COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Conservatorship of the Person and Estate of OLIVIA B. TERI B. and CLEO B., as Conservators, etc., Petitioners and Respondents, vs. OLIVIA B., Objector and Appellant.	Court of Appeal No. B290805 Santa Barbara County No. 17PR00325

Appeal from the Superior Court of California,
County of Santa Barbara
Honorable James Rigali, Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

The present appeal is from an order granting a petition for the appointment of a probate conservator of the person and establishing a limited conservatorship, and the resulting issuance of letters of conservatorship, and from various matters embraced therein. The present appeal is authorized by Probate Code section 1301, subdivision (a) as an order granting or revoking of letters of guardianship or conservatorship.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the trial court's order imposing a conservatorship on appellant, because that order exceeded the trial court's jurisdiction, was unsupported by substantial evidence, and violated numerous basic principles under the Probate Code and the state's conservatorship statutes. The trial court's order granting the conservatorship petition ripped appellant, an high functioning 18 year woman with autism, away from the only home that she had ever known, and came against both expert advice and appellant's own express wishes. That petition, and the resulting order, was based solely on an intra-family dispute over her education, which arose when appellant was a single class away from her long sought goal of graduating from high school. As such, the order resulted from the trial court's injection

of itself into an area – i.e. the sufficiency of appellant's federally mandated educational plan – over which it clearly had no jurisdiction, and which was in the process of being resolved in a separate, more appropriate, and statutorily mandated forum.

In addition, in depriving appellant of her basic adult rights to manage her financial, health, and social affairs, the trial court materially prejudged the case by insisting, at the very outset, and contrary to statutory and case law limitations, that a conservatorship was necessary. The trial court ignored among other things the statutory presumption of competency and the lack of any clear or convincing evidence that appellant lacked the capacity to manage her affairs, the availability of less restrictive alternatives, including those proposed by appellant's counsel and caretaker; and the unanimous opinion of expert third party witnesses that appellant's educational and other needs could be met in her present home location, and that no conservatorship was necessary. The result was a fundamental miscarriage of justice, and the needless and improper disruption of the life of a young woman, which this Court can and should remedy, by reversing the conservatorship order in this case.

STATEMENT OF THE CASE[1]

A. The Parties To This Action.

Appellant Olivia B. ("Olivia" or "appellant") is the conservatee in this action, which was brought by her mother, Teri B. ("Teri"), and her older sister, Cleo B. ("Cleo") (collectively "petitioners"). Lanor K. ("Lanor") is the grandmother of Teri and the great grandmother of Olivia. As described more fully herein, Olivia resided with Lanor from the time that she was a small child until the granting of the conservatorship petition. At the time of the conservatorship proceedings, Olivia was eighteen or nineteen years old, and her prior diagnosis of pervasive developmental disorder was changed to autism when she was twelve years old. (*See, e.g.,* 2 R.T. p. 549.)

B. Procedural History Of This Action.

1. The Original And Cross-Petitions For Conservatorship, And The Appointment Of The Temporary Conservator.

On August 1, 2017, petitioners filed a petition for the appointment of a temporary conservatorship over Olivia, pursuant to Probate Code section 2250. (1 C.T. pp. 1-3.) On August 4, 2017, the Santa Barbara County Public

[1]References to "C.T." are to the three volume clerk's transcript, while references to "R.T." are to the two volume reporter's transcript. Because the appellant conservatee and the respondent conservators share the same last name, and to protect their privacy, this brief will refer to them, as well as appellant's great grandmother and cousin, by their first names. No disrespect is intended.

Defender was appointed as counsel to represent Olivia, pursuant to Probate Code section 1471, subdivisions (a) and (c). (1 C.T. pp. 45-46.) On August 18, 2017, the court issued an order for a temporary conservatorship. (1 C.T. pp. 68-69.) Following a supplement to the petition (1 C.T. pp. 70-72), the court on August 30, 2017 issued amended orders of conservatorship. (1 C.T. pp. 83-84.)

On September 11, 2017, Lanor, Olivia's great grandmother, filed a counter-petition to be appointed conservator of Olivia. (1 C.T. pp. 92-107.) Following a written opposition by Teri and Cleo (1 C.T. pp. 167-77), Lanor filed an amended petition, which added Olivia's cousin Chelsea P. as an additional proposed co-conservator (1 C.T. pp. 188-97.)[2]

2. The Termination Of The Temporary Conservatorship, And The Court's Education And Other Interim Orders.

On September 14, 2017, Teri and Cleo filed a declaration by Christian Knox, an education rights attorney retained by them, outlining allegations against the Lompoc Unified School District, where Olivia attended classes at Cabrillo High School. (1 C.T. pp. 136-39.)

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[2]During the litigation, Lanor and Chelsea took the position that no conservatorship was necessary, but that if the court were to appoint a conservator, it should appoint them, rather than Teri and Cleo. (*See, e.g.,* 2 R.T. pp. 454-55, 518-19.)

