id. § 71-1-26 (1963).
Upon receipt of such a petition the court is required to appoint two reputable doctors licensed to practice medicine to examine the respondent at the place where he is then physically present and to report their findings to the court. If the respondent is confined at the time the petition is filed, at least one of the appointed doctors must have no association with the institution of confinement. If the court finds from the examination that the respondent is no longer mentally ill or deficient, it shall enter an order of competency which frees the respondent from confinement and all legal disabilities resulting from adjudication. After entering its order adjudicating competency, the court has no power to issue further orders regarding the restored respondent's property except those which may be necessary to settle the accounts of the conservator and to restore the property to the respondent. The court must forward a copy of the order of competency to the department of institutions.

G. Additional Case Law Concerning Commitment Proceedings

In addition to the points already mentioned in conjunction with individual sections of the commitment statute, the Colorado Supreme Court has also decided various other more general questions involving the commitment/adjudication statutes. It has repeatedly stressed that a proceeding under the commitment laws is a special statutory proceeding neither criminal nor civil in nature. Because of their special nature — their sole aim being to benefit the respondent — the high court has held the testimonial privilege statutes to be inapplicable to commitment proceedings.

The court has also repeatedly stated that the properly asserted jurisdiction of a court in a commitment proceeding is a continuing one and that consequently orders and judgments

167 Id.
168 Id.
169 Id.
170 Id.
171 People ex rel. Smith v. County Court of Fremont County, 106 Colo. 95, 101, 102 P.2d 476, 478 (1940).
174 See Hawkyard v. People, 115 Colo. 35, 169 P.2d 178 (1946). In this case the attorney-client privilege was held inapplicable to a medical commission hearing. Id. at 39, 169 P.2d at 180. See also Sabon v. People, where the husband-wife privilege was held not applicable to a jury trial commitment proceeding. 142 Colo. 323, 329, 350 P.2d 576, 579 (1960).
entered in such proceedings are open to reconsideration and modification by the court of original jurisdiction upon the application of any party in interest, at any time before the respondent is adjudicated competent or dies.\textsuperscript{175}

On this ground the high court has not allowed judgments and orders in commitment cases to be challenged in collateral actions such as habeas corpus proceedings.\textsuperscript{176} If the court entering a commitment order had no jurisdiction to do so, however, the order may be challenged in a habeas corpus proceeding.\textsuperscript{177}

The cases indicate that although orders and judgments entered in commitment proceedings are continually open to modification, they still possess the degree of finality necessary for appeal.

III. RECOMMENDATIONS, CRITICISMS, AND EVALUATIONS

A. Introduction

\textit{Colo. Rev. Stat. Ann.} § 71-1-23 (1963). Rights of Respondent. — (1) Every respondent shall be entitled to humane care and treatment. No respondent shall lose any civil rights nor forfeit any legal status unless he has been adjudicated mentally ill or mentally deficient. Upon the entry of any order of competency, any adjudicated respondent shall be restored and entitled to all civil rights and legal status of any other mentally competent person. (2) Any person in custody under this article shall have the right to communicate with his attorney, by sealed mail or otherwise.

This first sentence of this statute indicates that respondents are to receive humane care. In general it can be fairly said, if my observations at Fort Logan are typical of state-wide practice, that respondents do receive humane care within the mental institutions of Colorado. The mental health professionals are conscientiously striving to provide the most effective treatment possible for those committed to their charge within the limitations of the resources available to them. However, the commitment process fails to satisfy this statutory


\textsuperscript{177} Hunt \textit{v. People}, 76 Colo. 231, 230 P. 607 (1924).
requirement and it is towards the commitment procedures themselves that my comments are aimed.

The criticisms, evaluations and recommendations which follow are not intended to form a detailed blueprint for the reformation of the present system of involuntary hospitalization and commitment. They do, however, indicate problems and concerns which the legal profession, the medical profession, and ultimately legislators must take into account if a fairer, more orderly and more humane hospitalization and commitment process is to be established.

B. Philosophical Principles to Guide Policy Decisions

The United States conceives of itself as a free and open society. In such a society every individual should be guaranteed the maximum amount of individual freedom consistent with the well-being and safety of others and of society as a whole. The decision to divest an individual of any part of his freedom or any of his rights should not be undertaken lightly or perfunctorily.

