Case No.
S254938

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)

PETITIONER'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

Other **Page**

ISSUE PRESENTED

On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the Court of Appeal's decision affirming the conservatorship order in this case, because the appellate court used a demonstrably improper standard of review that failed to consider the heightened, "clear and convincing evidence" burden of proof applicable in conservatorship proceedings. As a result, the appellate court erroneously found that the evidence presented to the trial court was sufficient to establish that Petitioner, a 19 year old high functioning autistic woman, lacked the capacity and ability to care for herself. The appellate court did so despite the fact that the evidence at trial consisted almost entirely of the biased and self-serving testimony of Petitioner's mother, who had not resided with Petitioner for most of her life and sought to impose a conservatorship only after Petitioner achieved majority and only as a result of an educational dispute. The court also did so despite the fact that such testimony was contradicted by virtually every other witness, including several neutral

experts, who testified that Petitioner was a high-functioning, albeit autistic woman, for whom conservatorship was neither necessary nor appropriate.

As shown below, the Court of Appeal's use of an erroneous standard of review reflects a longstanding division of authority among the appellate courts as to whether the standard of review must consider the specific, heightened burden of proof applicable in conservatorship or other proceedings in determining whether the evidence presented to the trial court was sufficient to support the resulting judgment. Petitioner respectfully submits that the better reasoned line of authority holds that appellate review of the sufficiency of the evidence must bear in mind that heightened standard, not only as a matter of logic and necessity, but also as a means of fully implementing the legislative and judicial policies behind that standard, including those governing conservatorship proceedings. Petitioner also respectfully submits that such a result is compelled by the prior decisions of the United States Supreme Court and this Court in analogous situations and cases in which a heightened standard of proof applies. By contrast, the notion, embraced by the Court of Appeal in this case, that the "clear and convincing evidence" or other heightened standard applicable in the trial court simply "disappears" on appeal, and that any evidence that is "substantial" will support the judgment in such cases is illogical and based on outdated, antiquated authority, and does not reflect either those prior decisions or the policies and safeguards behind the applicable heightened standard.

As a result, this Court should reverse the Court of Appeal's decision in this case,

on grounds that it employed an erroneous standard of review. Instead, this Court should hold that the standard of review of the sufficiency of the evidence in conservatorship proceedings must consider whether that evidence was "clear and convincing," as required by the conservatorship statute. In addition, because the evidence presented in support of the requested conservatorship was sparse, biased, uninformed and ultimately unpersuasive, it was neither clear nor convincing, and was insufficient to justify the extraordinary step of depriving Petitioner of her basic right to care for herself and make her own decisions. Accordingly, this Court should both reverse the judgment of the Court of Appeal, and remand the matter with instructions to reverse the conservatorship order in this case.

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 in this matter. 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. 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 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.

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[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.

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

A contested hearing or 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., 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 and unnecessary. (*See Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 629-30.) 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* 32 Cal.App.5th at pp. 630-31.)

On May 24, 2018, the court granted Mother's petition, and appointed her as conservator of Petitioner, over Petitioner's objection.

D. The Court Of Appeal's Reported Decision.

On February 26, 2019, the Court of Appeal (Second District, Division Six) issued its reported decision, in which it affirmed the trial court's conservatorship order. With respect to the parties' educational dispute, the court rejected Petitioner's argument that the probate court's jurisdiction was preempted by federal and state special education statutes, and that it lacked the ability to modify or alter the special education plan

instituted by the local school district. (32 Cal.App.5th at pp. 632-33.) In addition, the Court of Appeal held that sufficient evidence supported the establishment of a limited conservatorship. (*Id.* at pp. 633-35.) 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.'"

32 Cal.App.5th at pp. 633-34, quoting *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-81 (remaining citations omitted). The court also held that the trial court properly considered Petitioner's desires and possible less restrictive alternatives, and that the trial court did not improperly prejudge the case (*Id.* at pp. 635-36.)

On March 18, 2019, the Court of Appeal denied a petition for rehearing. On May 1, 2019, this Court granted review, but limited such review to whether the "clear and convincing" evidence standard applied to appellate review of the trial court's conservatorship order.

STATEMENT OF FACTS[2]

A. The Testimony Of The Proposed Conservators.[3]

1. The Testimony Of Petitioner's Mother.

Mother is a designer, and lives with her husband (Petitioner's father) and Petitioner's sisters in a five bedroom home in Silverado Canyon in Orange County. (1 R.T. pp. 80-81, 163, 177.) Mother lived with L.K. for several years when she was a teenager. (1 R.T. p. 78.)

At the time of the conservatorship proceedings, Petitioner resided with Mother's grandmother (Petitioner's great grandmother) L.K. in Lompoc, where she has lived since she was 4½ years old. (1 R.T. pp. 74-75.) Petitioner came to live with L.K. when Mother and her husband separated, and she took a job in Arizona. Although they later reconciled, Petitioner was doing so well at L.K.'s house that the family decided to keep her there while Mother took a political job in Florida in 2004, and while she and her husband lived in Texas. (1 R.T. pp. 75-76, 86-87, 89.)

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[2]Inasmuch as review in this case is limited to the standard of review with respect to the issue of whether Petitioner "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" (Probate Code section 1828.5, subdivision (c)), this brief will focus upon the evidence pertaining to such capacity. As a result, the brief will only briefly summarize the evidence regarding to the other primary contested issue, i.e. the educational dispute between the parties. Such a summary, however, may be found in the Court of Appeal's reported decision. (*See* 32 Cal.App.4th at pp. 630-31.)

[3]References to "R.T." are to the volume and page number of the two volume reporter's transcript in this appeal.

According to Mother, Petitioner is unable to clean or cook for herself, balance a checkbook, or handle a financial transaction, but is able to shower and get dressed. (1 R.T. pp. 79-80, 166-67.) She also testified that Petitioner needs guidance in making routine decisions and assistance in performing daily tasks, including what clothes to wear and brushing her teeth and hair. (1 R.T. p. 191.) She also testified that Petitioner is prone to emotional outbursts and is too trusting of other people. (1 R.T. pp. 198-99, 208-09, 212, 277-78.) Mother filed the conservatorship petition to "basically protect her from the school and then long-term just protect her." (1 R.T. p. 162.) Mother intended to eventually move Petitioner to Orange County, where she, her husband, and her other daughters reside. (*Id.*)

2. The Testimony Of L.K. (Petitioner's Great Grandmother).

L.K. is the grandmother of Mother, and the great grandmother of Petitioner, and is 82 years old and in good health. (2 R.T. pp. 442-43, 455.) When Petitioner was a year and a half old, L.K. noticed a knot protruding from Petitioner's head, and Mother told her that she thought that Petitioner would have to be institutionalized. L.K. spoke with her husband, and told Mother that they would take care of Petitioner before that would happen. (2 R.T. p. 444.) Shortly thereafter, Petitioner came to live with L.K., and has resided with her ever since. (2 R.T. pp. 444-45.)

