

**SUFFICIENCY OF THE EVIDENCE:
DOES THE BURDEN OF PROOF “DISAPPEAR” ON APPEAL?**

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Appellate courts have, on occasion, given mixed signals as to how they must assess a sufficiency of the evidence argument. In the criminal area, the standard was settled by *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, at least as to the evidence necessary to support a conviction: the appellate court must determine whether a reasonable trier of fact could find guilt beyond a reasonable doubt.¹ But in the dependency area, where a number of trial-level decisions are governed by the clear and convincing evidence standard, opinions sometimes contain perplexing and apparently contradictory language as to an appellate court’s role in reviewing the trial court’s decision.

Counsel should not be sidetracked by this apparent disagreement and should insist that the reviewing court apply the “correct test” – whether the evidence supporting the decision was “substantial” in the sense that a reasonable trier of fact could have found the applicable burden of proof was met. This memo explores further what this test is, what the apparent conflict is about, and how counsel can resolve it to their clients’ benefit.

The test most favorable to criminal and dependency appellants requires the decision be reasonable in light of the trial-level burden of proof. If the test on appeal is a homogeneous “substantial evidence” one, unrelated to the burden of proof, with all cases relegated to the lowest common denominator, criminal defendants and dependency parents on appeal lose any continuing benefit from the higher burdens of proof protecting them at trial. That is certainly not the law, and counsel can help guard against mistaken application of a lower, less protective standard on appeal.

“Correct Test” for Sufficient Evidence on Appeal

The appropriate test on appeal for sufficiency of the evidence has, in brief, these elements:

¹Many decisions in criminal cases carry different evidentiary burdens: e.g., probable cause for search or arrest, instruction on affirmative defenses, insanity, incompetence to stand trial, entrapment, necessity, binding over for trial, probation revocation, statute of limitations, corroboration of accomplice, bail, etc. In some instances, the burden is still being debated.

Decision for the reviewing court

When faced with a sufficiency of the evidence contention, the appellate court must determine whether the decision of the trier of fact was *reasonable*. That is an objective legal question, not a factual one, although it of course must be answered in reference to the evidence presented in the lower court.

To resolve the reasonableness question, the court must determine whether the evidence was “substantial” – i.e., reasonable, credible, and of solid value – *such that a reasonable trier of fact could find the applicable burden of proof was met*.

Authorities supporting this proposition include *Jackson v. Virginia, supra*, 443 U.S. 307 and *People v. Johnson* (1980) 26 Cal.3d 557 [beyond a reasonable doubt in criminal appeals]; *In re Jasmon O.* (1994) 8 Cal.4th 398, 422-423, and *In re Angelia P.* (1981) 28 Cal.3d 908, 924 [clear and convincing in termination of parental rights appeals]; *Lake v. Reed* (1997) 16 Cal.4th 448, 468 [preponderance of evidence in civil case]; see *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1082, conc. opn. of Brown, J. [evidence sufficient under preponderance standard, but not under clear and convincing one].²

Limitations – or: what the test is *not*

These determinations do not mean the reviewing court chooses which decision among several reasonable ones was correct. The court does not weigh the evidence, does not decide what parts of conflicting evidence were true, does not determine credibility of witnesses, does not choose which inference among several reasonable ones to draw, and does not decide whether the burden of persuasion was met. The court must view the evidence in the light most favorable to the decision below and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. The appellate court has authority to determine only whether the outer boundaries of reasonableness in each of these decisions were crossed.

²This article focuses on the tests used to review evidentiary decisions in *judicial* proceedings. In other contexts, standards may be more deferential. For example, courts use the “some evidence” standard in reviewing parole decisions by the Governor or Board of Parole Hearings. (*In re Shaputis* (2011) 53 Cal.4th 192, 210; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.) In contrast to judicial decisions, there is no definitive “burden of proof” governing these highly discretionary executive and administrative decisions; rather the courts intervene only to prevent arbitrary or capricious action in violation of due process. (*Rosenkrantz*, p. 658.)

Hundreds of cases state these principles in very similar language. Just a few examples include: *People v. Gonzales* (2011) 51 Cal.4th 894, 941; *People v. Jennings* (2010) 50 Cal.4th 616, 638-639; *People v. Johnson, supra*, 26 Cal.3d 557, 577-578; see also *Jackson v. Virginia, supra*, 443 U.S. 307, 326 (reviewing “court faced with a record of historical facts that supports conflicting inferences must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution”).

Supreme Court Authority

The sufficiency of the evidence test applicable to dependency appeals is authoritatively set out in *In re Jasmon O., supra*, 8 Cal.4th 398. That case held:

On review of the order of the juvenile court terminating parental rights, the reviewing court must determine whether there is any substantial evidence to support the trial court’s findings It is not our function, of course, to reweigh the evidence or express our independent judgment on the issues before the trial court Rather, as a reviewing court, we view the record in the light most favorable to the judgment below and “‘decide if the evidence [in support of the judgment] is reasonable, credible and of solid value – *such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence.*”³]

(8 Cal.4th at. pp. 422-423, emphasis added.)

