S254938

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re Conservatorship of O.B.

T.B., et al.
Petitioners and Respondents,

v.

O.B.
Objector and Appellant.

ANSWERING BRIEF OF RESPONDENTS T.B. AND C.B.

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Introduction

Appellate review for substantial evidence arises directly from the fundamental principle that only trial courts can determine credibility, weigh evidence, and resolve evidentiary conflicts. Substantial evidence review has worked well in California for well over a century, and the Legislature enacted the clear and convincing evidence standard against the backdrop of this longstanding rule. To depart from this standard would increase transaction costs and create appellate error. The decision of the Court of Appeal should be affirmed.

Statement of Facts

The opening brief filed by Petitioner O.B. (herein, "Petitioner" or "O.") accurately recounts a portion of the testimony introduced below. It nonetheless relies in part on evidence not admitted at trial, *see In Re Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 628, and commits the classic error of highlighting evidence that conflicts with the trial court's judgment while omitting evidence that supports it. *In Re Marriage of Fink* (1979) 25 Cal.3d 881, 887-88.

All parties agree that O. is a person with autism spectrum disorder, a medical condition in which there is a wide variation in the types and severity of symptoms experienced by those afflicted. *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 628. The petition for a limited conservatorship here was filed by O.'s mother, T.B. ("Mother"), and O.'s older sister, C.B. ("Sister").

The dispositive issue at trial was whether O. "lack[ed] 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 manager his or her own financial resources." *Cal. Probate Code* § 1828.5(c); *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 633 (emphasis in original). Individuals for whom a limited conservator has been appointed are not presumed to be incompetent, and retain all legal and civil rights except those expressly designated as legal disabilities in the court's order. *Cal. Probate Code* § 1801(d).

At the time the petition was filed, O. was an 18-year old repeating the twelfth grade. *In Re Conservatorship of O.B.*, 32

Cal.App.5th at 629. While under the care of her 82-year old great-grandmother, L.K. ("Great-Grandmother"), O. missed over 300 classes at school in a single year, and had also been subjected to numerous suspensions. *Id.* at 631. O. had frequent "behavioral outbursts" in which she would "run off or scream and yell," and her school would sometimes place O. in detention for the entire day. *Id.* at 630-31; 1 R.T. 198-212 & 277-78.

In addition to these behavioral and educational deficiencies, the testimony at trial was that O. needs to be reminded to perform basic personal hygiene (e.g., brushing her hair and teeth and wearing clean underwear), and asked her mother to perform even simple tasks like turning on the shower or selecting her clothes. *Id.* at 631; 1 R.T. 79-80 & 191. O. cannot handle her own medication. *Id.* She cannot cook or do her own laundry. *Id.* She cannot balance a checkbook or handle any financial transaction, and will sign any document presented to her without reading or understanding it. *Id.*; 1 R.T. 79-80 & 166-67.

O.'s naivety and lack of sophistication also imperiled her safety. O. "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. . . . She trusts [] anyone she's seen before, people at restaurants, restaurant staff." *Id.*; 1 R.T. 198-212 & 277-78. Two years ago, O. left to see a fictional character, SpongeBob SquarePants, in Hollywood – a fact entirely omitted from Petitioner's's brief. *Id.*

Great-Grandmother testified that O. was relatively "clever" on the computer and opined that O. could take care of herself "as much as any teenager can." 2 R.T. 463. But, with respect, although most teenagers are indeed more sophisticated with computers than their great-grandparents, most teenagers do not run off to Los Angeles to find SpongeBob SquarePants. Nor do most teenagers need to be reminded to wear clean underwear, have their parents turn on the shower for them, or exhibit the degree of behavioral problems routinely displayed by O.

The experts who evaluated O. came to conflicting conclusions with respect to the need for a limited conservatorship on her behalf. Kathy Khoie, a self-employed psychological evaluator, testified that she rarely suggested a conservatorship based on autism, and did not

suggest one here. *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 634; 2 R.T. 371-95. Christopher Donati, an investigator, held a similar view. *Id.*; 2 R.T. 420-25.

The trial court, however, found substantially more persuasive the conflicting evidence from Dr. Jacobs, Dr. Blifeld, and O's mother. *Id.* These individuals detailed the nature of O.'s disability and its manifestations and recommended a limited conservatorship on her behalf. *Id.* Moreover, the trial court also expressly relied upon its own observations of O. during the ten months of proceedings in the matter. *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 634. Although Petitioner asserted that "the fact that the trial court 'observed' [O.] – who was sitting right in front of him – over a ten month period, proves nothing," both the trial court and the Court of Appeal disagreed. *Id.*; *see also People v. Rodas* (2018) 6 Cal.5th 219, 234 ("The trial court may appropriately take its personal observations in 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 has had the opportunity to observe and converse with the defendant.").

The trial court concluded that the evidence from Dr. Jacobs, Dr. Blifeld, Mother, and its own observations of O. clearly and convincingly established that she lacked "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 manager his or her own financial resources," *Cal. Probate Code* § 1828.5(c), and accordingly entered an appropriate limited conservatorship. *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 632-35. The Court of Appeal held that substantial evidence supported that judgment. *Id.* This Court granted review.

Argument

A. The Longstanding Rule Is That The Clear And Convincing Evidence Standard Applies In the Trial Court But Disappears On Appeal.

From the beginning, the rule routinely and repeatedly applied in California has been that a clear and convincing evidence standard is to be applied by a trial court, but not on appeal, in which review is limited to deciding whether substantial evidence exists to support the decision below. This Court has articulated and applied this principle for over a century and a half.

The cases on this point are legion, each of which were decided by this Court unanimously and without critique. For a sample of the cases decided by this Court to this effect in its first century, s*ee, e.g.*, *Cox v. Delmas* (1893) 99 Cal. 104, 124 (reviewing disputed findings of fact by trial court for substantial evidence); *Adair v. White* (1893) 4 Cal. Unrep. 261, 262 ("There was a sharp conflict of evidence upon both of these questions, and, under the well-established rule, the finding of the trial court thereon must be held conclusive. It is only where there is no substantial evidence in support of a finding that this

court can disregard the finding of the trial court."); *Adams v. Burbank* (1894) 103 Cal. 646, 648-49 ("As to the disputed facts, concerning which there was a substantial conflict in the testimony, it may be said that, in support of the verdict in favor of the plaintiff, we are authorized to assume as proven the facts which there is substantial evidence to uphold."); *Casey v. Leggett* (1899) 125 Cal. 664, 670 ("We have not the power to disturb a finding of fact if there is substantial evidence to support it."); *see also Thornton v. Petersen* (1891) 3 Cal. Unrep. 415, 415-16 ("This appeal is from the judgment. . . . We have carefully examined the record, and are satisfied that there is abundant evidence to sustain all the findings. It is really an attempt to have this court weigh the evidence . . . . The appeal ought not to have been taken.").