On September 29, 2017 the court, pursuant to Education Code section 56041, vacated the temporary letters of conservatorship, allowing Olivia to return to Cabrillo High School.[3] The court denied Olivia's request that she be permitted to hold her own educational rights, and appointed Tammi Faulks as guardian ad litem with respect to those rights, pursuant to Probate Code section 1003. The court further ordered that Olivia remain in school, and that there be no changes to her Individual Education Plan (IEP). (2 C.T. pp. 313-14; 1 R.T. pp. 98-103, 108-09; *see also* 2 C.T. pp. 340-41.)

On October 23, 2017, the court ordered that Olivia not be removed from Santa Barbara County without the court's permission, and that she continue to attend Cabrillo High School. (2 C.T. pp. 316-26.) However, on October 30, 2017, the court among other things ordered Faulks and Knox to "work together to have Olivia's IEP modified." The court also ordered that Olivia "shall not graduate from Cabrillo High School," and "shall not take World History at Cabrillo High School," which was the one remaining course required for her to graduate. (2 C.T. pp. 336-39.)

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[3]Section 56041, subdivision (a) provides that the school district responsible for the Individual Education Plan (IEP) for pupils over the age of eighteen that have not been conserved shall be the district that the pupil last attended prior to attaining majority, while subdivision (b) provides that the responsible agency for pupils that have been conserve is the local district where the conservator resides. In this case Olivia, prior to turning eighteen resided with Lanor in Santa Barbara County, whereas Teri at all times resided in Orange County.

On January 24, 2018, Olivia's appointed counsel filed a motion for reconsideration of the court's October 30, 2017 orders regarding Olivia's proposed graduation from Cabrillo High School. (2 C.T. pp. 368-91.) Following a written opposition by Teri and Cleo (2 C.T. pp. 393-401), the court on February 16, 2018 denied the motion in pertinent part, and continued to prohibit Olivia from graduating. (2 C.T. p. 407.)

3. The Granting Of The Permanent Conservatorship, And The Present Appeal.

Trial on the conservatorship petitions was held on November 28, 2017, May 4, 2018, and May 29, 2018. (2 C.T. pp. 347-49, 547-48, 559-60; 1 R.T. pp. 151-306; 2 R.T. pp. 352-524, 543-74.) On May 24, 2018, the court granted Teri's petition, and appointed her as conservator of Olivia. (2 C.T. pp. 559-65; 2 R.T. pp. 570-71.)

Olivia filed a timely notice of appeal on June 7, 2018. (3 C.T. pp. 592-94.) That same date, she requested the appointment of counsel on appeal. (2 C.T. pp. 595-600.) Pursuant to Probate Code section 1470, subdivision (a), the undersigned was appointed as appellate counsel on July 3, 2018.[4] On July 31,

[4]Section 1470, subdivision (a) provides that "[t]he court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests" Appointed counsel does not act as an adversary against those competing for appointment as conservator, but

2018, this Court granted Olivia's unopposed motion for calendar preference under Rule 8.240 of the California Rules of Court.

STATEMENT OF FACTS

A. The Testimony Of The Proposed Conservators.

1. Teri B. (Olivia's Mother).

Teri, Olivia's mother, is a designer, and lives with her husband (Olivia's father) and Olivia's sisters Cleo (age 20) and Lillian (age 17) in a five bedroom home in Silverado Canyon in Orange County. (1 R.T. pp. 80-81, 163, 177.) Teri lived with Lanor for several years when she was a teenager. (1 R.T. p. 78.)

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

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serves as an advocate for the conservatee. (*Conservatorship of Sides* (1989) 211 Cal.App.3d 1086, 1093; *see also Wendland v. Superior Court (Wendland)* (1996) 49 Cal.App.4th 44, 50.)

75-76, 86-87, 89.)

According to Teri, Lanor initially provided Olivia with a quiet space, which kept Olivia from banging her head like she did when she was little, and what was what Olivia needed. However, she believes that in the 12 to 14 years since, Lanor has done little to help Olivia's behavior, and instead reinforces it by letting Olivia do what she wants. (1 R.T. p. 91.) Lanor's husband (Teri's grandfather) passed away in 2011, and Teri has several concerns about Olivia continuing to live with Lanor, including Lanor's hearing and the fact that she suffers from vertigo. (1 R.T. pp. 76-77.) In addition, Lanor has recently exhibited personality changes that have alarmed Teri, including several occasions when Lanor slapped Olivia when Olivia swore or otherwise misbehaved. (1 R.T. pp. 79.) According to Teri, Olivia is unable to clean or cook for herself, balance a checkbook, or handle a financial transaction, but is able to shower and get dressed. (1 R.T. pp. 79-80, 166-67.)