L.K. believes that Petitioner is going to be successful eventually, because she has a "fantastic" memory and is "clever" on the computer, and L.K. would continue to take care

of and love and guide Petitioner for as long as she can. L.K. does not believe that Petitioner needs a conservatorship, and that she can take care of herself "as much as any teenager can." (2 R.T. p. 463.) Petitioner does not cook on the stove, but can get cereal, warm up pizza, and make a quesadilla and bologna sandwich. (2 R.T. pp. 464-65.)

B. The Expert And Other Third Party Testimony.

1. The Testimony Of The Psychological Evaluator (Dr. Khoie).

Kathy Khoie, Ph.D. is a self-employed psychological evaluator for various regional centers, including Tri Counties Regional Center, and conducts evaluations for intellectual disabilities, including autism and conservatorships. (2 R.T. pp. 356-57.) Khoie has conducted approximately 5,000 evaluations over the past ten years, including approximately 1,500 conservatorship evaluations. (2 R.T. p. 358.)

Khoie is familiar with Petitioner, and evaluated her in December 2017. (2 R.T. p. 361.) During that evaluation, Khoie considered Petitioner's intellectual, mental status, academic achievement, and adaptive functioning, reviewed records, and conducted clinical interviews with Petitioner and her great grandmother L.K.. (*Id.*) In particular, she reviewed approximately 2,000 pages of educational and academic materials pertaining to Petitioner, and met with Petitioner on December 11, 2017. (2 R.T. pp. 362-63.) During the evaluation, at which L.K. was present, Khoie obtained background information from Petitioner, administered various intelligence and behavior assessment tests, and received information regarding Petitioner's adaptive functioning. (2 R.T. pp.

363-64.)

Based on her review of information and her evaluation, Khoie did not believe that Petitioner was a candidate for conservatorship. (2 R.T. p. 366.) That opinion was based upon Petitioner's intellectual functioning level, which showed her to be of at least average intelligence, and high average in her nonverbal functioning, with the ability to talk about her likes and dislikes. (2 R.T. p. 367.) Khoie believed that Petitioner understood her condition and is trying to cope with her difficulties, and that she is coherent. Petitioner's mental status examination is within normal limits, and shows normal precognition with no impairment. (2 R.T. p. 368.)

In addition, Khoie testified that it is unusual for a conservatorship request to be based on autism, or to evaluate individuals with average intellectual functioning for conservatorship. Instead, most of her conservatorship evaluations have been based upon intellectual disability, which impairs the individual's perception of reality. (2 R.T. pp. 368-69.) Khoie believed that individuals with autism that required a conservatorship typically exhibited severe or significant difficulty with their adaptive functioning skills, including an inability to communicate or care for themselves or to receive training and experience, but that Petitioner did not show such an impairment. (2 R.T. p. 371.) She also testified that approximately 90% of the evaluations that she does through Tri Counties involve autistic individuals, and that she generally does not recommend a conservatorship where the sole issue is autism, and there is no intellectual impairment or

impairment in adaptive functioning skills. (2 R.T. p. 395.)

Khoie testified that Petitioner is able to shower, use the restroom, and groom herself independently, and has assisted in paying her medical bills. (2 R.T. p. 381.) She also testified that, although Petitioner presently needs assistance in handling money, with proper training she would be able to pay her bills and take care of her shopping or other financial decisions. (2 R.T. pp. 382, 393.)[4]

2. The Testimony Of The Probate Investigator (Donati).

Christopher Donati, an investigator with the Santa Barbara County Public Guardian's office, reviewed contacts, medical evaluations, and general information, met with Petitioner and L.K., and spoke with Mother. (2 R.T. pp. 420-21.) At her interview, Petitioner was well groomed, polite, and direct, and told Donati that she did not want to leave her current home, that she had always lived there, and that she did not want to move away from her great grandmother or other family members. (2 R.T. pp. 422-25.) Donati believed that the current investigation was unusual, because Petitioner was able to understand the concept of a conservatorship and what would be removed from her, and

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[4]Although Khoie believed that a conservatorship was inappropriate, she believed that other protective measures were necessary for and available to Petitioner, including employment assistance and continued psychiatric treatment to help Petitioner regulate her emotions. (2 R.T. p. 369.) Khoie also believed that she should continue with medication under the care of her psychiatrist to help her control her emotions, that Petitioner could benefit from life and adaptive skills training offered by the regional center or school district, as well from a power of attorney for financial and other decision-making. (2 R.T. pp. 369-70, 391-92.)

because Petitioner was doing fairly well in the home, with no substantiated allegations of abuse or other issues. (2 R.T. pp. 425-26.)

As part of his evaluation, Donati reviewed declarations and reports regarding Petitioner's capacity, as well as the psychological evaluation conducted by Dr. Khoie. (2 R.T. pp. 426-27.) The reports conflicted as to whether Petitioner lacked capacity to make her own medical decisions, which caused Donati to be concerned as to the benefits of a conservatorship. (2 R.T. pp. 428-29.) Donati spoke with Mother and asked her what she was hoping to accomplish with a conservatorship, and understood that she was hoping to move Petitioner and have her attend a different educational institution where she (Mother) resides. (2 R.T. p. 429.) As a result, Donati believed that, unlike most instances in which he would apply for a conservatorship, there was no clear plan of action as to how the conservatorship would benefit Petitioner, or provide medical treatment that she was not already receiving. (2 R.T. pp. 429-30.) Accordingly, although Donati believed that Mother wanted the best for Petitioner, he believed that absent such evidence, there would be no current benefits to Petitioner from a conservatorship. (2 R.T. p. 430.)

3. The Testimony Of The Special Education Administrator (Butterfield).

Jarice Butterfield, a special education administrator with Santa Barbara County, testified that her agency works with the Lompoc School District and other county school districts to provide special education services to approximately 8,000 students. (1 R.T. pp. 229-23.) Butterfield testified that Petitioner was a high functioning person within the

autism spectrum, and was receiving social skills training through a speech and language specialist. (1 R.T. pp. 237, 248, 257.

