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 REPLY BRIEF

GERALD J. MILLER
P.O. Box 543
Liberty Hill, TX 78642
(512) 778-4161
California State Bar No. 120030

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

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LEGAL ARGUMENT

RESPONDENTS FAIL TO DISTURB PETITIONER'S SHOWING THAT AN APPELLATE COURT, IN REVIEWING THE SUFFICIENCY OF THE EVIDENCE IN SUPPORT OF A CONSERVATORSHIP ORDER, MUST INCORPORATE AND CONSIDER THE "CLEAR AND CONVINCING EVIDENCE" APPLICABLE TO CONSERVATORSHIP PROCEEDINGS.

The answering brief filed by respondents T.B. and C.B. (collectively "respondents")[1] fails to disturb petitioner's showing that the Court of Appeal erred by reviewing the sufficiency of the evidence supporting the conservatorship order in this case without considering whether such evidence met the "clear and convincing" standard imposed by statute, and by instead holding that such standard somehow "disappeared" on appeal. Respondents conveniently ignore the unfavorable decisions by the United States Supreme Court and this Court, which hold that an appellate court's review of the sufficiency of the evidence should and must consider that and other heightened standards of proof, as well as the policies behind such standards, and the consistent majority of decisions in the clearly analogous field of dependency.

Instead, respondents rely on outdated and inapposite authority, and on a fictitious "longstanding historical practice" that fundamentally confuses the issue of the nature of the evidence with that of its sufficiency. Respondents further rely on the Orwellian and self-contradicted view that the overly deferential standard that they seek to apply is

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[1]References to "AB" are to the answering brief filed by respondents, while references to "POB" are to petitioner's opening brief.

somehow "robust" and will minimize erroneous rulings – when the opposite is in fact the case – and on fanciful and unsupported claims of legislative intent, in a failed attempt to persuade this Court not to do what both logic and precedent dictate it must, namely ensure that the standard of review on appeal considers and applies the heightened standard of proof required in conservatorship cases. Finally, respondents misstate and misapply the facts in this case – which consisted, in their entirety, of the biased and uninformed testimony of respondent Mother, the undisclosed observations of the trial court, and passing references to conflicting expert reports that were never introduced as evidence, and whose authors never testified or subjected themselves to cross-examination or observation of their demeanor – which can hardly be said to "clearly" or "convincingly" support the drastic step of conservatorship. As a result, and because nothing in respondents' answering brief supports the appellate court's refusal to consider or apply the "clear and convincing evidence" standard in its review, or its determination that the evidence was sufficient to support a conservatorship, this Court should and must reverse the Court of Appeal's decision, and the conservatorship order in this case.

A. Respondents Fail To Challenge The Central Premise Of Petitioner's Argument That, Under Recent Case Law, The Standard Of Review On Appeal Must Incorporate Or Consider The Heightened Standard Of Proof At The Trial Court.

Initially, respondents' brief is remarkable for what it does not include. Respondents nowhere challenge the central premise of petitioner's argument, i.e. that under recent decisions by the courts, including both this Court and the United States

Supreme Court, an appellate court, in determining whether sufficient evidence supports the trial court judgment, must consider the heightened standard of proof – e.g. clear or convincing evidence or proof beyond a reasonable doubt – applicable in the trial court. (*See* POB, pp. 25-42.) In doing so, respondents ignore the fundamental purposes of a heightened standard of proof, i.e. to create confidence in the final judgment, and to "allocate[] the risk of erroneous judgment between the litigants and indicate[] the relative importance society attaches to the ultimate decision." (POB, pp. 24-25, quoting *Colorado v. New Mexico* (1984) 467 U.S. 310, 316 [104 S.Ct. 2433; 81 L.Ed.2d 247].) Likewise, respondents largely ignore the seminal cases in the criminal and dependency contexts which, as stated in petitioner's opening brief (pp. 29-33) establish that the standard of review must reflect that higher standard.[2] And, respondents ignore the majority of the dependency cases that apply that principle (*see* POB, pp. 32-33, 32 n.5) as well as the recent case of *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, which discusses the

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[2]Thus, for example, the only references in respondents' brief to *Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L. Ed. 2d 560] and *People v. Johnson* (1980) 26 Cal. 3d 557 consist of the same observations made by petitioner in her opening brief, namely that this Court in *Johnson* incorporated the standard established by the United States Supreme Court in *Jackson*, including that the appellate court "must review the whole record," and must determine whether "a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*See* AB, pp. 46-47; POB, pp. 28-29, quoting *Johnson, supra*, 26 Cal.3d at p. 578 (emphasis added).) Similarly, the only references in respondents' brief to this Court's decisions in *In re Angelia P.* (1981) 28 Cal.3d 908 (erroneously referred to as "*Angela P.*") and *In re Jasmon O.* (1994) 8 Cal.4th 398, which applied those principles to dependency cases, involve citations to other, basic principles of law, such as the definition of "substantial evidence." (*See* AB, pp. 21, 32, 46, 51.)