Teri is concerned about Olivia returning to Cabrillo High School, because Olivia has called her many times to complain, and because the school has treated her badly, including shutting her in detention or quiet room on her seventeenth birthday. (1 R.T. pp. 69-70, 184.) She also believes that Olivia was left out of senior activities, and was mistreated by her choir teacher, causing Olivia to quit. (1 R.T. pp. 70-72.) According to Teri, Olivia

has missed 190 class periods, but is still passing classes, even though she does not know the subject matter, and is being given "charity grades," which are designed to "get this kid out of my class." (1 R.T. pp. 72-74, 182-83, 201.) Teri conceded that Olivia has told her that she wants to stay at Cabrillo High School, but claims that she "goes hot and cold on it," and puts her loyalty to the school ahead of her own best interests, which prevents her from making decisions that are in her best interest. (1 R.T. pp. 185-86.)

According to Teri, she has participated in Olivia's IEP, and at the last IEP in May, Olivia was changed to a graduate graduation track against Teri's wishes. As a result, Teri has been fighting "tooth and nail" with Cabrillo High School and Lompoc Unified School District, and has filed a due process lawsuit. (1 R.T. pp. 82-83.) She believes that the Orange County School District has a lot more resources, and does not believe that Lompoc could change some of their policies and procedures to provide what Olivia needs. (1 R.T. pp. 92-94.)

Teri filed the conservatorship petition to "basically protect her from the school and then long-term just protect her." (1 R.T. p. 162.) If the petition is granted, Teri intends to eventually move Olivia to Orange County, where she, her husband, and her other daughters reside. (*Id.*) If the petition is granted, Olivia would attend El Modena High School, which according to Teri is one of

the highest rated schools in the district, and whose special education program has a good reputation. (1 R.T. p. 163.) Teri believes that the appropriate course for Olivia is to continue to fill in the gaps in her academics and to get the social skills and other support that she will need until she is ready to move on from high school. (1 R.T. p. 164.) At that point, her options would include a community college or training program, or a pre-college or similar university program like Meristem, a program in Northern California for autistic young adults that bridges the gap between high school and college. (1 R.T. pp. 164-65.)

According to Teri, Olivia frequently becomes upset with communicating with Lanor, because Lanor tells her things like she is the only person that understands her and that she (Teri) will never understand her. (1 R.T. p. 170.) According to Teri, she has a very loving home with no screaming and yelling or fighting. By contrast, she claimed that, when Olivia was with Lanor, she screams and yells and fights, and gets her way no matter what she does. (1 R.T. p. 176.) Teri believes that the idea of Chelsea being a co-conservator for Olivia is "ridiculous," because she has shown no interest in Olivia, and does not have a close relationship with her. (1 R.T. p. 167.)

Teri is aware of a lawsuit filed on behalf of Olivia by her guardian ad litem against the Lompoc Unified School District, which seeks to help pay for

Olivia's remediation and education. (1 R.T. pp. 177-78.) She testified that if Olivia is awarded a sum of money as a result of the lawsuit, those funds would be used to pay for whatever educational program Olivia needs. (1 R.T. pp. 178, 181.) She is aware of the recommendation by Tri Counties Regional Center that Olivia be consulted with regard to where she lives, but disagrees with that recommendation, and states that she "know[s] better than what's in that report." (1 R.T. p. 214.) She also believes that Olivia's new IEP is not in her best interest, because it removed her academic and special education classes and behavioral supports, and replaced them with electives. (1 R.T. p. 217.) Teri has considered the possibility that Olivia could sign a power of attorney to name her or Lanor to help her with decisions, but believes that it would not be sufficient, because it is revocable. As a result, she does not see any alternatives to a conservatorship for Olivia. (1 R.T. p. 275.)

In addition to the testimony from Teri, Cleo testified that her understanding from discussions with her parents is that Olivia has not been given the education that she deserves, and that there have been a multitude of problems during her entire time at Cabrillo High School. (1 R.T. pp. 288.) She testified that she is protective of Olivia and has always wanted the best for her, and that her parents suggested placing her as co-conservator in case something were to happen to them, and because she is the eldest child. (1

R.T. pp. 292-93.)[5]

2. Lanor K. (Olivia's Great Grandmother).

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

Lanor testified that, since the conservatorship proceedings were instituted, Olivia has been a "nervous wreck." (2 R.T. p. 447.) Lanor deals

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[5]In addition to Teri and Cleo, Christian Knox, a special education attorney, testified that she was retained by Teri to review Olivia's educational file to determine whether she was denied a free and appropriate public education under state and federal law. (1 R.T. pp. 29-30.) She testified that she had reviewed the last two years of that file, totaling approximately an inch and a half out of approximately a thirteen to fourteen inch file. (1 R.T. pp. 43, 47-48.) Based on that review, she believed that the behavior plan developed for Olivia was not being implemented and that as a result Olivia had missed large portions of her school day, and that her special education aid was not adequately trained. (2 R.T. pp. 30-31, 42.) She also believed that the fact that Olivia was apparently wearing headphones for a large portion of the day was not conducive to her transitioning into a work environment. (2 R.T. pp. 31-32.) As a result, and because she did not believe that Olivia could get the education she was entitled to at Cabrillo High School, due to its lack of resources, Knox planned to (and ultimately did) file a lawsuit against the Lompoc Unified School District on behalf of Olivia. (2 R.T. pp. 31-33, 36, 46.)