LEGAL ARGUMENT

THIS COURT SHOULD REVERSE THE COURT OF APPEAL'S DECISION AFFIRMING THE CONSERVATORSHIP ORDER, BECAUSE THE COURT OF APPEAL EMPLOYED AN ERRONEOUS STANDARD OF REVIEW THAT FAILED TO CONSIDER THE REQUIREMENT THAT THE NEED FOR CONSERVATORSHIP BE PROVEN BY "CLEAR AND CONVINCING EVIDENCE."

This Court should reverse the Court of Appeal's decision in this case, because the appellate court utilized an erroneous standard of review that permitted it to improperly find that the mere existence of the testimony of Mother, regardless of its lack of persuasive force, was sufficient to satisfy the "clear and convincing evidence" standard and to support the conservatorship order. The law is clear that a heightened burden of proof, such as that required in conservatorship proceedings, reflects the importance placed by society on the issues and the interests involved in the applicable proceeding, and the need to safeguard the persons whose rights are at issue and reduce the risk of erroneous judgments in such matters. As a result, and as both this Court and the United States Supreme Court have recognized, consideration by a reviewing court of the heightened burden of proof applicable at trial is both logical and necessary to determine whether the resulting trial court judgment was supported by substantial evidence, and thereby preserve the benefits of and the interests served by that higher standard of proof.

Moreover, the limited case law to the contrary, including the holding of the Court of Appeal in this case, is based on demonstrably outdated principles and authority that fails to account for the binding, analogous precedents of this Court, or the clear distinction between the nature of such evidence and its persuasive force or effect. As a result, and because the present case offers a classic instance in which evidence supporting the imposition of a conservatorship, was technically present but utterly lacked persuasive support, and failed to meet the "clear and convincing" standard, this Court should reverse the Court of Appeal's decision upholding the conservatorship order in this case.

A. Civil, Criminal, And Other Special Proceedings Are Subject To Various Levels Of Proof, Reflecting The Nature And Relative Importance Of The Respective Proceedings, And The Varying Needs To Ensure A Correct Decision.

The standard of proof in most civil actions is a "preponderance of the evidence," in which the party with the burden of proof need show only that the claimed fact is more likely to be true than not true. (*See, e.g.,* Evidence Code section 115; *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483; CACI No. 200; *see also Conservatorship of Wendland* (2001) 26 Cal. 4th 519, 546 (describing preponderance of evidence as "default" standard).) By contrast, under the Due Process Clause of the Fifth and Fourteenth Amendments, the facts necessary to convict a defendant in a criminal proceeding must be proven "beyond a reasonable doubt," which is the highest applicable standard in American jurisprudence. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S. Ct. 1068; 25 L. Ed. 2d 368]; CALCRIM No. 220.)

In addition to the traditional distinction between civil and criminal actions, the Legislature has created a number of other proceedings that, although technically civil in nature, require proof beyond a reasonable doubt. Those include proceedings for the commitment of mentally disordered offenders (MDOs) (Penal Code section 2960 *et seq.*) and sexually violent predators (SVPs) (Welf. & Inst. Code section 6600 *et seq.*) However, because the purpose of such statutes is considered to be treatment rather than punishment (*see, e.g., Hubbart v. Superior Court* (1999), 19 Cal. 4th 1138, 1170-72; *People v. Robinson* (1998) 63 Cal App 4th 348, 350-52), the proof beyond a reasonable doubt requirement derives from statute, rather than from the state or federal constitutions. (*See, e.g.,* Penal Code section 2966, subdivision (b); *People v. Miller* (1994) 25 Cal.App.4th 913, 919 (MDO statute); Welf. & Inst. Code section 6604; *People v. Hurtado* (2002) 28 Cal 4th 1179, 1183 (SVP statute).)

In addition, the Legislature has created a number of statutory schemes in which an intermediate standard of proof – i.e. between "preponderance of the evidence" and "proof beyond a reasonable doubt" – is required. That standard consists of "clear and convincing evidence," defined as requiring a "finding of high probability," i.e. that the evidence be "'so clear as to leave no substantial doubt'" and "'sufficiently strong to command the unhesitating assent of every reasonable mind.'" (*See, e.g., In re Angelia P.* (1981) 28 Cal.3d 908, 919, quoting *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193; *see also Colorado v. New Mexico* (1984) 467 U.S. 310, 316 [104 S.Ct. 2433; 81 L.Ed.2d 247]

(stating that "clear and convincing evidence" exists where the "ultimate factfinder [has] an abiding conviction that the truth of its factual contentions are 'highly probable'"); CACI No. 201.) Among the proceedings that are subject to the "clear and convincing evidence" standard are restraining orders (Cal. Code Civ. Proc. section 527.6, subdivision (i)), dependency cases, i.e. cases involving the loss of parental rights (*In re Angelia P.*, *supra*), and certain will cases (Probate Code section 6110, subdivision (c)(2)). (*See, e.g., Conservatorship of Wendland* (2001) 26 Cal. 4th 519, 546-47; *Santosky v. Kramer* (1982) 455 U.S. 745 [102 S. Ct. 1388; 71 L. Ed. 2d 599].) The "clear and convincing evidence" standard also applies to conservatorship proceedings, including the present case. (*See* Probate Code section 1801, subdivision (e) ("[t]he standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence").)

The differing standards of proof reflect basic policy decisions made by the courts or the Legislature, and in particular the differing weights placed upon various types of proceedings by society: "The function of any standard of proof is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (*In re Winship, supra*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring).) As a result, the establishment of differential standards of proof "allocates the risk of erroneous judgment between the litigants and indicates the relative importance society attaches to the ultimate decision." (*Colorado v. New Mexico, supra*, 467 U.S. at p. 316; *see also Addington v. Texas* (1979)

441 U. S. 418, 423-25 [99 S. Ct. 1804; 60 L. Ed. 2d 323]; *Weiner, supra*, 54 Cal.3d at p. 487 ("the standard of proof may depend upon the 'gravity of the consequences that would result from an erroneous determination of the issue involved.'").)3d 595, 604.)

B. The Courts Have Held That An Appellate Court, In Reviewing Proceedings That Are Subject To A Heightened Trial Court Burden Of Proof, Must Consider That Higher Burden In Determining Whether Sufficient Evidence Exists To Support The Resulting Judgment.