division in authority. (*See* POB, pp. 35-36.) Finally, respondents ignore the clear analogy between dependency and conservatorship cases, which establish that the holdings in the former should apply equally to the latter. (*See* POB, p. 39.) As a result, respondents fail to even address, much less refute, the central arguments on which petitioner relies.[3]

B. The "Substantial Evidence" Cases On Which Respondents Rely Are Inapposite And Do Not Support The Court Of Appeal's Failure To Apply The "Clear And Convincing Evidence" Standard In Reviewing The Sufficiency Of The Evidence In This Case.

Instead, respondents' claim that the Court of Appeal's decision in this case reflects a "longstanding rule" of appellate review (AB, pp. 15-21) consists of little more than a term paper-like string of computerized search results regarding the concept of "substantial evidence," which is largely irrelevant to the present appeal. Throughout their brief, respondents hopelessly conflate the distinction between the nature of the evidence, i.e.

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[3]In addition to ignoring petitioner's arguments, respondents' brief plays fast and loose with certain facts, in an apparent attempt to exaggerate petitioner's disability and the purported need for a conservatorship. Thus, for example, contrary to both respondents' brief (p. 10) and the Court of Appeal opinion (*Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 629), petitioner at the time of trial was not repeating twelfth grade. Rather, pursuant to petitioner's Individualized Educational Plan (IEP), she was awaiting completion of the last remaining class (World History) needed to graduate, and it was Mother who sought to have her repeat twelfth grade until she was age 22, and to receive a certificate of completion rather than a high school degree. Similarly, respondents' reference to petitioner's absences from school (AB, p. 11) are to individual class periods rather than days, and included approximately a month in which Mother took petitioner without notifying the court or the school, classes that the court ordered petitioner not to attend, and days spent in court during these proceedings. Finally, the "Sponge Bob" incident referred to in respondents' brief (pp. 12, 40) did not involve the act of running away; instead, that incident occurred when petitioner was in Hollywood sightseeing and she walked over to a costumed character to take a picture.

whether it is "reasonable, credible, and of solid value," and the sufficiency of that evidence, i.e. whether it is adequate to meet the burden of proof standard applicable to the particular trial court proceeding. (*See Jackson, supra*, 443 U.S. at pp. 317-18; *Johnson, supra*, 26 Cal.3d at pp. 562, 578; *see also* POB, pp. 22, 42-43.)

As a result, the historical and even contemporary viability of the "substantial evidence" doctrine has little if anything to do with the issue of the proper standard of review in cases, such as conservatorship proceedings, that are subject to a "clear and convincing evidence" or other heightened standard of proof. Moreover, even if it did, respondents' treatment of the issue does not aid their present claims, for several reasons. First, the nineteenth and early twentieth century cases cited by respondents are comparatively ancient, and those and other cases cited by respondents predate *Jackson*, *Johnson*, *Angelia P.*, and the other cases referred to above.[4] Moreover, many if not most of those decisions involved purely civil disputes that were subject to the preponderance of the evidence standard, and so have no relevance where, as here, a higher standard of proof applies.[5] Further, in none of the cases, including those involving the "clear and

[4]Those cases include *Crail v. Blakely* (1973) 8 Cal. 3d 744, which as stated in petitioner's opening brief has been used to justify the notion that the "clear and convincing evidence" standard is solely for the edification of the trial court and somehow "disappears" on appeal. (*See* POB, pp. 43-44 n.10.) Predictably, respondents fail to address petitioner's showing that the decision in *Crail* both predated each of the major decisions referred to above, and was limited to the unique circumstances (i.e. an oral contract to make a will) found in that case.

[5]*See, e.g., Adair v. White* (1893) 4 Cal.Unrep. 261 and *Meeker v. Shuster* (1897) 5 Cal.Unrep. 578 (ejectment actions); *Adams v. Burbank* (1894) 103 Cal. 646 (contract

convincing evidence" standard, did the parties or the courts address, much less decide, the present issue, namely whether the "clear and convincing evidence" or other higher standard of proof applies on appellate review.