³*Jasmon O.* and *Angelia P.* were appeals from termination decisions under former Civil Code section 232, not Welfare and Institutions Code section 300 et seq., which uses a different statutory scheme, with varying presumptions and burdens of proof, to satisfy federal due process. (*Santosky v. Kramer* (1982) 455 U.S. 745 [due process requires high evidentiary standard, such as clear and convincing, to sever family relationship permanently]; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242 [clear and convincing standard not constitutionally required for Welf. & Inst. Code, § 366.26 termination decision, because that standard had already been met through earlier stages of the dependency proceeding].)

The statutory differences affect where and when a clear and convincing or other standard applies at trial, but they do not affect the critical point here: the appellate court must incorporate the trial burden of proof – clear and convincing, where applicable – into the test for sufficiency of the evidence.

This standard echoes one set out 13 years earlier, in *In re Angelia P.*, *supra*, 28 Cal.3d 908:

Appellants argue insufficiency of the evidence. We apply, with appropriate modifications, our holding in *People v. Johnson* (1980) 26 Cal.3d 557, 578, made in accordance with *Jackson v. Virginia* (1979) 443 U.S. 307: “the [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – *such that a reasonable trier of fact could find [that termination of parental rights is appropriate based on clear and convincing evidence].*”

(28 Cal.3d at p. 924, emphasis added, brackets original, see preceding footnote.)

The fact the *Angelia P.* court used and adapted the test enunciated in *People v. Johnson*, *supra*, 26 Cal.3d 557 is significant, because *Johnson*, like the *Jackson v. Virginia* decision it followed, rejected the “some evidence” or “any evidence” standard, which would purport to apply a uniform and minimalist test on appeal for sufficiency of evidence, regardless of the burden at trial. Instead, both courts quite consciously incorporated the burden of proof into the test for appeal.

Jackson held, for example, that “a substantive constitutional standard [beyond a reasonable doubt] must also require that the factfinder will rationally apply that standard to the facts in evidence.” (443 U.S. 307, 317.) “[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (*Id.*, at p. 318.)

Johnson in turn held:

Whenever the evidentiary support for a conviction faces a challenge on appeal, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that *a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt*

The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. . . . Evidence, to be substantial[,] must be

of ponderable legal significance . . . reasonable in nature, credible, and of solid value.

(*People v. Johnson, supra*, 26 Cal.3d 557, 562, 576, emphasis added.) This test melds the highly subjective, qualitative “substantial” or “ponderable, . . . reasonable in nature, credible, and of solid value” formulation with the more objective and quantitative “reasonable application of the burden of proof” one.

In re Angelia P. modified the *Johnson* test for dependency cases, using the clear and convincing standard in place of beyond a reasonable doubt. Along with *Jackson-Johnson* and *Jasmon O.*, it forecloses a position that the burden of proof applicable at trial is totally irrelevant on appeal.

Any Court of Appeal cases to the contrary notwithstanding, these Supreme Court authorities should be adequate in and of themselves to argue the sufficiency of the evidence must be determined by reference to the applicable burden of proof. After all, *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 is still good law (decisions of higher court binding on lower courts within its jurisdiction).

Nevertheless, if opposing counsel or the court persists in applying the “disappearing burden” test and rejecting the “reasonable application of the burden of proof” one, counsel may consider the following analysis.

Apparently Conflicting Court of Appeal Lines of Authority

Despite the fact the Supreme Court spoke on the issue a number of years ago, Court of Appeal cases have apparently split into two lines.

Cases incorporating trial burden of proof into appellate standard

On the one hand, some cases have agreed with the position taken here and said the appellate court must determine whether the evidence is sufficient to meet the applicable standard – clear and convincing evidence, in termination of parental rights cases. For example, *In re Henry V.* (2004) 119 Cal.App.4th 522, 529, citing to *In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038, and *In re Basilio T.* (1992) 4 Cal.App.4th 155, 170, said:

[O]n appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, “the substantial evidence test applies to determine *the existence of the clear and convincing standard of proof*”

(Emphasis added; see also *In re Alexis S.* (2012) 205 Cal.App.4th 48 and *In re Kristin H.* (1996) 46 Cal.App.4th 1635 [“On review of the court’s dispositional findings, we employ the substantial evidence test, *however bearing in mind the heightened burden of proof*,” emphasis added]; *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415 [“the record contains sufficient evidence . . . from which a reasonable trier of fact could find a substantial danger . . . by clear and convincing evidence]; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 441 [“we review the record in the light most favorable to the dependency court’s order to determine whether it contains sufficient evidence from which a reasonable trier of fact could make the necessary findings by clear and convincing evidence”]; *In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536 [evidence must be “reasonable, credible and of solid value – such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence”]; *In re Heidi T.* (1978) 87 Cal.App.3d 864, 870-871 [appellate court must make “determination whether substantial evidence exists to support the conclusions reached by the trial court in utilizing the appropriate standard”]; see also *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891 [“we must inquire whether the record contains ‘substantial evidence to support a determination by clear and convincing evidence’”].)

