#30.300 8/30/77

First Supplement to Memorandum 77-54

Subject: Study 30.300 - Guardianship-Conservatorship Revision

Attached to this memorandum is the balance of the staff draft of the new guardianship-conservatorship statute. The attached material should be inserted preceeding the material already in your green binder previously sent.

Still in preparation by the staff is the preliminary portion of the tentative recommendation. This portion will explain the important changes in existing law proposed by the tentative recommendation. The tentative recommendation also will contain a second proposed bill that will set forth the conforming changes in other statutory provisions. This bill will be drafted after the basic statute has been revised to reflect the decisions at the September meeting and to eliminate inconsistencies and technical defects.

General Comment on Staff Draft

The preparation of the staff draft for the September meeting proved to be a substantial undertaking. In order to provide you with portions of the draft for your study and review prior to the meeting, the staff reproduced portions of the draft before other portions were drafted. The staff has not yet made a final editorial review of the entire draft. Some decisions made in drafting later portions of the draft require corresponding adjustments in other portions. For example, Part 1 of the draft contains a number of definitions and general provisions which will permit us to omit comparable definitions and provisions in various sections of the draft. We are aware of inconsistencies which we will also eliminate. Our consultant, Garrett Elmore, has devoted a great deal of time to the careful review of portions of the draft, and we have incorporated many of his suggestions in the draft. He is now reviewing additional portions of the draft, and we will take his suggestions into account when we prepare a revised draft after the September meeting. We also plan to expand and improve the Comments. Mr. Elmore has been of considerable assistance in assuring that the Comments note any deviations from the language of existing statutory provisions.

Procedure at September Meeting

At the September meeting, the staff is hopeful that the Commission will carefully review each section of the draft. A careful review not only will provide background on the substance of the law but also should bring to light any defects in the draft statute. The Comments to the individual sections purport to point out any changes from the existing law. In some cases, where there are problems or policy issues not well highlighted by the Comments to the individual sections, the staff has added a "Note" following the section for Commission consideration.

Schedule on This Project

If possible, the staff believes that the Commission's recommendation on this subject should be submitted to the 1978 legislative session. If the recommendation is to be submitted to the 1978 session, it should be approved for printing at the November 1977 meeting. The printed pamphlet will be distributed for review and comment, and any required revisions can be made by amendment of the bills introduced in 1978. The most important factor in determining whether this is possible is whether the special subcommittee of the State Bar Guardianship and Conservatorship Committee believes that this schedule is a reasonable one. We would not want to approve our recommendation for printing unless it meets the approval or substantial approval of the State Bar Subcommittee.

With the approval of the Commission, the staff proposes to send copies of the material prepared for the September meeting to the State Bar Subcommittee in the form it was considered at the September meeting and without further revision. We would request that the subcommittee review the material to determine (1) whether it is reasonable to schedule this recommendation for submission to the 1978 session and (2) whether individual members of the committee have any comments on particular provisions that they believe should be given further study by the staff and the Commission. The State Bar Subcommittee has already been assigned the task of reviewing a proposal made by another source to revise the provisions of existing law relating to community and homestead property of incompetent persons (corresponding to Chapter 5 of Part 6 of our draft), and it would be useful to get our draft into their

hands expeditiously. In addition, we would like to send the members of the subcommittee all materials sent to the Commission members at the same time we send them to the Commission members.

Material Relevant to Policy Issues Presented by Draft

Also attached to this memorandum is a copy of the recent decision of the California Supreme Court in the case of In re Roger S., 19 Cal.3d 655 (1977). The case held that, in connection with civil commitment to a mental health facility, a minor over the age of 14 has an independent right to assert the protections of the due process clause. The staff has, therefore, drafted Section 2403 to read in part: "No person over the age of 14 for whom a guardian or conservator [of the person] has been appointed shall be placed in a mental health treatment facility under the provisions of this division against his or her will." Existing law provides: "No person for whom a . . . [guardian or conservator] of the person has been appointed shall be placed in a mental health treatment facility against his will." Sections 1500, 1851. Although Sections 1500 and 1851 literally apply to minors of any age as well as adults, the language was enacted as part of the Lanterman bill (Assembly Bill 1417) of 1976 which was intended to provide various procedural safeguards for adults. It is, therefore, uncertain whether the staff draft of proposed Section 2403 extends or restricts the application of Section 1500. Section 2403 presents an important policy issue for Commission resolution.

A similar question is presented by the staff proposal not to continue Sections 1663 and 1664 (Uniform Veterans' Guardianship Act) relating to commitment to a Veterans Administration facility. These sections are superseded by the Lanterman-Petris-Short Act. See, e.g., Welf. & Inst. Code §§ 4123, 5008(c), 5358, 5366.1. The substance of Sections 1663 and 1664 is set forth in the green sheet attached to this memorandum.

Respectfully submitted,

John H. DeMoully
Executive Secretary

[Crim. No. 19558. July 18, 1977.]

In re ROGER S., a Minor, on Habeas Corpus.

SUMMARY

The Supreme Court, in habeas corpus proceedings by a 14-year-old seeking release from a state mental hospital to which he was admitted on application of his mother, denied the writ without prejudice to a renewed application for relief in the superior court. The court held that although the personal liberty interest of a minor is less comprehensive than that of an adult, and a parent or guardian not only may but must curtail that interest in the proper exercise of the obligation to guide the child's development, in the area of admission to a state hospital a minor of 14 years or more possesses rights which may not be waived by the parent or guardian. Among these rights is the right guaranteed under U. S. Const., 14th Amend., and Cal. Const., art. I, § 7(b) to procedural due process in determining whether the minor is mentally ill or disordered, and whether, if the minor is not gravely disabled or dangerous to himself or others as a result of mental illness or disorder, the admission sought is likely to benefit him.

The court further held that the procedures established by the Department of Health to implement the authorization of Welf. & Inst. Code, § 6000, subd. (b), for admission of minors to state hospitals, denies minors 14 years of age and older due process, rejecting the contention that the requirement of prior screening and referral by a community mental health professional and review by state hospital personnel satisfied due process demands. The court held in light of the drastic invasion of the minor's right to personal liberty and the potential damage that may accompany an erroneous diagnosis and placement of a minor child in a mental hospital, the failure of established procedures to accord the minor an opportunity for a precommitment hearing before a neutral factfinder could not be justified. The court delineated the due process procedures required to insure the child a fair opportunity to establish

that he is not mentally ill or disordered, or that even if he is, confinement is unnecessary, and held that neither trial by jury nor a judicial hearing was required. The court concluded that its holding did not require the release of all minors 14 years of age or older now confined in state hospitals, although they were entitled to a hearing, if they so requested, on the propriety of their continued confinement. (Opinion by Wright, J.,* with Tobriner, Acting C. J., Sullivan, J.,† and Mosk and Richardson, JJ., concurring. Separate dissenting opinion by Clark, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Iompetent Persons § 6—Commitment—Minors—Due Process.**—Although the personal liberty interest of a minor is less comprehensive than that of an adult, and a parent or guardian not only may, but must curtail that interest in the proper exercise of the obligation to guide the child's development, in the area of admission to a state mental hospital, a minor of 14 years or more possesses rights which may not be waived by the parent or guardian. Among these rights is the right guaranteed under U.S. Const., 14th Amend., and Cal. Const., art. I, § 7(b), to procedural due process in determining whether the minor is mentally ill or disordered, and whether, if the minor is not gravely disabled or dangerous to himself or others as a result of mental illness or disorder, the admission sought is likely to benefit him.

(2) **Constitutional Law § 104—Due Process—Operation and Scope—Minors—Personal Liberty.**—Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions. A principal ingredient of personal liberty is freedom from bodily restraint, and minors as well as adults are "persons" under the Constitution who are entitled to the protection of that right.

*Retired Chief Justice of the Supreme Court sitting under assignment by the acting Chairman of the Judicial Council.

†Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

(3) **Constitutional Law § 104—Due Process—Operation and Scope—Minors.**—The liberty interest of a minor is not coextensive with that of an adult, and even when there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. Parents have powers greater than that of the state to curtail a child's exercise of the constitutional rights he may otherwise enjoy, since a parent's own constitutionally protected "liberty" includes the right to bring up children. As against the state, this parental duty and right is subject to limitation only if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

(4) **Constitutional Law § 104—Due Process—Operation and Scope—Minors.**—A minor is entitled to the protections of due process whenever the state itself initiates action, whether civil or quasi-criminal, to deprive a minor of his liberty.

(5) **Parent and Child § 4—Custody and Control—Commitment to Mental Hospital.**—No interest of the state or a parent sufficiently outweighs the liberty interest of a minor who has reached the age of 14, and thus entitled to independently exercise his right to due process, to permit the parent to deprive him of that right by committing the minor to a state mental hospital against the minor's will.

(6a-6c) **Incompetent Persons § 6—Commitment—Minors—Due Process.**—The procedures established by the Department of Health to implement the authorization of Welf. & Inst. Code, § 6000, subd. (b), for the admission of minors to state mental hospitals, which involve prior screening and referral by a community mental health professional and review by state hospital personnel, denies minors 14 years of age and older due process, in light of the drastic invasion of the minor's right to personal liberty and the potential damage that may accompany an erroneous diagnosis and placement of a minor child in a hospital, and in view of the failure to accord the minor an opportunity for a precommitment hearing before a neutral factfinder. However, all of the procedures required by the Lanterman-Petris-Short Act (Welf. & Inst. Code, §§ 5000-5401), applicable to the admission of adults and juvenile wards to state

hospitals, are not mandated by due process in the case of minors admitted at the initiative of a parent.

[See **Cal.Jur.2d**, Insane and Incompetent Persons, § 173; **Am. Jur.2d**, Incompetent Persons, § 39 et seq.]

(7a, 7b) **Constitutional Law § 90—Equal Protection—Classification—Essential and Nonessential Characteristics—Material Differences in Regulated and Unregulated Classes—Minors—Commitment to Mental Hospital.**—Equal protection does not preclude placement of mentally ill minors in state operated mental hygiene facilities on the initiative of their parents without a showing they are either gravely disabled or dangerous to themselves, as is required for adults and wards of the juvenile court. While the liberty interest of an adult may sufficiently outweigh the state's interest in promoting optimal mental health that the state may not confine a nondangerous adult solely for the purpose of treating that person's mental illness, it does not follow that a nondangerous minor is denied equal protection if his parent is permitted to obtain treatment for the minor's mental illness or disorder by such placement, since the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. Moreover, admissions of such a minor are distinguishable from those of court wards since the placement of the child in the hospital is initiated by the parent.

