# SUFFICIENCY OF THE EVIDENCE:
# THE BURDEN OF PROOF DOES NOT "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 (*Jackson*), 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, for a period of time, opinions sometimes contain perplexing and apparently contradictory language as to an appellate court's role in reviewing the trial court's decision. Such contradictions were, however, settled by the California Supreme Court in *Conservatorship of O.B.* (2020) 9 Cal.5th 989.

## Correct Test for Sufficient Evidence on Appeal

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

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.

[1] Many 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.

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, supra,* 443 U.S. 307 and *People v. Johnson* (1980) 26 Cal.3d 557 (*Johnson*) [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]

Although the substantial evidence standard is deferential, "it is not toothless." (*In re I.C.* (2018) 4 Cal.5th 869, 892 ["evidence supporting the jurisdictional finding must be considered 'in the light of the *whole record*' 'to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value . . . .'"].)

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 does not view isolated evidence outside of the context of the whole record. Rather, 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

[2] This 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, supra,* at p. 658.)

evidence. The appellate court has authority to determine only whether the outer boundaries of reasonableness in each of these decisions were crossed.

Hundreds of cases state these principles in very similar language. Just a few examples include: *In re I.C., supra,* 4 Cal.5th at p. 892; *People v. Gonzales* (2011) 51 Cal.4th 894, 941; *People v. Jennings* (2010) 50 Cal.4th 616, 638-639; *Johnson, supra,* 26 Cal.3d 557, 577-578; see also *Jackson, supra,* 443 U.S. at p. 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**

Prior Court of Appeal decisions reflected some uncertainty about whether the clear and convincing standard of proof applied in the trial court "disappears" on appeal. (See, e.g., *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 441; *In re Henry V.* (2004) 119 Cal.App.4th 522, 529; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1656–1658 ["we employ the substantial evidence test, however bearing in mind the heightened burden of proof"]; compare with *In re E.B.* (2010) 184 Cal.App.4th 568, 578; *In re A.S.* (2011) 202 Cal.App.4th 237, 247; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1526 ["on appeal from a judgment required to be based upon clear and convincing evidence, the clear and convincing test disappears"].)

However, the California Supreme Court resolved that uncertainty in *Conservatorship of O.B., supra*, 9 Cal.5th 989. That case held:

> In general, *when presented with a challenge to the sufficiency of the evidence* associated with a finding *requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof* . . . Therefore, when reviewing a finding that demands clear and convincing evidence, an appellate court must determine whether the evidence reasonably could have led to a finding made with the specific degree of confidence required by this standard.

(*Id.* at p. 1005, emphasis added.) The court reasoned that whether the evidence is of "ponderable legal significance" cannot be properly evaluated without accounting for the heightened standard of proof that was applied in the trial court, and keeping the clear and convincing standard in mind when reviewing for the sufficiency of evidence ensures proper appellate scrutiny for the underlying findings and orders. (*Id.* at p. 1006.) The court further reasoned its holding was consistent with recent precedent in *In re Angelia*

*P., supra,* and *In re Jasmon O., supra,* as well as criminal case precedent. (*Id.* at p. 1007.)

In *In re Jasmon O., supra,* 8 Cal.4th 398, the California Supreme Court 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.)

That 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

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[3] *In re Jasmon O.* and *In re 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.

> 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 *In re Angelia P.* court used and adapted the test enunciated in *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. at p. 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.

These cases, along with *Conservatorship of O.B.,* now foreclose a position that the burden of proof applicable at trial is totally irrelevant on appeal. Rather, "an appellate

court must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard. (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1011.) Thus, the clear and convincing standard of proof does not "disappear" on appeal. (*Ibid*.)