S254938

Case No.
_____

SUPREME COURT OF CALIFORNIA

Conservatorship of the Person and Estate of O. B. _____ T.B., et al., Petitioners and Respondents, vs. O.B., Objector and Appellant. _____	Second District Court of Appeal No. B290805

Appeal from the Superior Court of California,
County of Santa Barbara
Honorable James Rigali, Judge
(Santa Barbara County No. 17PR00325)

PETITION FOR REVIEW

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ISSUES PRESENTED

(1) Does the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. sections 1400 *et seq*., preempt the state conservatorship statute, so as to deprive the probate court of jurisdiction to impose a conservatorship or other order that modifies or alters a pupil's Individual Education Program (IEP), and require that the parties resolve all educational disputes through the procedures prescribed by that Act?

(2) Is a reviewing court in a conservatorship or other proceeding that is subject to a higher standard of proof (e.g. clear and convincing evidence) bound by that standard in determining whether substantial evidence exists to support the trial court judgment or order?

WHY REVIEW SHOULD BE GRANTED

This Court should grant review of the Court of Appeal's reported decision, because this case involves several recurring issues of public importance, both with specific reference to the present conservatorship proceeding, and with respect to those and other proceedings that are subject to the "clear and convincing" standard or other elevated standards of proof.

Initially, this Court should grant review to determine an issue that affects a potentially large number of autistic or other special needs individuals, and their right to an

appropriate education under the federal special education statute. In particular, this case presents the issue of whether the federal statute – which prescribes the manner in which federal special education assistance is to be administered, including the means for resolving disputes regarding the special needs individual's education – or preempts the state conservatorship statute or, conversely, whether conservatorship may be used to evade the requirements of the federal education statute. As set forth below and in the briefs filed by Petitioner with the Court of Appeal, the federal Individuals with Disabilities Education Act (IDEA) provides for the formulation and administration of an individualized education program (IEP) for special needs pupils, as a condition of receiving federal assistance, through a process that ensures that all interested and relevant parties – including the pupil, parents, and the local school district – are involved. The Act also provides for an administrative procedure to resolve disputes – including that between the family members in this case – which ensures accountability and effectiveness, and that must be followed prior to the filing of litigation. As a result, the federal statute clearly preempts state law, including the conservatorship statute, which the respondent mother in this case admits she utilized primarily to address perceived shortcomings in her daughter's special education program. However, the Court of Appeal in this case not only upheld the use of the conservatorship statute for that purpose, but failed to even address the federal statutes and the preemption argument raised by Petitioner.

In addition, this Court should grant review to determine an issue that affects not only all conservatorship appeals, but also dependency and all other proceedings that require, at the trial court level, "clear and convincing evidence" or some other elevated level of proof. In particular, this Court, which has held that appellate courts in dependency proceedings should incorporate the "clear and convincing evidence" standard into their standard of review, should clarify whether the same is true in determining whether substantial evidence exists in conservatorship and other areas, or whether, as the Court of Appeal held here, such standard "disappears" on review, and the existence of any evidence, regardless of how "clear and convincing," is, therefore, sufficient to uphold the judgment or order. The present Court of Appeal decision reflects the continued division between appellate courts on this issue and, if allowed to stand, would both perpetuate that confusion and deprive conservatees and other beneficiaries of the protections afforded by the higher, statutory standard of proof. Review is, therefore, appropriate to decide this matter of public importance, and clarify the proper standard of review to be utilized by reviewing courts in such instances.

STATEMENT OF THE CASE

A. The Parties, And The Respective Conservatorship Petitions.

Petitioner O.B. ("Petitioner") is the conservatee in this action, which was brought by her mother, T.B. ("Mother"), and her older sister, C.B. ("Sister") (collectively

"respondents"). L.K. is the grandmother of Mother, and the great grandmother of Petitioner. Petitioner, who was diagnosed with autism when she was twelve years old, resided with L.K. from the time that she was a small child until the granting of the conservatorship petition. At the time of the conservatorship proceedings, Petitioner was eighteen or nineteen years old, and was a senior at Cabrillo High School in Lompoc, while Mother and Sister resided in a different school district in Orange County.

On August 1, 2017, respondents filed a petition for the appointment of a temporary conservatorship, which was issued on August 18, 2017. On September 11, 2017, L.K. filed a counter-petition to be appointed conservator of Petitioner, and later filed an amended petition, which added Petitioner's cousin (C.P.) as an additional proposed co-conservator.[1]

B. The Educational Dispute, And The Trial Court's Preliminary Orders.

On September 14, 2017, respondents filed a declaration by an education rights attorney (Knox) outlining allegations against the Lompoc Unified School District, where Petitioner attended classes at Cabrillo High School. In response, the trial court denied Petitioner's request that she be permitted to hold her own educational rights, and appointed a guardian ad litem (Faulks) as to those rights. The court ordered that there be no changes to Petitioner's Individual Education Plan (IEP), that she not be removed from

[1]During the litigation, L.K. and C.P. took the position that no conservatorship was necessary, but that if one were appointed, it should be them rather than respondents.

Santa Barbara County without the court's permission, and that she continue to attend Cabrillo High School. However, on October 30, 2017, the court ordered Knox and Faulks to "work together to have [Petitioner's] IEP modified," that Petitioner "shall not graduate from Cabrillo High School," and that she "shall not take World History at Cabrillo High School," which was the one remaining course required for her to graduate.

C. The Granting Of The Conservatorship Petition, And The Resulting Appeal.

Trial on the conservatorship petitions was held on November 28, 2017, May 4, 2018, and May 29, 2018. At trial, Petitioner presented the testimony of her great grandmother L.K., with whom she had lived since the age of three or four, as well as of several third party experts, including a psychologist and a probate investigator for Santa Barbara County. Each of them testified that Petitioner was in the higher range of the autism spectrum and was intelligent and high functioning; that she could perform certain basic tasks; and that a conservatorship was, therefore, inappropriate. (*See* Slip Opinion, pp. 4-6.) By contrast, the only evidence presented by Mother consisted of her own testimony, which stated, among other things, that Petitioner was incapable of performing daily tasks, including dressing and cooking for herself, and is too trusting of other people. (*See* Slip Opinion, pp. 7-8.)