This Court made clear in even its earliest decisions that appellate review is properly limited to deciding whether substantial evidence exists to support the judgment below, regardless of the substantive burden of proof applied in the trial court. For example, in *Capelli v. Dondero* (1899) 123 Cal. 324, this Court noted that "[i]t is

true, as appellants contend, that evidence warranting the reformation of a deed must be clear and convincing . . . . [b]ut these are rules for the government of the trial court, and are not controlling in this court where findings find support in the evidence." *Id.* at 328. Similarly, in *Meeker v. Shuster* (1897) 5 Cal. Unrep. 578, this Court noted that while "the testimony must be [] clear and convincing . . . . whether the evidence is of such character and strenth [sic] as to produce conviction is a question for the trial court to determine." *Id.* at 582. This Court reiterated and applied this same principle in a plethora of other cases decided during the beginning of appellate review in this state. *See, e.g., Hutchinson v. Ainsworth* (1887) 73 Cal. 452, 457-58 (holding that a clear and convincing evidence standard is only for the trial court, and is not applied on appellate review); *Ward v. Waterman* (1890) 85 Cal. 488, 502-04 (same); *DeJarnatt v. Cooper* (1881) 59 Cal. 703, 706 (same).

This same principle was routinely applied by this Court during the next century as well. *See, e.g., Couts v. Winston* (1908) 153 Cal. 686, 688-89 ("Whether or not the evidence offered to change the

ostensible character of the instrument is clear and convincing is a question for the trial court. In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court."); *Steinberger v. Young* (1917) 175 Cal. 81, 84-85 ("The sufficiency of the evidence to establish a given fact, even where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court, and, if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal."); *Steiner v. Amsel* (1941) 18 Cal.2d 48, 54 ("[W]hether the evidence was sufficiently convincing . . . was a question primarily addressed to the trial court, and its determination thereon should be deemed conclusive."); *Stromerson v. Averill* (1943) 22 Cal.2d 808, 815 ("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."); *National Auto & Cas. Ins. Co. v. Industrial Acc.*

Comm'n (1949) 34 Cal.2d 20, 25 (same); *Crail v. Blakely* (1973) 8 Cal.3d 744, 750 ("It is true that the trial court reasonably could have concluded that Mrs. Maris' testimony failed to satisfy the 'clear and convincing' standard referred to above. That standard was adopted, however, for the edification and guidance of the trial court, and was not intended as a standard for appellate review.")

The principle that limits appellate review to substantial evidence regardless of the substantive burden in the trial court has been sufficiently firmly entrenched in California to be expressed in every edition of Witkin's seminal treatise, from the first (in 1954) to the latest (in 2008). *See* 3 B. Witkin, *Cal. Procedure* (1954) Appeal, § 84, pp. 2246-47. As the Fifth Edition describes this longstanding rule:

> In a few situations, the law requires that a party produce more than an ordinary preponderance; he or she must establish a fact by 'clear and convincing evidence.' But the requirement applies only in the trial court. The judge may reject a showing as not measuring up to the standard, but, if the judge decides in favor of the party with this heavy burden, the clear and convincing test disappears. On appeal, 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.

9 B. Witkin, *Cal. Procedure* (2008) Appeal, § 371, pp. 428-29 (citations omitted).

It is true, of course, that even a longstanding practice that no longer reflects contemporary reality may be overruled by this Court. *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288, 302; *but see infra* (discussing the implications of such history on the assessment of Legislative intent). But considerations of *stare decisis* are particularly weighty when, as here, a particular judicial view has prevailed for a substantial period of time. *Cf. Darcie v. Darcie* (1942) 49 Cal.App.2d 491, 495 ("That case has been accepted by the legal profession as the correct rule for over twenty-one years. A question once deliberately examined and decided should be considered settled and closed to further arguments. Courts are slow to interfere with a principle announced by a decision and may uphold it even though they would decide otherwise, were the question a new one.").

At a minimum, the fact that appellate review has been limited by this Court to an assessment of substantial evidence for over a

century and a half, with no apparent manifest injustice, weighs strongly against a conclusion that such a practice is inconsistent with fundamental fairness or generates significant untoward results.

B. Appellate Review For Substantial Evidence Is Robust.

. Rather than attempt to reweigh the evidence introduced at trial to ascertain whether it appears "clear and convincing" on a cold record, the existing practice of appellate review instead decides whether the evidence in support of the judgment below is substantial. Such review, at least in California, is far from hollow, and is replete with substantive content.

As this Court has repeatedly explained, "substantial evidence" sufficient to affirm the findings of fact below requires the introduction of evidence that is "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 328; *In Re Jasmon O.* (1994) 8 Cal.4th 398, 404; *Osefit v. Trustees of Cal. State Univ. & Colleges*

(1978) 21 Cal.3d 763, 773 n.9. These required characteristics are meaningful. The evidence necessary to support the decision below must be credible, reasonable, and solid; otherwise, the judgment will be reversed.

Evidence that is speculative does not qualify as substantial. *Chutuck v. Southern California Gas Co.* (1933) 218 Cal. 395, 400. Nor may substantial evidence be found based upon "suspicion, surmise, implications or plainly incredible evidence." *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1293.

There is, in short, a meaningful and substantive standard that is currently applied on appeal to a trial court's findings of fact. As this Court has recently noted, "substantial evidence is a deferential standard, but it is not toothless." *In re I.C.* (2018) 4 Cal.5th 869, 892. When the appellate tribunal determines that the evidence in support of a judgment is not credible, solid or reasonable, the decision below will be reversed. *See, e.g., id.* at 892-96 (concluding unanimously that the trial court's "commendably thorough" finding of parental abuse was

nonetheless not supported by substantial evidence); *In Re Jasmine G.* (2000) 82 Cal.App.4th 282, 284-93 (finding no substantial evidence to separate child from mother).