with Olivia's behavioral issues by being patient with her and letting her have her quiet time, and Olivia typically spends a lot of time in her room, including singing, which calms her down. (2 R.T. pp. 447-48.) Olivia's behavior through junior high was fine, but once she got to high school, she began having problems and received a one-on-one aide, whom Lanor believed was not properly trained. (2 R.T. p. 448.) Lanor receives financial assistance for the in home support care of Olivia; however, the amount has recently been reduced from $3,000 to about $800 per month. (2 R.T. pp. 448-50.)

When Olivia spends time at her parents' home, she communicates with Lanor by text or phone calls. (2 R.T. p. 452.) During those visits, Olivia is usually very sad, and keeps repeating "come get me, come get me" to Lanor. (2 R.T. pp. 452-53.) Lanor believes that Olivia does not want to be there, because Teri is kind of strict with her and takes her phone and iPad away. (2 R.T. p. 453.) Lanor loves Olivia like her own daughter, and does not believe that a conservatorship is in her best interest, because it would involve "complete control" over Olivia. However, Lanor believes that if a conservator were to be appointed, she believes it should be her and Chelsea, rather than Teri and Cleo. (2 R.T. pp. 454-55, 503, 518-19.)

Lanor believes that Olivia requires additional educational help, and that the past year at the Lompoc School District has been "terrible." (2 R.T.

pp. 455-56.) She believes that the people around Olivia at school mark down all of her negative conduct and report it to the school district, and that none of their one on one aides have been taught how to handle an autistic child. (2 R.T. p. 456.) According to Lanor, school administrators frequently send Olivia to a detention area as punishment, despite the fact that Olivia likes to go there, and that she sometimes stays there all day. (2 R.T. pp. 456-57.) Lanor has seen the attendance record at the school, but does not believe that Olivia has missed the number of periods stated in those records, and believes that many of the supposedly missed periods involved the world history class that the court ordered Olivia not to take. (2 R.T. pp. 457-58.)

Lanor believes that Olivia has the potential to be "fantastic," but that she needs to develop a lot of social skills, including by attending school and interacting with the regular students. (2 R.T. pp. 458-59.) She believes that Olivia would "collapse" if forced to move from her home to Orange County or a school in Sacramento, and that she "just can't handle that kind of stuff right now." (2 R.T. p. 459.) Lanor believes that it is a bad idea for Olivia to live with her mother, father, and sisters, because she is afraid of them and afraid that she would not be able to come back and see Lanor. (2 R.T. pp. 476-77.) In addition, Teri yells and swears at Olivia, and punishes her by taking away her electronics, which are very important to Olivia. (2 R.T. p. 477.)

Lanor believes that Olivia is going to be successful eventually, because she has a "fantastic" memory and is "clever" on the computer, and Lanor would continue to take care of and love and guide Olivia for as long as she can. (*Id.*) She believes that Olivia will eventually graduate and obtain a certificate, and that after doing so, Lanor intends to obtain help for Olivia from the Tri Counties Regional Center. (2 R.T. pp. 451, 473.) Lanor does not believe that Olivia needs a conservatorship, and that she can take care of herself "as much as any teenager can." (2 R.T. p. 463.) Olivia does not cook on the stove, but can get cereal, warm up pizza, and make a quesadilla and bologna sandwich. (2 R.T. pp. 464-65.) Lanor has discussed what would happen to Olivia if something were to happen to Lanor, and believes that Olivia would be taken care of by her co-conservator or by her family. (2 R.T. p. 491.).

In addition to Lanor, Chelsea P., Olivia's cousin and proposed co-conservator, testified that she has seen Olivia at least once or twice a week while Olivia has lived at Lanor's house; that she "adores" Olivia, and that although she has not always gotten along with Olivia, Olivia has done a lot of maturing. (2 R.T. pp. 508-10.) She also testified that Lanor and Olivia love each other and that Lanor has done and would do anything to make sure Olivia was safe and happy. (2 R.T. p. 511.) Chelsea was committed to being

Olivia's sole conservator in the event Lanor can no longer act as conservator, and there were enough persons within their family to take care of Olivia and make sure her needs would always be met. (*Id*.) By contrast, Chelsea believed that Cleo had a "lot of her own stuff going on," including a boyfriend and plans to transfer to a bigger university. and that she was only 21 or 22 years old and therefore "rather young." (2 R.T. pp. 517-18.) She also has heard phone conversations involving Olivia, Teri, and Cleo, and stated that they were "not pleasant" and that Teri yelled at or "talk[ed] down" to Olivia. (2 R.T. p. 518.) As a result, she did not believe that it would be appropriate to have Teri as a conservator over Olivia, because it takes a lot of patience and personal compromise, and she did not believe Teri was able to do that. (*Id*.)