In sum, then, respondents' answering brief fails to address the arguments and authority set forth by petitioner – including the United States Supreme Court's decision in *Jackson* and this Court's decisions in *Johnson*, *Angelia P.*, and *Jasmon O.* – and instead, relies on case law that antedates those decisions and is otherwise inapposite. As a result, nothing in respondents' brief disturbs the conclusion that the Court of Appeal erred in failing to consider the "clear and convincing evidence" standard in determining the sufficiency of the evidence in this case, and that its decision, and the trial court's conservatorship order, must be reversed.

C. Respondents' Policy Arguments Are Without Merit, And Do Not Support The Failure To Incorporate The "Clear And Convincing Evidence" Standard Into The Standard Of Review On Appeal.

Having failed to address, much less refute, petitioner's arguments and authority, respondents proffer a number of policy and other arguments to support their claim that the "clear and convincing evidence" standard, which applies to conservatorship petitions under Probate Code section 1801, subdivision (e), nonetheless "disappears" on appeal. As shown below, however, those arguments are unsupported by logic or authority and

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action); *Thornton v. Petersen* (1891) 3 Cal.Unrep. 415; *Capelli v. Dondero* (1899) 123 Cal. 324, *Hutchinson v. Ainsworth* (1887) 73 Cal. 452, and *Steiner v. Amsel* (1941) 18 Cal.2d 48 (property disputes); *Ward v. Waterman* (1890) 85 Cal. 488 (trust action).

frequently contradictory, and are otherwise without merit.

1. Contrary To Respondents' Claims, The "Substantial Evidence" Standard For Appellate Review Is Hardly "Robust," And Increases Rather Than Minimizes The Likelihood Of Uncorrected Erroneous Rulings In Cases Involving The "Clear And Convincing Evidence" Standard.

Initially, respondents' characterization of the "substantial evidence" standard as "robust" (AB, pp. 21-23), and their claim that application of that standard "minimizes the risk of error," even in cases involving the clear and convincing evidence standard (AB, pp. 35-43) are without merit, for several reasons. First, as with the remainder of their arguments, those claims hopelessly conflate the distinction between the nature of the evidence and its weight or sufficiency, and focus entirely on the former, while ignoring the latter. Stated another way, the fact that a particular piece of evidence may be "solid," "credible," or otherwise "substantial" does not, without more, create confidence that the resulting judgment or order is correct, particularly where, as here, there is contrary evidence that is at least equally "solid," "credible," or "substantial." Instead, as shown above and in petitioner's opening brief (pp. 24-25), the responsibility for creating such confidence and helping ensure a correct result falls to the standard of proof, whether it consists of the normal civil "preponderance of the evidence" or the higher "clear and convincing evidence" or "beyond a reasonable doubt" standards.

Respondents' argument fails for other reasons as well. First, although the "substantial evidence" standard may not be "toothless" (AB, p. 22, quoting *In re I.C.*

(2018) 4 Cal.5th 869, 892), it can hardly be plausibly characterized as "robust." (*See, e.g., People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681 ("When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ."). Indeed, respondents' characterization of the substantial evidence standard as "robust" or "stringent" (AB, p. 36) is contradicted by numerous other statements in their brief, in which respondents acknowledge the limitations of that standard and both the potential and likelihood that it will result in uncorrected errors.[6]

Respondents' contention that a review of past case law "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" (AB, p. 23) is equally specious, for several reasons. First, a reviewing court, in affirming a lower court

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[6]*See, e.g.,* AB, pp. 35 (failure to incorporate the "clear and convincing evidence" standard is a "potential downside of the existing rule" and creates the risk of "leaving erroneous trial court decisions potentially unreversed"), 37 (stating that "trial courts indeed make errors in this field routinely," that trial court adjudications are "undoubtedly replete with errors regarding credibility, weight, and evidentiary conflict," and that the rule "undoubtedly leaves serious errors unreversed"), and 38 ("There is no doubt errors – indeed serious errors – may sometimes be made in [conservatorship] proceedings"). By contrast, respondents concede that "[h]eightened standards for review on appeal will, by definition, reduce the rate at which trial court errors are likely left unreversed." (*See* AB, p. 38.)

judgment based on the sufficiency of evidence, is unlikely to emphasize, or even mention, the injustice of its decision, particularly since, as noted above, its inquiry ends once it finds substantial evidence to support the judgment. Second, the relevant case law – including the pronouncements of the United States Supreme Court – does, in fact, reveal the potential injustice resulting from an overly deferential standard of review, and indeed has been held to justify the abandonment of that standard. (*See, e.g., Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L. Ed. 2d 560] (holding that the existing standard of appellate review under *Thompson v. Louisville* (1960) 362 U.S. 199 [80 S. Ct. 624; 4 L. Ed. 2d 654], in which a criminal conviction would be reversed only if there was "no evidence" to support it, violated due process); POB, pp. 27-28.) Finally, as shown in petitioner's opening brief (pp. 44-47) and below in section D., the Court of Appeal's decision in this case presented exactly that type of situation, by affirming the imposition of a conservatorship on petitioner, with the resulting loss of liberty and autonomy, based on little more than the subjective, biased, and uninformed testimony of her mother.