A review of the past century of California jurisprudence does not readily reveal any cases in which the existing standard of appellate review for substantial evidence has resulted in the affirmance of a manifestly unjust decision below. Nor does Petitioner's Opening Brief reveal any cases in which a trial court erred in a manner that would have been reversed had the Court of Appeal applied a clear and convincing standard rather than reviewed for substantial evidence, The ability of existing substantial evidence review to robustly correct existing trial court errors thus militates against a change in that longstanding, apparently effective standard.

C. Substantial Evidence Review Follows From the Respective Competence and Capacity of Trial and Appellate Tribunals.

The adoption and implementation of substantial evidence review has not only been a longstanding and effective practice, but also flows naturally from the nature and limitations of appellate decision making. Trial courts, confronted by live witnesses, can make effective credibility determinations. Appellate courts, which review only a stale paper record, have no such ability. Similarly, trial courts can decide the relative strength of admitted evidence. Trial courts can resolve evidentiary conflicts. Trial courts can weigh evidence. By contrast, appellate tribunals can do *none* of these things -- or at least cannot do them effectively.

These limitations of appellate review are expressly why this Court has adopted and applied the "substantial evidence" standard on appeal, even in cases in which the trial court was bound to decide whether clear and convincing evidence exists. Only trial courts can effectively decide whether evidence is "clear," as what may be

unclear to an appellate tribunal quickly reviewing a paper transcript may nonetheless be crystal clear to a judge who has personally listened to the evidence at trial for weeks or months. Similarly, only trial courts can effectively make credibility decisions, and thereby ascertain whether a given piece of evidence is "convincing" or, instead, worthy of discredit.

This Court has repeatedly stated that the unique ability of trial courts to decide credibility and weigh competing evidence is why a clear and convincing evidence standard is for the direction of the trial court but not the Court of Appeal. As this Court explained as early as 1890, "[i]t is apparent that the mind to which the evidence is to be 'clear and convincing' is the mind of the court below – the court which heard the evidence, and is especially charged with the duty of passing upon the credibility of the witnesses – a duty which is not imposed upon, and a right which is not vested in, this court." *Ward v. Waterman* (1890) 85 Cal. 488, 503. When the trial court has been presented with substantial evidence – i.e., evidence that is solid, reasonable, creditable and non-speculative -- and finds, as a factual

matter, that this evidence is both clear and convincing, an appellate tribunal cannot reverse that decision with a contrary finding, "because the right to pass upon the credibility of witnesses is not vested in this court" and "[t]he credibility and appearance of the witnesses would necessarily have much to do with determining the weight to be given to this evidence, and, consequently, its sufficiency." *Id.* at 504. So the clear and convincing evidence standard applies in the trial court, but not on appeal. *Id.*

Trial courts weigh evidence, ascertain credibility, and are able to view the demeanor and other characteristics of the witnesses. When a trial court has heard this evidence and concludes, based upon all of the factors before it, that such evidence is clearly persuasive, appellate tribunals cannot effectively (or accurately) conclude otherwise. "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression."

Maslow v. Maslow (1953) 117 Cal.App.2d 237, 243; *see also Cummings v. Kendall* (1940) 41 Cal.App.2d 549, 555 ("There are many factors aiding in a reasonable conclusion which are presented to the trier of facts in the first instance and not available to one going over the cold record. There is what might be called the 'feel' of the case. This embraces a consideration of the witnesses, the manner in which they testify and their general attitude in the courtroom.").

The institutional limitations on the ability of appellate tribunals to determine credibility, to weigh competing evidence, and to decide whether evidence is "clear" or "convincing" is precisely why these tribunals do not review for such qualities, and instead limit their inquiry to whether substantial evidence supports the trial court's determinations. *DeJarnatt v. Cooper* (1881) 59 Cal. 703, 706. "The learned judge of the lower court having seen and heard the witnesses and found the fact, under the elementary rule we cannot disturb the finding if there is any substantial evidence to support it." *Blair v. Squire* (1899) 6 Cal.Unrep. 350, 352. Even when an appellate court, on a cold record, might come to a different conclusion, and think that

the evidence as a whole appears neither clear nor convincing, as a matter of institutional competence, the contrary determination of the trial court rightly takes precedence. As this Court cogently explained in a hotly contested case over a century ago:

> If we had to pass upon it in the first instance, we are not at all certain that we would find as did the judge of the court below. But . . . the judge of the court below has found it true. As he saw and heard the witnesses, he was more capable of judging of the credit to be given to their testimony than we could possibly be by examining the record. . . . [W]e have not the power to disturb a finding of fact if there is substantial evidence to support it. Unlike the court below when trying the cause without a jury, we possess none of the functions of the jury, and therefore cannot substitute our opinion in the place of his, and say which testimony is true and which is false.

Casey v. Leggett (1899) 125 Cal. 664, 670.

What is true for a single piece of evidence in isolation is exponentially true where -- as in virtually every case (including this one) -- the evidence is in conflict. It is blackletter law that, on appeal, conflicts in the evidence are viewed in favor of the judgment below, as well as all reasonable inferences thereupon. *Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429. To do otherwise would

impermissibly require the appellate court to weigh the strength of conflicting evidence despite its inability to view the witnesses, judge credibility, or perform all the other tasks uniquely suited to the trial judge. *Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142.

Yet deciding whether evidence is "clear and convincing" almost necessarily requires a judge to weigh precisely such competing evidence. Whether evidence is sufficiently strong to "leave no substantial doubt" (i.e., be clear and convincing) depends both upon the weight afforded to that evidence as well as consideration of the evidence to the contrary. Both functions can be successfully accomplished only by the trial judge. The weight to be given to particular evidence necessarily depends upon the credibility of the speaker, its feel in the context of the entire trial, and other factors obtainable only by in-person viewing of the witness.