B. The Expert And Other Third Party Testimony.

1. The Psychological Evaluator (Dr. Khoie).

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

Khoie is familiar with Olivia, and conducted a conservatorship

evaluation of her in December 2017. (2 R.T. p. 361.) During that evaluation, Khoie considered Olivia's intellectual, mental status, academic achievement, and adaptive functioning, reviewed records, and conducted clinical interviews with Olivia and her great grandmother Lanor. (*Id*.) In particular, she reviewed approximately 2,000 pages of educational and academic materials pertaining to Olivia, and met with Olivia on December 11, 2017. (2 R.T. pp. 362-63.) During the evaluation, at which Lanor was present, Khoie obtained background information from Olivia, administered various intelligence and behavior assessment tests, and received information regarding Olivia's adaptive functioning. (2 R.T. pp. 363-64.)

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

In addition, Khoie testified that it is unusual for a conservatorship

request to be based on autism, or to evaluate individuals with average intellectual functioning for conservatorship. Instead, most of her conservatorship evaluations have been based upon intellectual disability, which impairs the individual's perception of reality. (2 R.T. pp. 368-69.) Khoie believed that individuals with autism that required a conservatorship typically exhibited severe or significant difficulty with their adaptive functioning skills, including an inability to communicate or care for themselves or to receive training and experience, but that Olivia did not show such an impairment. (2 R.T. p. 371.) She also testified that approximately 90% of the evaluations that she does through Tri Counties involve autistic individuals, and that she generally does not recommend a conservatorship where the sole issue is autism, and there is no intellectual impairment or impairment in adaptive functioning skills. (2 R.T. p. 395.) Khoie testified that Olivia is able to shower, use the restroom, and groom herself independently, and has assisted in paying her medical bills. (2 R.T. p. 381.) She also testified that, although Olivia presently needs assistance in handling money, with proper training she would be able to pay her bills and take care of her shopping or other financial decisions. (2 R.T. pp. 382, 393.)

Although Khoie believed that a conservatorship was inappropriate, she believed that other protective measures were necessary for and available to

Olivia, including assistance from Tri Counties Regional Adult Unit, employment assistance from the Department of Rehabilitation, and continued psychiatric treatment to help Olivia regulate her emotions. (2 R.T. p. 369.) Olivia currently receives psychotropic medication (Lexapro) to help her with her emotions, and Khoie believed that she should continue with that medication under the care of her psychiatrist. (2 R.T. pp. 369-70, 391-92.) She also believed that Olivia could benefit from life and adaptive skills training offered by the regional center or school district, as well from a power of attorney for financial and other decision-making. (2 R.T. p. 370.) In Khoie's opinion, such measures are less restrictive than a conservatorship, and are consistent with Olivia's ability to make decisions and advocate for herself, and to take directives and receive help from other people. (2 R.T. pp. 370-71, 409-10.)

Khoie believed, from her review of records, that much of Olivia's academic functioning had to do with her emotional dysregulation, and that her school was not the right setting for her and caused her to feel overwhelmed. (2 R.T. p. 372.) Despite her academic difficulties, Khoie did not recommend conservatorship, based on Olivia's intellectual and adaptive functioning and skills, her willingness to learn and accept help, and her ability to advocate for herself. In addition, Khoie believed that a controlled

environment where she was not overwhelmed with stimulation would enable Olivia to function better. (2 R.T. pp. 373-74.)

2. The Probate Investigator (Donati).

Christopher Donati, an investigator with the Santa Barbara County Public Guardian's office, handles all probate investigations for the county, whether court ordered or referred by outside agencies. (2 R.T. pp. 416-17.) In this case, Donati reviewed the documentation supplied by the referring party, including contacts, medical evaluations, and general information, met with Olivia and her great grandmother Lanor, and spoke with Olivia's mother Teri. (2 R.T. pp. 420-21.)

At Donati's interview with Olivia, which occurred on March 29, 2018, Olivia was well groomed, polite, and direct. In addition, Lanor's home, at which the interview took place, was well organized and appeared to be a very good home life situation for Olivia. (2 R.T. pp. 422, 424.) Olivia told Donati that she did not want to leave her current home, for several reasons, including that she had chickens at the home that she liked caring for, which Donati believed she utilized almost as therapy animals to help her relax and focus and become less agitated. (2 R.T. pp. 422-23.) Olivia also told Donati that Lanor's residence was her home and that she had always lived there, and that she did not want to move away from her great grandmother or other

family members. (2 R.T. p. 423.)