Given the varying levels of proof required in civil, criminal, and other special proceedings, the courts have wrestled with the issue of whether and how to reflect those various levels in connection with the appellate review of judgments in different proceedings. In particular the courts, in considering the issue of whether the evidence supports the particular judgment, have sought to reconcile the heightened burden of proof imposed at the trial court level with the traditional, deferential standards of appellate review. As shown below, the more authoritative of these decisions – i.e. those of this Court and the United States Supreme Court – plainly hold that a reviewing court must consider or take into account the applicable burden of proof in determining whether the court or jury discharged its obligations properly, i.e. whether sufficient evidence exists to support the judgment.

1. Under The Decisions In *Jackson* And *Johnson*, An Appellate Court, In Reviewing The Evidence In A Criminal Case, Must Determine Whether That Evidence Is Sufficient To Support A Finding Of Guilt Beyond A Reasonable Doubt.

The issue of the effect of a heightened trial court standard of proof on the standard

of appellate review for sufficiency of the evidence first arose in the context of a criminal conviction. In *Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L. Ed. 2d 560], the United States Supreme Court faced the interplay between the burden of proof at the trial court level and the standard of review on appeal, and specifically the issue of the proper appellate standard of review in cases that, as here, are subject to a higher trial court level of proof. In *Jackson*, defendant was convicted of first degree murder. He filed a petition for habeas corpus to set aside the conviction, arguing that there was insufficient evidence to support a finding beyond a reasonable doubt of premeditation, a necessary element. The federal district court agreed, but the federal appellate court reversed, stating that there was "some evidence" that the defendant had intended to kill his victim, and that the state court judge could have found that defendant was not so intoxicated as to be incapable of premeditation. (*Jackson*, 443 U.S. at p. 412.)

The issue in *Jackson*, therefore, was "what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence." (*Jackson*, 443 U.S. at p. 309.) The Court held that because the Constitution, as interpreted in *Winship*, required proof beyond a reasonable doubt, the higher standard of trial court proof must also be reflected in the standard of review employed by the appellate court. Citing *Winship*, the Court in *Jackson* noted that "proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability," and that the standard

"'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." (*Jackson*, 443 U.S. at p. 315, quoting *Winship*, 397 U.S. at p. 363.)

As a result, the Court in *Jackson* held that the existing standard for appellate review of a criminal conviction – in which a conviction would be reversed only if there was "no evidence" to support it (*Thompson v. Louisville* (1960) 362 U.S. 199 [80 S. Ct. 624; 4 L. Ed. 2d 654]) – was insufficient to protect those interests. The Court recognized that even "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt" (*Jackson*, 443 U.S. at p. 317), and that the standard of review on appeal must, therefore, reflect that possibility. As a result, the Court stated that "[a]fter *Winship*, 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*." (*Id.* at p. 318 (emphasis added).) In particular, the Court explained as follows its reasons for abandoning the *Thompson* standard:

> "That the *Thompson* "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. '[A] mere modicum of evidence may satisfy a no evidence standard. . . .' Any evidence that is relevant – that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence – could be deemed a 'mere modicum.' But it could not seriously be argued that such

> a 'modicum' of evidence could, by itself, rationally support a conviction beyond a reasonable doubt. The *Thompson* doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored." (*Jackson*, 443 U.S. at p. 320 (citations omitted).)

In *People v. Johnson* (1980) 26 Cal. 3d 557, this Court reexamined the issue of the proper standard of review for the sufficiency of the evidence in criminal cases, in light of the United States Supreme Court's opinion in *Jackson*. In doing so, this Court clarified that the standard enunciated in *Jackson* already applied fully in this State:

> "California decisions state an identical standard. In *People v. Reilly* (1970) 3 Cal.3d 421, 425 [90 Cal.Rptr. 417, 475 P.2d 649], for example, we said that 'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'". . . .Evidence, to be 'substantial' must be 'of ponderable legal significance. . .reasonable in nature, credible, and of solid value.'"

Johnson, 26 Cal.3d at p. 576 (citations omitted). This Court further stated that, although a reviewing court, in determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, must view the evidence most favorably to respondent and the trial court judgment, "[t]he court does not, however, limit its review to the evidence favorable to the respondent." Instead, the appellate court "must resolve the issue in the light of the whole record – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." In addition, this Court in *Johnson* stated "it is not enough for the respondent simply to point to 'some' evidence supporting the finding," because "[n]ot

every surface conflict of evidence remains substantial in the light of other facts.'" (*Johnson*, 26 Cal.3d at p. 577 (citations omitted).)

This Court in *Johnson* also disapproved language in other cases "which could be interpreted to suggest that an appellate court should sustain a conviction supported by any evidence which taken in isolation might appear substantial, even if on the whole record no reasonable trier of fact would place credit in that evidence." Such disapproved language included, for example, language suggesting that the appellate court need only determine whether there is "any substantial evidence, contradicted or uncontradicted," or that the court should not consider evidence that would "tend to defeat" the judgment below. This Court stated that such language, although not technically incorrect, "stresses the importance of isolated evidence supporting the judgment" and, therefore, "risks misleading the court into abdicating its duty to appraise the whole record." (*Johnson*, 26 Cal.3d at p. 577.) The *Johnson* Court summarized its holding as follows:

> "[T]he 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 the defendant guilty *beyond a reasonable doubt*." (*Id.* at p. 578 (emphasis added).

2. The Majority Of Courts, Including This Court, Have Applied The Principles Set Forth In *Jackson* And *Johnson* To Proceedings Involving The "Clear And Convincing Evidence," Including The Analogous Area Of Juvenile Dependency And The Termination Of Parental Rights.

Although *Jackson* and *Johnson* each involved appeals from criminal convictions,

which were subject to the higher, constitutional standard of proof beyond a reasonable doubt, the courts, including this Court, have applied the basic holding of those cases – i.e. that a review for sufficiency of the evidence must reflect and consider the higher standard of proof required at the trial court level – in other situations involving such higher standards, including those set forth in section A. *supra*. In particular, this Court has applied the holdings of *Jackson* and *Johnson* in the analogous area of juvenile dependency. In *In re Angelia P.* (1981) 28 Cal.3d 908, this Court held that, although the statute was silent on the subject, an order terminating parental rights must be made on the basis of clear and convincing evidence. (*Angelia P.*, 28 Cal.3d at p. 919.) This Court based its holding, i.e. that the "more serious potential consequences" of such proceedings "require a higher evidentiary standard than civil actions in which money damages are awarded," on the ground that "[t]he conflicting interests are weightier when the result may be termination of natural parental rights." (*Id.* at p. 918.) Further, this Court in *Angelia P.* held that, as in *Jackson* and *Johnson*, appellate review of the sufficiency of the evidence in support of an order terminating parental rights must incorporate and consider that higher evidentiary standard of proof:

> "Appellants argue insufficiency of the evidence. We apply, with appropriate modifications, our holding in *People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738], 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. 934 (citations omitted) (emphasis added). Similarly, in *In re Jasmon O.* (1994) 8 Cal.4th 398, 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).