(8) **Constitutional Law § 94—Equal Protection—Bases of Classification—Age.**—A minor committed to a mental hospital by his parents was not similarly situated with adults for purposes of equal protection analysis, in view of the facts that the liberty interest of a minor is qualitatively different than that of an adult, being subject both to reasonable regulation by the state to an extent not permissible with adults, and to an even greater extent to the control of the minor's parents.

(9) **Constitutional Law § 112—Substantive Due Process—Protection From Arbitrary Government Action—Commitment.**—Due process forbids the arbitrary deprivation of liberty, and, in the context of commitment to a mental hospital, requires at least that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

(10) **Incompetent Persons § 6—Custody, Control and Protection—Commitment—Minors—Due Process—Requirements.**—When the state participates in deprivation of a person's right to personal liberty, even a conditional liberty, due process requires that the facts justifying that action be reliably established. Accordingly, before a minor of 14 years of age or over, may be committed to a state mental hospital on the initiative of his parent, due process requires that he receive a hearing after adequate written notice of the basis for the proposed action; an opportunity to appear in person and to present evidence in his own behalf; the right to confrontation by, and the opportunity to cross-examine, adverse witnesses; a neutral and detached decision maker; findings by a preponderance of the evidence; a record of the proceeding adequate to permit meaningful judicial or appellate review; and that counsel be provided for the minor. However, neither due process or equal protection mandates a jury trial or a judicial hearing.

(11) **Incompetent Persons § 6—Commitment—Minors—Due Process—Evidence.**—Because proceedings to admit a mentally ill or disordered minor to a state mental hospital are within the parental right to custody and control of his child, whereas the rights of the child and the interest of the state are limited to preventing hospitalization that may be harmful to the physical or mental health of the child, the reasonable doubt standard of proof is inapplicable, and the lesser standard of proof by a preponderance of the evidence satisfies the due process requirements to which a child of 14 years of age or older is entitled.

(12) **Incompetent Persons § 6—Commitment—Minors.**—The Supreme Court's holding that procedures established by the Department of Health to implement the authorization of Welf. & Inst. Code, § 6000, subd. (b), for admission of minors to state hospitals, denies minors 14 years of age and older due process, does not require the release of all such minors presently confined in state hospitals, although they are entitled to a hearing, if they so request, on the propriety of their continued confinement, and may seek relief by petition for writ of habeas corpus. In such proceedings, if the court finds after a hearing that the minor is not mentally ill or disordered, he must be released, and if the court finds that the minor is mentally ill or disordered, but is not gravely disabled or dangerous to himself, the minor is entitled to his release only if the court also

finds that treatment in the state hospital is not reasonably likely to be of benefit to him.

COUNSEL

Paul N. Halvonik, State Public Defender, Clifton R. Jeffers, Chief Assistant State Public Defender, Ezra Hendon, Deputy State Public Defender, William C. Connel, Public Defender, and Thomas Petersen, Deputy Public Defender, for Petitioner.

Robert L. Walker and Peter B. Sandmann as Amici Curiae on behalf of Petitioner.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Edward P. O'Brien, Assistant Attorney General, Robert R. Granucci and Ronald E. Niver, Deputy Attorneys General, for Respondent.

OPINION

WRIGHT, J.*—By petition for writ of habeas corpus Roger S., a 14-year-old minor, seeks release from the Napa State Hospital to which he was admitted on May 10, 1976, on application by his mother made pursuant to Welfare and Institutions Code section 6000, subdivision (b).[1] Petitioner asserts that his confinement is unlawful, arguing that section 6000, subdivision (b)[2] does not afford procedural due process to minors

*Retired Chief Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

[1]Unless otherwise specified all references are to the Welfare and Institutions Code.

[2]Section 6000 provides: "Pursuant to the rules and regulations established by the State Department of Health, the medical director of a state hospital for the mentally disordered or mentally retarded may receive in such hospital, as a boarder and patient, any person who is a suitable person for care and treatment in such hospital, upon receipt of a written application for the admission of the person into the hospital for care and treatment made in accordance with the following requirements:

"(a) In the case of an adult person the application shall be made voluntarily by the person at a time when he is in such condition of mind as to render him competent to make it or, if he is a conservatee with a conservator of the person or persons and estate . . . by his conservator.

"(b) In the case of a minor person, the application shall be made by his parents, or by the parent, guardian or other person entitled to his custody to any of such mental

"voluntarily" admitted thereunder. He further asserts that section 6000, subdivision (b) denies equal protection to such minors because it permits their admission even though they are neither "gravely disabled" nor dangerous to themselves or others, a standard which applies to minor wards of the court, and denies them the procedural protections to which wards are entitled under the Lanterman-Petris-Short Act. (§§ 5000-5401; *In re Michael E.* (1975) 15 Cal.3d 183 [123 Cal.Rptr. 103, 538 P.2d 231].)

(1) We have concluded that although the personal liberty interest of a minor is less comprehensive than that of an adult, and a parent or guardian not only may but must curtail that interest in the proper exercise of his obligation to guide the child's development, in the area of admission to a state hospital a minor of 14 years or more possesses rights which may not be waived by the parent or guardian. Among these rights is the right guaranteed under the Fourteenth Amendment to the United States Constitution, and article I, section 7(a) of the California Constitution, to procedural due process in determining whether the minor is mentally ill or disordered, and whether, if the minor is not gravely disabled or dangerous to himself or others as a result of mental illness or disorder, the admission sought is likely to benefit him.[3] We shall explain below the basis for our conclusion and, as guidance to the Legislature in formulating new statutory procedures to protect these minors against possible arbitrary admission to mental hospitals, we shall outline those procedures which will afford at least those minimum protections to which they are constitutionally entitled.

The Liberty Interest of Minors

(2) "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*People* v. *Olivas* (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55, 551 P.2d 375].) It is beyond dispute that a principal ingredient of personal liberty is "freedom from bodily restraint" (*Meyer*

hospitals as may be designated by the Director of Health to admit minors on voluntary applications. . . ."

[3]We have no occasion in the instant case to consider the lawfulness of the section 6000, subdivision (b) admission procedure as applied to children under 14 years of age, nor do we consider here whether parents may compel minors 14 years of age or older to submit to medical and/or psychiatric treatment in a closed private facility, or on an outpatient basis.

v. *Nebraska* (1923) 262 U.S. 390, 399 [67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 A.L.R. 1446]) and that minors as well as adults are "persons" under the Constitution who are entitled to the protection of that right. (*Tinker* v. *Des Moines School Dist.* (1969) 393 U.S. 503, 511 [21 L.Ed.2d 731, 740, 89 S.Ct. 733].) Only last term the United States Supreme Court reaffirmed the right of minors to constitutional rights and protection. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." (*Planned Parenthood of Cent. Mo.* v. *Danforth* (1976) 428 U.S. 52, 74 [49 L.Ed.2d 788, 808, 96 S.Ct. 2831, 2843].)

(3) It is equally well established, however, that the liberty interest of a minor is not coextensive with that of an adult. "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.' " (*Ginsberg* v. *New York* (1968) 390 U.S. 629, 638 [20 L.Ed.2d 195, 203, 88 S.Ct. 1274]; *Prince* v. *Massachusetts* (1944) 321 U.S. 158, 170 [88 L.Ed. 645, 654-655, 64 S.Ct. 438].) Parents, of course, have powers greater than that of the state to curtail a child's exercise of the constitutional rights he may otherwise enjoy, for a parent's own constitutionally protected "liberty" includes the right to "bring up children" (*Meyer* v. *Nebraska, supra,* 262 U.S. 390, 399 [67 L.Ed. 1042, 1045]), and to "direct the upbringing and education of children." (*Pierce* v. *Society of Sisters* (1925) 268 U.S. 510, 534-535 [69 L.Ed. 1070, 1077-1078, 45 S.Ct. 571, 39 A.L.R. 468].) As against the state, this parental duty and right is subject to limitation only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." (*Wisconsin* v. *Yoder* (1972) 406 U.S. 205, 234 [32 L.Ed.2d 15, 35, 92 S.Ct. 1526].)

(4) It is settled that a minor is entitled to the protections of due process whenever the state itself initiates action, whether civil or quasi-criminal, to deprive a minor of his liberty. (*In re Gault* (1967) 387 U.S. 1 [18 L.Ed.2d 527, 87 S.Ct. 1428]; *Goss* v. *Lopez* (1975) 419 U.S. 565, 574 [42 L.Ed.2d 725, 734-735, 95 S.Ct. 729]; *In re Winship* (1970) 397 U.S. 358, 367 [25 L.Ed.2d 368, 377, 90 S.Ct. 1068]; *In re Arthur N.* (1976) 16 Cal.3d 226 [127 Cal.Rptr. 641, 545 P.2d 1345].) We have not had occasion heretofore, however, to consider whether the minor may assert the same or similar rights when a parent already entitled to his custody and control initiates the action in the exercise of the parent's responsibil-

ity to obtain for the minor that care which the parent reasonably believes necessary to the proper upbringing of his child.

Petitioner assumes, and respondent does not dispute, that the detention of Roger in a state hospital is "state action," and that the state, albeit at the behest of Roger's mother, is therefore a significant participant in depriving Roger of the greater personal liberty which he would have outside the hospital. Respondent also recognizes, as he must, that even a conditional liberty interest, such as that of a minor, is entitled to the protections of due process when the state is involved to any significant degree in its dimunition. (Cf. *Morrissey* v. *Brewer* (1972) 408 U.S. 471, 484 [33 L.Ed.2d 484, 496, 92 S.Ct. 2593].) The parties do not agree, however, on what process is due, nor do they address themselves to the question of a parent's power to waive or otherwise relinquish his child's due process rights. We shall address the latter question first.