Compulsory hospitalization and commitment proceedings have traditionally been justified by the courts because they benefit the individual subject to them. Although the "benefit" concept is appealing, it has seldom, if ever, been realized in practice. It is time that this "benefit" conception be implemented in a rational manner. The commitment process should insure that a searching inquiry and determination — guided by reasonably well-defined standards — is made as to what course of action would confer the most benefit on the individual.

With these guiding principles in mind, the following recommendations are submitted. Some of the recommendations envision a drastic legislative revision of the present system. Others suggest major reforms within the basic framework of the present process.

C. Who Should Be Hospitalized?

1. The Short Term Hospitalization Law

The policy question of who should be compulsorily hospitalized or committed is perhaps the most difficult problem in the field of involuntary civil commitment. Presently, the Colorado law allows an individual to be hospitalized for up to six months if a reputable person and a licensed physician believe that it would be in the best interest of the respondent
to be hospitalized.\textsuperscript{178} He is not required to present a danger to himself or others nor does the statute require that he be suffering from any particular mental illness or defect, nor does it state that he must display a certain form of aberrant behavior.

The term "in the best interest of" is clearly exceedingly broad and vague. It poses a serious potential threat to the liberty and security of all citizens. This is true because of the unique nature of mental illness. The conception of mental illness (at least that which lacks a clearly discernible organic basis) is inextricably linked to the behavioral values and standards established by society. In fact the symptoms of mental illness consist of a noticeable deviation from societal norms on the part of an individual. As anthropologists and other social scientists have frequently pointed out, behavior which in one society would constitute conclusive evidence of mental illness would bring its perpetrator wide public praise in another.\textsuperscript{179} The same situation can exist between sub-groups within the same society.

It is possible that the compulsory mental treatment process might be used as a quiet, tidy means of suppressing dissent or behavior unpleasing to the government or society. The practice of the Soviet Union is perhaps the best known and most extreme example of this practice.\textsuperscript{180} In America, well known writers and intellectuals are not removed by these means as they are in the Soviet Union, but the system could readily be converted and consciously applied toward the end of suppressing dissent as long as the vague terminology exists in the law.

Thus, unless we desire to use the involuntary hospitalization and commitment system as a means of enforcing conformity to societal beliefs and conventions, and unless we desire to move toward a therapeutic state\textsuperscript{181} where all nonconformists and troublesome people are viewed as "mental health" problems, vague statutory standards for compulsory hospitalization and commitment should be eliminated. In regard to the Colorado hospitalization statute, a showing that the individual whose hospitalization is sought is dangerous to himself or others should be required, and some reasonable definition should be given to the term "dangerous."

\textsuperscript{178} The statutory requirements concerning short term involuntary hospitalization are found in section 71-1-4. COLO. REV. STAT. ANN. § 71-1-4 (Supp. 1965).


\textsuperscript{180} See V. Tarsis, Ward 7 (1965).

\textsuperscript{181} For an interesting expression of the viewpoint that the United States is moving in this direction, see Kaplan, \textit{Civil Commitment "As you Like it,"
2. The Indefinite Term Commitment Statute

Most of the same criticisms set out above apply to the present indefinite term commitment process, where the statute speaks of the respondent's mental or emotional functions being so impaired as to require protection, supervision, treatment or confinement for his own welfare or the welfare or safety of others, and his lack of ability to manage his own affairs.182

"Own welfare" and "welfare of others" are, of course, terms which are as vague as the term "in the best interest of." "Safety of others" seems to furnish a more manageable standard. The question of a person's capacity to manage his own affairs is an issue with which the courts, but not the medical commissions have had a long experience.

Regardless of the particular standards adopted to determine whether an individual is a proper subject for commitment and adjudication, they must be conscientiously applied by the trier of the facts to be of any value. Presently, medical commissions make no in-depth inquiry as to what the "welfare of the respondent" is or as to what the "safety and welfare of others" consists of in each particular case. If the medical commission is to be retained as the decision-making agency in involuntary civil commitments, it should be specifically required to make a thorough inquiry and specifically report its findings with regard to these matters as part of its normal hearing procedure.