Similarly, whether evidence "leaves no substantial doubt" depends substantially on the value and strength of the contrary testimony. For example, a witness who says she definitively saw the defendant commit a tort may, standing alone, entail clear and

convincing proof, and absent contrary facts, leave no substantial doubt. But when that witness is contradicted by three other neutral witnesses, that evidence may no longer be seen as clear and convincing -- unless, of course, the trial court, for reasons perceivable only in person, concludes that the three witnesses are not credible, or that their testimony is for other reasons less worthy of credence than the sole contrary witness.

Accordingly, deciding (1) the weight of any particular piece of evidence (strong or weak -- "clear" or otherwise), as well as (2) the weight (if any) to be given to the evidence contrary to that piece of evidence are functions that are properly delegated solely to the trial court. Conflicts in the evidence are viewed, conclusively, in favor of the trial court's judgment. Similarly, deciding whether to give highly persuasive weight – such that it leaves extraordinarily little doubt -- notwithstanding the presence of contrary evidence is similarly viewed, conclusively, in favor of the decision below. *Crocker Nt'l Bank v. San Francisco* (1989) 49 Cal.3d 881, 888. Weight and conflict are thus necessarily decided by the trial court, not on appeal. The continuing

validity of these fundamental principles is not subject to reasonable dispute.

Yet those same rules directly engender the principle at issue here: that whether evidence is "clear and convincing" is a determination that can only be made by the trial court, which is the only entity invested with the ability to effectively ascertain the weight to be accorded to particular evidence and to resolve evidentiary conflicts. Because conflicts are resolved in favor of the trial court's findings, if evidence exists that is "credible, reasonable and of solid value" (i.e., is substantial), and if the trial court elects to reject the contrary evidence, that conflict resolution is determinative on appeal. Simply put, any conflicting evidence rejected by the trial court does not establish the requisite level of doubt because we resolve all conflicts in favor of the decision below. Solid, credible evidence is thus, by definition, clear and convincing because we have rationally invested with determinative significance the trial court's rejection -- on credibility, persuasiveness, or other grounds -- of the evidence to the contrary.

This too is a longstanding principle. This Court has repeatedly mentioned that the substantial evidence rule of appellate review directly follows from the fact that we resolve all evidentiary conflicts in favor of the trial court's judgment. As this Court said as early as *Capelli v. Dondero* (1899) 123 Cal. 324:

> It is true, as appellants contend, that evidence warranting [relief] must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt; and, unless the proofs come up to this standard, equity will withhold relief. But these are rules for the government of the trial court, and are not controlling in this court where the findings find support in the evidence. This court cannot enter upon an examination of all the evidence to determine where the preponderance lies. Upon questions of fact its province is to determine whether there be evidence tending to support the findings, and it cannot decide as to the weight of the evidence where there is a conflict.

Id. at 328 (citations omitted); *see also Hutchinson v. Ainsworth* (1887) 73 Cal. 452, 457-58 (reaffirming that the rule of substantial evidence on appeal applies to cases decided according to a clear and convincing standard in the trial court as a result of the requirement that conflicts in the evidence are to be conclusively judged in favor of the judgment below); *Ward v. Waterman* (1890) 85 Cal. 488, 502-04 (same).

The longstanding validity of the substantial evidence rule thus follows from the similarly longstanding (and continuing) validity of the related rule that trial courts are given exclusive province to decide credibility, to adjudge the weight to be afforded the evidence, and to resolve evidentiary conflicts. If evidence is substantial, it is, by definition, worthy of credence and of solid probative value. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 328; *In Re Jasmon O.* (1994) 8 Cal.4th 398, 404. If a trial court decides that the conflicting evidence is unworthy of credence (e.g., is not credible), and on appeal, we categorically resolve those conflicts in favor of the trial court, then all that remains is the persuasive, reasonable and "solid" evidence that supports the judgment. Such evidence satisfies the clear and convincing standard because, on appeal, every reasonable mind would be persuaded the existence of such solid, probative and substantial evidence, particularly once we conclusively reject -- as we do on appeal -- the evidence to the contrary as unworthy of credence given its express or implicit rejection by the trial court.

If trial courts are the exclusive judge of credibility, of weight, and of conflicts – as they surely are -- then the presence of substantial evidence is dispositive on appeal even in cases in which the trial court is directed to ensure that it enters judgment for the plaintiff only if the evidence is clear and convincing. Whether evidence is clear or convincing is a task we conclusively delegate to the factfinder, whether a jury or trial judge. For the same reasons we properly do not ask on appeal whether the testimony of a given witness was convincing (e.g., credible), and instead rely exclusively on the factfinder for that assessment, so too does the substantial evidence rule similarly not ask whether such evidence was clear and convincing. Whether evidence is "clear" or "convincing" is for the trial judge to decide. Once the trial judge so decides, and once the appellate tribunal is satisfied that this evidence is indeed solid, creditable and probative, then we resolve all contrary evidence in favor of the judgment, and task of the appellate courts is at an end. The substantial evidence rule is part and parcel of the rule that we

conclusively delegate to trial courts the ability to decide credibility, weigh evidence, and resolve evidentiary conflicts.

D. The Substantial Evidence Rule Minimizes the Risk of Error.

Rules, of course, necessarily entail costs. Petitioner correctly notes that not incorporating the heightened "clear and convincing" standard on appeal risks, at least in theory, leaving erroneous trial court decisions potentially unreversed. That is surely a potential downside of the existing rule.

But there are substantial reasons to believe that the deleterious effects of this longstanding principle are overstated, and, in any event, are preferable to the alternative.

First, as noted *supra*, the robust application of the substantial evidence rule by the California judiciary likely catches most, if not all, of those potential trial court errors. When a trial court relies on evidence that is insubstantial, or speculative, or unworthy of probative significance, this Court and the Courts of Appeal have been (and

remain) more than willing to reverse, both in conservatorship cases and beyond. *See, e.g., In re I.C.* (2018) 4 Cal.5th 869, 892; *In Re Jasmine G.* (2000) 82 Cal.App.4th 282, 284-93. Moreover, the difficulty of finding cases that would have been decided any differently with "clear and convincing" review on appeal, particularly when combined with a century and a half of positive empirical experience with review for substantial evidence, suggests an extraordinarily low rate of existing error.