The Extent of Parental Power

If, within his power to direct his child's upbringing, a parent may place the child in a state operated mental hospital and require him to remain there, just as he may place the child in a public hospital for treatment of a physical condition, it follows that he may waive those due process rights that the child might assert if the state sought the hospitalization. As noted above, we have concluded that as to minors 14 years of age or older, the parental power is not this comprehensive. The consequences of confining a person, minor or adult, involuntarily in a mental hospital are quite different and impinge much more directly on the liberty interest of the patient than does confinement for treatment of physical illness. Not only is there physical restraint, but there is injury to protected interests in reputation (see *Goss* v. *Lopez*, *supra*, 419 U.S. 565, 574 [42 L.Ed.2d 725, 734-735]; *Wisconsin* v. *Constantineau* (1971) 400 U.S. 433, 437 [27 L.Ed.2d 515, 519, 91 S.Ct. 507]), an interest in not being improperly or unfairly stigmatized as mentally ill or disordered. (*People* v. *Burnick* (1975) 14 Cal.3d 306, 321 [121 Cal.Rptr. 488, 535 P.2d 352].) Additionally, we note again the uncertainties in psychiatric diagnosis and the divergence of expert views (*People* v. *Burnick*, *supra*, 14 Cal.3d 306, 326) which render the possibility of mistake significantly greater than in diagnosis of physical illness. We are not alone in recognizing these uncertainties. (See *O'Connor* v. *Donaldson* (1975) 422 U.S. 563, 579 [45 L.Ed.2d 396, 409, 95 S.Ct. 2486], conc. opn. of Burger, C. J.) The serious consequences attendant upon involuntary commitment of a minor as a mentally ill or disordered person, and the significant potential for error

in diagnosis convinces us that a minor who is mature enough to participate intelligently in the decision to independently assert his right to due process in the commitment decision must be permitted to do so.

We recognize that permitting the child to independently assert his right does to some extent conflict with parental authority, but a substantial state interest justifies recognition of the minor's right. The United States Supreme Court, in confirming the right of a parolee to due process in proceedings to revoke parole, recognized a similar interest. "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole .... And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." (*Morrissey* v. *Brewer, supra,* 408 U.S. 471, 484 [33 L.Ed.2d 484, 496].) Here, too, society has an interest in the future development of the child, in avoiding diagnosis and/or commitment based on erroneous information and evaluation thereof, and in assuring the child fair treatment. An erroneous conclusion by a parent that his child is mentally ill or in need of treatment in a closed mental hospital facility might well "jeopardize the health or safety of the child, or have a potential for significant social burdens," factors recognized by the United States Supreme Court as justifying a limitation on parental authority. (*Wisconsin* v. *Yoder, supra,* 406 U.S. 205, 234 [32 L.Ed.2d 15, 35].)

The therapeutic importance of granting due process to juveniles in commitment proceedings cannot be overlooked. Studies "suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." (*In re Gault, supra,* 387 U.S. 1, 26 [18 L.Ed.2d 527, 545].)

Neither the state, nor the parent, has an interest in committing a child to a state mental hospital for care and treatment if the child is not in need of treatment or if treatment can be provided without so drastically curtailing the freedom of the child. Recognition of the child's right to demand due process in the proceedings leading to commitment does not therefore impermissibly impinge on the parent's right to control the upbringing of his child.

Nor would such recognition of the child's right to due process in proceedings to admit him to a state mental hospital necessarily weaken the family unit. The contrary may be true. Rejecting a similar argument in *Planned Parenthood of Cent. Mo.* v. *Danforth, supra,* 428 U.S. 52 [49 L.Ed.2d 788, 96 S.Ct. 2831, 2844], the Supreme Court suggested that conditioning a minor's right to an abortion on parental consent by allowing the parent to overrule the minor's decision would not strengthen the family unit or enhance parental authority if the parent and the minor are "so fundamentally in conflict." Here too, the parent and petitioner are in conflict, but here it is the minor who wishes to return to and the parent who would remove the minor from the family unit. A decision that petitioner is indeed in need of treatment for mental illness or disorder that can best be given in a hospital, fairly made after proceedings in which petitioner has been afforded due process, may well help him to accept the need for and thus be more receptive to treatment. If, on the other hand, it appears that the minor is not mentally ill or disordered, or that treatment can be given without removing him from the home, the family unit may be strengthened. Indeed, the Supreme Court has suggested that a court may have a duty to explore possible alternatives to the involuntary commitment of a juvenile, citing with apparent approval *Lake* v. *Cameron* (D.C.Cir. 1966) 364 F.2d 657 [124 App.D.C. 264], which arose in the context of a mentally ill adult. (*In re Gault, supra,* 387 U.S. 1, 28, fn. 41 [18 L.Ed.2d 527, 546].)

(5) We conclude, therefore, that no interest of the state or of a parent sufficiently outweighs the liberty interest of a minor old enough to independently exercise his right to due process to permit the parent to deprive him of that right.

Inasmuch as petitioner is 14 years of age we need not consider whether there may be circumstances in which younger children may also be entitled to assert their right to due process independently when opposed to a parental decision to institutionalize the child. We are persuaded, however, that 14 years is the appropriate age at which such rights must be recognized. In affirming that minors have fundamental constitutional rights that the state must respect, the Supreme Court has also emphasized the responsibility of minors to respect their obligations to the state. (*Tinker* v. *Des Moines School Dist., supra,* 393 U.S. 503, 511 [21 L.Ed.2d 731, 740].) Traditionally, and modernly by statute, minors have been presumed competent to accept responsibility for criminal acts at age 14. (Pen. Code, § 26; *In re Gladys R.* (1970) 1 Cal.3d 855, 863-864 [83 Cal.Rptr. 671, 464 P.2d 127].) It would be anomalous indeed if they were

not also presumed to have sufficient capacity to exercise due process rights at that age.[4]

The Demands of Due Process and Equal Protection

(6a) Respondent contends that the existing procedures for "voluntary" admission of minors to state hospitals afford due process because no minor is admitted to a state hospital unless he has first been screened and referred by a local agency in accordance with section 5651, subdivision (f).[5] Respondent alleges that at Napa State Hospital this requirement is met when a designated "Community Mental Health Professional" screens the child to "insure that hospitalization is necessary" and ascertains if "appropriate" placement is available in the community, in which case no referral is made. Following a decision to refer a minor for hospitalization a representative of the Community Mental Health Clinic telephones a counterpart at the state hospital and relates the "clinical picture of the minor." If the staff at Napa State Hospital believes the minor is "appropriate for treatment in our program," more clinical material is requested and an admission date is arranged.

Respondent concedes that if the state admitted a child to a state mental hospital without "prior approval of a disinterested and competent third party" the procedure would be constitutionally suspect, but argues that the requirement of prior screening and referral by a community mental health professional only after determination that no community placement is available, and the review by state hospital personnel to assure that admission of the minor to the hospital program is "appropriate" fully satisfies the demands of due process.

Petitioner, on the other hand, claims not only that due process entitles him to all of the substantive and procedural rights extended to adults and minor wards of the court, but that failure to accord him equivalent rights

[4]Increasing legislative recognition is also being accorded to the capacity of minors to participate intelligently in decisions affecting their lives. (See, e.g., § 700; Civ. Code, §§ 34.5, 34.6, 225, 4600; Prob. Code, § 1406.)

[5]Section 5650, a part of the Short-Doyle Act (§ 5600 et seq.) requires each county to submit annually to the director of health a plan for community mental hygiene services. Section 5651 specifies the matters to be included in the plan and provides following subdivision (f): "No mentally disordered person shall be admitted to a state hospital prior to screening and referral by an agency designated by the county Short-Doyle plan to provide this service."

denies him equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution and article I, section 7(b) of the California Constitution. The rights to which petitioner claims to be entitled are those accorded under the Lanterman-Petris-Short Act for evaluation and treatment of mentally disordered persons which we held in *In re Michael E., supra,* 15 Cal.3d 183, are applicable to juvenile court wards.[6] He would include the substantive right not to be involuntarily hospitalized without a determination that he is gravely disabled[7] or dangerous to himself or others as a result of mental disorder,[8] and the procedural rights to counsel, to notice and judicial hearing, to confrontation and cross-examination, to present evidence on his own behalf, and to a jury trial.

(7a) We do not agree that equal protection precludes involuntary placement of mentally ill minors in state operated mental hygiene facilities if the minors are neither gravely disabled nor dangerous to themselves or others. The liberty interest of an adult may sufficiently

[6]Petitioner claims also that since wards have now been given the right to voluntarily commit themselves (§ 6552) equal protection requires that non-wards have the same option. Since petitioner has never attempted to assert or been denied that right, since he denies that he suffers from a mental disorder, and he asserts that he is entitled to be released from the state hospital because he is not in need of and does not wish to receive treatment there, we need not consider this claim.

[7]"Gravely disabled" in the present context is defined in subdivision (h)(1) of section 5008.

"(h) For purposes of Article 1 (commencing with Section 5150), Article 2 (commencing with Section 5200), and Article 4 (commencing with Section 5250) of Chapter 2 of this part, and for the purposes of Chapter 3 (commencing with Section 5350) of this part, "gravely disabled" means:

"(1) A condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter: . . .

"A person of any age may be 'gravely disabled' under this definition, but the term does not include mentally retarded persons." (See also *In re Gonzales* (1971) 6 Cal.3d 346, 351 [99 Cal.Rptr. 17, 491 P.2d 809].)

[8]Section 5300 permits certification of an "imminently dangerous" person for 90-day periods of treatment if after 14 days of intensive treatment the person:

"(a) Has threatened, attempted, or inflicted physical harm upon the person of another after having been taken into custody for evaluation and treatment, and who, as a result of mental disorder, presents an imminent threat of substantial physical harm to others, or

"(b) Had attempted or inflicted physical harm upon the person of another, that act having resulted in his being taken into custody and who presents, as a result of mental disorder, an imminent threat of substantial physical harm to others.

"For purposes of this article 'custody' shall be construed to mean involuntary detainment under the provisions of this part uninterrupted by any period of unconditioned release from a facility providing involuntary care and treatment."

Suicidal persons may not be detained involuntarily for treatment beyond 14 days unless they are subject to commitment under section 5300 or are the object of conservatorship proceedings for the "gravely disabled" under section 5350 et seq. (§ 5264.)

outweigh the state's interest in promoting optimal mental health that the state may not confine a nondangerous adult solely for the purpose of treating that person's mental illness. Clearly the state may not involuntarily confine a harmless mentally ill individual without providing treatment. (*O'Connor* v. *Donaldson, supra,* 422 U.S. 563, 576 [45 L.Ed.2d 396, 407].) Whether or not it might constitutionally do so, the Legislature has not permitted involuntary confinement of harmless mentally ill adults or juvenile court wards in state mental hospitals unless they are gravely disabled. It does not follow, however, that a nondangerous minor is denied equal protection if his parent is permitted to obtain treatment for the minor's mental illness or disorder by such placement for "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner* v. *Texas* (1940) 310 U.S. 141, 147 [84 L.Ed. 1124, 1128, 60 S.Ct. 879, 130 A.L.R. 1321]; see also *Estelle* v. *Dorrough* (1975) 420 U.S. 534, 538-539 [43 L.Ed.2d 377, 381-382, 95 S.Ct. 1173].)