On May 24, 2018, the court granted Mother's petition, and appointed her as conservator of Petitioner, over Petitioner's objection. Petitioner appealed the order, arguing: (1) that the trial court lacked jurisdiction to issue orders, including the order

imposing a conservatorship, that affected her special education needs, because the conservatorship statute was preempted by federal special education laws; (2) there was insufficient evidence to establish that Petitioner lacked the ability to manage her affairs; (3) that the trial court failed to consider Petitioner's desires and the existence of less restrictive alternatives to conservatorship; and (4) the trial court improperly prejudged the need for a conservatorship. Respondents' brief , filed on November 13, 2018, did not directly address the federal preemption argument, or the federal authorities cited in Petitioner's opening brief.

D. The Court Of Appeal's Reported Decision.

On February 26, 2018, the Court of Appeal (Second District, Division Six) issued its reported decision, a copy of which is attached hereto as an exhibit, pursuant to the Rules of Court, in which it affirmed the trial court's conservatorship order. Quoting Petitioner's opening brief, The appellate court noted that Petitioner argued that "[t]he probate court's 'jurisdiction was preempted by the Federal and State Education Statutes," and that it "lacked the ability to modify or alter the special education plan instituted by the local school district under requirements established under federal and state education statutes." (Slip Opinion, p. 9.) However, the court, like respondents, failed to address that argument, or the federal authorities cited by Petitioner. Instead, it held that the conservatorship order, which resulted in the transfer of Petitioner from L.K.'s residence in Santa Barbara County to Mother's residence in Orange County, with a resulting change

in schools, "did not modify her special plan," but "merely granted to the limited conservators the power to make decisions concerning her education." (Slip Opinion, p. 10.)

In addition to its holding regarding Petitioner's education, the Court of Appeal held that sufficient evidence supported the establishment of a limited conservatorship. (*Id.* at pp. 10-13.) In doing so, the Court rejected Petitioner's argument that it was required to apply the same "clear and convincing evidence" standard as the trial court in determining whether "substantial evidence" supported the judgment. (Probate Code, section 1801, subdivision (e).) The Court stated as follows:

> "'The 'clear and convincing' standard . . . is for the edification and guidance of the trial court and not a standard for appellate review. "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.'"

Slip Opinion, p. 11, quoting *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-81 (remaining citations omitted). The Court of Appeal also held that the trial court properly considered Petitioner's desires and possible less restrictive alternatives (Slip Opinion, at pp. 13-14), and that the trial court did not improperly prejudge the case (*Id*. at pp. 14-15). On March 18, 2019, the court denied a petition for rehearing.

STATEMENT OF FACTS.[2]

A. The Parties' Respective Educational Arguments.

Mother was concerned about Petitioner returning to Cabrillo High School, because she believed that it has treated her badly, including shutting her in detention or a quiet room, leaving her out of senior activities, and allowing her to miss class periods while still passing classes in order to "get this kid out of my class." (*See* Slip Opinion, p. 6.) At trial, Mother testified that, if the requested conservatorship were established, Petitioner would attend El Modena High School in the Orange County School District, which she asserted was "one of the highest rated schools in the district and has a really good reputation for their special education program." (*See* Slip Opinion, pp. 6-7.)

Petitioner's great grandmother L.K. conceded that Petitioner requires additional educational help, and that her past year in school had been "terrible." She also testified, among other things, that district employees were not properly trained to handle an autistic child, and that they frequently send Petitioner to a detention area as punishment. However, she did not believe that Petitioner has missed the number of periods stated in school records, and believes that many of the supposedly missed periods involved the

[2]As indicated below in the argument (section II.), the present petition, with respect to the non-educational issues involved in the conservatorship petition, involves a primarily procedural issue, i.e. the standard of review on appeal. As a result, the following facts pertain solely to the educational issue. A summary of the remaining facts may be found in the Statement of the Case (section B.), and at pages 4-8 of the Court of Appeal's opinion.

World History class that the court ordered Petitioner not to take. She also believed that Petitioner would "collapse" if forced to move from her home to Orange County or a school in Sacramento.

In addition to family members, a psychological evaluator (Khoie) testified that much of Petitioner's academic functioning had to do with her emotional dysregulation, but that, despite Petitioner's academic difficulties, she believed that Petitioner's intellectual and adaptive functioning and skills did not warrant conservatorship. In addition, a special education administrator with Santa Barbara County (Butterfield), testified that Petitioner's most recent IEP appeared fairly typical for a high functioning autistic student. She also testified that, although she was aware of a due process lawsuit filed on behalf of Petitioner, the IEP in her opinion provided adequate educational benefits to Petitioner, that all of Petitioner's needs could be met within Santa Barbara County, and that Petitioner's combination of core and elective classes were appropriate for her education.

B. Petitioner's Individual Education Plan, And The Pending Educational Lawsuits.

According to Mother, she has participated in Petitioner's individual education plan (IEP), and at the last IEP in May, Petitioner was changed to a graduation track against Mother's wishes. As a result, Mother has been fighting "tooth and nail" with Cabrillo High School and Lompoc Unified School District, and has filed a due process lawsuit. She believed that the Orange County School District has a lot more resources, and did not believe that Lompoc could change some of their policies and procedures to provide what

Petitioner needs. Mother was also aware of a lawsuit filed by the guardian ad litem against the Lompoc Unified School District, which sought to help pay for Petitioner's remediation and education, and testified that any sums of money awarded as a result of the lawsuit, those funds would be used to pay for Petitioner's educational needs.

LEGAL ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE FEDERAL SPECIAL NEEDS EDUCATION STATUTES PREEMPT THE STATE CONSERVATORSHIP STATUTE, AND DEPRIVE THE PROBATE COURT OF JURISDICTION TO MODIFY OR ALTER A SPECIAL EDUCATION PLAN.

This Court should initially grant review to address an issue that was left unaddressed by both respondents and the Court of Appeal, and that affects potentially numerous autistic or other special needs children that receive federal educational assistance. In particular, this Court should address whether the federal special education statute – which provides for a detailed process for the development of a special needs student's individual education plan, as well as for resolving disputes arising under that plan, as a condition of providing federal assistance – preempts the state conservatorship statute, or, conversely, whether conservatorship proceedings may be used, as in this case, to avoid or "short-circuit" that process.