The majority of Courts of Appeal have followed the above reasoning, and held that the standard of review for sufficiency of the evidence on appeal must reflect the heightened standard of proof for the submission of such evidence at trial. (*See, e.g., In re Alexis S.* (2012) 205 Cal.App.4th 48; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654 ("On review, we employ the substantial evidence test, however bearing in mind the heightened burden of proof"); *In re Mariah T.* (2008) 159 Cal.App.4th 428, 441 ("In examining mother's claim, 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").)[5]

As a result, several courts have reversed orders terminating parental rights, based on the lack of sufficient evidence to support such an order under the "clear and convincing evidence" standard. Thus, for example, in *In re Henry V.* (2004) 119 Cal. App. 4th 522, the court found that the fact that the minor was physically abused on a single occasion, and the fact that a single testifying expert recommended against returning the minor to his mother "did not amount to clear and convincing evidence of a threat to [the minor's] safety or emotional well-being," and that there was ample evidence of alternatives to an out-of-home placement. (*See Id.* at pp. 529-30.) Similarly, in *In re Basilio T.* (1992) 4 Cal.App.4th 155, the appellate court held that an order removing two minors from the parents' home was not supported by clear and convincing evidence, where it was based on unconfirmed reports of prior alleged incidents involving screaming and hitting the minors that constituted double hearsay and were contradicted by a live witness, and where two other, confirmed incidents of domestic violence between the parents were not directed at and did not physically affect the minors. (*Id.* at pp. 170-71.) And, in *Alexis S., supra*, the court reversed an order removing two boys from the custody

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[5]Other post-*Angelia P.* cases indicating that an appellate court must determine whether the dependency order was supported by clear and convincing evidence include *In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038; *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415; *In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536; *In re Hailey T.* (2012) 212 Cal.App.4th 139, 146; *In re Heidi T.* (1978) 87 Cal.App.3d 864; *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426; *In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1326; and *In re William B.* (2008) 163 Cal.App.4th 1220, 1229.

of their biological father, where there was no evidence that the boys were aware of certain alleged "touching" incidents invoiving their stepsister, and where the father had moved out of the family home and complied with an order prohibiting contact with his stepdaughter.. (*Alexis S.,* 205 Cal.App.4th at pp. 55-56.)

The courts have also applied the principle that the standard of review on appeal must consider and reflect the heightened standard of proof at the trial court level to other areas in which "clear and convincing evidence" is required. Thus, for example, the court in *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, citing *Angelia P.*, held that the evidence in support of an award of punitive damages under Civil Code section 3294 "must satisfy a distinct and far more stringent standard" (78 Cal.App.4th at p. 890), and that "since the jury's findings were subject to a heightened burden of proof, we must review the record in support of these findings in light of that burden. In other words, we must inquire whether the record contains 'substantial evidence to support a determination by clear and convincing evidence.'" (*Id.* at p. 891 (citation omitted); *see also Pulte Home Corp. v. American Safety Indem. Co.* (2017) 14 Cal.App.5th 1086, 1125; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 59-60.)[6]

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[6]In *Hoch*, *supra*, the court, in upholding a nonsuit on a punitive damages claim, noted that the United States Supreme Court had analogized between the beyond a reasonable doubt standard in criminal cases and other issues requiring proof by clear and convincing

In contrast to the above authority, certain courts, including the Court of Appeal in this case, have held that no separate test exists for the review of trial court determinations that were subject to a heightened standard of proof. Indeed, those courts hold that the "clear and convincing evidence" requirement or other burden of proof simply "disappears" on review and is irrelevant to the appellate analysis. Thus, for example, the court in *In re E.B.* (2010) 184 Cal.App.4th 568 stated as follows:

> "Father appears to argue that even if substantial evidence supports a finding of jurisdiction under a preponderance standard, it does not support the juvenile court's dispositional orders under a clear and convincing standard. [¶] The argument is meritless. The clear and convincing standard was adopted to guide the trial court; it is not a standard for appellate review. The substantial evidence rule applies no matter what the standard of proof at trial. '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."'"

Id. at p. 578, citing *Crail v. Blakely* (1973) 8 Cal. 3d 744, 750 and *Sheila S. v. Superior Court* (2000) 84 Cal. App. 4th 872, 881; *see also In re Angelique C.* (2003) 113 Cal.App.4th 509, 519; *In re A.S.* (2011) 202 Cal.App.4th 237, 247; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1526; *In re J.N.* (2010) 181 Cal.App.4th 1010, 1022; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-81. None of the above cases, however, address or cite the United States Supreme Court's holding in *Jackson*, or this Court's holdings in

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evidence, stating that in each instance, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." (*Hoch,* 24 Cal.App.4th at p. 60, quoting *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 254-55 [106 S.Ct. 2505; 91 L.Ed.2d 202].)

Johnson, *Angelia P.*, or *Jasmon O.* Instead, and in addition to citing each other, many of the cases, like the appellate court here, cite the above-quoted "disappears" language, which appears in the Witkin treatise on California Procedure. (*See E.B.*, 184 Cal.App.4th at p. 578; *Sheila S.*, 84 Cal.App.4th at p. 881; *Angelique C.*, 113 Cal.App.4th at p. 519; *A.S.*, 202 Cal.App.4th at p. 247; *I.W.*, 180 Cal.App.4th at p. 1526 *Mark L.*, 94 Cal.App.4th 573, 580-81.)[7]

Recently, in *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, the First District noted the above division in authority, stating that "[t]he Courts of Appeal do not speak with one voice in describing how the substantial evidence standard is to be applied in dependency cases when the clear and convincing standard of proof was required at trial." (*Id.* at p. 1238.) Further noting that the division reflected a "nuanced distinction but one that can make a difference in a close case like this one," and citing *Angelia P.* and *Jackson*, the court in *T.J.* resolved the conflict in favor of the standard urged by Petitioner here, i.e. that the appellate court must "conduct our substantial evidence review 'bearing in mind' the heightened standard of proof":

> "We believe the correct standard requires us to bear in mind that clear and convincing evidence was required in the trial court. In a closely related context, our Supreme Court has adopted the view that the clear and convincing evidence standard is incorporated into the substantial evidence standard of review. As

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[7]The "disappears" language quoted by the above courts appeared in the prior edition of the Witkin treatise at 9 Witkin *California Procedure* (4th ed. 1997) Appeal § 365 p. 415, and appears in the most current edition at 9 Witkin *California Procedure* (5th ed. 2008) Appeal § 371 p. 428.