(8) The liberty interest of a minor is qualitatively different than that of an adult, being subject both to reasonable regulation by the state to an extent not permissible with adults (*Planned Parenthood of Cent. Mo.* v. *Danforth, supra,* 428 U.S. 52, 74 [49 L.Ed.2d 788, 808, 96 S.Ct. 2831, 2843]; *Ginsberg* v. *New York, supra,* 390 U.S. 629, 638 [20 L.Ed.2d 195, 203]; *Prince* v. *Massachusetts, supra,* 321 U.S. 158, 170 [88 L.Ed. 645, 654-655]), and to an even greater extent to the control of the minor's parents unless "it appears that the parental decisions will jeopardize the health or safety of the child or have a potential for significant social burdens." (*Wisconsin* v. *Yoder, supra,* 406 U.S. 205, 234 [32 L.Ed.2d 15, 35].) Minors in the circumstances of petitioner, therefore, are not "similarly situated" with adults for purposes of equal protection analysis. When, as here, a parent seeks to exercise the parent's right to direct his child's upbringing, a right which we have recognized as "a compelling one, ranked among the most basic of civil rights" (*In re B. G.* (1974) 11 Cal.3d 679, 688 [114 Cal.Rptr. 444, 523 P.2d 244]) by obtaining for the child treatment that the parent believes to be advisable, the parent is not precluded from obtaining that treatment at a state hospital simply because it might be available elsewhere or because the state could not force an adult to accept the same treatment. Were that the rule, not only would some minors be denied treatment if the parents were unable to afford private care of a similar kind, but the parent would be denied the right to choose the type of care the child would receive even though the parent "may have a better understanding of the best interests of his child than does the juvenile court." (*Id.,* at p. 694.)

(7b) Finally, admissions such as that of petitioner are distinguishable from those of court wards because although the state is necessarily involved, the placement of the child in the hospital is initiated by the parent. No right is denied these minors by permitting their admission to state hospitals by their parents even though nondangerous court wards could not be committed unless mentally retarded or gravely disabled (see *In re Michael E., supra,* 15 Cal.3d 183, 193, fn. 14; *In re L. L.* (1974) 39 Cal.App.3d 205 [114 Cal.Rptr. 11]). As to both classes of minors the state has the same interest—that they mature into healthy adults capable of full participation in society. By providing care in state hospitals, the state has made treatment available to nondangerous mentally ill children for whom adequate care is not available in the community either because the local community does not have a comparable closed treatment facility or because the parent cannot afford the expense of care in such a facility. Both public and private closed facilities other than state hospitals are available to the juvenile court, however, and wards may be placed in these facilities and given psychiatric treatment at public expense. (§§ 739, subd. (c), 888, 900; *In re Aline D.* (1975) 14 Cal.3d 557, 566-567 [121 Cal.Rptr. 816, 536 P.2d 65].) That one class of minors is compelled by factors unrelated to state action to receive treatment in a state hospital while another receives it in a county facility or closed private school or hospital does not in our view deny equal protection to either class. (See *Reed* v. *Reed* (1971) 404 U.S. 71, 75-76 [30 L.Ed.2d 225, 229-230, 92 S.Ct. 251]; *Barbier* v. *Connolly* (1885) 113 U.S. 27, 32 [28 L.Ed. 923, 925, 5 S.Ct. 357].)

(6b) The question remains whether petitioner has been afforded due process. We do not accept either petitioner's suggestion that all of the procedures required by the Lanterman-Petris-Short Act are mandated by due process or respondent's assertion that the procedures presently being followed satisfy constitutional requirements. **(9)** Due process forbids the arbitrary deprivation of liberty (*Goss* v. *Lopez, supra,* 419 U.S. 565, 574 [42 L.Ed.2d 725, 734-735]) and, in the context of commitment to a mental hospital requires at least "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." (*Jackson* v. *Indiana* (1972) 406 U.S. 715, 738 [32 L.Ed.2d 435, 451, 92 S.Ct. 1845].) Thus, the focus of our attention must be to delineate procedures that will ensure the child a fair opportunity to establish that (1) he is not mentally ill or disordered, or that, (2) even if he is, confinement in a state mental hospital is unnecessary to protect him or others and might harm rather than improve his condition. Procedures designed to establish these facts are

necessary to accommodate both the parent's right to control his child's development and the state's interest in limiting parental control when parental action may harm the physical or mental health of the child. (*Wisconsin* v. *Yoder, supra,* 406 U.S. 205, 230 [32 L.Ed.2d 15, 33]; *Stanley* v. *Illinois* (1972) 405 U.S. 645, 650-651 [31 L.Ed.2d 551, 558, 92 S.Ct. 1208].) We emphasize here our assumption that the great majority of parents are well motivated and act in what they reasonably perceive to be the best interest of their children. That fact cannot, however, detract in any way from the child's right to procedures that will protect him from arbitrary curtailment of his liberty interest in such a drastic manner no matter how well motivated.

That the present screening procedure does not offer an adequate forum in which to resolve either the disputed questions of fact, upon which the psychiatric diagnosis of mental illness or disorder may rest in part, or conflicting medical opinions as to whether the minor is mentally ill or disordered and in need of the treatment to be provided by the state hospital is forcefully illustrated by the instant case. Respondent asserts that petitioner is in the "borderline defective category" and is presently diagnosed as suffering from latent schizophrenia for which he is receiving an antipsychotic drug. The diagnosis is based in part on a history which accompanied him at the time of admission. The history recited that petitioner had been verbally and physically aggressive toward his mother, had threatened suicide, and had threatened to jump off a roof. Respondent admits, however, that petitioner has "maintained for several months without aggressive, destructive acts," and "is not gaining from further hospitalization."

Petitioner, on the other hand, denies that he is psychotic, that he suffers from a latent form of schizophrenia, that he has a history of aggressive behavior, or that he has threatened harm to himself or others. In support of his claim that he is not mentally ill or disordered and is not in need of and will not benefit from the treatment program of the hospital, he alleges that after a preadmission evaluation at the Gladman Memorial Hospital a physician concluded that petitioner is "clearly not psychotic," while a psychologist concluded that he was not only not psychotic, but was "a vulnerable youngster who has most of his energy focused on his own self protection." Two other physicians from the same facility recommended that petitioner not be confined by a placement such as that at a juvenile hall since he "cannot tolerate physical restraint and needs space."

Notwithstanding these conflicting diagnoses and evaluations of petitioner's needs he was admitted to the Napa State Hospital where he has allegedly been confined in a complex which has barred windows and locked doors in an open ward with 40 other minors some of whom are so severely disturbed that they are unable to dress themselves. He alleges that he has been approached sexually by other boys whose advances he has repelled, and he fears further such advances. While he has been hospitalized two other minors have attempted suicide.

(6c) In light of the drastic invasion of the minor's right to personal liberty and the potential damage that may accompany an erroneous diagnosis and placement of a minor child in a mental hospital, the failure to accord petitioner an opportunity for a precommitment hearing before a neutral factfinder cannot be justified. Respondent's suggestion that the postadmission evaluation by the hospital staff is adequate to avoid misdiagnosis ignores both the diametrically opposed views to which precommitment and postadmission evaluation led in the instant case, and the fact that neither postadmission evaluation or even a postadmission hearing would afford the minor the benefit of a hearing in the community where his witnesses would be readily available and alternative resources better understood. (Cf. *Morrissey* v. *Brewer, supra,* 408 U.S. 471, 485 [33 L.Ed.2d 484, 496].) Clearly, postadmission procedures would be inadequate to avoid the trauma of removal of the child from the home and unnecessary placement in a mental hospital.[9] The Supreme Court has described as a "root requirement" of due process the obligation to give an individual "an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (*Boddie* v. *Connecticut* (1971) 401 U.S. 371, 379 [28 L.Ed.2d 113, 119, 91 S.Ct. 780], italics in original. See also, *Fuentes* v. *Shevin* (1972) 407 U.S. 67, 82 [32 L.Ed.2d 556, 570-571, 92 S.Ct. 1983].) Surely, the individual's interest in personal liberty can be accorded no less protection.

(10) When the state participates in deprivation of a person's right to personal liberty, even a conditional liberty, due process requires that the

[9]Not to be overlooked is the possibility that a full hearing prior to a decision to admit a minor to a state hospital will reveal that the parent or parents seeking the admission are a contributing factor in the child's problem, that treatment of the child will be effective only if the family is counseled together, or that placement outside the home in foster care or a less restrictive environment than that of the hospital will better serve the minor's needs. (See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions* (1974) 62 Cal.L.Rev. 840, 859-862.)

facts justifying that action be reliably established. To that end the United States Supreme Court has suggested that, at a minimum, due process requires that the person receive a hearing after adequate written notice of the basis for the proposed action; an opportunity to appear in person and to present evidence in his own behalf; the right to confrontation by, and the opportunity to cross-examine, adverse witnesses; a neutral and detached decision maker; findings by a preponderance of the evidence; and a record of the proceeding adequate to permit meaningful judicial or appellate review. (Cf. *Morrissey* v. *Brewer, supra,* 408 U.S. 471, 489 [33 L.Ed.2d 484, 499]; *In re Gault, supra,* 387 U.S. 1.) Inasmuch as a minor may be presumed to lack the ability to marshal the facts and evidence, to effectively speak for himself and to call and examine witnesses, or to discover and propose alternative treatment programs, due process also requires that counsel be provided for the minor. (Cf. *Gagnon* v. *Scarpelli* (1973) 411 U.S. 778, 790-791 [36 L.Ed.2d 656, 666-667, 93 S.Ct. 1756]; *In re Gault, supra,* 387 U.S. 1, 36 [18 L.Ed.2d 527, 551]; *Gee* v. *Brown* (1975) 14 Cal.3d 571 [122 Cal.Rptr. 231, 536 P.2d 1017]; *In re Ricky H.* (1970) 2 Cal.3d 513 [86 Cal.Rptr. 76, 468 P.2d 204].)[10]