As a result, respondents' conclusion that the substantial evidence minimizes the risk of error (AB, pp. 35-43) is unsupported by evidence and makes no sense. Respondents' claim that application of the "clear and convincing evidence" standard at the trial court but not the appellate level sufficiently "focuses attention and minimizes error" (AB, p. 36) ignores the fact that a trial court has little or no incentive to properly apply that standard if it believes that, as here, that standard will "disappear" on appeal,

and that its determination is, therefore, largely insulated from appellate review. Further, respondents' acknowledgment that "serious errors" in conservatorship proceedings may occur, and their argument that the judicial system nonetheless prefers to "leave those errors uncorrected rather than adopt an alternative course" (AB, pp. 38-39) suggests a "close enough for government work" mentality that is fundamentally at odds with the protections afforded by the conservatorship statute. (*See* POB, pp. 39-40 n.6.)[7]

2. Contrary To Respondents' Claims, The Trial Court's Ability To Observe Demeanor And Determine Credibility Does Not Justify The Abandonment Of The "Clear And Convincing" Evidence Standard On Appeal.

Respondents' reliance on the ability of the trial court finder of fact to observe

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[7]In support of their argument that the judicial system accepts the risk of errors in conservatorship proceedings, respondents contend that "unlike in criminal cases, we do not even fund public counsel in an *attempt* to correct them." (*See* AB, p. 38 (emphasis in original).) That contention, however, ignores the fact that Probate Code section 1471, subdivisions (a) and (c) provide for the appointment of counsel (i.e. the public defender in this case) to represent the proposed conservatee at trial, and that Probate Code section 1470, subdivision (a) provides for the appointment of counsel (i.e. the undersigned counsel on this appeal) where such appointment "would be helpful to the resolution of the matter or is necessary to protect the person's interests." Similarly, respondents' attempt to minimize the impact of the present conservatorship order by characterizing petitioner's liberty interests as being of "intermediate magnitude," i.e. where petitioner will "spend her second senior year" (AB, p. 39) ignores the fact that the conservatorship order is not limited to petitioner's educational situation, but affects virtually petitioner's entire existence, including her residence and her rights to contract and to give or withhold medical consent. (See 2 C.T. p. 565.) It also ignores the fact that, unlike an LPS conservatorship, which is subject to automatic termination, a limited conservatorship expires only upon the death of the conservator or conservatee, the granting of a general conservatorship, or or a termination petition under Probate Code section 1860.5 where the person is still presumed to lack capacity

demeanor and other characteristics and thereby judge the credibility of witnesses (AB, pp. 24-35) also fails, for several reasons, to support their argument that the "clear and convincing evidence" standard should be allowed to "disappear" on appeal. First, as *Johnson* illustrates, the fact that a judge or jury has the sole ability to observe demeanor does not prevent a reviewing court from making the necessary determination as to whether the evidence, taken as a whole, is sufficient to meet the "beyond a reasonable doubt" or other heightened level of proof.

Respondents' argument fails for other reasons as well. Although the ability to determine the credibility of a witness is no doubt significant, it by no means constitutes the sole means for determining the sufficiency of the evidence in a particular case, for the simple reason that there are <u>other</u> forms of evidence, whose sufficiency and persuasiveness do not depend on the determination of credibility. *See, e.g.,* Evidence Code section 140 (evidence consists of "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact"); CACI No. 5002 ("evidence" consists of the sworn testimony of witnesses, as well as exhibits admitted into evidence, stipulations, matters that may be judicially noticed, etc.). Similarly, although demeanor and behavior while testifying no doubt constitutes a significant consideration, it is by no means the only consideration in determining credibility, and many if not most of those considerations do not depend on personally observing a witness, and may be done just as well by an appellate court as by a trial court

judge or jury. *See, e.g.,* Evidence Code section 780 (in evaluating a witness's testimony, one may consider, among other things, the character of his or her testimony; his or her capacity to perceive, recollect, or communicate matter about the matters; the extent of the witness's opportunity to perceive such matters; the witness's character for honesty or veracity; the existence or absence a bias, interest, or other motive; prior consistent or inconsistent statements by the witness; or the witness's admission or proof of untruthfulness). In addition, and of particular relevance to this case, in evaluating credibility, one may consider whether the witness's testimony was influenced by a personal relationship with a litigant or a personal interest in the outcome, and whether that testimony is reasonable in light of all of the other evidence in the case. (*See, e.g.,* CACI No. 5003.)