Olivia was aware of the nature of a conservatorship, and told Donati that she was opposed to it, because she didn't want to move, and because she wanted to stay with her great grandmother and to stay and finish up at her school. (2 R.T. pp. 424-25.) Donati believed that the current investigation was unusual, because Olivia was able to understand the concept of a conservatorship and what would be removed from her, and because Olivia was doing fairly well in the home, with no substantiated allegations of abuse or other issues with the home. (2 R.T. pp. 425-26.)

As part of his evaluation, Donati reviewed declarations and reports regarding Olivia's capacity, as well as the psychological evaluation conducted by Dr. Khoie. (2 R.T. pp. 426-27.) The reports conflicted as to whether Olivia lacked capacity to make her own medical decisions, which caused Donati to be concerned as to the benefits of a conservatorship. (2 R.T. pp. 428-29.) Donati spoke with Teri and asked her what she was hoping to accomplish with a conservatorship, and understood that she was hoping to move Olivia and have her attend a different educational institution where she (Teri) resides. (2 R.T. p. 429.) However, Teri did not mention a specific school, and there has been no school that has accepted Olivia, and no discussion regarding the services that a new regional center would provide. (*Id*.) As a result, Donati

believed that, unlike most instances in which he would apply for a conservatorship, there was no clear plan of action as to how the conservatorship would benefit Olivia, or provide medical treatment that she was not already receiving. (2 R.T. pp. 429-30.)

Accordingly, although Donati believed that Teri wanted the best for Olivia, he believed that absent such evidence, there would be no current benefits to Olivia from a conservatorship. (2 R.T. p. 430.) Instead, Donati was concerned that Olivia had resided in her current location the vast majority of her life; that in his experience, taking a person from their home, especially when they do not want to go, is a traumatic experience; and that, as reflected by her statement that she did not want to leave, any forced removal would be traumatic for Olivia. (2 R.T. pp. 430-31.) He also believed that to justify such a dramatic move, a conservatorship would have to clearly benefit Olivia, which he did not believe was the case. To the contrary, Olivia would be placed in a completely new setting, with a new therapist and new school, and would lose the ability to make certain medical and financial decisions for herself. (2 R.T. pp. 432-33.)

3. The Special Education Administrator (Butterfield).

Jarice Butterfield, a special education administrator with Santa Barbara County, testified that her agency works with the Lompoc School

District and other county school districts to provide special education services to approximately 8,000 students. (1 R.T. pp. 229-23.) Of that number, approximately ten percent (10%) have autism, including persons with both high and low levels of skills. (1 R.T. pp. 223, 236.) Such individuals typically display rigidity of thought, and may have issues with overstimulation and require a quiet and calm environment. (1 R.T. pp. 223-24.)

Butterfield has reviewed Olivia's most recent IEP, as well as recent assessments of Olivia by Tri Counties Regional Center and others. (1 R.T. pp. 225-26.) Olivia's IEP appeared fairly typical for a high functioning autistic student, and reflected various behavioral concerns and addressed Olivia's social skills. (1 R.T. p. 226.) Although Butterfield was aware of a due process lawsuit filed on behalf of Olivia, in her opinion, the IEP provided adequate educational benefits to Olivia, (1 R.T. pp. 226-27.) Butterfield believed that all of Olivia's needs could be met within Santa Barbara County, and in particular that her post-education needs could be met through Tri Counties Regional Center, which provides a wide array of services, including full and partial day programs, living and behavioral supports, and social skills training. (1 R.T. pp. 228-29, 235.) Such services would be available to Olivia until she was ready to transition to a college level curriculum. (1 R.T. p. 229.) To access the full range of services through Tri Counties, one has to reach age

22 or get a diploma, or the family can opt out of the certificate of completion and access such services at any time after reaching age 18. (1 R.T. p. 238.)

Butterfield testified that Olivia was a high functioning person within the autism spectrum, and that special education students that do not thrive in a school setting often do well after going into vocational or day training at Tri Cities. (1 R.T. pp. 237, 248.) Butterfield also testified that, according to her IEP, Olivia was presently taking both core and elective classes, and that such electives were appropriate for her education. (1 R.T. pp. 230, 255.) She also testified that Olivia was receiving social skills training through a speech and language specialist. (1 R.T. p. 257.) Butterfield believed that, if a student has the capacity to obtain a diploma, it should be their first goal, and that the IEP would generally encourage high functioning autistic students who understand the curriculum and want a diploma to work towards obtaining it. (1 R.T. pp. 259, 261.) In particular, students that obtain a diploma have broader educational opportunities, because they can generally apply at a four-year university rather than having to first attend a community college. (1 R.T. p. 260.)