We do not accept petitioner's suggestion that he is entitled to a jury trial and a judicial hearing. Minors do not have a constitutional right to a jury trial in juvenile proceedings, even those which have penal overtones. (*People* v. *Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 274 [124 Cal.Rptr. 47, 539 P.2d 807]; *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528 [29 L.Ed.2d 647, 91 S.Ct. 1976].) It follows that minors do not have any greater right in purely civil commitment proceedings. Although the Legislature has extended a statutory right to a jury trial in those commitments which are undertaken pursuant to the Lanterman-Petris-Short Act, equal protection does not require identical procedures. As we have heretofore noted, the minor whose hospital admission is sought by parents who retain the right to control their child's upbringing, including the type and extent of medical and/or psychiatric treatment the child shall receive is not similarly situated with the class of minors

[10]A minor may, of course, waive any of these rights and acquiesce in the parent's decision to place him in a state hospital for treatment, thus achieving what is in practical effect a "voluntary" admission. To be truly voluntary and intelligent in a constitutional sense such a waiver should be made only if the minor is aware of his rights and the consequences of the waiver, including the nature of the commitment, its probable duration, and the treatment regimen. It has been suggested that a waiver by a minor should not be accepted unless accompanied by a certificate of his counsel attesting that the attorney has consulted with the minor about the proposed commitment, explained his right to protest it, described possible alternatives and ascertained that the minor wished to enter the hospital without a hearing. (See Ellis, *supra,* fn. 9, at p. 906.)

who have been adjudicated wards or dependent children of the court. Since the jury is not a necessary component of accurate factfinding (*McKeiver* v. *Pennsylvania, supra,* 403 U.S. 528, 543 [29 L.Ed.2d 647, 659-660]), absent some basis upon which to conclude that a neutral judge or hearing officer will not offer a decision making process substantially equivalent to a jury trial, neither due process nor equal protection requires that this decision be by jury.

For similar reasons we decline to hold that due process or equal protection mandates a judicial hearing. Although the informal atmosphere that can be achieved in a juvenile court may suggest that court as an appropriate forum, a judicial hearing is not constitutionally compelled. We are cognizant that when personal liberty is at stake and institutionalization the object of the proceeding, a judicial hearing is the norm. (See, e.g., *Jackson* v. *Indiana, supra,* 406 U.S. 715; *In re Gault, supra,* 387 U.S. 1; *Baxstrom* v. *Herold* (1966) 383 U.S. 107 [15 L.Ed.2d 620, 86 S.Ct. 760].) We recognize, too, that due process requires a judicial hearing whenever the *state* seeks to deprive an adult of his liberty by committing him to a mental hospital. When the parent who already has the right and obligation to control a child's personal liberty seeks, in the exercise of that right, to place the child in a mental hospital, however, an administrative hearing may be adequate to satisfy due process.

The United States Supreme Court has upheld administrative hearings when the state, which already has custody, seeks to curtail the conditional liberty interest of a parolee or probationer. (*Morrissey* v. *Brewer, supra,* 408 U.S. 471; *Gagnon* v. *Scarpelli, supra,* 411 U.S. 778.) We conclude therefore that due process does not require that the hearing be conducted by a judge. (11) By analogy, we also conclude that because the proceedings to admit a mentally ill or disordered minor to a state hospital are within the parental right to custody and control of his child, whereas the rights of the child and the interest of the state are limited to preventing hospitalization that because unnecessary or potentially ineffective may be harmful to the physical or mental health of the child, the reasonable doubt standard of proof is inapplicable. (Cf. *In re Arthur N., supra,* 16 Cal.3d 226.) The lesser standard of proof by a preponderance of the evidence which is applicable to dependency proceedings (§ 701), and the dispositional phase of delinquency proceedings (*In re Winship, supra,* 397 U.S. 358, 366 [25 L.Ed.2d 368, 376-377]) will also satisfy due process in hearings on a parent's application to admit a minor child to a state hospital.

(12) Our holding that procedures established by the Department of Health to implement the authorization of section 6000, subdivision (b), for admission of minors to state hospitals denies minors 14 years of age and older due process does not require the release of all such minors now confined in state hospitals.[11] They have been placed there by parents whom we presume have acted in the best interests of their children. Their judgment has been ratified by both the local community mental health professional and by the medical staff of the hospital. A precipitous release of these children to families and community facilities unprepared to care for them could be both disruptive to the treatment program and potentially harmful to the child and the community. They are, however, entitled to a hearing, if they so request, on the propriety of their continued confinement.

Those minors 14 years of age or older now confined in state hospitals under voluntary admissions pursuant to section 6000, subdivision (b), may therefore seek relief by petition for writ of habeas corpus,[12] alleging that they are not mentally ill or disordered, or that, even if they are mentally ill, they are not gravely disabled or dangerous and the treatment for which they are confined is not reasonably likely to be beneficial. If the petition states such a prima facie case, an order to show cause should issue, and a hearing should be held. If the court finds, after the hearing, that the minor is not mentally ill or disordered, he must be released. If the court finds that the minor is mentally ill or disordered but is not gravely disabled or dangerous to himself or others, the minor is entitled to his release only if the court also finds that treatment in the state hospital is not reasonably likely to be of benefit to him.

Petitioner unsuccessfully sought relief by petition to the superior court of the county in which he is confined but no hearing has been held to determine whether a basis exists for his continued confinement. The superior court is the appropriate forum in which to adjudicate disputed issues of fact. No writ having issued on his last application to the

[11]Although minors 14 years of age and older may no longer be admitted under section 6000, subdivision (b), absent a voluntary and intelligent waiver of their rights as outlined above, we anticipate that the Legislature will adopt legislation to assure due process to minors whose parents apply for their admission. In the interim commitment under the Lanterman-Petris-Short Act is available to assure treatment and confinement of those minors whose condition is such that they are gravely disabled or dangerous to themselves or to others.

[12]We anticipate that, as in the instant case, the public defender of the county of the minor's residence, and/or the state public defender, will identify and assist those minors who may be entitled to release in the preparation and filing of these petitions.

superior court, petitioner is not precluded from again seeking relief by petition to that court. (Pen. Code, § 1475.)

The order to show cause is therefore discharged and the petition denied without prejudice to a renewed application for relief in the superior court.

Tobriner, Acting C. J., Sullivan, J.,† Mosk, J., and Richardson, J., concurred.

CLARK, J., Dissenting.—We have witnessed greater expansion of procedural due process in the last seven years than in the previous 180-year period following ratification of the Fifth Amendment to the United States Constitution. (Friendly, *Some Kind of Hearing* (1975) 123 U.Pa.L.Rev. 1267, 1273.) As this expansion has occurred, the response in one area after another has been to say, "If there, why not here?" Indeed, now that the United States Supreme Court has held that a child must be given "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story" before he may be temporarily suspended from school (*Goss* v. *Lopez* (1975) 419 U.S. 565, 581 [42 L.Ed.2d 725, 739, 95 S.Ct. 729]), it is probably too late in the day to argue that a child does not have the right to a "due process hearing" before being committed to a mental institution.

However, granting that Roger is entitled to due process, the question remains, in the now hackneyed formula, "What process is due?" (*Morrissey* v. *Brewer* (1972) 408 U.S. 471, 481 [33 L.Ed.2d 484, 494, 92 S.Ct. 2593].) Unlike the majority, I do not believe that due process requires trial-type procedure here. To the contrary, I am convinced that the present system could with very little modification meet appropriate standards.

Due process does, as the majority contend, require that the hearing be held before a "neutral factfinder." However, contrary to the majority's assumption, this requirement does not narrow the list of eligibles to judges and administrative hearing officers. In *Goldberg* v. *Kelly* (1970) 397 U.S. 254 [25 L.Ed.2d 287, 90 S.Ct. 1011], the high court "pointedly did not require that the hearing on termination of [welfare] benefits be

†Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case." (*Morrissey* v. *Brewer, supra,* 408 U.S. 471, 486 [33 L.Ed.2d 484, 497].) Accordingly, the court held in *Morrissey* that in the parole revocation context due process would be satisfied if the pre-revocation hearing were held by a parole officer not previously involved in the case and if the revocation hearing were held by the parole board. (408 U.S. at pp. 486, 489 [33 L.Ed.2d at pp. 497-499]; see *Wolff* v. *McDonnell* (1974) 418 U.S. 539, 570-571 [41 L.Ed.2d 935, 959, 94 S.Ct. 2963] [prison officials may conduct hearing on disciplinary infraction which may result in loss of "good time" credit].)

The present system was established by legislative and executive action. It is not our prerogative to insist on greater changes in the system than are constitutionally required. Therefore, we should uphold existing procedure by recognizing that the mental health professionals on the hospital staff qualify as "neutral factfinders." Aside from the fact that a hearing by hospital staff would occur after admission, a point discussed below, the majority's only objection to such a hearing is that "the diametrically opposed views to which precommitment and postadmission evaluation led in the instant case" allegedly demonstrate that "evaluation by the hospital staff is [not] adequate to avoid misdiagnosis." (*Ante,* p. 671.) This argument, of course, proves too much. When a case is heard by the superior court, Court of Appeal, this court and the United States Supreme Court, the 20 judges may be evenly divided on the applicable principles of law. But that would not demonstrate their incompetence. The judicial robe is not a magic cloak. It should be obvious—but apparently it is not—that neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments. (Cf. *In re Bye* (1974) 12 Cal.3d 96, 107 [115 Cal.Rptr. 382, 524 P.2d 854] ("[A] revocation decision in a civil addict program is often a medical one and as such is necessarily less subject to objective scrutiny by a lay hearing officer.")

As to timing, due process does not require that the hearing be held prior to the minor's admission to the hospital. The majority quote the statement in *Boddie* v. *Connecticut* (1971) 401 U.S. 371, 379 [28 L.Ed.2d 113, 119, 91 S.Ct. 780], that due process requires a person be given " 'an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " (*Ante,* p. 671.) Upon reading this quotation one is

inclined to conclude, as the majority urge, "Surely, the individual's interest in personal liberty can be accorded no less protection." (*Ante*, p. 671.) However, one then recalls that in parole revocation proceedings due process is satisfied if the hearings, even the so-called "prerevocation" hearing, are held *after* the parolee has been deprived of his conditional liberty. As this court stated in *People* v. *Vickers* (1972) 8 Cal.3d 451, 460 [105 Cal.Rptr. 305, 503 P.2d 1313], "[W]e read *Morrissey* as applicable only in those instances where an actual seizure of the individual has occurred. It is this loss of liberty which compels the procedures set forth in *Morrissey*." A child's interest in liberty is qualified for very different reasons than is a parolee's, but it is qualified, nevertheless, as the majority recognize. (*Ante*, p. 668.)