A. Federal And State Education Statutes Entitle A Developmentally Disabled Pupil To A Free And Appropriate Public Education, Based On An Individualized Education Plan That Is Developed By The Local School District, And That Can Be Modified Only Through A Prescribed Statutory Process.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. sections 1400 *et seq*.) provides states with federal funds to assist in educating children with disabilities. (*See, e.g., Arlington Central School Dist. Bd. of Educ. v. Murphy* (2006) 548 U S. 291, 295 [126 S.Ct. 2455; 165 L. Ed. 2d 526].)[3] The purpose of the IDEA was to address situations in which disabled children were either totally excluded from schools or sat idly in classrooms, awaiting the time when they were old enough to drop out. (*See, e.g., Endrew F. v. Douglas County School Dist*. (2017) 580 U.S. ___ [137 S.Ct. 988; 197 L. Ed. 2d 335]; *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 182 [102 S.Ct. 3034, 73 L.Ed.2d 690].) In exchange for such funds, a state pledges to comply with a number of statutory conditions, including providing a free appropriate public education (FAPE) to all eligible children. (*Endrew F., supra*.)

To provide the FAPE required under the IDEA statute, the state relies on an "individualized education program" (IEP), which is uniquely tailored to the individual child. (20 U.S.C. sections 1401(9)(D), 1412(a)(1); *Rowley, supra*, 458 U.S. at pp.

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[3]Autism, defined as a "neurodevelopmental disorder generally marked by impaired social and communicative skills, 'engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences,'" is considered a "disability" under the IDEA statute. (*Endrew F. v. Douglas County School Dist*. (2017) 580 U.S. ___ [137 S.Ct. 988, 996; 197 L. Ed. 2d 335], quoting 34 C.F.R. § 300.8(c)(1)(i) (2016).)

205-06.) The essential function of an IEP is to set out a plan to pursue academic and functional advancement on behalf of the disabled pupil, consistent with the broad purpose of the IDEA. (*Endrew F.*, *supra*, 137 S.Ct. at p. 999; *Rowley, supra*, 438 U.S. at p. 182.) The IEP is "the centerpiece of the statute's education delivery system for disabled children" (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L. Ed. 2d 686]), and is prepared by a child's "IEP team," which includes teachers, school officials and parents. (*Endrew F.,* 137 S.Ct. at p. 999; 20 U.S.C. section 1414(d)(1)(B).) In addition, the IEP must be drafted in compliance with a detailed set of procedures, which emphasize collaboration among parents and educators, and require careful consideration of the child's individual circumstances. (*Endrew F.*, 137 S.Ct. at p. 994.) The IEP must be reviewed and, if necessary revised at least once a year to ensure that the required FAPE is tailored to each child's unique needs. (20 U.S.C. section 1414(a)(5); *Honig, supra*, 484 U.S. at p. 311.) The responsibility for developing, reviewing, and revising the IEP, including the right to ultimately select the student's educational program, lies with the school district, and the IDEA does not empower parents to make unilateral decisions about the education programs funded by the public. (*Slama v. Independent School Dist. No. 2* (D. Minn. 2003) 259 F.Supp.2d 880, 885.)

Significantly, for purposes of this petition, the IDEA provides a detailed administrative mechanism for the resolution of disputes arising out of a child's IEP. Specifically, the statute provides initially for the informal resolution of disputes through a

"preliminary meeting" or mediation and, if those measures fail, a "due process hearing" before a state or local educational agency. Only at the conclusion of the administrative process may a losing party seek redress in state or federal court. (*See* 20 U.S.C. section 1415(e)-(i); *Endrew F.*, 137 S.Ct. at p. ___; *see also Honig, supra*, 484 U.S. at p. 312; *Slama*, *supra*, 259 F.Supp.2d at p. 885.) In addition, Education Code section 56501 provides that the Office of Administrative Hearings has sole jurisdiction over hearing and deciding special education disputes. Further, the "stay-put" provisions of the federal statute require that, unless the parties otherwise agree, the child must remain in their current educational placement while such a civil action is pending. (20 U.S.C. section 1415(e)(3); *Endrew F.*, 137 S.Ct. at p. 994; *see also Anchorage School Dist. v. M. P.* (9th Cir. 2012) 689 F.3d 1047, 1052, 1054.)

In addition to the above authority regarding the special federal education statutes, the law is clear that the jurisdiction and powers of the probate court are entirely statutory, and therefore limited. (*See, e.g.*, *Copley v. Copley* (1978) 80 Cal.App.3d 97, 107; *Conservatorship of Coffey* (1986) 186 Cal.App.3d 1431, 1439 ("Probate proceedings being purely statutory. . .the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided").)

B. Review By This Court Is Appropriate In Light Of The Novel And Unresolved Preemption Issue Presented By This Case, And By The Potential Effects Of The Court Of Appeal's Reported Opinion On The Numerous Special Needs Individuals Receiving Federal Educational Assistance.

The foregoing demonstrates that review by this Court is appropriate to address and correct an issue of public importance to a large number of autistic and other special needs students who participate in and receive benefits under the federal special education statute (IDEA). As indicated above, the IDEA envisions providing states with the funds necessary to ensure that developmentally disabled children, including children with autism, receive a free and appropriate public education. As the price for that assurance, the statute requires, as its "centerpiece," that the specific parameters of that education be set forth in a detailed IEP, which is uniquely tailored to the individual pupil, and which incorporates the input of specific members of the IEP team, including parents, teachers, and school officials. That process, and the detailed considerations that go into the development and implementation of the IEP, are fundamentally undermined where, as here, the courts rely on other, unrelated provisions of state law, such as the conservatorship statute, to "second-guess" the determinations of parents and educational professionals, and impose a completely different set of educational requirements, including a transfer to a completely different school and school district, and the pursuit of a completely different educational goal. Simply put, the trial court was and is not part of the "IEP team," and has no particular expertise in educational matters. Therefore, it

should not and cannot lawfully make educational decisions – including preventing Petitioner from taking World History or thereafter graduating from high school, or otherwise micromanaging her education. That conclusion is further buttressed by the dispute resolution procedures established by the Act. Those procedures include an informal "preliminary meeting" or mediation, followed by a hearing before a state or local educational agency that focuses on the limited issue of whether the parents child received due process in connection with the development and implementation of the IEP. The Act further provides that, only when such measures are unsuccessful may the parent or child seek redress in state or federal court.