D. Preliminary Investigation by Mental Health Professionals in Place of Physician's Letter

Presently an individual can be hospitalized for up to 6 months on the basis of a verified petition and a physician's letter. He can be committed for an indefinite term by a similar procedure. The medical commission hearing which is an additional requirement in commitment cases adds nothing substantial because of its perfunctory nature. The physician submitting the letter is not required to be a specialist in mental disorders. Often he submits the letter on the basis of only a cursory examination or interview. Consequently many people are forced into the care of the mental hospitals who are not proper subjects for the kind of care offered by these institutions.

To rectify the deficiencies in the initial phases of the commitment procedure, the requirement of a physician's letter should be abolished. Instead, whenever a petition for hospitali-
zation or commitment is filed with the court, it should be referred to a team of mental health professionals (psychiatrists, psychologists and social workers) whose job it would be to investigate the matter fully and make recommendations to the court as to the best course of action. The court would not be bound by such a recommendation, but would be required to give it serious consideration. No individual should be hospitalized during this investigatory period unless a showing was made to the court that the individual presented a substantial danger to himself or others.

E. Voluntary Action Should Be Encouraged

If some form of mental health care is necessary, the mental health team should be required to make a serious attempt to get the individual to agree to voluntarily accept their recommendations before resorting to any compulsory process. The psychiatrists and mental health workers I have talked with believe that most persons who need treatment will accept it voluntarily if they have the benefit of effective counseling.

F. The Medical Commission Should Be Abolished

If a compulsory process is believed necessary, a hearing to determine whether it should be invoked should be held before a court, not a medical commission. Courts have the experience to maintain an orderly procedure, conduct a fair hearing, and weigh evidence properly. Further, as full-time public servants whose special skill and function is to adjudicate, judges are free of the conflict of interest problems which clearly affect the decision making capacities of busy doctors pulled reluctantly away from private practice.

G. Effective Counsel For the Respondent

Perhaps the greatest single need from a due process standpoint is the need for every respondent to be furnished with effective counsel.

The guardian ad litem does not adequately fulfill this function for several reasons. First of all, the statutes are extremely vague in spelling out the duties of a guardian ad litem. In short term hospitalization cases the law requires only that he make such investigation as may be necessary to protect the interests of the respondent, that he make certain that respondent is advised of his right to a hearing, and that he make a report of his investigation to the court.\textsuperscript{183} No attempt has been

\textsuperscript{183} Id. § 71-1-4(3) (Supp. 1965).
made by the legislature, the supreme court, or the bar association to spell out what the interests of a respondent are or what kind of an investigation is adequate in such cases. Thus, each individual guardian ad litem must determine his role for himself. As illustrated by the accounts in previous sections of this article most guardians ad litem in hospitalization cases generally perform in a perfunctory manner.

In involuntary commitment proceedings where the respondent stands to suffer far more serious deprivations than in short term hospitalization proceedings, the statute defining the duties of a guardian ad litem requires even less. The attorney is simply required to attend all meetings of the medical commission and to make a report to the court. This report contains primarily information about the respondent’s financial and family status. True, one Colorado Supreme Court case has interpreted the statutory language as requiring the guardian ad litem to investigate and prepare prior to the first medical commission hearing. Yet, in another case the court interpreted the statutes more literally and stated that the guardian ad litem had no duty to inform the respondent of his right to a court or jury trial of the issues decided by the medical commission.

Two steps should be taken to insure that every respondent enjoys effective representation. First, the statutes must be revised so that the role of counsel is spelled out in greater detail. Second, wherever possible a full-time public defender staff should be established to deal with mental health matters.

Defining a role for counsel in mental health proceedings will not be an easy task because these proceedings differ markedly in purpose, at least theoretically, from criminal actions. A joint committee composed of representatives of the legal and psychiatric disciplines should be convened to study the problem and present a proposal to the legislature.

It has been recommended that counsel in mental health proceedings perform the following tasks:

1. Advise the commitment or adjudication process subject thoroughly of the nature of the process, his rights under it, and all of its legal implications.