Moreover, even assuming that *Boddie* states the applicable rule, this case comes within the declared exception. Roger's life may have been at stake. He had allegedly threatened to kill himself. Surely the state had a sufficient interest in preventing this disturbed youngster from taking his own life to justify postponing the hearing until he had been admitted to the hospital and helped through this crisis. The safeguards against abuse built into existing procedure are ample. Roger's mother, who presumptively has his best interests at heart, initiated admission proceedings and a community mental health professional, after consultation with hospital staff, concluded that Roger was in need of treatment that could not be provided within the community.

Finally, due process does not require that the minor be represented by counsel. It is popularly held "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty." (Friendly, *Some Kind of Hearing* (1975) 123 U.Pa.L.Rev. 1267, 1288; see Frankel, *The Search for Truth: An Umpireal View* (1975) 123 U.Pa.L.Rev. 1031.) In *Wolff* v. *McDonnell* (1974) 418 U.S. 539 [41 L.Ed.2d 935, 94 S.Ct. 2963], the high court recognized in the prison context that "[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals." (418 U.S. at p. 570 [41 L.Ed.2d at p. 959].) The court thus declined to hold that inmates had a right either to appointed or even to retained counsel, instead indicating that where an illiterate inmate was involved, or where the issues were sufficiently complex to make the inmate unable "to collect and present the evidence necessary for an adequate comprehen-

sion of the case," he should be permitted to seek the aid of fellow prisoners, or if that is prohibited, to have "adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." (*Id.*) As the questions presented in this proceeding do not involve guilt or innocence, but necessity and availability of treatment, the youngster should be assisted not by a lawyer but by a mental health professional from his own community having ready access to witnesses and familiarity with community resources.

The judiciary is developing a messianic image of itself. It is coming to believe that salvation for society's ills lies in adversary hearings. I cannot subscribe to that view.

EXHIBIT

OMITTED PROVISIONS

§ 2915.5. Commitment to federal agency

2915.5. (a) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be mentally ill or otherwise in need of confinement in a hospital or other institution for proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental illness or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans Administration or other agency of the United States Government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilites are available and that such person is eligible for care or treatment therein, may commit such person to the Veterans Administration or the other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this part shall affect the person's right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the Veterans Administration or other agency. The chief officer of any facility of the Veterans Administration or institution operated by any other agency of the United States to which the person is so committed shall with respect to such person be vested with the same powers as superintendents of state hospitals for mental illness within this state with respect to retention of custody, transfer, parole, or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of restraint, and all commitments pursuant to this part are so conditioned.

(b) Upon receipt of a certificate of the Veterans Administration or such other agency of the United States that facilities are available for

the care or treatment of any person heretofore committed to any hospital for the mentally ill or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notifed thereof by the transferring agency. No person shall be transferred to the Veterans Administration or other agency of the United States who is confined pursuant to conviction of any felony or misdemeanor or who has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans Administration or other agency of the United States pursuant to the original commitment.

Comment. Section 2915.5 continues former Section 1663.

405/989

§ 2915.6. Certificate of discharge or competency

2915.6. When a person who has been committed or transferred to a facility of the Veterans Administration, in accordance with the provisions of Section 2915.6, is thereafter discharged as recovered by the chief officer of such facility or is rated competent by the Veterans Administration, a certificate showing such discharge or rating may be filed with the clerk of the superior court of the county from which the person was committed. The clerk shall keep an index of the certificate. No fee shall be charged by the clerk for performing such duties. If no guardian has been appointed for such person as provided in this code, the certificate showing such discharge as recovered or rating as competent is prima facie evidence that the person has recovered competency, and the filing of such certificate or a duly certified copy thereof with the clerk of the court shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of this code.

Comment. Section 2915.6 continues former Section 1664.

FAMILY LAW ACT

Civil Code § 4600 (amended)

GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS

Probate Code §§ 1400-1700 (repealed)
Probate Code §§ 1701-2207 (repealed)
Probate Code §§ 1400-3603 (added)

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS

PART 1. DEFINITIONS AND GENERAL PROVISIONS (§ 1400)

Chapter 1. Rules of Construction and Definitions (§ 1400)
Chapter 2. General Provisions (§ 1450)
Chapter 3. Notice of Hearing (§ 1460)
Chapter 4. Transitional Provisions (§ 1470)

PART 2. GUARDIANSHIP (§ 1500)

Chapter 1. Appointment (§ 1500)
Chapter 2. Termination (§ 1600)

PART 3. CONSERVATORSHIP (§ 1800)

Chapter 1. Appointment (§ 1800)
Chapter 2. Biennial Review of Conservatorship (§ 1850)
Chapter 3. Termination (§ 1860)
Chapter 4. Right to Counsel (§ 1870)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP (§ 2100)

Chapter 1. Definitions and General Provisions (§ 2100)
Chapter 2. Jurisdiction and Venue (§ 2200)
Chapter 3. Temporary Guardians and Conservators (§ 2250)
Chapter 4. Oath, Letters, and Bond (§ 2300)
Chapter 5. Powers and Duties of Guardian or Conservator of the Person (§ 2400)
Chapter 6. Powers and Duties of Guardians or Conservators of the Estate (§ 2500)
Chapter 7. Inventory and Accounts (§ 2600)
Chapter 8. Removal or Resignation (§ 2650)
Chapter 9. Requests for Special Notice (§ 2700)
Chapter 10. Appeals (§ 2750)
Chapter 11. Transfer of Proceedings Out of State (§ 2800)

PART 5. UNIFORM VETERANS' GUARDIANSHIP ACT (§ 2900)

PART 6. TRANSACTIONS NOT REQUIRING GUARDIANSHIP OR CONSERVATORSHIP (§ 3050)

Chapter 1. Definitions and General Provisions (§ 3050)
Chapter 2. Small Estates of Minors (§ 3100)
Chapter 3. Fees of Minor's Attorney; Compromise of Minor's Disputed Claim (§ 3200)
Chapter 4. Payment or Delivery of Property Pursuant to Compromise or Judgment for Minor or Incompetent (§ 3300)
Chapter 5. Community or Homestead Property of Incompetent Persons (§ 3400)
Chapter 6. Personal Property of Absentees (§ 3500)
Chapter 7. Removal of Property of Nonresident (§ 3600)

DIVISION 5. GENERAL FIDUCIARY BOND LAW

[Not part of this project; to be drafted for future session.]

CONTENTS

FAMILY LAW ACT

CONFORMING CHANGES

[Not included in this draft.]

The Commission's recommendation would be effectuated by enactment of the following measures:

An act to amend Section 4600 of the Civil Code, to add Division 4 (commencing with Section 1400) to, and to repeal Division 4 (commencing with Section 1400) and Division 5 (commencing with Section 1701) of, the Probate Code, relating to guardianship, conservatorship, and other protective proceedings.

The people of the State of California do enact as follows:

FAMILY LAW ACT

Civil Code § 4600 (amended)

SEC. 1. Section 4600 of the Civil Code is amended to read:

4600. (a) In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of ~~such~~ the child during ~~his~~ minority as may seem necessary or proper. ~~If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof.~~

(b) In making or modifying an award of child custody, the court shall consider and give due weight to the following:

(1) The child's wishes if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody.

(2) The testamentary appointment of a guardian of the person of the child under Section 1500 of the Probate Code.

(c) Custody should be awarded in the following order of preference:

~~(a)~~ (1) To either parent according to the best interests of the child.

~~(b)~~ (2) To the person or persons in whose home the child has been living in a wholesome and stable environment.

~~(c)~~ (3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(d) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

Comment. Section 4600 is amended to add the language contained in paragraph (2) of subdivision (b) to assure that testamentary appointment by a parent or a guardian of the person of a child will be given weight regardless of the nature of the custody proceeding. It was not clear under prior law whether Section 4600, which applies to "any proceeding where there is at issue the custody of a minor child," superseded the Probate Code provisions for such a testamentary appointment. See, e.g., Guardianship of Marino, 30 Cal. App.3d 952, 958-59, 106 Cal. Rptr. 655, ___ (1973).

405/198

GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS

Probate Code §§ 1400-1700 (repealed)

SEC. 2. Division 4 (commencing with Section 1400) of the Probate Code is repealed.

Comment. Former Division 4, Guardian and Ward (former Sections 1400-1700), is replaced by new Division 4 (Guardianship and Conservatorship). The disposition of each repealed section of the former law is indicated in the Comment to the repealed section. See Appendix to Recommendation Relating to Guardianship-Conservatorship Revision, 14 Cal. L. Revision Comm'n Reports 0000 (1977).

405/199

Probate Code §§ 1701-2207 (repealed)

SEC. 3. Division 5 (commencing with Section 1701) of the Probate Code is repealed.

Comment. Former Division 5, Conservatorship (former Sections 1701-2207), is replaced by new Division 4 (Guardianship and Conservatorship). The disposition of each repealed section of the former law is indicated in the Comment to the repealed section. See Appendix to Recommendation Relating to Guardianship-Conservatorship Revision, 14 Cal. L. Revision Comm'n Reports 0000 (1977).

Probate Code §§ 1400-3603 (added)

SEC. 4. Division 4 (commencing with Section 1400) is added to the Probate Code, to read:

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS

PART 1. DEFINITIONS AND GENERAL PROVISIONS

CHAPTER 1. RULES OF CONSTRUCTION AND DEFINITIONS

Article 1. Rules of Construction

Comment. This article contains rules of construction for this division. Unlike most of the California codes, the Probate Code does not contain general rules of construction. The inclusion of this article follows the pattern adopted in the Eminent Domain Law which was codified in the Code of Civil Procedure, which likewise does not contain general rules of construction.

404/931

§ 1400. Construction of division

1400. Unless the provision or context otherwise requires, these rules of construction govern the construction of this division.

Comment. Section 1400 is a standard provision in the various California codes. E.g., Evid. Code § 4; Veh. Code § 6.