Regrettably, the orderly procedure described above has been disrupted, first by the trial court, which used the conservatorship statute to perform an "end run" against the litigation that had already been initiated by Mother, who was eventually appointed as Petitioner's conservator, and later by the Court of Appeal, which affirmed the conservatorship order without even addressing the preemption issue, or the federal statutes or other authority. Moreover, the Court of Appeal's stated rationale for its decision, i.e. that the conservatorship order "did not modify [Petitioner's] special plan" but "merely granted to the limited conservators the power to make decisions concerning her education" (Slip Opinion, p. 10) is, respectfully, disingenuous. Specifically, it was clear from the outset that Mother resided in an entirely different school district; that, as she herself admitted, she initiated the conservatorship proceedings primarily because of

Petitioner's educational situation; and that she intended to and did move Petitioner, as a result of the conservatorship, to her own district and the specific school that Mother had selected, without complying with any of the requirements of the IDEA Act or awaiting the outcome of the litigation that she herself initiated.

Clearly, the use of the state conservatorship statute as a tool to address a special needs individual's educational situation, and to evade the requirements of the federal special educational statute presents issues of public importance that the Court of Appeal, regrettably, failed to even address. This Court should, therefore, grant review to determine the issue and the effects, if any, of the federal education statute upon conservatorship proceedings in this State.

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER STANDARD OF APPELLATE REVIEW IN CASES THAT ARE SUBJECT TO THE "CLEAR AND CONVINCING EVIDENCE" REQUIREMENT OR OTHER HEIGHTENED STANDARD OF PROOF.

In addition to the federal education preemption issue set forth in section I., which affects special needs individuals under the conservatorship statute, this Court should grant review to address an issue of broad public importance that affects not only conservatorship cases as a whole, but dependency and other areas which, like conservatorships, are subject to a heightened standard of proof. In particular, this Court should clarify that, where a statute provides that certain proceedings require proof by "clear and convincing evidence" or some similar standard, that standard applies both to

the trial court and the reviewing or appellate court, and that the appellate court must incorporate that higher standard in determining whether substantial evidence supports the trial court judgment or order. Here, the Court of Appeal, in finding that the biased and one sided testimony of Mother nonetheless constituted "substantial evidence" to support the conservatorship order, despite the existence of considerable, detailed contrary evidence, including that of two neutral experts, relied on prior case law holding that the "clear and convincing evidence" standard applicable to conservatorship proceedings "disappears" once the trial court issues its decision, and that appellate review is instead governed by the deferential, "substantial evidence" standard applicable to all cases, regardless of the specific standard of proof. In doing so, the court ignored several decisions by this Court in the analogous area of dependency law, and reflected and perpetuated a division among the appellate courts as to how to conduct their review in such situations. As a result, review by this Court is both necessary and appropriate to finally resolve this conflict and determine the proper standard of review in conservatorship and other areas, and to ensure that persons involved in proceedings that are subject to a higher standard of proof receive the benefits of that higher standard.

A. Under This Court's Decisions, An Appellate Court Must Incorporate In Its Review The "Clear And Convincing Evidence" Or Other Heightened Standard Of Proof Applied To The Trial Court.

Several decisions by this Court indicate that, where a particular type of proceeding is subject to a heightened standard of proof, such as "clear and convincing evidence" or

"beyond a reasonable doubt," a reviewing court must incorporate that higher standard of proof in determining whether there was "substantial evidence" to support a judgment or order. (*See, e.g., People v. Johnson* (1980) 26 Cal. 3d 557, 576 (test in reviewing a criminal conviction is whether "a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt").) Thus, in *In re Jasmon O.* (1994) 8 Cal.4th 398, a juvenile court proceeding involving the termination of parental rights, this Court stated as follows:

> "A court may order termination of parental rights only if it finds the elements of the action under former Civil Code section 232 established by clear and convincing evidence. On review of the order of the juvenile court terminating parental rights, the reviewing court must determine whether there is any substantial evidence to support the trial court's findings. It is not our function, of course, to reweigh the evidence or express our independent judgment on the issues before the trial court. Rather, as a reviewing court, we view the record in the light most favorable to the judgment below and "'decide if the evidence [in support of the judgment] is reasonable, credible and of solid value – *such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence*."
>
> *Jasmon O.*, 8 Cal.4th at pp. 422-23 (citations omitted) (emphasis added).

Similarly, this Court in *In re Angelia P.* (1981) 28 Cal.3d 908 stated as follows:

> "Appellants argue insufficiency of the evidence. We apply, with appropriate modifications, our holding in *People v. Johnson* (1980) 26 Cal. 3d 557, 578, made in accordance with *Jackson v. Virginia* (1979) 443 U.S. 307 [61 L. Ed. 2d 560, 99 S.Ct. 2781]: 'the [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – *such that a reasonable trier of fact could find [that termination of parental rights is appropriate based on clear and convincing evidence*]." *Angelia P.*, 28 Cal.3d at p. 924 (emphasis added).

The above authority makes clear that there are, in essence, two separate tests to determine whether a judgment or order is supported by sufficient evidence. One of those tests focuses upon the evidence itself, i.e whether it is "reasonable, credible, and of solid value." The second test focuses upon the relationship between that evidence and the applicable burden of proof, and whether it was sufficient to meet that standard. Significantly, both the *Johnson* and *Jackson* cases on which this Court in *Angelia P.* relied incorporated the burden of proof into the test on appeal, and rejected the notion that "some" evidence, however slight, is sufficient to uphold a judgment or order in a case that is subject to a higher burden of proof. (*See Jackson, supra*, 443 U.S. at p. 317 ("a substantive constitutional standard [beyond a reasonable doubt] must also require that the factfinder will rationally apply that standard to the facts in evidence"); *see also Id.* at p. 318 ("the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt"); *Johnson, supra*, 26 Cal.3d at p. 562 ("Whenever the evidentiary support for a conviction faces a challenge on appeal, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt . . . .") (emphasis added).)

B. Because The Court Of Appeal Erroneously Held That The "Clear And Convincing Evidence" Standard In Conservatorship Proceedings Applied Only To The Trial Court And "Disappeared" Upon Review, And Because That Holding Reflects The Ongoing Conflict Between The Courts, This Court Should Grant Review To Clarify The Proper Standard Of Review In Such Situations.