Moreover, even if respondents were otherwise correct that a trial judge or jury is alone able to judge a witness's credibility, that "fact" does not justify the drastic step of ignoring the "clear and convincing evidence" or other heightened standard of proof on appeal. The notion that the validity of a judgment or other order depends upon, among other things, the "feel" of particular case (AB, p. 29) belies respondents' characterization of the present standard of appeal as "robust," ignores the entire purpose of a heightened standard of proof, and would essentially eliminate any meaningful review of the sufficiency of evidence in cases that are subject to that standard. (*See* POB, pp. 24-25.) Further, and contrary to the hypothetical situation posited by respondents (AB, pp. 29-30),

a reviewing court that is called upon to merely consider the standard of proof on appeal – which is all that *Johnson*, *Angelia P.*, and *Jasmon O.* require – would not necessarily be required to disregard a single witness, particularly where, in addition to his or her demeanor, other of the factors identified in Evidence Code section 780 are present.

Finally, even if one were to accept respondents' position that a reviewing court should abdicate its responsibilities by blithely accepting the trial court's apparent determination of credibility, that "principle" has little or no application to the present case. Although respondents contend that the trial court's ability to determine credibility is based largely on its ability to observe demeanor and other aspects of witnesses, they conveniently ignore the fact that the only "evidence" supporting the imposition of a conservatorship, other than the mother's testimony and the trial court's unspecified personal observations of petitioner, consisted of the written reports of Drs. Jacobs and Blifeld, neither of whom testified at trial. Instead, those reports, which likewise were never introduced as evidence, were considered by the Court of Appeal solely because they were referred to by petitioner's witnesses Donati and/or Khoie, each of whom did testify at trial. (*See Conservatorship of O.B.*, 32 Cal.App.5th at p. 629.)[8] As a result,

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[8]In particular, the only evidence concerning the findings by Jacobs consisted of the testimony of Khoie and Donati that they reviewed the report, which was prepared for the local regional center, and which recommended a conservatorship. (*See* 2 R.T. pp. 378-79, 427.) Similarly, the only evidence regarding the findings by Blifeld consisted of Donati's testimony that he had reviewed her capacity declaration, which provided the medical component required in conservatorship proceedings. (*See* 2 R.T. p. 427.) In neither instance did the trial court have before it either the actual reports by Jacobs or Blifeld, or

respondents nowhere explain how the trial court's supposedly plenary authority to observe demeanor and determine credibility is somehow relevant, where, as here, the sole "evidence" from purportedly neutral third parties consisted of reports that were never introduced at trial, and whose authors never testified and were never subjected to cross-examination, and whose demeanor and credibility were never evaluated at trial.

3. Respondents' Claim That Legislative Intent Supports Substantial Evidence Review Is Unsupported By Any Authority, And Is Otherwise Without Merit.

Finally, respondents' claim that legislative intent supports the use of the "substantial evidence" standard on review (AB, pp. 44-56) is without merit. As with the remainder of their brief, respondents ignore the distinction between the nature of the evidence and its weight or sufficiency. As a result, respondents' argument ignores the possibility – indeed, the reality – that it is possible to both review individual pieces of evidence to determine whether they are "reasonable," "credible," and of "solid value," while also reviewing the overall quantum of evidence to determine whether it meets the "clear and convincing" or other applicable standard.

Moreover, respondents' attempt to divine the legislative intent, if any, behind the

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their live testimony. As a result, the trial court had no basis whatsoever to determine either the qualifications of the two "experts," the validity of their opinions, or their respective demeanors or credibility. However, the Court of Appeal nonetheless held that the mere reference by Khoie and Donati to those reports justified their consideration by the trial court (*Conservatorship of O.B.*, 32 Cal.App.5th at pp. 629-30), and that such "evidence" "add[ed] to the already substantial evidence in support of the probate court's findings." (*Id.* at p. 634.)

applicable standard of review on appeal is based entirely on speculation, and is otherwise specious. Although respondents cite over a century of law applying the substantial evidence standard, they nowhere set forth any statute or other legislative enactment establishing or defining that standard. Moreover, the reason for that dearth of statutory authority is not, as respondents claim (AB, pp. 48-56), because the Legislature has actively enacted, through its silence, the "substantial evidence" test, but because the standard for appellate review is set by the courts – and in particular, this Court – and not the Legislature. (*See, e.g., In re Rosenkrantz* (2002) 29 Cal. 4th 616, 655-56) (Court has power to establish the standard of review for parole board decisions); *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal. 4th 750, 758 (declining to apply substantial evidence test in case arising out of division of income for tax purposes statute).) Indeed, as this Court's decisions in *Johnson*, *Angelia P.*, and *Jasmon O.*, as well as its grant of review in this case, illustrate, this Court has the authority to and has modified the rules of appellate review to reflect the standard of proof applicable at the trial court level. Further, although respondents attempt to characterize the decision in *Johnson* as driven by considerations of due process (AB, pp. 44-47), those considerations, as respondents concede, apply equally to conservatorship proceedings. (*See, e.g., Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235; AB, pp. 47-48.)[9]