2. Check the accuracy of the alleged behavioral incidents

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184 Id. § 71-1-8 (1963).
185 Hultquist v. People, 77 Colo. 310, 236 P. 995 (1925).
187 The term "guardian ad litem" should be dropped. A respondent should be assured of counsel, preferably the same attorney, not only during the course of a particular hearing, but during the entire period of his subjection to court order under the statute.
or psychological symptoms (e.g. reported delusions, erratic behavior, etc.) upon which the state relies.

(3) Attempt to determine what would be best for the client by interviewing family members, doctors, social workers, etc., and by exploring alternative courses of treatment or action.

(4) Insure that all aspects of an individual's case are seriously considered at the hearing and that the decision maker is apprised of all possible alternatives.

(5) If a client is committed, the attorney should continue to follow the case periodically to see that the client is receiving proper care and treatment.  

The low rate of compensation is a major reason for the ineffectiveness of counsel in mental health cases, yet to pay an attorney a fee comparable to that which he would receive in private practice would strain the public financial resources. A full-time salaried professional staff could avoid this problem. Counties with low rates of hospitalization and commitment activity could be joined together to form public defender districts.

A second benefit would result from a public mental patient defender system. The attorneys could easily be given special training in the mental health field. Further, their daily involvement in the total mental health process would undoubtedly make them more effective in the area than attorneys only infrequently working in the field.

H. Opportunity For Examination By an Independent Psychiatrist

The respondent should have the right to an examination by a psychiatrist not associated with any state agencies or institutions. The testimony or report of this expert should be accorded as much weight as those of the treating team.

I. Liberty and Rights Should Be Protected From Abrogation

Today an order of adjudication serves as blanket judgment of incompetency for all legal purposes. The present procedure is favored by many of the participants in the process precisely because of this feature. In their view it is nice to be able to wrap everything up in one proceeding. Yet, the normal tradition and practice of the law is the opposite. The law recog-

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189 See Appendix.
nizes that a person may be mentally incompetent for one purpose but not for another. For instance, an individual may be mentally incompetent to make a will but not possess that kind and degree of incompetency which would justify compulsory confinement.

The Colorado Supreme Court has already recognized that meanings of the term "mental incompetency" can differ in dissimilar situations by ruling that the fact that an individual has been adjudicated mentally incompetent is not necessarily conclusive on the question of testimonial, testamentary, and contractual capacity.190

Why should this fundamental legal fact not be recognized and implemented by the mental incompetency adjudication process? The prime function of the law is not to serve the convenience of those charged with its administration. This is especially true where the basic liberty and rights of human beings are at stake. The judicial, adjudication, and hospitalization proceedings should require the court to make specific findings concerning each right or portion of liberty which the respondent is alleged to be mentally incompetent to enjoy.

J. Indefinite Term Commitments Should Be Abolished.

Presently, when an individual is adjudicated and committed he is placed in the hands of institutional administrators and cut adrift from the legal process, which for all practical purposes, takes no further interest in him. A Colorado statute191 gives a respondent the right to communicate with an attorney and with the judge of the court. These statutorily prescribed rights have little meaning for the typical respondent who is of modest means and whose understanding of the legal system is not great. He becomes, in effect, a forgotten person as far as the legal system is concerned.

The implications of this fact may not presently be so horrifying in view of the current trend in Colorado toward the adoption of enlightened mental health treatment policies. Yet the day when hundreds of mental patients sat in gloomy, custodial isolation is not so remote in the experience of the state that the potential ability an involuntary commitment system possesses to inflict grief and injustice cannot be appreciated. Further, even in the most progressive and enlightened of mental health systems, pockets of insensitivity and neglect are bound to exist.

190 See cases cited in Appendix.
191 COLO. REV. STAT. ANN. § 71-1-23(2) (Supp. 1965).
It is imperative, therefore, that the legal system be obliged to demonstrate a continuing interest in those compulsorily placed in the custody of the mental health agencies. All such orders should be reviewable periodically, perhaps every three or four months, by the court. The public defender should be required to contact every respondent at the end of this same period to discuss his treatment with him, and also make an independent investigation (e.g. by interviewing the treating doctors, etc.) of his treatment and prognosis. The defender would be required to submit a report of his investigation to the court. At every such interval the respondent, by himself or through the public defender should be able to demand a court hearing, challenging either the confinement or custody *per se* or challenging the manner of treatment or confinement. This would, of course, not preclude the availability of court review between these particular dates if extraordinary circumstances warrant it.