In contrast to the above authority, the Court of Appeal in this case, while acknowledging that conservatorship cases are subject to the "clear and convincing evidence" standard of proof (Slip Opinion, p. 11, citing Probate Code section 1801, subdivision (e)), refused to apply that standard to its review of the evidence in this case. In doing so, the court did not cite or rely upon either *Johnson*, *Jasmon O.*, or *Angelia P.* Instead, as noted above in the Statement of Facts (section D.), the Court stated that "[t]he 'clear and convincing' standard . . . is for the edification and guidance of the trial court and not a standard for appellate review," and that "on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.'" (Slip Opinion, p. 11, quoting *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-81.) *Sheila S.,* in turn, relied on several Court of Appeal cases that antedated this Court's decisions in *Jasmon O.* and *Angelia P.*, and on a portion of the Witkin treatise that does no more than restate the traditional limitations on appellate review of trial court decisions. (*See* 9 Witkin California Procedure (5th ed. 2008) Appeal § 371 p. 428).

As a result, the Court of Appeal decision in this case fails to account for the

changes in the law resulting from *Jackson* and *Johnson*, and reflected by this Court's opinions in *Jasmon O.* and *Angelia P.* Moreover, that failure reflects the existing divisions among the different appellate courts as to the proper standard of review in cases that are subject to a heightened trial court standard of proof. Thus, for example, some appellate courts have taken the position that the reviewing court must determine whether the evidence is sufficient to meet the applicable standard, i.e. clear and convincing evidence, in termination of parental rights cases.[4] Other courts, however, have stated, like the Court of Appeal in this case, that the trial level burden of proof "disappears" on appeal, and that the only issue is whether "substantial evidence" supports the decision of the trier of fact.[5] However, the holdings in the latter cases, and of the Court of

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[4] *See, e.g., In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038 ("on appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, 'the substantial evidence test applies to determine the existence of the clear and convincing standard of proof '""); *In re Alexis S.* (2012) 205 Cal.App.4th 48 and *In re Kristin H.* (1996) 46 Cal.App.4th 1635 ("[o]n review of the court's dispositional findings, we employ the substantial evidence test, however bearing in mind the heightened burden of proof"); *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415 ("the record contains sufficient evidence . . . from which a reasonable trier of fact could find a substantial danger . . . by clear and convincing evidence"); *In re Mariah T.* (2008) 159 Cal.App.4th 428, 441 ("we review the record in the light most favorable to the dependency court's order to determine whether it contains sufficient evidence from which a reasonable trier of fact could make the necessary findings by clear and convincing evidence"); *In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536 (evidence must be "reasonable, credible and of solid value – such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence"); *In re Heidi T.* (1978) 87 Cal.App.3d 864, 870-871 (appellate court must make "determination whether substantial evidence exists to support the conclusions reached by the trial court in utilizing the appropriate standard").)

[5] *See, e.g., In re E.B.* (2010) 184 Cal.App.4th 568, 578; *Sheila S., supra*, 84 Cal.App.4th at pp. 880-81; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-81.

Appeal in this case, ignore the fact that, as shown above, the sufficiency of the testimony or other evidence must be determined according to the applicable standard of proof in the particular case. Moreover, that holding, taken to its logical conclusion, would mean that judgments or orders in all cases that are subject to a higher standard of proof, including criminal cases requiring proof beyond a reasonable doubt, must be upheld if there is the "slightest" evidence to support them. Such a result is directly contrary to the United States Supreme Court's holding in *Jackson* and this Court's holding in *Johnson*, and would deprive a criminal defendant and others entitled to a higher burden of proof of the benefit of those standards, by allowing the decision of a trial court that ignored such standard to stand, so long as there was some "slight" evidence to support it.[6]

The effects of the Court of Appeal's failure to apply the proper standard of appellate review are evident in this case. The undisputed evidence, including the testimony of several neutral third party experts, established that Petitioner was of at least

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[6]In addition to depriving a proposed conservatee of the benefits of the "clear and convincing evidence" standard, the standard of review utilized by the Court of Appeal in this matter would also deprive such individuals of other protections under the conservatorship and mental health statutes. Those protections include the principle that the conservatee is not presumed to be incompetent, and retains all rights other than those designated as legal disabilities and specifically granted to the limited conservator (Probate Code section 1801, subdivision (d); the fact that the conservatee must be allowed "to remain as independent and in the least restrictive setting as possible" (Probate Code section 1800, subdivision (d); the rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their acts or decisions (Probate Code section 810, subdivision (a); and the requirements that the deficit be "substantial," and "should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder" (Probate Code section 810, subdivision (c)).

average intelligence and, although autistic, was high functioning, and was able to perform or could be taught to perform basic life tasks. The facts also established that the only contrary evidence came from Mother, who was seeking to impose a conservatorship and therefore hardly neutral, and was in any case inconclusive. As a result, the Court of Appeal's refusal to apply the "clear and convincing" standard to its own review of the evidence allowed the trial court to impose a conservatorship, and take away Petitioner's basic rights of self-determination, based solely on the say-so of the party seeking such conservatorship.

In sum, the Court of Appeal's decision in this case, if permitted to stand, would exacerbate existing divisions in the appellate courts and result, including in conservatorship cases, in the continued imposition of an erroneous standard of review that is contrary to this Court's decisions in *Johnson*, *Jasmon O.* and *Angelia P.* For this additional reason, this Court should grant review in this case.

DATED: March 28, 2019

GERALD J. MILLER
Attorney at Law

_____
Attorney for Objector, Appellant, and Petitioner O.B.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.360(b)(1) of the California Rules of Court, the undersigned counsel states that the foregoing petition contains 6,158 words, according to the word count of the computer program used to prepare the petition.

DATED: March 28, 2019

GERALD J. MILLER
Attorney at Law

_____
Attorney for Objector, Appellant, and Petitioner O.B.

EXHIBIT A (COURT OF APPEAL OPINION)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Conservatorship of the Person of O.B.	2d Civil No. B290805 (Super. Ct. No. 17PR00325) (Santa Barbara County)
T.B. et al., Petitioners and Respondents, v. O.B., Objector and Appellant.	

O.B. is a person with autism spectrum disorder (autism).[1] She appeals from an order establishing a limited conservatorship

[1] "Autism spectrum disorder is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or

of her person and appointing respondents T.B., her mother (mother), and C.B., her elder sister, as conservators. Appellant's principal contentions are (1) the probate court acted in excess of its jurisdiction by modifying her special education plan, and (2) the evidence is insufficient to support the probate court's findings.