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[9]Similarly, the fact that the right to appeal in conservatorship cases is purely statutory (AB, p. 47) proves nothing because, as respondents' own authority establishes, the same is true with respect to appeals generally. (*See, e.g., Jennifer T. v. Superior Court* (2007)

As a result, respondents' bald claims that "there is no legislative silence," and that "[t]he Legislature has spoken" (AB, p. 48) are, to put it charitably, preposterous. Both Probate Code section 1801, subdivision (e) (AB, p. 49) and Probate Code section 1800.3, subdivision (b) (AB, pp. 51-52) by their terms applies only to conservatorship proceedings in the trial court. As such, they constitute a quintessential example of legislative silence and deference to the judicial branch, and particularly this Court, which as shown above is responsible for determining the manner in which appellate review is exercised. Similarly, although respondents claim that "the Legislature could have departed from the longstanding principle that appellate review of such decisions would be limited to substantial evidence" (AB, p. 52), the constitutional provision on which they rely (Cal. Const. art. VI, § 11) deals solely with the issue of jurisdiction of the appellate courts, and not the standard of review to be employed in exercising that jurisdiction.

Respondents' remaining arguments are equally specious. The claim that this Court will generally presume that the Legislature, by its silence, intends that the statute will be interpreted and applied according to a "longstanding historical practice" (AB, p. 50) ignores the fact that, as indicated above, the Legislature has instead deferred to the courts to define its internal manner of review. In addition, that claim relies on a selective sampling of older cases that have nothing to do with the issue in the present case, and are

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159 Cal.App.4th 254, 260 (cited in *In re Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 67).)

otherwise distinguishable.[10] Moreover, the claim that the Legislature's silence and inaction somehow equates to speech or action because the Legislature "could have" departed from that practice (AB, pp. 52-53) relies on similarly inapposite authority. The case of *Bixby v. Pierno* (1971) 4 Cal.3d 130 (AB, pp. 52-53) concerned a statute (Cal. Code Civ. Proc. section 1094.5) that merely codified the existing standard of review that had already been established by the courts. (*Bixby*, 4 Cal.3d at pp. 137-38.) Here, the Legislature has not seen fit to codify or otherwise address the standard of review in other proceedings, including this one, and has instead left the task of defining that standard to this Court. Further, and as the *Bixby* court recognized, that case involved a unique area of the law, i.e. the review of administrative decisions by state agencies, and a series of critical interests and considerations, none of which apply here. (*See Id.* at p. 138, citing

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[10]In addition to the fact that none of the cases cited by respondents concern the standard of review on appeal, respondents rely on the more than a century old opinion of this Court in *Sacramento Bank v. Alcorn* (1898) 121 Cal. 379, which refused to invalidate the use of trust deeds as security for loans, based on the fact that "many people have invested their money, relying upon this construction of the law by the highest tribunal of the state, while those who have executed such deeds have done so with the expectation that they would be held valid." (*Id.* at p. 382.) Here, there is no comparable reliance on the "rule" proffered by respondents which, as indicated by this Court's grant of review, instead constitutes a matter of first impression. Moreover, although the United States Supreme Court in *Radovich v. National Football League* (1957) 352 U.S. 445 [77 S. Ct. 390; 1 L. Ed. 2d 456] referred to Congress's failure to overturn the Court's prior, aberrational decisions that professional baseball did not constitute interstate commerce and were, therefore, not subject to the antitrust laws, it expressly declined to do so with respect to professional football. (*See* 352 U.S. at pp. 449-52.) As a result, even if respondents could point to a "longstanding historical practice" of disregarding the trial court standard of review in conservatorship appeals – which they cannot – that "fact" would not preclude this Court from adopting a contrary rule in this case.

Drummey v. State Board of Funeral Directors (1939) 13 Cal.2d 75, 85 ("Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands," in which "constitutional rights of liberty and property are involved").)

As a result, the notion that the limited action by the Legislature to codify an existing rule in a highly specialized area of the law somehow reflects a universal endorsement of the principle that the heightened standard of proof that it enacted to govern other trial court proceedings somehow "disappears" on appeal is absurd and should be rejected by this Court.