> pointed out in *Angelia P.*, incorporating the standard of proof into the standard of review also comports with the usual way we assess the sufficiency of the evidence in criminal cases, where a heightened standard of proof is required. [¶] But even if not compelled to follow *Angelia P.*, we choose to follow the 'bearing in mind' approach so our reviewing function is not eroded. If the clear and convincing evidence standard 'disappears' on appellate review, that means the distinction between the preponderance standard and the clear and convincing standard imposed by statute is utterly lost on appeal, an outcome we believe undermines the legislative intent as well as the integrity of the review process."

T.J., supra, 21 Cal.App.5th at p. 1239 (citations omitted). The court further noted that the United States Supreme Court, in *Santosky v. Kramer* (1982) 455 U.S. 745 [71 L.Ed.2d 599, 102 S.Ct. 1388], held that the "clear and convincing evidence" standard was required by due process in cases involving the potential termination of parental rights, and that such standard "conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process" and "thereby impresses upon the factfinder the gravity of the decision he or she is called upon to make." As a result, the court in *T.J.* reasoned that, "[i]f that standard is ignored on appeal, the heightened standard of proof applied in the juvenile court loses much of its force, or at least the ability of the appellate court to correct error is unacceptably weakened," and that such an approach was "inimical to the legislative scheme in dependency proceedings." (*T.J., supra*, 21 Cal.App.5th at p. 1239.)[8]

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[8]A similar division in authority exists with respect to the standard of review of an award of punitive damages. Thus, although the courts in *Shade Foods*, *Pulte Home Corp.*, and *Hoch* each held that an award of punitive damages must be reviewed with reference to the "clear and convincing evidence" standard, other courts have reached the opposite conclusion. (*See, e.g., Morgan v. Davidson* (2018) 29 Cal.App.5th 540, 548-49.)

C. This Court Should Hold That The Reviewing Court In A Conservatorship Proceeding, Including The Court Of Appeal In This Case, Must Find That The Trial Court Made The Necessary Findings Based On Clear And Convincing Evidence.

Applying the above principles, it is evident that this Court should hold that a reviewing court in a conservatorship proceeding is not simply required to find substantial evidence to support the trial court's order, but must instead find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence. In particular, consideration of the "clear and convincing evidence" standard as part of the standard of appellate review is justified, for several reasons.

1. Consideration Of The "Clear And Convincing Evidence" Standard As Part Of Appellate Review Of The Sufficiency Evidence Is Consistent With The Use Of Differing Standards Of Proof, As Well As With This Court's Decisions In *Johnson* And *Angelia P.*

Initially, consideration of the "clear and convincing" standard as part of the appellate standard of review for sufficiency of the evidence plainly comports with both logic and the law establishing differential evidentiary standards for different proceedings, as well as with the prior decisions of this Court. The imposition of heightened burdens of proof, beyond the "default" standard of preponderance of the evidence, reflects a societal and legislative recognition that not all cases are created equal, and that the relief involved in certain proceedings – whether criminal or other confinement, the loss of certain other basic rights, or a judgment for punitive damages – should only be imposed under limited or extraordinary circumstances. That fact is directly reflected by the opinions of the

United States Supreme Court in *Jackson* and by this Court in *Johnson*, *Angelia P.*, and *Jasmon O.*, and by the majority of the appellate courts that have considered the issue in connection with dependency or other proceedings. In each instance, those courts, and this one, have expressly incorporated the "beyond a reasonable doubt" or "clear and convincing evidenced" standard into the standard to be applied by appellate courts in determining whether the trial court judgment was supported by substantial evidence. The Supreme Court in *Jackson* recognized that doing so was necessary to give "concrete substance" to the presumption of innocence, and to "reduce the risk of factual error," and that the existing "some evidence" or "modicum" standard was insufficient to fulfill those goals. (*See* 443 U.S. at pp. 315, 317, 320.) Likewise, this Court, in *Johnson* and *Angelia P.*, recognized that determination of the sufficiency of evidence based on a heightened standard of proof cannot consist merely of review of the evidence favorable to the respondent, or the acceptance of the existence of "some" isolated evidence as sufficient to support the judgment. Instead, that determination involves a review of the entire record, in light of that heightened standard. (*Johnson*, 26 Cal.3d at pp. 576-78; *Angelia P.*, 28 Cal.3d at p. 934; *Jasmon O., supra*, 8 Cal.4th at pp. 422-23; *see also T.J., supra*, 21 Cal.App.5th at p. 1239 ("incorporating the standard of proof into the standard of review also comports with the usual way we assess the sufficiency of the evidence in criminal cases, where a heightened standard of proof is required").) Petitioner therefore respectfully suggests that this Court's decisions in *Johnson, Angelia P.* and *Jasmon O.*

are, as the majority of appellate courts have found, dispositive, and require application of the "clear and convincing standard" to the appellate review of the sufficiency of the evidence in conservatorship proceedings.

2. Consideration Of The "Clear And Convincing Evidence" Standard As Part Of Appellate Review Of The Sufficiency Evidence Is Consistent With The Societal Importance Of Conservatorship Proceedings, As Expressed By The Legislature.