A person with autism is not automatically a candidate for a limited conservatorship. Each case requires a fact-specific inquiry by the probate court. "Autism is known as a 'spectrum' disorder because there is wide variation in the type and severity of symptoms people experience." (https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml.) Based on the facts here, we affirm the order establishing a limited conservatorship of appellant's person.

Factual and Procedural Background

The limited conservatorship was imposed after a contested evidentiary hearing (also referred to herein as "trial"). Our summary of the facts is based on evidence presented at the trial in the form of testimony and exhibits. We disregard respondents' summary of the facts based upon reports and declarations that were neither offered nor received in evidence. During the parties' closing argument, the probate court made clear that it would consider only evidence presented at the trial: "We have had lengthy proceedings outside of the evidentiary proceeding, so you need to limit your arguments to the record inside of the evidentiary proceeding." (See also Prob. Code, § 1046 ["The court shall hear and determine any matter at issue and any response or objection presented, *consider evidence presented*, and make

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activities." (American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) p. 31.)

appropriate orders" (italics added)].)[2] Moreover, because the evidentiary hearing was contested, declarations were inadmissible pursuant to section 1022.[3]

In August 2017 respondents filed a verified petition requesting that they be appointed limited conservators of appellant's person. The petition alleged that appellant had been diagnosed with autism and "is unable to properly provide for . . . her personal needs for physical health, food, clothing, or shelter."

When the petition was filed, appellant was 18 years old. She was living with her great-grandmother in Lompoc, County of Santa Barbara, and was repeating the 12th grade at Cabrillo High School. She had been living with her great-grandmother since she was three or four years old. Mother resided in Orange County.

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[2] Unless otherwise stated, all statutory references are to the Probate Code.

[3] Section 1022 provides, "An affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." "[S]ection 1022 authorizes the use of declarations only in an 'uncontested proceeding.'" (*Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309.) "When a petition is contested, as it was here, . . . absent a stipulation among the parties to the contrary, each allegation in a verified petition and each fact set forth in a supporting affidavit must be established by competent evidence. [Citations.]" (*Estate of Lensch* (2009) 177 Cal.App.4th 667, 676.) On the other hand, a declaration or report received in evidence without objection at a contested hearing may properly be considered as competent evidence. (See *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1088.) Here, no one objected to the exhibits received in evidence.

An expert witness, Dr. Kathy Khoie, testified on appellant's behalf. Khoie, a psychologist, opined that appellant "is not a candidate for conservatorship." Khoie explained: "My opinion is based on her intellectual functioning level. I believe that [she] has at least average intelligence. She's high average in her non-verbal functioning." "[S]he is verbal. She's able to talk about her likes and dislikes." In her report, Khoie concluded that although appellant "has a diagnosis of Autism Spectrum Disorder," she "has the potential to live independently with support. She does not require a high level of supervision and decision making by a conservator."

In her report Khoie said she had reviewed the "Conservator Evaluation" report of the "Tri-Counties Regional Center." The regional center report, which was neither offered nor received in evidence, was prepared by David Jacobs, Ph.D. Section 1827.5, subdivision (a) provides that the proposed limited conservatee, "with his or her consent, shall be assessed at a regional center . . . . The regional center shall submit a written report of its findings and recommendations to the court."[4] Khoie stated: "Dr. Jacobs recommended limited conservatorship concerning habilitation, education/training, medical and psychological services; access to confidential records, and the right to enter into

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[4]See Cal. Conservatorship Practice (Cont.Ed.Bar 2018 update) § 22.7 D. Role of Regional Center: "The regional center plays a very significant role in the establishment of a limited conservatorship. Before a limited conservatorship is created, the regional center performs an assessment of the proposed limited conservatee and submits a written report of its findings and recommendations to the court. [Citations.]" "[T]he regional center report is required before the court can proceed to decide the petition for a limited conservatorship."

a contract. Recommended power for education and medical treatment were reiterated. Dr. Jacobs did not recommend conservatorship for decision regarding place of residence." Since Dr. Khoie's report was received in evidence without objection, we may consider her report's reference to Dr. Jacobs' recommendations even though Dr. Jacobs' report was not received in evidence. (See *Estate of Nicholas*, *supra*, 177 Cal.App.3d at p. 1088.)

Appellant's other expert witness, Christopher Donati, is the probate investigator for the Santa Barbara County Public Guardian's Office. Pursuant to a "non-court ordered" referral, he met with appellant and evaluated her "to determine if conservatorship was appropriate." Appellant said she "was opposed to the idea of a conservatorship." She wanted to continue living with her great-grandmother in Lompoc and continue attending Cabrillo High School. Donati spoke to mother, who said "she was hoping to move [appellant] and have her attend a different educational institution and begin regional services where [mother] resides [in Orange County]." Donati opined that he did not "see any . . . way that the conservatorship would benefit [appellant] at this point." His primary concern was the removal of appellant from her great-grandmother's home. The removal could cause her to "experience trauma."

Donati reviewed Dr. Jacobs' regional center report as well as the "capacity declaration by Dr. [Cindy] Blifeld." Her declaration was neither offered nor received in evidence, but Donati testified that Dr. Blifeld's declaration contained the required "medical component [for a limited conservatorship] where a medical professional is in support of a conservatorship and [declares] that they feel that the . . . potential conservatee

lacks capacity." Dr. Blifeld "did feel that . . . [appellant] lacked capacity." Donati continued: "There seemed to be conflicting reports where certain professionals felt . . . that she did lack capacity. And I believe Dr. Khoie was a professional that felt like she did have capacity and the conservatorship was not appropriate. So there seemed to be conflicting information."

L.K. is appellant's 82-year-old great-grandmother. She testified that, since the conservatorship proceedings began, appellant has been "a nervous wreck." L.K. opined that appellant does not need a conservatorship and can take care of herself "[a]s much as any teenager can." She also opined that it was "a bad idea for [appellant] to live with her mom and her dad and her sisters" because "[s]he's afraid of them. She's afraid that she won't be able to come back and see me." "Her mother yells and swears at her and takes her electronics . . . away from her."