404/932

§ 1401. Division, part, chapter, article, and section headings

1401. Division, part, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions in this division.

Comment. Provisions similar to Section 1401 appear in almost all of the existing California codes. E.g., Evid. Code § 5; Veh. Code § 6.

404/933

§ 1402. References to statutes

1402. Whenever any reference is made to any portion of this division or to any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

Comment. Section 1402 is a standard provision in various California codes. E.g., Evid. Code § 6; Veh. Code § 10.

404/934

§ 1403. "Part," "chapter," "article," "section," and "subdivision"

1403. Unless otherwise expressly stated:

(a) "Part" means a part of this division.

(b) "Chapter" means a chapter of the part in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

Comment. Section 1403 is similar to Evidence Code Section 7.

404/935

§ 1404. Tenses

1404. The present tense includes the past and future tenses; and the future, the present.

Comment. Section 1404 is a standard provision in various California codes. E.g., Evid. Code § 8; Veh. Code § 12.

404/936

§ 1405. Singular and plural

1405. The singular number includes the plural; and the plural, the singular.

Comment. Section 1405 is a standard provision in various California codes. E.g., Evid. Code § 10; Veh. Code § 14.

404/938

§ 1406. Severability

1406. If any provision or clause of this division or application thereto to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the division that can be given effect without the invalid provision or application and, to this end, the provisions of this division are severable.

Comment. Section 1406 is the same in substance as Section 3 of the Evidence Code and Section 1108 of the Commercial Code.

Note. The staff has not included the following provision ordinarily included in the rules of construction: "Shall" is mandatory, and "may" is permissive. This provision has not been included because we believe that some of the provisions that use the word "shall" are not mandatory because the court can later confirm or approve an action of a guardian or conservator that should have been taken only with prior court approval.

17023

Article 2. Words and Phrases Defined

§ 1410. Application of definitions

1410. Unless the context otherwise requires, the words and phrases defined in this article govern the construction of this division.

Comment. Section 1410 is new.

17024

§ 1414. Absentee

1414. "Absentee" means either of the following:

(a) A member of a uniform service covered by United States Code, Title 37, Chapter 10, who is determined thereunder by the secretary concerned or a delegate to be in missing status, as missing status is defined therein.

(b) An employee of the United States government or an agency thereof covered by United States Code, Title 5, Chapter 55, Subchapter VII, who is determined thereunder by the head of the department or agency concerned or a delegate to be in missing status, as missing status is defined therein.

Comment. Section 1414 continues the definition of "absentee" contained in former Section 1751.5.

18481

§ 1418. Account in an insured savings and loan association

1418. "Account in an insured savings and loan association" means any of the following:

(a) Shares issued by a federal savings and loan association.

(b) Investment certificates issued by a state-chartered building and loan association or savings and loan association doing business in this state which is an "insured institution" as defined in Title IV of the National Housing Act.

(c) Shares issued by a state-chartered building and loan association or savings and loan association doing business in this state which does not issue investment certificates and which is an "insured institution" as defined in Title IV of the National Housing Act.

Comment. Section 1418 continues the substance of the fourth paragraph of former Section 1510.

404/942

§ 1420. Court

1420. In the case of a guardianship or conservatorship proceeding, "court" means the court in which the guardianship or conservatorship proceeding is pending.

Comment. Section 1420 is new.

404/943

§ 1422. Bank

1422. "Bank" means a bank in this state.

Comment. Section 1422 is new and avoids the need to repeat "in this state" wherever "bank" is used in this division.

Note. A careful review of proposed Division 4 will be made to insure that the term "bank" is not used in any section to refer to an out-of-state bank.

404/953

§ 1426. Secretary concerned

1426. "Secretary concerned" has the same meaning as defined in United States Code, Title 37, Section 101.

Comment. Section 1426 continues the substance of subdivision (b) of former Section 1751.5.

18531

§ 1430. Shares of an insured credit union

1430. "Shares of an insured credit union" means shares issued by a credit union, either federally chartered or state licensed, which are insured under Title II of the Federal Credit Union Act.

Comment. Section 1430 continues the substance of the fifth paragraph of former Section 1510.

§ 1434. Single-premium deferred annuity

1434. "Single-premium deferred annuity" means an annuity offered by an admitted life insurer for the payment of a one-time lump-sum premium and for which the insurer neither assesses any initial charges or administrative fees against the premium paid nor exacts nor assesses any penalty for withdrawal of any funds by the annuitant after a period of five years.

Comment. Section 1434 continues the substance of the sixth paragraph of former Section 1510.

404/954

§ 1438. Trust company

1438. "Trust company" means a trust company authorized to transact a trust business in this state.

Comment. Section 1438 is based on a portion of former Section 1405.1. The definition avoids the need to repeat the words "authorized to transact a trust business in this state" in various sections.

CHAPTER 2. GENERAL PROVISIONS

§ 1450. Law governing

1450. Guardianships and conservatorships are governed by the provisions of this division. If no specific provision of this division is applicable, the provisions of Division 3 (commencing with Section 300) govern so far as they are applicable to like situations.

Comment. Section 1450 supersedes former Sections 1606 (section added in 1931) and 1702. The language conforms more closely to former Section 1702 than to former Section 1606. The language "except as provided in Section 1853 of this code" which was contained in former Section 1702 is not continued. This makes no substantive change since the effect of the former exception is continued in the introductory clause of the second sentence of Section 1450.

By incorporating the provisions of Division 3, the second sentence of Section 1450 applies Section 1230 to guardianship and conservatorship proceedings. Section 1230 provides that "[a]ll issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions" and refers also to the right to trial by jury. This is consistent with prior law. See Budde v. Superior Court, 97 Cal. App.2d 615, 218 P.2d 103 (1950) (guardianship). See also LeJeune v. Superior Court, 218 Cal. App.2d 696, 32 Cal. Rptr. 390 (1963) (conservatorship). Section 1450 is supplemented by special provisions in Part 3 (conservatorship), applying the "law and procedure relating to the trial of civil actions, including trial by jury if demanded." See Sections 1828 (appointment), 1864 (termination).

404/970

§ 1451. Petitions to be verified

1451. Except as otherwise specifically provided, a petition filed under this division shall be verified.

Comment. Section 1451 is new. It supersedes various provisions of the former guardianship and conservatorship statutes requiring that petitions be verified and establishes a general requirement that petitions under this division be verified. For an exception to Section 1451, see Section 2643.

404/971

§ 1452. Setting petitions for hearing

1452. When a petition is filed with the clerk of the court pursuant to this division, the clerk shall set the petition for hearing.

Comment. Section 1452 is based on a portion of Section 1200, which was made applicable to guardianship and conservatorship proceedings by former Sections 1606 and 1702. Section 1452 supersedes comparable

provisions in various sections of the former guardianship and conservatorship statutes and establishes a general requirement that the clerk of the court set petitions filed under this division for hearing. The requirement of some provisions of the former statutes that petitions be set for hearing "by the court" has not been continued. Although ordinarily petitions will be heard by the court, in some cases the right to a jury trial exists unless waived. See, e.g., Sections 1828, 1864.

404/974

§ 1453. Guardian ad litem

1453. The provisions of this division do not limit the power of a court to appoint a guardian ad litem to protect the interests of any minor or incompetent person.

Comment. Section 1453 continues the substance of former Section 1607, but the reference to "insane" persons and the former language "in an action or proceeding therein" have been omitted as unnecessary. For provisions relating to a guardian ad litem, see Civil Code Section 42 and Code of Civil Procedure Sections 372-373.5.

CHAPTER 3. NOTICE OF HEARING

§ 1460. Notice of hearing generally

1460. (a) Subject to Section 1461, if notice of hearing is required under this division but the applicable provision does not fix the manner of giving notice of hearing, the notice of the time and place of the hearing, in substantially the form prescribed in Section 1462, shall be given at least 10 days before the day of the hearing as provided in this section.

(b) Subject to Section 1461, the clerk of the court shall cause the notice of the hearing to be posted at the courthouse of the county where the proceedings are pending.

(c) Subject to Section 1461, the petitioner (which includes for the purposes of this section a person filing an account, report, or other paper) shall cause the notice of hearing to be mailed or personally delivered to each of the following persons (other than the petitioner or persons joining in the petition):

(1) The guardian or conservator.

(2) The conservatee.

(3) The spouse of the ward or conservatee, if the ward or conservatee has a spouse.

(4) Except as provided in subdivision (b) of Section 1512, the adult relatives of the ward or conservatee within the second degree named in the petition for appointment of a guardian or conservator and the parents of the ward or conservatee.

(d) Proof of the giving of notice shall be made at or before the hearing as provided in Section 1465.

Comment. Section 1460 is based on portions of Section 1200 which was incorporated and made applicable to guardianship and conservatorship proceedings by various sections. For the adult relatives of the ward or conservatee required to be named in the petition for appointment, see Sections 1510 and 1821.

The court may require additional notice, may dispense with notice, and may enlarge or shorten the time for notice. See Section 1461. For provisions concerning requests for special notice, see Sections 2700-2704.

Note. Should the requirement of posting by the court clerk be retained?

Should notice be required to be given all adult relatives within the second degree in every case where no notice procedure is otherwise

provided? Should notice be given to the ward in cases where the ward is 14 years of age or older?

We plan to substitute references to Section 1460 for the references throughout the draft statute to Section 1200.

404/988

§ 1461. Court may vary or dispense with notice

1461. (a) The court, in its discretion, may:

(1) Dispense with any notice required by this division.

(2) Enlarge or shorten the time for giving any notice required by this division.

(3) Where the court determines that the notice otherwise required under this division is insufficient in the particular circumstances, require that such further or additional notice be given as the court orders.

(b) Paragraphs (1) and (2) of subdivision (a) do not apply to notice which is required to be given by personal service.

Comment. Subdivision (a) of Section 1461 is based on a portion of former Section 2001 with the addition of the language authorizing the court to enlarge or shorten the time for notice. Subdivision (b) is new.

404/989

§ 1462. Form of notice

1462. The notices provided for in Section 1460, and in all other cases in which notice of hearing is required in this division and no other type of notice is prescribed by law or by the court or judge, shall be in substantially the following form:

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE (CITY AND) COUNTY OF _____

[Guardianship][Conservatorship] of the [person, estate, or person and estate] of _____, a [proposed] [ward or conservatee]	No. _____ NOTICE OF HEARING ON [describe nature of petition, account, or report]

Notice is given that (name of petitioner and representative capacity, if any) has filed a (nature of petition, account, or report). The hearing on the (petition, account, or report), reference to which is made for further particulars, will be held on (date), at _____ m.,

at the courtroom of (department or judge) of the Superior Court of the State of California for the (City and) County of _____, in the City of _____, California.