In addition, consideration of the "clear and convincing evidence" standard as part of an appellate court's review of a trial court order imposing a conservatorship is justified by the nature and importance of a conservatorship proceeding, both in the abstract and as reflected by the conservatorship statute enacted by the Legislature. In addition to the fact that they both require proof by "clear and convincing evidence," conservatorship cases are clearly analogous to *Angelia P.*, *Jasmon O.,* and the remaining juvenile dependency cases set forth above. Like dependency cases, which involve the potential termination of fundamental parenting rights, a conservatorship proceeding involves the potential loss of an equally fundamental right, namely the basic right of autonomy, i.e. the ability to care for one's self and make one's own decisions. Moreover, the gravity and drastic nature of a conservatorship proceeding, and the need to protect the rights of potential conservatees, are reflected by the law governing conservatorship proceedings, including several of the specific provisions of the conservatorship statute.[9]

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[9]In addition to the "clear and convincing evidence" requirement contained in Probate Code section 1801, subdivision (e), those provisions hold, among other things, the fact

As shown above in section A., the establishment of a heightened standard of proof reflects an intent to ensure the correctness of a judge or jury's factual conclusions in a particular case and an expression of the "relative importance society attaches to the ultimate decision" (*Colorado v. New Mexico*, 467 U.S. at p. 316), as well as the "gravity of the consequences that would result from an erroneous determination of the issue involved" (*Weiner, supra*, 54 Cal.3d at p. 487). The requirement that the elements

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that a conservatorship may be required only where the person is "*unable* to provide properly for his or her personal needs for physical health, food, clothing, or shelter" or "*substantially* unable to manage his or her own financial resources or resist fraud or undue influence" (Probate Code section 1801, subdivisions (a) and (b)); the fact that "[t]he conservatee of the limited conservator *shall not be presumed to be incompetent* and *shall retain all legal and civil rights*" except as specifically granted to the limited conservator" (Probate Code section 1801, subdivision (d)) (emphasis added). Moreover, Probate Code section 1800 states that the intent of a conservatorship is, among other things, to "[p]rotect the rights of persons who are placed under conservatorship" (subdivision (a)), to "[p]rovide that the health and psychosocial needs of the proposed conservatee are met" (subdivision (c)), and to "allow the conservatee to remain as independent and in the least restrictive setting as possible" (subdivision (d)).

In addition, other, general provisions of the Probate Code, applicable to conservatorship proceedings, reflect a similar desire to protect the rights of persons subject to such proceedings. Those provisions include the existence of a rebuttable presumption, affecting the burden of proof, that "all persons have the capacity to make decisions and to be responsible for their acts or decisions" (Probate Code section 810, subdivision (a)); the requirement that the deficit must be "*substantial*" and based on the person's mental functions rather than a mental or physical disorder (Probate Code section 810, subdivision (c)); the requirement that a defect in mental function may be considered only if "*significantly* impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question," and the statement that "[t]he mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act" (Probate Code section 810, subdivision (d)) (emphasis added).

necessary to impose a conservatorship be proven by "clear and convincing evidence," as well as the numerous other safeguards enacted by the Legislature, reflect both the inherent importance of conservatorship proceedings, and the societal and legislative interest in their outcomes. As recently stated by the court in *T.J.,* that interest, and the protections afforded by the heightened standard of proof in conservatorship cases, would be fatally undermined were the appellate courts unable to consider whether the evidence presented at trial was "clear and convincing." Instead, such a result would mean, as the court in *T.J.* stated, that "the distinction between the preponderance standard and the clear and convincing standard imposed by statute is utterly lost on appeal," and that such an outcome would "undermine[] the legislative intent as well as the integrity of the review process." (*T.J.,* 21 Cal.App.5th at p. 1239.)

3. The Holding By The Court Of Appeal And Others That The "Clear And Convincing Evidence" Standard Applies Only To The Trial Court And "Disappears" On Appeal Is Illogical And Based On Outdated And Obsolete Authority, And Ignores This Court's Holdings In *Johnson* And *Angelia P.*

Finally, and in contrast to the majority of the cases in the dependency and other areas that have held that the standard of appellate review must consider the heightened burden of proof applicable in the trial court, the cases that have held that the heightened standard applies only at the trial court level, and "disappears" on appeal – including the Court of Appeal in this cases – suffer from numerous, fatal shortcomings. As shown above, none of those cases address – much less refute – the holdings in *Jackson*, *Johnson*,

Angelia P. or *Jasmon O.* which, as shown above in section C.1., expressly provide that "substantial evidence" must be found with reference to the applicable standard of proof. Similarly, none of those cases address the basic policy justifications behind the differing standards of proof, which as shown above in section C.2. are intended to reflect the relative importance assigned to each type of judicial proceeding, and the importance of avoiding erroneous determination of the issues involved in them. As indicated above, and in particular as recently set forth by the First District in *T.J., supra*, it would at the very least be incongruous if the trial court were required to utilize a heightened standard of proof, only to have that standard "disappear" once it reaches the appellate court – the very institution charged most directly with preventing erroneous judgments and determinations.

In addition, the minority "rule," utilized by the Court of Appeal in this case – i.e. that the reviewing court must apply "'the usual rule of conflicting evidence. . .giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.'" (*Conservatorship of O.B.*, 32 Cal.App.5th at pp. 633-34, quoting *Sheila S.*, 84 Cal.App.4th 872, 880-81) hopelessly conflates several distinct and disparate legal concepts. As indicated above, 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." (*Johnson, supra*, 26 Cal.3d at 578.) 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. (*See Jackson, supra*, 443 U.S. at pp. 317-18; *Johnson, supra*, 26 Cal.3d at p. 562.) By giving full credit to the "slight" or weak evidence offered by the respondent, while disregarding the "strong" evidence offered by the appellant, the erroneous standard employed by those courts, including the Court of Appeal in this case, utterly ignores that distinction, as well as the heightened standard of proof, and disregards this Court's directive that the reviewing court must consider the entire record on appeal. (*Johnson*, 26 Cal.3d at pp. 576-78; *Angelia P.*, 28 Cal.3d at p. 934.)

Finally, although the derivation of the minority "rule" is unclear, the "rule" appears to be based on authority that is outdated and shopworn, and that no longer accurately reflects the law. In addition to ignoring the distinction between the nature and the sufficiency of the evidence, the "conflicting evidence" rule set forth by the above courts, including the present Court of Appeal, essentially restates the "some evidence" or "modicum" rule of *Thompson* which, under *Jackson*, has long been discredited. That fact is reflected by the citation, in several appellate opinions, to the "disappear" language contained in the Witkin treatise, which essentially restates the "some evidence" or "conflicting evidence" rule criticized and abandoned in *Jackson* and *Johnson*.[10]

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[10]Certain of the appellate cases also appear to rely on this Court's decision in *Crail v. Blakely* (1973) 8 Cal. 3d 744, a case involving an oral contract to make a will, in which this Court stated, among other things, that "the 'clear and convincing' standard. . .was adopted, however, for the edification and guidance of the trial court, and was not intended as a standard for appellate review." (8 Cal.3d at p. 750.) However, *Crail* was decided

In sum, then, the Court of Appeal's decision in this case is the product of the rote and erroneous application of an appellate standard review that is woefully outdated and that fails to reflect the basic policies of the Legislature or the directives of this Court. This Court should, therefore, remedy the situation, and bring needed clarity to the law governing the standard of review in cases involving a heightened standard of proof in the trial court, by reversing the conservatorship order in this case.