Mother testified: For the past 10 years, she has had "[n]early daily" contact with appellant. Mother lives with appellant's father and two sisters in a "large five bedroom home" in Orange County. She "filed the petition to basically protect [appellant] from the school [Cabrillo High School in Lompoc] and then long term just [to] protect her." Appellant "has had . . . like 160 missed class periods, but she still manages to get passing grades, even high grades, in all of her academics." Mother referred to the grades as "'get this kid out of my class' grades." "[S]he's not in class to earn the grades. She's not producing work to earn the grades." Sometimes the school placed appellant in detention for the entire day.

If the requested conservatorship were established, mother said appellant would attend El Modena High School in the Orange County School District. Mother asserted that this school

is "one of the highest rated schools in the district and has a really good reputation for their special education program." Mother spoke to the "special education coordinator of the district."

Mother further testified: Appellant needs guidance in making routine decisions and assistance in performing daily tasks. Appellant "really struggles with taking in information needed to make decisions." Mother needs to ask her, "'Are you going to wear a sweater today? Are you putting on clean underwear? Are you going to brush your hair? Did you brush your teeth? Did you take your pills? . . . Is it hot out? Do you need to wear shorts?'" Appellant asks mother, "'Can you lay my clothes out for me. . . . Can you turn the shower on.'" Mother, appellant's father, or her great-grandmother "handles her medication." Appellant cannot cook or do her laundry. Appellant has "behavioral outbursts" where she will "run off or scream and yell." She "screams and yells and fights and gets her way no matter what she does, . . . and it stresses her out and makes her upset."

Mother also testified that appellant is too trusting of other people. She will trust "people who are just nice to her . . . . She will go off with people she shouldn't and trust people she shouldn't. It's dangerous." Two years ago, appellant "ran off" to see "Sponge Bob on Hollywood Boulevard." She trusts Sponge Bob.[5] She also trusts "all of her family and anyone at school,

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[5]Pursuant to Evidence Code sections 452, subdivision (h) and 459, we take judicial notice that "SpongeBob is depicted as being a good-natured, optimistic, naïve, and enthusiastic yellow sea sponge residing in the undersea city of Bikini Bottom alongside an array of anthropomorphic aquatic creatures." (https://en.wikipedia.org/wiki/SpongeBob_SquarePants_(character).)

anyone she's seen before, people at restaurants, restaurant staff." If a person she trusts asks her to sign a document, "she'll just sign it no matter what." If "you're explaining [the document], she doesn't really care."

Tammi L. Faulks, appellant's guardian ad litem, filed an action against the Lompoc Unified School District claiming that appellant had not "received the education to which she was entitled." Faulks sought to "get the school district to either set aside a compensatory education fund [for appellant] or allow [her] to continue to obtain high school services and all of the benefits that go with that until she's age 22." Faulks told the court she was "very worried that [school employees] seem to . . . do whatever it takes to push [appellant] out of the school regardless of whether she gets a proper education."

During closing argument, respondents' counsel stated that appellant "has had 312 unexcused class absences this year, so far, and numerous suspensions." No one objected to this statement. Appellant's guardian ad litem said, "[I]t's true that she's missed over 300 class periods . . . this school year."

The trial court found that a limited conservatorship "is appropriate" and that appellant "is unable properly to provide for . . . her personal needs for physical health, food, clothing, or shelter." The court also found that she "lacks the capacity to give informed consent for medical treatment." The court remarked that appellant's treatment at Cabrillo High School has "been a failure of the education system for her." The court characterized this remark as "just dicta because the County of Santa Barbara Education Office" and the "Lompoc Unified School District [are] not . . . part[ies] to this action." None of the parties requested a statement of decision.

Limited Conservatorship

"A limited conservator of the person . . . may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator." (§ 1801, subd. (d).)

Court's Alleged Lack of Jurisdiction to Modify Appellant's Educational Plan

Section 2351.5, subdivision (b)(7) provides that, "in its order appointing the limited conservator," the probate court may grant to the conservator the power to make "[d]ecisions concerning the education of the limited conservatee." The probate court expressly granted this power to respondents.

Appellant argues: The probate court's "jurisdiction was preempted by the Federal and State Education Statutes." (Bold and capitalization omitted.) "[T]he [probate] court . . . lacked the ability to modify or alter the special education plan instituted by the local school district under requirements established under federal and state education statutes." "As a result, . . . the [probate] court's order granting [respondents'] petition, which prevented [appellant] from . . . graduating from Cabrillo High School, and resulted in the removal of [appellant] from both her

school and her home, exceeded the court's jurisdiction and was legally invalid."

Appellant's argument lacks merit. The probate court did not modify her special education plan. As authorized by section 2351.5, subdivision (b)(7), the court merely granted to the limited conservators the power to make decisions concerning her education. The court stated, "I'm not involved in her education, really, at all, except to the extent that if I impose the . . . limited conservatorship, . . . that might affect who gets to talk about her education."

Appellant has not cited authority prohibiting the establishment of a limited conservatorship solely because it may result in an adult student's transfer from a school that has failed to meet her educational needs. "'It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and """all intendments and presumptions are indulged in favor of its correctness."' [Citation.]" [Citation.] An appellant must provide an argument and legal authority to support his contentions. . . .'" (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799.)

Substantial Evidence Supports the Establishment of a Limited Conservatorship of Appellant's Person

At the hearing on a petition for appointment of a limited conservator of the person, the court shall make the appointment "[i]f the court finds that the proposed limited conservatee lacks the capacity to perform *some*, but not all, of the tasks necessary to provide properly for his or her own personal needs for physical health, food, clothing, or shelter, or to manage his or her own financial resources." (§ 1828.5, subd. (c), italics added.)

Appellant contends that the evidence is insufficient to support the required findings.

We review the probate court's findings to determine whether they are "supported by substantial evidence. In making that determination, we view the entire record in the light most favorable to the . . . findings. [Citations.] We must resolve all conflicts in the evidence and draw all reasonable inferences in favor of the findings. [Citation.]" (*Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390, 401.)

The "clear and convincing" standard of proof applies to the appointment of a limited conservator. (§ 1801, subd. (e).) Appellant erroneously contends that we "must apply the same standard in determining whether 'substantial evidence' supports the judgment." "The 'clear and convincing' standard . . . is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] '"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881.)