Cases apparently saying burden of proof “disappears” on appeal and is irrelevant to appellate analysis

On the other hand, some opinions insist the trial-level burden of proof “disappears” on appeal, and the only issue is whether “substantial evidence” supports the decision of the trier of fact. *In re E.B.* (2010) 184 Cal.App.4th 568, 578, noted:

Father appears to argue that even if substantial evidence supports a finding of jurisdiction under a preponderance standard, it does not support the juvenile court’s dispositional orders under a clear and convincing standard.

The argument is meritless. The clear and convincing standard was adopted to guide the trial court; it is not a standard for appellate review. [Citation.] The substantial evidence rule applies no matter what the standard of proof at trial. “Thus, on appeal from a judgment required to be based upon clear and convincing evidence, ‘the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.’ [Citation.]” (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881.)

(See also *In re J.N.* (2010) 181 Cal.App.4th 1010, 1022 [“On appeal, the ‘substantial evidence’ test is the appropriate standard of review for both the jurisdictional and dispositional findings”]; *In re A.S.* (2011) 202 Cal.App.4th 237, 247, *In re I.W.* (2009) 180 Cal.App.4th 1517, 1526, *In re Angelique C.* (2003) 113 Cal.App.4th 509, 519, and *In re Mark L.* (2001) 94 Cal.App.4th 573, 581 [“on appeal from a judgment required to be based upon clear and convincing evidence, ‘the clear and convincing test disappears’”].)

These cases tend to cite one other or Witkin and do not discuss the Supreme Court holdings of *Jasmon O.* and *Angelia P.* on the subject.⁴

Confronting the Apparent Conflict

Difficulty with “disappearing burden” test, if taken at face value

If the “disappearing burden” language means the trial-level burden of proof is wholly irrelevant to a sufficiency of the evidence decision on appeal, it is inconsistent with the United States and California Supreme Court cases cited above.

Further, the reasoning and implications of such a test are highly problematic. The decision whether the trier of fact was “reasonable” in light of the evidence before it cannot, logically, be answered independently of the applicable burden of proof. At the polar ends, for example, it is obvious that evidence sufficient to *raise a reasonable doubt* (the test for instructing on many defenses⁵) is qualitatively and quantitatively different from evidence sufficient to *establish guilt* beyond a reasonable doubt (the standard for conviction). An appellate court would abandon its reviewing function if it found evidence sufficient to meet the first was thereby automatically sufficient to meet the second. The appellate tests, though both are linguistically formulated as “substantial evidence,” are not even close to the same.

The preponderance of the evidence and clear and convincing evidence tests are closer together, but hardly identical. Evidence sufficient to uphold a finding under the former test will not necessarily satisfy the latter, which is applied to protect against erroneous decisions involving fundamental personal interests. (E.g., *In re Angelia P.*, *supra*, 28 Cal.3d 908, 919 [“[c]lear and convincing’ evidence requires a finding of high probability . . . [;] so clear as to leave no substantial doubt; sufficiently strong to

⁴I could find no case, published or unpublished, considering this apparent conflict.

⁵E.g., *People v. Salas* (2006) 37 Cal.4th 967, 982-983; *People v. Mower* (2002) 28 Cal.4th 457, 481; see also *Mathews v. United States* (1988) 485 U.S. 58, 63.

command the unhesitating assent of every reasonable mind”]; *Rich v. Thatcher* (2011) 200 Cal.App.4th 1176, 1181; *People v. Riskin* (2006) 143 Cal.App.4th 234, 238-242; see *Santosky v. Kramer* (1982) 455 U.S. 745; *Addington v. Texas* (1979) 441 U.S. 418, 423-424; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242.)

It is difficult to see how an appellate court could coherently conclude the evidence is sufficient if *no* reasonable trier could have found the necessary facts at the requisite level of certainty (beyond a reasonable doubt, by clear and convincing evidence, by a preponderance of the evidence, etc.), regardless whether the evidence meets an amorphous “substantial, credible, solid, etc.” standard.

Reconciling “disappearing burden” cases

Although, as just argued, the “disappearing burden” line of cases can be attacked frontally as inconsistent with Supreme Court authority and internally illogical, it is not necessary to construe those cases as unfavorable. It is often better strategy to suggest an alternative interpretation, consistent with one’s position, rather than ask the court to take a position disapproving precedents, many of which may be its own.