Further, if, as is almost certainly the case, trial courts take seriously the admonition that they grant relief only when clear and convincing evidence "leaves no substantial doubt" as to the validity of a claim, we would (and should) expect trial courts to rarely grant relief when evidence is in fact opaque. That does not mean that trial courts will always be perfect. But the fact that all participants recognize the deliberately stringent nature of the test to be applied below surely focuses attention and minimizes error.

Mistakes might nonetheless perhaps be made. Potentially even made and not caught by the existing review for substantial evidence.

But recall that these errors, if any, involve mistakes that by definition relate to the weight to be afforded to particular evidence; *i.e.,* whether that evidence is "clear" or "convincing." There is no doubt that trial courts indeed make errors in this field routinely. Trial judges surely sometimes find witnesses credible even though they are, in fact, not telling the truth. Similarly, juries sometimes place more weight on one piece of conflicting evidence than another, or find one expert witness more persuasive than her counterpart, even though a more informed factfinder might resolve the conflict differently. Trial court adjudications are, in short, undoubtedly replete with errors regarding credibility, weight, and evidentiary conflict.

We nonetheless deliberately leave such errors uncorrected on appeal. We do not correct credibility determinations on appeal even when we feel confident that the trial court got it wrong. We similarly do not reweigh the evidence on appeal -- or (generally) even on a new trial motion -- even though this undoubtedly leaves serious errors unreversed. The same is true in a legion of other areas as well; for example, as regards procedural or evidentiary mistakes made by the

trial court that might well have, but likely did not, affect the verdict. *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.

It is not just in legal doctrine that we are willing to accept the risk of such unreversed trial court errors, notwithstanding their undeniable significance. This systemic decision also reflects practical reality. To take but the most pervasive example; in conservatorship cases, virtually no appeals are filed, nor do most of these proceedings even have contested evidentiary hearings. *See* Amicus Brief of Spectrum Institute at 37-41 (citing statistics). There is no doubt that errors – indeed, serious errors – may sometimes be made in these proceedings. But we do not correct them; indeed, unlike in criminal cases, we do not even fund public counsel in an *attempt* to correct them. Rather, we understand that credibility, weight, and conflict errors may sometimes be made, but given the limitations of appellate review, we prefer to leave those errors uncorrected rather than adopt an alternative course.

Heightened standards for review on appeal will, by definition, reduce the rate at which trial court errors are likely left unreversed.

But when (as here) such a heightened standard would displace the trust we deliberately and conclusively repose in trial courts to assess the credibility, weight and degree of persuasiveness of a particular piece (or set) of evidence, countervailing considerations take precedence. We deliberately reject the imposition of that heightened appellate standard notwithstanding our recognition that uncorrected trial court errors of *any* type are serious ones, even if they relate to liberty interests of intermediate magnitude (e.g., here, where a particular high school student will spend her second senior year).

And the countervailing considerations at issue in this matter are serious ones. Even if applying the "clear and convincing" evidence standard on appeal will meaningfully reduce the prevalence of "Type II" (i.e., trial court) errors – and, as noted *supra*, there is serious reason to believe that it will not – it will undeniably generate "Type I" errors; i.e., the rejection on appeal of trial court decisions that *correctly* view the evidence as clear and convincing. *See generally Small v. Fritz Cos.* (2003) 30 Cal.4th 167, 181 (discussing Type I and Type II errors in analogous contexts).

Even if the Court of Appeal is reminded to give deference to the trial court, imposition of a heightened standard of review will inevitably result in appellate tribunals finding insufficiently "convincing" some evidence that the trial court, which personally heard the witnesses for weeks, found compelling. *Cf. In re Matter of Burke* (2014) 2014 WL 5088876, *8 ("While the hearing judge's candor determination is entitled to great weight, we do not find clear and convincing evidence in the record that Burke lacked candor."). Those Type I errors are serious as well. They displace the superior capacity of the trial court for accurate factfinding. More practically, in the conservatorship context, such appellate errors also result in a concrete lack of protection for individuals with potentially serious disabilities. *Cf. In Re Conservatorship of O.B.*, 32 Cal.App.5th at 630-31 (suggesting that the failure to impose a conservatorship would risk continuation of events like running off to find SpongeBob SquarePants, trusting inappropriate strangers and signing binding legal documents without reading or understanding them). Imposing such heightened standards would also increase transaction costs and

encourage meritless appeals by losing litigants who hope the Court of Appeal will substitute its own assessment of the evidence for that of the trial court.

Imposing a clear and convincing evidence standard on appellate review is especially likely to generate such adverse consequences given the substantive (and substantially subjective) nature of such review. The Court of Appeal has often noted that "[t]he question whether evidence is clear and convincing . . . necessarily involves a weighting of the evidence." *Callahan v. Chatsworth Park, Inc.* (1962) 204 Cal.App.2d 597, 608; *see also Distefano v. Hall* (1963) 218 Cal.App.2d 657, 680 (whether evidence at trial satisfies a clear and convincing standard "necessarily involves the weighing of evidence"). That is because evidence is not "convincing" or "clear" in isolation, but rather involves a decision based upon the whole of the record. This Court will surely continue to instruct the Court of Appeal that is not permitted to weigh evidence or resolve conflicts. *See* 9 B. Witkin, *Cal. Procedure* (2008) Appeal, § 365, pp. 422-23 ("This fundamental doctrine is stated and applied in hundreds of cases.") (citations

omitted). Yet to instruct appellate tribunals to ensure that evidence is clear and convincing necessarily involves *precisely* such weighing. Serious errors in such a procedure are inevitable.

Appellate review to ensure that the record as a whole is "clear and convincing" will also require the Court of Appeal to accurately define and apply inherently indeterminate rules. For example, in a simple case, the Court of Appeal will surely say that evidence is not insufficiently "clear and convincing" just because such evidence was from a single witness, or was contradicted by the contrary testimony of a different witness. *Kircher v. Atchinson, Topeka & Santa Fe Ry. Co.* (1948) 32 Cal.2d 176, 183. But what if that single witness was contradicted by three seemingly neutral witnesses? What if there were a dozen contrary witnesses? Does evidence remain "clear and convincing" even in such a setting?