K. Sensitivity Training

Most people probably have the impression that doctors, social workers, and others involved in the so-called service professions are, of necessity, more kind, patient, and sensitive than are ordinary persons. My experience in studying the involuntary commitment system and in other dealings with members of these professions leads me to conclude that a substantial number of these people are, if anything, more calloused and insensitive than laymen. This hardening process no doubt takes place over a long period of time and results from their prolonged and continuous exposure to all varieties of human misfortune.

After long exposure people stop appearing as individuals with special qualities and needs and become “types” to be treated in a cold, efficient, “professional” manner which is sometimes ineffectually concealed by a stereotyped mask of conviviality. The prospect of a fee encourages the doctor or lawyer to exhibit at least a mechanical concern for his paying patient or client, but he is likely to view those problem-ridden persons not likely to achieve this status as burdensome “cases” to be disposed quickly.

It is important that those who are involved in compulsory mental health procedures, therefore, be afforded frequent opportunities to better understand themselves and those with whom they work. They should not only be encouraged, if not required, to participate in courses which convey an intellectual
understanding of recent developments in the mental health field, but they should also take part in recently-devised "sensitivity" programs which are designed to give an individual a total and unified understanding of himself and others — both emotionally and intellectually.

L. The Role of the Medical Commission

If the medical commission is to be retained, its duties should be more specifically defined. Today, if the examples related in this paper can be taken as representative of statewide practice, medical commissions perform totally perfunctory roles, automatically recommending commitment for most of the individuals placed in front of them. Hearing procedures are frequently outrageously chaotic and evidentiary standards of any kind appear to be nonexistent.

The statutes should set out a procedural format for the conduct of commission hearings, if for no other reason than to infuse such proceedings with some measure of dignity. Some minimum evidentiary requirements should be imposed. Again, an interdisciplinary study would probably be necessary to establish these procedures and standards.

M. Modification of Voluntary Hospitalization Provision

The present voluntary hospitalization statute allows any hospital to detain a voluntarily admitted patient up to five days after he has filed a written request for release, if hospital officials believe that he is mentally ill or that he displays symptoms of mental illness or deficiency. An individual could be kept longer than five days since the statute excludes Saturdays, Sundays and holidays from the computation of the five-day period.

This power to detain is greater than that enjoyed by peace officers under the emergency detention statute. Under that statute an individual cannot be held for longer than twenty-four hours (Saturdays, Sundays and holidays are again excluded in computing the time) without a court order. Further, the peace officer must in good faith believe not only that the individual is mentally ill or mentally deficient, but also that he is dangerous to himself or others.

Clearly, the five-day "hold" and the written request for release requirements under the voluntary hospitalization statute are harsh, unnecessary measures which can only serve to dis-

192 Id. § 71-1-2(3)(d) (Supp. 1965).
193 Id. § 71-1-3(1) (1963).
courage voluntary hospitalization. The emergency detention provisions seem sufficient to handle a patient posing a threat to himself or others. Otherwise, if the hospital officials believe that a patient needs further compulsory treatment, they should be required to follow the provisions of the short term hospitalization statute without the benefit of a lengthy "hold" period exercised at their own discretion without judicial supervision.

N. Records and Statistics

It is clear from even a cursory observation of the present involuntary commitment process that the system is being used to deal with a wide variety of society's problems. Yet no records are presently available which show exactly what problems the individuals becoming subject to the system possess.

In order to gain a clear idea of what functions the system is presently performing, an accurate, statewide record of all hospitalization and commitment cases would be invaluable. These records should show precisely what problems the respondents possess (i.e., alcoholism, drug addiction, schizophrenia, etc.), and how they become subject to the process (i.e., who set the commitment process in motion—a family member, the housing authority, the welfare department, etc.).

With a better knowledge of the system, an intelligent policy evaluation of its operation could be made. A determination could be made as to which problems are suitable for the commitment and hospitalization process and which problems are not.

O. The Problems of the Aged

An extremely large number of elderly persons are adjudicated and committed under the present law. Sometimes an older person is adjudicated because he needs someone to handle his financial affairs.