The troublesome cases can be read, not as denying *any* connection between the burden of proof at trial and appellate review, but instead as articulating the traditional limitations on appellate review of factual findings, as set out in the discussion of the “correct test.” Thus, for example, one may suggest the burden of proof “disappears” on appeal because the appellate court does not re-determine the facts from scratch, directly applying the trial burden of proof, but rather reviews the trier of fact’s application of the burden of proof. To the extent the opinions in the “disappearing burden” category merely restate these traditional limitations, they are unobjectionable and entirely consistent with existing authority. Reading them in such a way reconciles the two lines of cases and, more importantly, brings them into conformity with what the Supreme Court has held.

The “disappear” language may be traced to Witkin (currently 9 Witkin, Cal. Proc. 5th (2008) Appeal, § 371, p. 428). (See *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881, and *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, fn. 2, citing Witkin.) With one exception, the cases cited by Witkin do no more than restate the traditional limitations on appellate review of trial court decisions. They point out that clear and convincing is a trial standard; on appeal, the court determines whether there is substantial evidence to support the conclusion of the trier of fact that the standard was met. That is exactly what the “correct test” requires. The “outlier,” *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 601-604, rejected the proposition that it must consider the trial burden in reviewing a verdict governed by the clear and convincing standard: “Our review is the same regardless of the burden of proof at trial.” (*Id.* at p.

604.) This memo has already shown why such a conclusion is neither consistent with Supreme Court precedent nor logically coherent.

It is credible to argue that, when read in context, the analyses in the opinions using the “disappear” language from *Witkin* merely restate and apply the traditional limitations of appellate review. *In re E.B.*, *supra*, 184 Cal.App.4th 568, 578, for example, although apparently suggesting the burden of proof would make a difference on appeal, explained that it had “no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence.” Further, *E.B.* actually held: “For purposes of appeal, this evidence suffices under either the preponderance or clear and convincing standard of proof.” Thus its “disappearing” language had no effect on the decision and was arguably dictum.

In re J.N., *supra*, 181 Cal.App.4th 1010, 1022, while saying “substantial evidence” is the test for review of both jurisdictional and dispositional findings, explained that concept in terms of traditional limitations: “Thus, we must uphold the court’s [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings.” *J.N.* found the evidence insufficient even under the lower standard. (*Id.* at p. 1027.) Thus, again, the bothersome language was arguably dictum. (See also see *In re K.A.* (2011) 201 Cal.App.4th 905, 909 [“under any standard, . . . the juvenile court did not err”].)

Similarly, *In re Mark L.*, *supra*, 94 Cal.App.4th 573, 580-581 explained the “disappearance” of the clear and convincing standard on appeal in this way: “We have no power to judge the effect or value of the evidence, to weigh the evidence [or] to consider the credibility of witnesses.” The court quoted *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, for this proposition. (Same: *In re A.S.*, *supra*, 202 Cal.App.4th 237, 247; *In re Levi H.* (2011) 197 Cal.App.4th 1279, 1291; *In re Angelique C.*, *supra*, 113 Cal.App.4th 509, 519; *In re J.I.* (2003) 108 Cal.App.4th 903, 911.) If read in context, the language is fully consistent with the traditional limitations aspect of the “correct test,” as set out above.

People v. Johnson used an approach similar to the reconciliation urged here. That case, following *Jackson v. Virginia*, emphasized that the court must resolve the issue in the light of “the *whole* record and not isolated bits of evidence selected by the respondent.” (26 Cal.3d 557, 577, emphasis original.) The court acknowledged that some Court of Appeal opinions contained language that could be read to permit an appellate court to find some isolated fact that supports the judgment and ignore the

unreasonableness of the entire decision under the *Jackson v. Virginia* standard.⁶ (*Id.* at pp. 577-578.) The court declined to disapprove them merely because they *could* be read incorrectly, but instead insisted they be interpreted and applied in a way consistent with Supreme Court authority.

Counsel can do the same with the “disappearing burden” cases. They can argue these cases merely restate the traditional “limitations” part of the “correct test” as set out above and neither do, nor may (given they are subject to Supreme Court authority), dilute the test on appeal. To the extent the cases purport to set out a standard different from that articulated by the Supreme Court, they may not be followed. Counsel can thus seek to neutralize the cases’ potentially negative impact and direct the court back to the analysis counsel is urging.

⁶The comparable language from dependency cases considered here would be: “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.” (E.g., *In re A.S.*, *supra*, 202 Cal.App.4th 237, 247; *In re Mark L.*, *supra*, 94 Cal.App.4th 573, 580-581.) Carried to its literal extreme, in some evidentiary scenarios such a test could lead to results contrary to *Jasmon O.* and *Angelia P.*