D. Contrary To Respondents' Claim, The Evidence In This Case, Including The Mother's Self-Serving And Biased Testimony, Was Insufficient To Meet The "Clear And Convincing Evidence" Standard Necessary To Support The Imposition Of A Conservatorship.

Finally, there is no merit to respondents' claim that the evidence was sufficient to support the trial court order imposing a conservatorship upon petitioner, even under the "clear and convincing evidence" standard. (AB, pp. 56-63; *see also* POB, pp. 44-47.) While ironically accusing petitioner of committing the "classic error" of "highlighting evidence that conflicts with the trial court's judgment while omitting evidence that supports it" (AB, p. 9), it is respondents, and not petitioner, that distort the record in this case. Thus, for example, respondents falsely contend that petitioner's brief "nonetheless relies on evidence not admitted at trial" (AB, p. 9, citing *Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 628) when in fact, as the Court of Appeal noted, it was respondents, and not petitioner, that improperly did so. (*See Id.* at p. 628 ("We disregard *respondents'*

summary of the facts based upon reports and declarations that were neither offered nor received in evidence" (emphasis added).)

Further, respondents severely exaggerate both the quantity and the quality of their evidence in a failed attempt to create the impression that such evidence – which consisted of Mother's testimony, the trial court's observations of petitioner, and the expert opinions of Jacobs and Blifeld (*see* AB, p. 59) – was somehow "clear and convincing." Instead, each of those items of evidence suffered from severe if not fatal flaws that should have precluded the trial and reviewing courts from making such a finding. Thus, for example, although respondents and the Court of Appeal contend that the trial court properly considered its own observations of petitioner during trial (AB, pp. 13-14; *see also Conservatorship of O.B.*, 32 Cal.App.5th at p. 934), there was no indication, from either respondents, the Court of Appeal, or the trial court itself, what those observations were, or how they supported a finding of conservatorship. To the contrary respondents, consistent with their apparent view that appellate courts should simply "rubber stamp" the trial court's determination without regard to the "clear and convincing evidence" standard, concede that "we can never know what precisely led the trial court to conclude" that such evidence met that heightened standard. (*See* AB, p. 59.)

Respondents' treatment of the third party evidence in this case, and in particular their claim that the experts that evaluated petitioner "came to conflicting conclusions with respect to the need for a limited conservatorship on her behalf" (AB, p. 12) is equally

strained. That claim ignores the facts that, as indicated above (note 8), neither of respondents' experts (Drs. Jacobs and Blifeld) testified at trial, and neither of them were subject to cross-examination or evaluation of their demeanor and credibility, that neither of their reports were admitted as evidence, and that the only "evidence" of their findings consisted of the statements by both Khoie and Donati that they disagreed with those findings. As a result, far from supporting the abandonment of the "clear and convincing" standard on appeal, respondents' argument – including their claim that the trial court may have somehow found the nonexistent reports of the nontestifying experts more persuasive because Dr. Khoie may have "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" (AB, p. 57) – is not only speculative, but demonstrates the folly of leaving the matter entirely to the whims of the trial court, with no appellate oversight whatsoever.

As a result, nothing in respondents' brief disturbs the conclusion that the only direct evidence in support of the imposition of a conservatorship consisted of the testimony of respondents themselves. Moreover, nothing in their brief disturbs the conclusion that the testimony of Mother – the very party seeking a conservatorship in the first place – could not be considered "clear and convincing," in light of both her obvious bias and her lack of personal knowledge of the day to day living situation of petitioner, who since the age of four or five had resided with her great-grandmother L.K., rather than

Mother.[11] And, nothing in respondents' brief indicates that petitioner's alleged inability to care for herself was permanent or immutable, or that petitioner could not, like virtually every other teenager, eventually learn those basic life skills. (*See* POB, p. 46.) Accordingly, nothing in respondents' brief disturbs the basic conclusion that the Court of Appeal's failure to apply the "clear and convincing evidence" standard on appeal was both erroneous and prejudicial, and that this Court should reverse the conservatorship order in this case.[12]

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[11]Respondents' contention that Mother had "near daily contact" with petitioner (AB, p. 57) is not supported by any of the cited testimony, which in any event came from petitioner's experts Khoie and Donati, rather than from Mother herself. (*See* 2 R.T. pp. 371-95; 2 R.T. pp. 420-25.) Moreover, even if that were the case, it is apparent that such contact consisted almost exclusively of telephone calls, given that at all times Mother resided in Orange County, while petitioner lived with her great-grandmother in Lompoc.