Presently there are two ways in which an estate can be opened and a conservator appointed. Colo. Rev. Stat. Ann. § 153-9-2 (Supp. 1965) requires the court to appoint a conservator for an individual who is adjudicated mentally incompetent and has assets needing conservation. Colo. Rev. Stat. Ann. § 153-9-13 (Supp. 1965) establishes a voluntary estate procedure. Under the provisions of this statute an estate must be opened, and a guardian appointed, if a person files a verified petition for the appointment of a guardian with the court of jurisdiction in the county of his residence, or, if he is a non-resident, in the county where some of his property is located.
The petition must be accompanied by a written statement signed by a licensed, practicing physician which states that in the physician's opinion the petitioner was mentally competent at the time he signed the petition, but that by reason of old age, disease, physical infirmity, alcoholism, drug addiction, or some other cause he is not able to properly manage his estate and that the appointment of a guardian would be in his best interest.

In Denver this latter procedure is rarely counseled as an alternative to adjudication both because of the difficulty involved in obtaining a proper physician's statement and because the city attorneys generally prefer adjudication in order to facilitate confinement of the individual at a later date if this should appear necessary. A person may also be adjudicated for the additional reason that he needs institutional care and will not voluntarily enter a hospital or nursing home.

Presently, medical commission hearings involving elderly persons (referred to by mental health professionals as "geriatrics problems") are, if this can be possible, more perfunctory than those in which the respondents are younger people. Usually a son, daughter or other member of the family petitions for an adjudicatory hearing and then all of the participants in the process, including the guardian ad litem, cooperate to see that the goal of adjudication is reached as quickly and smoothly as possible.

The present procedure for handling the problems of the conservation of an aged individual's assets should be abolished because it serves no protective function for the subject. The same end could be reached by the adoption of a simpler and more economical procedure. Frequently, everyone, including the respondent himself, agrees that a conservator should be appointed, and the current cumbersome process constitutes a meaningless annoyance.

One approach which could be adopted would be to allow a family member or some other interested person to petition the court for the appointment of a conservator for an aged person whose mind is failing. Upon receipt of such a petition, it would be the duty of the mental health public defender, or an attorney appointed for this purpose, to investigate the matter, interview the individual for whom a conservatorship is sought, inform him of the legal nature of a conservatorship, and advise him of his right to a court hearing with representation by counsel, if he disagrees with the appointment of a conservator on his behalf. If he requests a hearing, the public
defender or some specially appointed qualified attorney should represent the individual in the same effective manner that an attorney would represent a client in private practice who desired to contest the appointment of a conservator on his behalf. The district or city attorney would have the duty of presenting the case for the conservatorship if he felt that it was warranted. The court would follow the same procedure and tests it presently applies in cases involving an individual's testamentary capacity or his capacity to contract.

This procedure would not necessarily need to be limited to the elderly. The statute could provide that a conservatorship could be set up for an individual regardless of age.

APPENDIX

THE LEGAL STATUS OF A MENTALLY INCOMPETENT INDIVIDUAL IN COLORADO

I. INTRODUCTION

The statutes do not clearly specify who is, for legal purposes, a mental incompetent. A definition of mental incompetence is found in *Colo. Rev. Stat. Ann.* § 153-1-1 (7) 1963, in the chapter dealing with wills and estates:

"Mental incompetent," "incompetent person," "incompetent," or "mentally ill person" denotes a person who has been adjudicated mentally ill or mentally deficient, or who by the laws of this state is designated as a lunatic, insane person, incompetent, mental incompetent, incapable or feeble-minded, or who has been found in an appropriate proceeding to be unable or unfit to manage his own property.