Dated: _____.

_____, Clerk

By _____, Deputy

OR

_____, Attorney for Petitioner

Comment. Section 1462 is based on Section 1200.1 (estates of deceased persons).

404/990

§ 1463. Publication of notice required in certain instances

1463. In case of a petition for leave to sell, or to give an option to purchase, a mining claim or real property worked as a mine, or for leave to borrow money or execute a mortgage or deed of trust or give other security, or for leave to execute a lease or sublease, in addition to the notice required by Section 1460, the petitioner shall also cause notice of the hearing on petition, in substantially the form prescribed in Section 1462, to be published in a newspaper of general circulation in the county in which the guardianship or conservatorship proceeding is pending pursuant to Section 6062a of the Government Code.

Comment. Section 1463 continues Section 1201 as that section applied to guardianships and conservatorships by incorporation by former Sections 1606 and 1702.

Note. Should this section be retained or should the publication requirement be eliminated by the substitution of the following provision for Section 1463: "Section 1201 does not apply to proceedings under this division."

404/991

§ 1464. Notice to Director of Health

1464. (a) Except as provided in subdivision (b), notice of the time and place of hearing on any petition, account, or other paper filed in the proceeding, and a copy of the petition, account, or other paper, shall be mailed or delivered to the Director of Health at the director's office in Sacramento at least 15 days before the hearing if both of the following requirements are met:

(1) The ward or conservatee is or has been during the guardianship or conservatorship proceeding a patient in or on leave from a state hospital under the jurisdiction of the State Department of Health.

(2) The petition, account, report, or other paper is filed under any one or more of the following provisions:

[list of provisions to be inserted here]

(b) If the ward or conservatee has been discharged from the state hospital, the Director of Health, upon ascertaining the facts, may file with the court a certificate stating that the ward or conservatee is not indebted to the state and waive the giving of further notices under this section. Upon the filing of the certificate of the Director of Health, compliance with this section thereafter is not required unless the certificate is revoked by the Director of Health and notice of the revocation is filed with the court.

(c) The statute of limitations does not run against any claim of the State Department of Health against the estate of the ward or conservatee for board, care, maintenance, or transportation with respect to an account that is settled without giving the notice required by this section.

Comment. Subdivision (a) of Section 1464 generalizes various provisions scattered throughout the former guardianship and conservatorship statutes. Subdivision (b) continues former Sections 1554.1 and 1906 but adds a provision for revoking the certificate and substitutes the "Director of Health" for the "Attorney General" as the one executing the certificate. Subdivision (b) supersedes former Section 1906. Subdivision (c) continues the last sentence of former Section 1554 and supersedes the broader provision of the last sentence of former Section 1905.

404/992

§ 1465. Proof of giving of notice

1465. (a) Proof of the giving of notice shall be made at or before the hearing by testimonial evidence presented at the hearing or by the following means, as applicable:

(1) Proof of notice by personal delivery may be made by the affidavit of the person making such delivery showing the time, place, and manner of delivery, and the name of the person to whom delivery was made.

(2) Proof of mailing may be made in the manner prescribed in Section 1013a of the Code of Civil Procedure.

(3) Proof of posting may be made by the affidavit of the person who posted the notice.

(4) Proof of publication may be made by the affidavit of the publisher or printer, or the foreman or principal clerk of the publisher or printer, showing the time and place of publication.

(b) If it appears to the satisfaction of the court that notice has been regularly given, the court shall so find in its order. When the order becomes final, it is conclusive on all persons.

Comment. Section 1465 is based on the last sentence of Section 1200. Proof of notice is allowed at or before the hearing, and the manner of proof is specified. Paragraph (1) is adapted from subdivision (a) of Section 417.10 of the Code of Civil Procedure. Paragraph (2) continues existing practice. See W. Johnstone & G. Zillgitt, California Conservatorships § 2.16, at 37 (Cal. Cont. Ed. Bar 1968). Paragraph (3) also continues existing practice. See W. Dorsey, Notice and Procedure, in 1 California Decedent Estate Administration § 20.12, at 785-86 (Cal. Cont. Ed. Bar 1971). Paragraph (4) is adapted from subdivision (b) of Section 417.10 of the Code of Civil Procedure. A declaration may be used in lieu of the affidavits required by this section in many instances. See Code Civ. Proc. § 2015.5. Although Section 1465 allows proof of notice to be made by testimonial evidence, such proof should be made by affidavit or declaration filed in the proceeding in those cases where notice is jurisdictional. See W. Dorsey, supra § 20.10, at 785.

As to proof of giving notice in response to requests for special notice and the effect of the court's order, see Section 2703.

405/462

CHAPTER 4. TRANSITIONAL PROVISIONS

Note. This chapter is drafted on the assumption that the proposed legislation will be submitted to the 1978 legislative session and will become operative on July 1, 1979.

405/464

§ 1470. Definitions

1470. As used in this chapter:

(a) "Operative date" means the date this division becomes operative pursuant to Section 1471.

(b) "Prior law" means the applicable law as in effect prior to the operative date.

Comment. Section 1470 is new. It is included to facilitate the drafting and amendment of sections included in this chapter.

405/466

§ 1471. Operative date

1471. This division becomes operative on July 1, 1979.

Comment. Section 1471 defers the operative date of this division for six months in order to allow sufficient time for interested persons to become familiar with the new law and for the development of the necessary forms by the Judicial Council.

405/480

§ 1472. Effect on existing guardianships and conservatorships generally

1472. Subject to Section 1476, a guardianship or conservatorship in existence under this code on the operative date continues in existence and is governed by this division.

Comment. Section 1472 states the general rule that the enactment of this division and the repeal of prior law governing guardianships and conservatorships does not affect the existence of guardianships and conservatorships formed under prior law. However, on and after the operative date such guardianships and conservatorships are no longer governed by prior law but by this division.

§ 1473. Effect on bonds, security, and other obligations

1473. The bonds, security, and other obligations in effect immediately prior to the operative date shall continue to apply after the operative date just as if filed, issued, or incurred under this division after the operative date.

Comment. Section 1473 is consistent with the general rule stated in Section 1472.

§ 1474. Appointments or confirmations made under prior law

1474. The changes made in prior law by this division after the operative date in the standards for appointment or confirmation of a guardian shall not affect the validity of any nomination, appointment, or confirmation made under prior law, but any appointment or confirmation after the operative date is governed by this division.

Comment. Section 1747 is consistent with the general rule stated in Section 1472.

§ 1475. Pending actions and proceedings; actions arising under prior law

1475. Subject to Section 1476:

(a) Any action, cause of action, defense, accounting, or other proceeding instituted or maintained before the operative date shall be continued under this division, so far as applicable, and if no provision of this division is applicable, under the law in effect immediately prior to the operative date of this act, and for this limited purpose the prior law is continued in force and effect.

(b) If any right or remedy is abrogated or substantially curtailed by the provisions of this division after the operative date, the person entitled to such right or remedy shall have one year after the operative date in which to commence enforcement thereof under prior law.

Comment. Section 1475 is consistent with the general rule stated in Section 1472.

§ 1476. Effect on guardianships of adults and married minors

1476. (a) A guardianship of an adult, or a guardianship of the person of a married minor, in existence under this code on the operative date shall be deemed to be a conservatorship and is governed by the provisions of this code applicable to conservatorships without application or order, whether or not the letters of guardianship or the title of the proceeding are amended as provided in this chapter.

(b) A conservatee subject to conservatorship described in subdivision (a) shall be deemed to have been judicially determined to lack legal capacity as provided in Section 1832 unless otherwise ordered by the court.

(c) The validity of transactions and acts of a guardian or conservator shall not be affected by a misdescription of the office, nor shall any judgment, decree, or order of the court be invalidated by any such misdescription.

Comment. Section 1476 continues in effect as conservatorships all guardianships for adults and for the person of married minors established under prior law. It preserves the effect of the creation of a guardianship under prior law, which renders the ward incapable of making a valid contract. Hellman Commercial Trust & Sav. Bank v. Alden, 206 Cal. 592, 604-605, 275 P. 794, ___ (1929). Section 1832 permits the court to order that the conservatee lacks the power to enter into specified types of transactions or any transaction in excess of a specified amount. If the court removes entirely the disability imposed on the conservatee by this section, the conservatee will have the limited power to contract provided by Section 2527. See Board of Regents State Univs. v. Davis, 14 Cal.3d 33, 41, 533 P.2d 1047, ___ (1975).

§ 1477. Amendment of letters of existing guardianships

1477. Unless the court otherwise orders, the letters of guardianship in existence immediately preceding the operative date with respect to guardianships described in Section 1476 shall be amended at the time of the court's next biennial review as provided in Section 1850 to reflect that the conservatee lacks legal capacity to the extent provided in Section 40 of the Civil Code. Noncompliance with this section does not alter the effect of Section 1476 and gives rise to no penalty.

Comment. Section 1477 requires amendment of letters of conservatorship to indicate whether the conservatee (formerly a ward) lacks capacity. This requirement implements Section 1476.

405/764

§ 1478. References in statutes

1478. (a) The term "guardian," when used in any statute of this state with reference to an adult or person of a married minor, means the conservator of that adult or the conservator of the person in case of the married minor.

(b) Any reference in the statutes of this state to the term "absentee" or "secretary concerned" as defined in former Section 1751.5 of the Probate Code shall be deemed to be a reference to the definitions of those terms in this division.

(c) Any reference in the statutes of this state to the terms "account in an insured savings and loan association," "shares of an insured credit union," or "single-premium deferred annuity" as defined in Section 1510 of the Probate Code shall be deemed to be a reference to the definitions of those terms in this division.

Comment. Section 1478 is intended to conform references made obsolete by the enactment of this division in cases where conforming changes were not made in the references through inadvertence.

405/765

§ 1479. Rules of Judicial Council

1479. The Judicial Council may provide by rule for the orderly transition of pending proceedings on the operative date, including but not limited to amendment of the title of the proceedings and amendment of, or issuance of, letters of guardianship or conservatorship.

Comment. Section 1479 recognizes the authority of the Judicial Council in the transition period to prescribe rules not inconsistent with this chapter.