D. Because The Evidence Presented In This Case Failed To Establish, By Clear And Convincing Evidence, That Petitioner Lacked The Capacity To Care For Herself, Or That A Conservatorship Was Necessary, This Court Should Reverse The Court Of Appeal's Decision And The Conservatorship Order In This Case.

Finally, this Court should apply the "clear and convincing evidence" standard to its appellate review of this case, and reverse the decision of the Court of Appeal, because the facts adduced in this case plainly failed to satisfy that evidentiary standard. As set forth in the Statement of Facts and in the Court of Appeal's opinion (32 Cal.App.5th at pp. 629-31), all of the evidence that Petitioner lacked the capacity to care for herself or to provide for her personal needs came from the testimony of Mother, the very person seeking to conserve her. That testimony was clearly insufficient to meet the "clear and

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several years prior to *Jackson* and the remaining cases outlined above. In addition, the Court in *Crail* emphasized the unusual nature of such cases, in which there is often no direct evidence of an oral agreement to make mutual wills, and which typically arise after both parties to the agreement have died, and must therefore rely upon indirect evidence. (*Crail*, 8 Cal.3d at p. 750.) As a result, Petitioner respectfully suggests that the above language from *Crail* is both outdated and limited to the situation found in that case.

convincing" standard, and to thereby justify the drastic step of conservatorship, for several reasons. First, that testimony was clearly biased and self-serving, and motivated by Mother's subjective desires to oversee Petitioner's education and otherwise execute the powers of conservatorship. Second, that testimony was based on at most the limited observations of Mother, who left Petitioner at the age of four to live with L.K. (Mother's grandmother and Petitioner's great-grandmother), and who lived for many years out of state, and at the time of the conservatorship proceedings resided in an entirely different jurisdiction (i.e. Orange County), hundreds of miles away. Third, that testimony was at best inconclusive as to Petitioner's basic ability to care for herself. In addition to the fact that Mother and the trial court focused largely on outside issues, such as the competence and physical health of L.K. and the dispute over Petitioner's education, Mother testified only that Petitioner could not clean or cook for herself, balance a checkbook, or handle a financial transaction. That testimony was plainly insufficient, both because it reflected merely Petitioner's present abilities, and did not that Petitioner could not be taught to perform those tasks, and because Mother's remaining testimony was vague or internally inconsistent, or at times downright contradictory.[11] Indeed, there was nothing to indicate that Petitioner's situation, as a high functioning albeit autistic nineteen year old, differed markedly from that of other, more typical teenagers, who are often equally unable to

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[11]Thus, for example, Mother conceded that Petitioner was able to shower and get dressed (1 R.T. pp. 79-80, 166-67), and that Petitioner merely needed "guidance" in other daily tasks. (1 R.T. p. 191.)

perform such tasks, but for whom the radical remedy of conservatorship is never contemplated, much less implemented.

Finally, and more fundamentally, the testimony of Mother – the only evidence adduced in support of the proposed conservatorship – could not be said to be "clear and convincing," because that testimony was contradicted by virtually all of the remaining evidence in this case. That evidence included not only the testimony of L.K., who although also not unbiased had resided with and cared for Petitioner almost her entire life, and who testified among other things that Petitioner could perform rudimentary cooking tasks and otherwise take care of herself "as much as any teenager can." (2 R.T. pp. 463-65.) It also included the testimony of three separate experts, from both the psychological and educational fields, who testified that Petitioner, although autistic, was high functioning and intelligent, that her disabilities or impairment did not warrant the imposition of a conservatorship, and that there were numerous, less restrictive alternatives by which Petitioner could be trained to or assisted in performing necessary life tasks.

As a result, this case, if anything, is significantly less "nuanced" or "close" than the type of case envisioned by the court in *T.J.*, in which consideration of the "clear and convincing evidence" standard by both the trial and the reviewing court would nonetheless make an outcome. Indeed, the evidence in support of the judgment in this case was if anything weaker than that found in *Henry V.*, *Basilio T.*, and *Alexis S., supra*, in which the appellate courts nonetheless reversed parental termination orders based on

the failure to meet the "clear and convincing evidence" standard. Instead, the Court of Appeal in this case relied upon a discredited and overly deferential standard that improperly allowed that heightened standard to "disappear" on appeal. As such, the Court of Appeal's actions represented a return to the "no evidence" or "modicum" *Thompson* standard that the Court in *Jackson* roundly condemned, and enabled a young woman to be conserved against her will based upon the slightest of evidence.

As a result, the Court of Appeal's decision in this case, and its refusal to apply the "clear and convincing" evidence standard on appeal, was both erroneous and prejudicial, and requires reversal of the resulting conservatorship order.

CONCLUSION

For the reasons stated above, this Court should reverse the Court of Appeal opinion, hold that a reviewing court in a conservatorship proceeding must find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence, and reverse the conservatorship order in this case.

DATED: May 28, 2019

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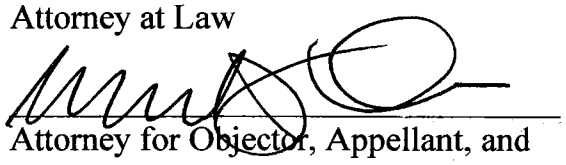


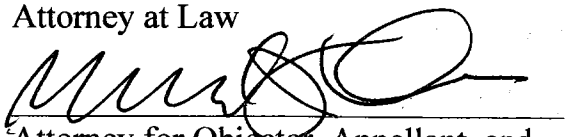
Attorney for Objector, Appellant, and Petitioner O.B.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.360(b)(1) of the California Rules of Court, the undersigned counsel states that the foregoing brief contains 10,935 words, according to the word count of the computer program used to prepare the brief.

DATED: May 28, 2019

GERALD J. MILLER
Attorney at Law



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

PROOF OF SERVICE

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: May 28, 2019

DOCUMENT SERVED: PETITIONER'S OPENING BRIEF

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

GERALD J. MILLER

ATTACHMENT A – Service List

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