*Colo. Rev. Stat. Ann.* § 71-1-23 (1) (1963) seems to imply that an individual does not become legally mentally incompetent before he is adjudicated mentally ill or deficient:

Rights of respondent. — (1) Every respondent shall be entitled to humane care and treatment. No respondent shall lose any civil rights nor forfeit any legal status unless he has been adjudicated mentally ill or mentally deficient. Upon the entry of any order of competency, any adjudicated respondent shall be restored and entitled to all civil rights and legal status of any other mentally competent person.
II. A Mental Incompetent Enjoys No Immunity From Liability for Tortious Acts of Negligence

In some areas a mentally incompetent individual, adjudicated or not adjudicated, is treated no differently from an ordinary citizen. For instance, he is not relieved of liability for his negligent acts by virtue of incompetency. In the case of Johnson v. Lambotte,¹⁹⁴ the Colorado Supreme Court followed the majority rule¹⁹⁵ and declared that an incompetent person is held to the same standard of care as a person of sound mind as far as tortious negligence is concerned. The court intimated that a different rule might apply with regard to torts requiring the elements of intent, or malice. This case involved a woman who had left the mental hospital where she was confined under a hospitalization order, drove a car, and became involved in an accident. Shortly after this time, she was adjudicated mentally incompetent.

In many areas, however, the Colorado law treats a mental incompetent in a special way. Sometimes he is stripped of rights and powers which most legally competent persons (barring certain special groups such as felons) are allowed to exercise. In some other areas the law affords a mental incompetent greater protection than it gives a competent individual. In some cases, the imposition of the disabilities and granting of these privileges depends on whether an individual has been formally adjudicated incompetent, but in many cases it does not.

III. Disabilities

A. Voting


No person under guardianship, non compos mentis, or insane shall be entitled to register or to vote at any general, primary or special election.

B. Disqualification as a Witness

Colo. Rev. Stat. Ann. § 154-1-6(1) (1963) provides: "(a) The following persons shall not be witnesses: (b) those who are of unsound mind at the time of their production for examination . . . ." The Colorado Supreme Court has ruled that the question of whether an individual is of sound mind under this statute is for the determination of the trial court in its sound discretion, and that such a determination will not be over-

¹⁹⁵ See 44 C.J.S. Insane Persons § 122 (1945).
turned, except where a clear abuse of discretion is shown. Thus the fact that a prospective witness has been adjudicated mentally incompetent is not by itself determinative of the question of soundness of mind.

C. Testamentary Capacity

_Colo. Rev. Stat. Ann._ § 153-5-1 (1963) requires a person to be of "sound mind and memory" to execute a will. The Colorado Supreme Court has ruled that an adjudication of incompetency by itself is not necessarily determinative of an individual's testamentary capacity. Instead, the supreme court has declared the test of testamentary capacity to be a positive showing that the testator understood the nature and consequences of his act.

D. Motor Vehicle Operator's License

_Colo. Rev. Stat. Ann._ § 13-4-22(1) (Supp. 1965) requires the motor vehicle bureau to immediately revoke an individual's operator's or chauffeur's license when he is adjudicated incompetent. _Colo. Rev. Stat. Ann._ § 13-4-1(5) (1963), however authorizes the department of revenue to issue a license containing any restrictions which may be desirable to insure the proper operation of a motor vehicle to any person whose license has been revoked as a result of an adjudication of incompetency. For an incompetent to receive such a restricted license, a certified copy of the order of a medical commission approved by the court adjudicating the individual mentally incompetent must be filed with the department. The order must state that the individual's mental condition as of the date of the finding of incompetency will not impair in any respect his ability to safely operate a motor vehicle on state highways. Before authorizing such a license, the statute requires the department to make an examination of an unspecified nature.

E. Change of Beneficiary on an Insurance Policy

In the case of _Crain v. Electrical Workers Benefit Association_, the Colorado Supreme Court applying the rule used
in most jurisdictions decided that an attempted change of beneficiary by a mental incompetent is ineffective.

F. Adjudication of Incompetency as a Ground for Divorce or Separate Maintenance

Colo. Rev. Stat. Ann. § 46-1-1(1) (i) (1963) states that an individual may sue for divorce on the ground that his spouse has been adjudicated mentally ill or deficient within the previous three years. However, the adjudicated spouse must not have been restored to competency before the entry of the divorce decree. Even though a divorce may be granted, a husband will not be relieved of his duty to support his incompetent wife unless she has sufficient means to support herself. Colo. Rev. Stat. Ann. § 46-2-1(b) (1963) makes all grounds for divorce sufficient bases in an action for separate maintenance and therefore to be deemed mentally ill or deficient will fulfill this requirement.