ARGUMENT

I. THIS COURT SHOULD REVERSE THE CONSERVATORSHIP ORDER, BECAUSE THE TRIAL COURT LACKED THE JURISDICTION OR AUTHORITY TO ADDRESS OLIVIA'S FEDERALLY MANDATED SPECIAL EDUCATION NEEDS, OR TO OVERCOME THE STATUTORY PROCESS FOR RESOLVING DISPUTES REGARDING SUCH NEEDS.

Initially, this Court should reverse the conservatorship order, because the trial court lacked jurisdiction over Olivia's educational situation, and in particular lacked the ability to modify or alter the special education plan instituted by the local school district under requirements established under federal and state education statutes. In addition to the fact that a probate court is a court of limited jurisdiction whose power and authority is circumscribed by statute, the federal and state statutes that provide for a free and appropriate public education for developmentally disabled individuals such as Olivia require adherence to an individual education plan developed by educational experts and professionals in connection with a child's parents or guardian. Further, those statutes preclude a lay judge from interfering with those plans, and provide for a process for the resolution of disputes that preempts other, parallel state court attempts at such resolution. As a result, and because as petitioners conceded, the entire *raison d'etre* for the conservatorship petition was to modify or alter Olivia's education plans, the trial court's order granting such petition, which prevented Olivia from taking

her single remaining class or graduating from Cabrillo High School, and resulted in the removal of Olivia from both her school and her home, exceeded the court's jurisdiction and was legally invalid, and should be reversed by this Court.

A. Federal And State Education Statutes Entitle A Developmentally Disabled Pupil To A Free And Appropriate Public Education, Based On An Individualized Education Plan That Is Developed By The Local School District, And That Can Be Modified Only Through A Prescribed Statutory Process.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. sections 1400 *et seq*.) provides states with federal funds to assist in educating children with disabilities. (*See, e.g., Arlington Central School Dist. Bd. of Educ. v. Murphy* (2006) 548 U S. 291, 295 [126 S.Ct. 2455; 165 L. Ed. 2d 526].)[6] The purpose of the IDEA was to address situations in which disabled children were either totally excluded from schools or sat idly in classrooms, awaiting the time when they were old enough to drop out. (*See, e.g., Endrew F. v. Douglas County School Dist*. (2017) 580 U.S. ___ [137 S.Ct. 988; 197 L. Ed. 2d 335]; *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 182 [102 S.Ct.

[6]Autism, defined as a "neurodevelopmental disorder generally marked by impaired social and communicative skills, 'engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences,'" is considered a "disability" under the IDEA statute. (*Endrew F. v. Douglas County School Dist*. (2017) 580 U.S. ___ [137 S.Ct. 988, 996; 197 L. Ed. 2d 335], quoting 34 C.F.R. § 300.8(c)(1)(i) (2016).)

3034, 73 L.Ed.2d 690].) In exchange for such funds, a state pledges to comply with a number of statutory conditions, including providing a free appropriate public education (FAPE) to all eligible children. (*Endrew F., supra.*)

To provide the FAPE required under the IDEA statute, the state relies on an "individualized education program" (IEP), which is uniquely tailored to the individual child. (20 U.S.C. sections 1401(9)(D), 1412(a)(1); *Rowley, supra*, 458 U.S. at pp. 205-06.) The essential function of an IEP is to set out a plan to pursue academic and functional advancement on behalf of the disabled pupil, consistent with the broad purpose of the IDEA. (*Endrew F.*, *supra*, 137 S.Ct. at p. 999; *Rowley, supra*, 438 U.S. at p. 182.) The IEP is "the centerpiece of the statute's education delivery system for disabled children" (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L. Ed. 2d 686]), and is prepared by a child's "IEP team," which includes teachers, school officials and parents. (*Endrew F.,* 137 S.Ct. at p. 999; 20 U.S.C. section 1414(d)(1)(B).) In addition, the IEP must be drafted in compliance with a detailed set of procedures, which emphasize collaboration among parents and educators, and require careful consideration of the child's individual circumstances. (*Endrew F.*, 137 S.Ct. at p. 994.) The IEP must be reviewed and, if necessary revised at least once a year to ensure that the required FAPE is tailored to each child's unique needs. (20 U.S.C. section 1414(a)(5); *Honig, supra*, 484 U.S. at

p. 311.) The responsibility for developing, reviewing, and revising the IEP, including the right to ultimately select the student's educational program, lies with the school district, and the IDEA does not empower parents to make unilateral decisions about the education programs funded by the public. (*Slama v. Independent School Dist. No. 2* (D. Minn. 2003) 259 F.Supp.2d 880, 885.)