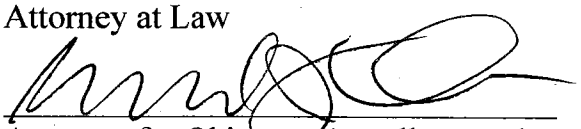
[12]Although petitioner agrees that there may be "substantial practical reasons" for this Court to decide the matter presently rather than to remand it to the Court of Appeal, respondents' suggestion that those reasons include Mother's alleged expenditure of her life savings on legal fees, the fact that petitioner's counsel is being paid by the State, and the claim that petitioner "desperately wants these proceedings concluded" (AB, pp. 61-62) is completely improper and frankly offensive. In addition to the fact that none of those claims are based on the record on appeal, the determination of the appropriate standard on appeal in conservatorship cases, as well as the other matters at issue on this appeal, should not depend on such extraneous considerations. Moreover, as indicated in petitioner's opposition to respondents' unsuccessful motion to the Court of Appeal to dismiss the appeal, if respondents are truly concerned about alleviating the cost of this litigation or fulfilling the wishes of petitioner, there is an easy way to do so, namely to dismiss the conservatorship petition, and allow petitioner to make her own life choices.

CONCLUSION

In enacting the conservatorship statute, the Legislature required proof of the need for a conservatorship by "clear and convincing evidence" in light of the serious infringement of a conservatorship order on a conservatee's autonomy and liberty interest. That policy is defeated by a standard of review that fails to account for those interests, and that enables a trial court, as here, to easily evade the standard of proof, secure in the knowledge that the reviewing court will follow an outdated, erroneous, and overly deferential conception of its responsibilities. Because nothing in respondents' brief justifies that standard of review, this Court should, for the reasons stated above and in petitioner's opening brief, 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: August 9, 2019

GERALD J. MILLER
Attorney at Law



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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.360(b)(1) of the California Rules of Court, the undersigned counsel states that the foregoing brief contains 6,369 words, according to the word count of the computer program used to prepare the brief.

DATED: August 9, 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: August 9, 2019

DOCUMENT SERVED: PETITIONER'S REPLY BRIEF

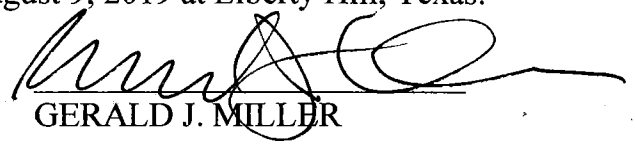
PERSONS SERVED:
See Attachment A

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 August 9, 2019 at Liberty Hill, Texas.



GERALD J. MILLER

ATTACHMENT A – Service List

Tammi L. Faulks Guardian Ad Litem 937 Main Street, Suite 208 Santa Maria, CA 93454 E-mail: afamilylawyer@aol.com	Laura Hoffman King, Esq. Law Offices of Laura Hoffman King 241 S. Broadway, Suite 205 Orcutt, CA 93455 E-mail: laura@lhkinglaw.com (Attorneys for Respondents Mother B. and Cleo B.)
Neil S. Tardiff, Esq. Tardiff Law Offices P.O. Box 1446 San Luis Obispo, CA 93401 E-mail: neil@tardifflaw.com (Appellate Counsel for Respondents)	Lana J. Clark, Esq. Law Office of Lana Clark 1607 Mission Drive, Suite 107 Solvang, CA 93463 E-mail: lana@lanaclarklaw.com (Trial Counsel for Respondents)
Susan Sindelar, Esq. Office of the Public Defender County of Santa Barbara 1100 Anacapa Street Santa Barbara, CA 93101 E-mail: Ssindelar@publicdefendersb.org (Trial Counsel for Petitioner)	Jay Kohorn, Esq. California Appellate Project 520 S. Grand Ave., Fourth Floor Los Angeles, CA 90071 E-mail: jay@lacap.com
Clerk, Court of Appeal Second Appellate District, Division Six 200 East Santa Clara Street Ventura, CA 93001	Shaun P. Martin, Esq. University of San Diego School of Law 5998 Alcala Park, Warren Hall San Diego, CA 92110 E-mail: smartin@sandiego.edu

Clerk, Superior Court County of Santa Barbara 1100 Anacapa Street Santa Barbara, CA 93121	Thomas Coleman, Esq. 555 S. Sunrise Way, Suite 205 Palm Springs, CA 92264 E-mail: tomcoleman@spectruminstitute.org (Attorney for Amicus Curiae Spectrum Institute)
Brook J. Chăngala, Esq. Fitzgerald Yap Kreditor LLP 2 Park Plaza, Suite 850 Irvine, CA 92614-2521 E-mail: bchangala@changalalaw.com (Attorney for Amicus Curiae Spectrum Institute)	