G. Mental Incompetency as a Ground for Annulment

Colo. Rev. Stat. Ann. § 46-3-1(g) (1963) makes a marriage voidable where "one or both of the parties were mentally incapable of giving voluntary consent to the marriage." Here again an adjudication of incompetency is not conclusive, but serves only as evidence of the requisite mental incapacity.201

IV. PRIVILEGES, IMMUNITIES AND SPECIAL PROTECTIVE MEASURES

A. Conservatorship

Colo. Rev. Stat. Ann. § 153-9-2(1) (Supp. 1965) requires the court of jurisdiction to appoint a conservator for an individual adjudicated mentally ill, if he is a resident in the county or has property in the county which must be conserved, and if a conservator has not already been appointed by another Colorado court.

Colo. Rev. Stat. Ann. § 153-9-4 (Supp. 1965) allows a district or probate court to appoint a conservator for a non-resident of Colorado adjudicated mentally ill, who owns property in the state regardless of whether a conservator or other fiduciary has been appointed in his state or county of residence.

An involuntary conservatorship contains elements of both a disability and of a privilege or special protective measure.

On the one hand, the mental incompetent is divested of the right to control his financial and general affairs as he sees fit. But at the same time, the law affords his assets special protection by placing them in the hands of a presumably competent fiduciary and placing liability on the estate rather than on the incompetent personally.\textsuperscript{202}

B. Execution of a Judgment Against an Incompetent

\textit{Colo. Rev. Stat. Ann.} \S\ 153-12-5(2) (1963) prohibits execution on a judgment against a mental incompetent and provides that the judgment must be filed as a claim against his estate. \textit{Colo. Rev. Stat. Ann.} \S\ 153-12-3 (1963) lists the priorities of claims against a mental incompetent’s estate.

C. Statute of Limitations

\textit{Colo. Rev. Stat. Ann.} \S\ 87-1-17 (1963) provides that statutes of limitation do not run against an individual who is insane at the time the cause of action accrues. The statute does not begin to run until after the individual has been restored to competency.\textsuperscript{203} The Colorado Supreme Court has held that an adjudication of incompetency is not necessary for this statute to operate.\textsuperscript{204}

D. Contracts

\textit{Colo. Rev. Stat. Ann.} \S\ 71-1-21 (1963) provides that “all contracts, agreements and credits with or to any insane person, shall be absolutely void as against such person, his heirs, or personal representatives; but persons making such contracts or agreements with any insane person shall be bound thereby at the election of his conservators.”\textsuperscript{205} The court has yet to be faced with the problem of interpreting this statute in a case where an individual had already been adjudicated incompetent prior to entering a contract.

The question of whether an individual was incompetent at the time of the making of the contract so as to relieve him from liability under the contract is an issue to be resolved on the facts of each individual case. The test to be applied is that of whether the alleged incompetent was incapable of under-

\begin{itemize}
\item \textsuperscript{202} See generally \textit{Ellis v. Colorado National Bank}, 86 Colo. 391, 282 P. 255 (1929).
\item \textsuperscript{203} Other statutes may place limitations on this provision. See \textit{Colo. Rev. Stat. Ann.} \S\S\ 87-2-3; 118-7-12; 118-7-13; 137-10-4 (1963).
\item \textsuperscript{204} \textit{Browne v. Smith}, 119 Colo. 469, 205 P.2d 239 (1949).
\item \textsuperscript{205} The Colorado Supreme Court has ruled that this statute does not necessarily apply to an individual found not guilty by reason of insanity in a criminal proceeding. See \textit{Davis v. Colorado Kenworth Corp.}, 156 Colo. 98, 396 P.2d 958 (1964).
\end{itemize}
standing and appreciating the extent and effect of business transaction in which he engaged.206

E. Conveyances

One early case held an attempted conveyance by an individual already adjudicated mentally incompetent at the time of the conveyance to be absolutely void. 207 The precise question of the validity of a conveyance by one adjudicated mentally incompetent at the time of the conveyance has not arisen in modern cases. In cases where mental incompetency has been asserted in an effort to invalidate a deed, the court has decided such cases according to their particular facts by applying the familiar test of whether the allegedly incompetent grantor understood the nature and extent of the transaction.208


207 Roher v. Darrow, 66 Colo. 463, 182 P. 13 (1919).