The traditional, longstanding rule holds that the trial court, which heard the witnesses directly, is in a superior position to decide these issues, and that if she is of the firm view that the single witness is telling the truth and the others are definitely not, that judgment

conclusively prevails. *Menning v. Sourisseau* (1933) 128 Cal.App. 635, 639 (noting that "demeanor on the stand, his appearance and his manner of giving testimony may have been sufficient to convince the trial judge of [his] honesty, integrity and the truthfulness of his testimony" notwithstanding contrary evidence). To instead invest the Court of Appeal with the duty to weigh the evidence and decide whether it is clear and convincing, even with deference, risks substantial prejudicial errors, particularly when deciding a record with conflicting evidence (as surely describes virtually every trial).

As with credibility determinations, the substantial evidence rule invests conclusive weight in the trial court. To do otherwise would undeniably generate erroneous reversals on appeal.

E. Legislative Intent Supports Substantial Evidence Review.

These countervailing considerations are why this Court has, for a century and a half, applied the substantial evidence rule on appeal even to cases decided in the trial court on a clear and convincing evidence standard. The benefits of such an approach outweigh the disadvantages, particularly given the respective competencies of trial and appellate tribunals.

And this is not merely the conclusion of this Court. It is also the normatively significant conclusion of the California Legislature.

Particular circumstances have, on occasion, authorized minimal departures from this Court's traditional exercise of appellate review. For example, in criminal cases, the requirements of the Due Process Clause and federal precedent led this Court to modify very slightly the "no evidence" rule expressed in dicta in language of some of its prior opinions. To this end, in *People v. Johnson* (1980) 26 Cal.3d 557, this Court concluded that the practice of "substantial evidence" appellate

review in California was fully consistent with the new federal requirements of *Jackson v. Virginia* (1979) 443 U.S. 307, in which the Supreme Court held that due process required reversal of criminal convictions in which the evidence was insufficient to establish guilt beyond a reasonable doubt. In so holding, this Court reiterated that substantial evidence review remained the controlling legal principle in California. *Johnson,* 26 Cal.3d at 576-77 ("California decisions state an identical standard. . . . The foregoing principles of judicial review are plainly consistent with *Jackson.*"). But the Court noted:

> A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment [] risks misleading the court into abdicating its duty to appraise the whole record. As Chief Justice Tobriner explained, the 'seemingly sensible' substantial evidence rule may be distorted in this fashion to take 'some strange twists.' 'Occasionally,' he observes, 'an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding at issue.

Id. at 577-78.

This Court accordingly reminded the Courts of Appeal that, consistent with federal precedent as well as existing California substantial evidence review, it could not "sustain a conviction supported by [] evidence which taken in isolation might appear substantial, even if on the whole record no reasonable trier of fact would place credence in that evidence." *Id.* at 577. But this Court concluded by reaffirming the continuing validity of the substantial evidence rule, even in criminal cases governed by the heightened restrictions of the Due Process Clause:

> We do not believe it necessary to disapprove past decisions merely because they contain language which could be misconstrued to permit affirmance based upon a standard of review which might contravene *Jackson v. Virginia*. We think it sufficient to reaffirm the basic principles which govern judicial review of a criminal conviction challenged as lacking evidentiary support: the 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 578.

The federal Due Process Clause controls the scope of appellate review in criminal cases, and such review is also constrained by both the constitutional status of the reasonable doubt standard as well as the longstanding policy preference that it is better to let multiple guilty people free rather than incarcerate a single innocent defendant. *In re Angela P.* (1981) 28 Cal.3d 908, 918; *In re Winship* (1970) 397 U.S. 358, 372 (Harlan, J., concurring). By contrast, in the present case, the appointment of a limited conservatorship involves none of these constraints. Such an appointment does not require proof beyond a reasonable doubt, does not constrain liberty in the same manner as criminal incarceration, and does not have a standard of review dictated by the Due Process Clause. *In re Angela P.*, 28 Cal.3d at 917-22. Indeed, in conservatorship cases, even the right to appeal is purely a statutory one, and a matter of Legislative grace. *In re Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 67.

The same is true for the standard of appellate review in such cases. On occasion, when the Legislature has been silent, this Court

has been left with the task of developing and applying the applicable standard of proof (and, by implication, the standard of appellate review). *See, e.g., In re Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223-34 (creating standard of "beyond reasonable doubt" in proceedings under the "grave disability" provisions of the Lanterman-Petris-Short (LPS) Act, under which individuals may be involuntarily committed to a state mental institution); *In re Amelia P.* (1981) 28 Cal.3d 908, 917-22 (creating standard of "clear and convincing evidence" before terminating parental rights); *see also In re Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 615-20 (creating standard of "clear and convincing evidence" before establishing Probate conservatorship under Section 1751) ("Since the Probate Code conservatorship provisions do not specify a standard of proof, it is for this court to determine which standard of proof should be applied.").

Here, by contrast, there is no legislative silence. The Legislature has spoken. When California enacted the limited conservator statute at issue here in 1980 and 1995, it expressly provided that such limited

conservatorships required clear and convincing evidence of some level of disability. *See Cal. Probate Code* § 1801(e) ("The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence."); *see also* Amicus Brief of Spectrum Institute at 33-34 (noting the historical progression of guardianship and conservatorship statutes in California, including the creation in 1980 of the limited conservatorship provisions at issue here).

It is assuredly true that the Legislature established this heightened standard of proof in an attempt to reduce trial court errors and suggests the importance of correct decision making therein. But it is equally undeniable that when the Legislature enacted these statutes and established this burden of proof, it did so against the backdrop of 150 years of consistent precedent from this Court squarely holding that such standards direct only the trial court, and do not apply ("disappear") on appeal. *See supra* (citing over a century of express holdings by this Court to this effect).