Mother's testimony constitutes substantial evidence in support of the required finding that "[appellant] lacks the capacity to perform *some* . . . of the tasks necessary to provide

properly for . . . her own personal needs for physical health, food, clothing, or shelter, or to manage . . . her own financial resources." (§ 1828.5, subd. (c), italics added.) "The testimony of one witness may be sufficient to support the findings." (*Conservatorship of B.C.* (2016) 6 Cal.App.5th 1028, 1034.) For purposes of determining the sufficiency of the evidence, it is of no consequence that appellant's experts, Dr. Khoie and Donati, opined that a limited conservatorship is inappropriate. "An appellate court . . . will sustain the trial court's factual findings if there is substantial evidence to support those findings, even if there exists evidence to the contrary. [Citation.]" (*Conservatorship of Amanda B.* (2007) 149 Cal.App.4th 342, 347.)

Dr. Khoie's and probate investigator Donati's opinions conflict with the regional center evaluation prepared by Dr. Jacobs, who recommended a limited conservatorship. Their opinions also conflict with Dr. Blifeld's evaluation of appellant. Donati testified that Dr. Blifeld had provided the required "medical component [for a limited conservatorship] where a medical professional is in support of a conservatorship and [declares] that they feel that the . . . potential conservatee lacks capacity." The opinions of Drs. Jacobs and Blifeld add to the already substantial evidence in support of the probate court's findings.

In deciding to appoint a limited conservator of appellant's person, the probate court took into account its personal observations of appellant during the proceedings. The court stated: "I've been involved in numerous hearings, and [appellant] has been at all of them or most of them. So in addition to some of the different witnesses[,] I am entitled to base my decision . . . in part on my own observation of [appellant] at the proceedings."

We reject appellant's assertion that "[t]he fact that the trial court 'observed' [appellant] - who was sitting right in front of him - over a ten month period [citation], proves nothing." The court's personal observations of appellant contribute to the substantial evidence in support of its findings. (See *People v. Rodas* (2018) 6 Cal.5th 219, 234 ["when a competency hearing has already been held, [in determining whether to conduct a second competency hearing] 'the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state,' particularly if the defendant has 'actively participated in the trial' and the trial court has had the opportunity to observe and converse with the defendant"].) The probate court had the opportunity to observe and converse with appellant. (See also *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 ["substantial evidence, including the trial court's own observations of defendant, supports the court's factual determination that defendant was not intoxicated at the time he entered his guilty plea and that his plea was knowing, intelligent, and voluntary"].)

The Probate Court Did Not Violate Principles of Conservatorship Law

Appellant claims that the probate "court's actions and orders violated basic principles under the State Conservatorship Statute." (Bold and capitalization omitted.) "[O]f particular significance, the [probate] court's conservatorship order ignored or disregarded the wishes and desires of [appellant] herself, contrary to both the letter and the spirit of conservatorship statutes."

The probate court considered appellant's personal preferences. Although appellant did not testify, the court

permitted her to explain at length in open court why she wanted to stay in Lompoc and attend Cabrillo High School. The court was not required to accede to her wishes.

Appellant argues that the probate court "failed to consider the clear availability of less restrictive alternatives to a conservatorship." (Bold and capitalization omitted.) "No conservatorship of the person . . . shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee." (§ 1800.3, subd. (b).) The probate court expressly made this exact finding. Appellant does not cite authority requiring the court to set forth on the record the less restrictive alternatives to a conservatorship that it considered. "Because such express findings are not required, we presume the court followed the law in making its determination [citation], including a consideration of [less restrictive alternatives]." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 698-699; see also *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563 ["it is presumed that the court followed the law. . . . The mere fact that the court did not explicitly refer to rule 203.5(e), when the statute contains no such requirement does not support the conclusion that it was ignored"].)

The Probate Court Did Not Prejudge the Case

Appellant contends, "[T]he statements and actions by the [probate] court demonstrate that it had already prejudged the case, and the purported need for a conservatorship." In support of her contention, appellant refers to the court's remarks at a pretrial hearing concerning "[a] placement decision," i.e., "whether or not [appellant] stays at Cabrillo [High School] or she

goes down to a high school in Orange County." The court said appellant's counsel should "be prepared to show cause why I shouldn't impose a permanent conservatorship on the date of the [upcoming trial] because . . . . I believe that the mother has shown a prima facie case [at the pretrial hearing] of why a permanent conservatorship is probably appropriate." A prima facie case is shown when a party produces "enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." (Blacks Law Dict. (9th ed. 2009) p. 1310, col.1.) The court continued, "So . . . you need to make sure that if you object to that, . . . you make it clear to both sides and to the Court on that day [the day of trial] that you don't want a conservatorship because when that day is over, I'm going to probably impose one, unless you change my mind." Appellant's counsel replied, "Understood, Your Honor."

The probate court's statements do not demonstrate that it prejudged the limited conservatorship issue before hearing the evidence at trial. As a courtesy to appellant, the court informed her counsel that at the pretrial hearing mother had made a prima facie case that a limited conservatorship "is *probably* appropriate." (Italics added.) Thus, the court warned counsel that at trial she should be prepared to present evidence showing that a limited conservatorship is not appropriate. The court made clear that it would not make up its mind until it had heard all of the evidence.

Disposition

The order establishing a limited conservatorship of appellant's person and appointing respondents as conservators is affirmed. The parties shall bear their own costs on appeal.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

James Rigali, Judge

Superior Court County of Santa Barbara

Gerald J. Miller, under appointment by the Court of Appeal for Appellant.

Law Offices of Laura Hoffman King and Laura Hoffman King; Tardiff Law Offices and Neil S. Tardiff for Respondents.

PROOF OF SERVICE BY MAIL

I am over the age of 18 years of age, and am not a party to the within action; my business address is P.O. Box 543, Liberty Hill, TX 78642. On the date hereinbelow specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Liberty Hill, Texas, addressed as follows:

DATE OF SERVICE: March 28, 2019

DOCUMENT SERVED: PETITION FOR REVIEW

PERSONS SERVED:
See Attachment A

I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Liberty Hill, Texas.

PROOF OF SERVICE BY ELECTRONIC SERVICE

(Cal. Rules of Court, Rules 2.251(i)(A)-(D), 8.71(f)(1)(A)-(D))

I additionally declare that I electronically served the foregoing document on all listed parties under the Court's True Service filing program.

I additionally declare that I served the Court of Appeal, Second District, Division Six, per Supreme Court TrueFiling policy.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 28, 2019 at Liberty Hill, Texas.

_____
GERALD J. MILLER

ATTACHMENT A – Service List

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