When such longstanding historical practice exists, this Court generally presumes that the Legislature intended the statute to be interpreted and applied accordingly. *Stewart v. Stewart* (1926) 199 Cal. 318, 341; *Radovich v. National Football League* (1957) 352 U.S. 445, 449-52; *see also Sacramento Bank v. Alcorn* (1898) 121 Cal. 379, 385 ("If these statutes are not in themselves sufficient . . . they nevertheless recognize and add weight to the judicial decisions [through history] . . . and which rulings, long acquiesced in, have become a rule of property not now to be reversed though erroneous."). When it enacted the relevant burden of proof in Section 1801, the Legislature knew that this would only direct the trial court, and would entirely disappear on appeal. And although Petitioner cites authority from *different* legal arenas to argue that isolated lower courts in *those* fields may have recently attempted to broaden the standard of review to incorporate a clear and convincing test on appeal, *see, e.g., T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229 (doing so for terminations of parental rights), these lower court cases both postdate the Legislature's enactment of the statute in *this* area as well as are

undeniably departures from the generally accepted, longstanding rule that existed at the time Section 1801 was passed. *See supra* (citing historical precedent from this Court); *see also* Eisenberg et al., *Cal. Practice Guide: Civil Appeals & Writs* ¶ 8:141 (2018) ("The weight of authority indicates that the trial court 'clear and convincing evidence' burden of proof does not supplant the appellate court standard of review on appeal.").

The Legislature accordingly struck a balance. Given the importance of the interests at stake, it wished to ensure that trial courts viewed the evidence as clear and convincing before establishing a conservatorship. But, similarly, given the need both to have a trial court (rather than an appellate court) view the proposed conservatee, decide credibility, and weigh the evidence -- as well as the undeniable need to protect individuals who are, in fact, disabled -- the Legislature understood that this standard would guide only the trial court, and would be inapplicable on appeal. (Indeed, several related provisions in the relevant statutes, as well as legislative history, appear to reflect a deliberate focus by the Legislature on required findings by the trial

court. *See, e.g., Cal. Probate Code* § 1800.3(b) ("No conservatorship of the person or of the estate 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."); Senate Judiciary Committee Report, AB 1727 at p.9 (2007) ("A clear statement of required findings that must be made on the record, in open court, in order to establish a conservatorship should be delineated.") (available at http://leginfo.ca.gov/pub/07-08/bill/asm/ab_1701-1750/ab_1727_cfa_20070627_154150_sen_comm.html))

When it enacted the clear and convincing evidence statute, the Legislature could have departed from the longstanding principle that appellate review of such decisions would be limited to substantial evidence. *Cal. Const.,* art. VI, § 11. Indeed, the Legislature has expressly done so in other (non-conservatorship) areas. *See, e.g., Bixby v. Pierno* (1971) 4 Cal.3d 130, 137-41 (discussing Legislative departure from substantial evidence standard and enactment of heightened appellate review in various administrative proceedings);

Ogundare v. Department of Industrial Relations (2013) 214 Cal.App.4th 822, 827-29 (same). But the Legislature deliberately did not do so when it enacted the statute at issue herein.

Nor has the Legislature done so subsequently. The California judiciary has for over a century made crystal clear that when applying each of the over 220 different statutes that expressly establish a "clear and convincing evidence" standard, the judiciary will apply that Legislative test only in the trial court, not on appeal. Yet, despite this clear and longstanding precedent, in not even one of these statutes has the Legislature seen fit to depart from this principle or to broaden application of the clear and convincing test beyond the trial court. In this regard, the language of this Court in *Schoonover v. Birnbaum* (1906) 148 Cal.548 seems substantially apt:

> Five sessions of the legislature have been held since the last decisions were promulgated. If the legislative department had not been satisfied with the judicial interpretation as to the extent of the right conferred, there has been ample opportunity to amend the statute so as to give in unmistakable language the right withheld by the decisions. In view of these circumstances, and without expressing any opinion concerning the soundness or

> unsoundness of the decisions in question, we are of the opinion that they should be adhered to.

Id. at 551.

When it enacted the limited guardianship statutes, the Legislature unquestionably desired the protection of disabled individuals, both from erroneous decisions of the trial courts (as a result of Type II errors) as well as from erroneous decisions by the disabled people themselves (as the result of Type I errors). The balance struck was to instruct trial courts to be exceptionally circumspect, but that nonetheless, when the trial court (or jury) was firmly and unalterably persuaded that the evidence established a disability, a limited conservatorship should be imposed, and that decision reviewed on appeal only for substantial evidence. This long history is why -- at where (as here) the Legislature has spoken -- this Court has unhesitatingly applied the substantial evidence rule on appeal, regardless of the burden of proof below. *See, e.g., In re Jasmon O.* (1994) 8 Cal. 4th 398, 422-23 (applying substantial

evidence test on appeal to terminations of parental rights pursuant to statute imposing a clear and convincing evidence test below).

Each of the over two hundred existing statutes in which the Legislature imposed a clear and convincing evidence test – some of which are over a century old – were enacted against a judicial template that unambiguously declared that such statutes would circumscribe the trial court but not affect the standard of review on appeal. *See also Armstrong v. Armstrong* (1948) 85 Cal.App.2d 482, 485 ("There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts.") Each of these statutes serves a vital purpose; that is why they impose a heightened burden of proof. But the Legislature simultaneously felt that such purposes were fully accomplished if the trial court – the entity that viewed the witnesses, judged credibility, and weighed the strength of the competing evidence – was the one to determine whether that burden was satisfied, with review on appeal only to confirm that substantial evidence exists. To do otherwise would detract, rather than

support, from the deliberate balance made by the Legislature, which fully reflects the relative institutional competencies of each component of the California judiciary. This Court should neither depart from this longstanding principle nor its underlying legislative intent.

F. The Decision Below Should Be Affirmed on Any Standard.

The present case is a prototypical example of how these principles are properly applied in practice. Indeed, the decision below should be affirmed even were this Court to conclude that the clear and convincing evidence test should be applied on appeal.

As Petitioner concedes, the evidence here was demonstrably in conflict. *See* Petitioner's Opening Brief at 20 ("The reports conflicted as to whether Petitioner lacked capacity to make her own medical decisions."). Two experts, Kathy Khoie (a self-employed psychological evaluator) and Christopher Donati (an investigator), did

not believe that a conservatorship was warranted. *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 634; 2 R.T. 371-95 & 420-25. But two other experts, Drs. Jacobs and Blifeld, disagreed. *Id.* One family member, L.K., O.'s great-grandmother, thought that O. was a typical teenager. But O.'s mother, who had "near daily contact" with O., thought that O. was far from fine, and recounted a plethora of harrowing tales. *Id.*

Trial courts rarely explain why they find one witness persuasive, another less than credible, or the weight of a third's testimony to be minimal. Juries, which are the default factfinder in conservatorship cases, explain their decisions even less. *Cal. Probate Code* § 1823(b)(7). Nor, even if an explanation existed, would it likely be helpful, as the factors that lend one witness credence and another to appear disingenuous are often nonverbal and immune from accurate description. *Estate of Bristol* (1943) 23 Cal.2d 221, 223.

Perhaps Dr. Khoie shifted in her seat, seemed hesitant in her testimony, or left a firm impression that she had conducted a less than fulsome investigation of the facts. Perhaps the bases for Dr. Jacob's

report, which expressed the views of the regional center, seemed eminently more persuasive than the contrary experts. *Cf. Cal. Conservatorship Practice* (Cont. Ed. Bar. 2018) § 22.7 ("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. The regional center report is required before the court can proceed to decide the petition for a limited conservatorship.").

Perhaps, for reasons that can only be revealed through in-person viewing of the witnesses, the trial court found substantially more credible and persuasive the testimony of O.'s mother as contrasted to the contrary testimony of O.'s great-grandparent. Perhaps, in combination with all of the above, and as the trial court itself suggested, the esteemed judge below relied in part upon his own personal interactions with and viewings of O. during the ten months of

contested proceedings in the matter. *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 634.

On a cold appellate record, we can never know what precisely led the trial court to conclude that Dr. Blifeld, Dr. Jacobs, O.'s mother, and its own observations established to an overwhelming degree of certainty that O. in fact lacked the capacity to perform some, but not all, of the tasks necessary to provide for herself properly. What we can, and do, know is that the evidence at trial was in conflict, and that the trial court decided that certain of this testimony was more credible and carried substantially more persuasive weight than the contrary testimony. What we can also say is that, on appeal, such conflicts in the evidence are conclusively resolved in favor of the judgment, and that even the testimony of a single witness (or the judge's own observations) can indisputably satisfy a clear and convincing evidence standard. *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.

There was, as the Court of Appeal held, substantial evidence – evidence that was solid, credible and probative – that supported the

trial court's judgment. *In Re Conservatorship of O.B.*, 32 Cal.App.5th at 634. The trial judge was the exclusive judge of credibility and weight, and for this reason, on appeal, all conflicting evidence – e.g, the evidence from Khoie, Donati, and L.K. – is properly assumed to be found unpersuasive. *Crocker Nt'l Bank v. San Francisco* (1989) 49 Cal.3d 881, 888. Which then leaves appellate review here where it first began: with substantial evidence to support the judgment, thereby requiring the affirmance of the decision below.

In virtually every real world case, then – including this one – even a "clear and convincing evidence" test collapses down to the traditional substantial evidence test, since conflicts in the evidence (e.g., the dispute here between the experts) are viewed in favor of the judgment, and do not detract from the legitimate ability to find the conclusion of a single expert or witness to be clear and convincing proof of an individual's disability. The trial court here could legitimately find the evidence from Dr. Blifeld, Dr. Jacobs, O.'s mother, and/or its own observations, individually or in combination, to be clear and convincing. Thus, for the very same reasons that this

evidence qualifies as substantial, the trial court could legitimately find it clear and convincing.

This Court should accordingly affirm. Indeed, it should do so even were it to conclude that the clear and convincing evidence test should be applied on appeal. This Court granted review on the legal issue regarding which test applies. But Petitioner has expressly requested that this Court hold that clear and convincing evidence does *not* exist here, and has fully briefed and argued these facts. *See* Petitioner's Opening Brief at 44-47 (Section D.). No prejudice will thus exist were this Court to decide this issue now, which is fairly included in the issues presented and briefed. *See Cal. Rule Ct.* 8.516; *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, 389.

There are also substantial practical reasons to decide this issue now rather than remanding to the Court of Appeal. Prior to obtaining *pro bono* counsel in this Court, Mother spent her life savings (and more) on legal fees below in an attempt to protect her daughter, and neither Mother nor O. -- who desperately wants these proceedings concluded – would benefit from a further round of appeals. The

taxpaying public will also appreciate an expeditious resolution in this Court, particularly since it pays for O.'s appointed counsel as well as any future expenditures by the judiciary in the Court of Appeal.

But perhaps even more importantly, regardless of what decision this Court reaches on the appropriate legal standard, it will assist the lower appellate courts to have a concrete example as to how those standards should apply. This Court could, of course, simply tell the Courts of Appeal to apply the clear and convincing evidence test, mindful of the need to grant deference to the factfinder below and the ability of the trial courts to decide credibility, resolve conflicts and weigh evidence.

But, particularly in this context, a picture – or, here, an example – is often worth a thousand words (or more). The present case is a perfect exemplar of an evidentiary conflict and the permissible ability of a trial court to find clear and convincing evidence notwithstanding such a conflict. Two experts said one thing, two experts said another, two family members disagreed, and the trial court legitimately found more persuasive one side (consistent with its own observations) than

the other. Even were this Court to conclude that the Court of Appeal should have applied the substantial evidence test on appeal, it should affirm the decision below with full recognition that this standard was satisfied in the present case and in others like it. To do so would reduce the inevitable confusion over how the Courts of Appeal should resolve abstract cases and evidentiary conflicts according to whatever test this Court concludes should rightly apply to future cases on appeal.

Conclusion

The substantial evidence test of appellate review works well, reduces errors and transaction costs, and is consistent with legislative intent and *stare decisis*. This Court should affirm the decision of the trial court and the Court of Appeal imposing a limited conservatorship in the present case.

Certificate of Compliance

Pursuant to California Rule of Court 8.360(b), the undersigned hereby certifies that the foregoing Answering Brief of Respondents is in 14-point Times New Roman font and contains 9,974 words, according to the word count generated by the computer program used to produce the brief.

Dated: July 22, 2019

/s/ Shaun P. Martin
Shaun P. Martin

Proof of Service
(Case No. S254938)

I, Shaun P. Martin, declare that I am a citizen of the United States and California and am employed in San Diego, California. I am over the age of eighteen years and not a party to this action. My business address is 5998 Alcala Park, Warren Hall, San Diego, California, 92110. On July 22, 2019, I caused the following documents to be served:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 22, 2019, at San Diego, California

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