Significantly, for purposes of this appeal, the IDEA provides a detailed administrative mechanism for the resolution of disputes arising out of a child's IEP. Specifically, the statute provides initially for the informal resolution of disputes through a "preliminary meeting" or mediation and, if those measures fail, a "due process hearing" before a state or local educational agency. Only at the conclusion of the administrative process may a losing party seek redress in state or federal court. (*See* 20 U.S.C. section 1415(e)-(i); *Endrew F.*, 137 S.Ct. at p. ___; *see also Honig, supra*, 484 U.S. at p. 312; *Slama*, *supra*, 259 F.Supp.2d at p. 885.) In addition, Education Code section 56501 provides that the Office of Administrative Hearings has sole jurisdiction over hearing and deciding special education disputes. Further, the "stay-put" provisions of the federal statute require that, unless the parties otherwise agree, the child must remain in their current educational placement while such a civil action is pending. (20 U.S.C. section 1415(e)(3);

Endrew F., 137 S.Ct. at p. 994; *see also Anchorage School Dist. v. M. P.* (9th Cir. 2012) 689 F.3d 1047, 1052, 1054.)

B. Because The Probate Court Is A Court Of Limited Jurisdiction Whose Jurisdiction Was Preempted By The Federal And State Education Statutes, The Court's Education Orders And Order Imposing A Conservatorship Were Invalid, And Should Be Reversed By This Court.

Applying the above principles, it is evident that the trial court's orders regarding Olivia's education, and indeed its entire order imposing a conservatorship upon Olivia, exceeded its jurisdiction and were, therefore, invalid and should be reversed by this Court. As indicated above, the IDEA envisions providing states with the funds necessary to ensure that developmentally disabled children, including children with autism, receive a free and appropriate public education. As the price for that assurance, the statute requires, as its "centerpiece," that the specific parameters of that education be set forth in a detailed IEP, which is uniquely tailored to the individual pupil, and which incorporates the input of specific members of the IEP team, including parents, teachers, and school officials. That process, and the detailed considerations that go into the development and implementation of the IEP, are fundamentally undermined where, as here, a trial court relies on other, unrelated provisions of state law, such as the conservatorship statute, to "second-guess" the determinations of parents and educational

professionals, and impose a completely different set of educational requirements, including a transfer to a completely different school and school district, and the pursuit of a completely different educational goal. Simply put, the trial court was and is not part of the "IEP team," and has no particular expertise in educational matters. Therefore, it should not and cannot lawfully make educational decisions – including preventing Olivia from taking World History or thereafter graduating from high school, or otherwise micromanaging her education.[7]

The above conclusion – i.e. that the IDEA generally preempts and prevents a state court from making educational decisions contrary to those contained in the IEP – is further buttressed by the dispute resolution procedures established by the Act. As indicated above in section A., the Act provides for a detailed mechanism for the resolution of such disputes, including an informal "preliminary meeting" or mediation, followed by a hearing before a state or local educational agency that focuses on the limited issue of whether the parents child received due process in connection with the development and implementation of the IEP. Only when such measures are unsuccessful may the parent or child seek redress in state or federal court

[7]Indeed, if as indicated above a parent cannot make unilateral decisions regarding a child that are contrary to the IEP (*Slama, supra*), it stands to reason that a court may not either.

which, as shown above, is exactly what happened in this case. Here, however, that statutorily mandated process was fatally interrupted by the trial court's use of the conservatorship statute to perform an "end run" against that litigation, which was directly initiated and maintained by the eventual appointed conservator, Teri.

The law is clear that the jurisdiction and powers of the probate court are entirely statutory, and therefore limited. (*See, e.g.*, *Copley v. Copley* (1978) 80 Cal.App.3d 97, 107; *Conservatorship of Coffey* (1986) 186 Cal.App.3d 1431, 1439 ("Probate proceedings being purely statutory. . .the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided").) Moreover, it is equally clear that the present conservatorship proceedings were motivated by and provided a "fig leaf" for Teri's desire to avoid the requirements of the IEP, fundamentally alter the direction of Olivia's education, and summarily adjudicate the pending due process lawsuit. Indeed, Teri herself admitted as much.[8] And, it is similarly

[8] *See* 1 R.T. pp. 82-83 (stating that she had fought "tooth and nail" with the school board, and that the IEP was recently changed against her wishes), 92-94 (stating that she planned to move Olivia to Orange County and enroll her in a different school with more resources, and that Lompoc would not change its policies since "[t]hey have been sued several times and that hasn't made

clear that the trial court viewed the present conservatorship proceedings as an opportunity to "correct" the perceived inadequacies in Olivia's IEP. (*See* 1 R.T. p. 101 (stating, before hearing any testimony, that "if I don't let her graduate, I don't let her graduate"); 2 R.T. p. 318 (stating, before hearing from the educational experts, to "you have some sort of idea of where the school entity issues are going"). This Court should not permit the trial court to exercise jurisdiction that it does not have, or to use a conservatorship as a means of short-circuiting the requirements of and procedures established under the federal education statute, and should instead reverse the conservatorship order in this case.

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them do it"); *see also* 1 R.T. pp. 162-64 (stating that she filed the conservatorship petition to "basically protect [Olivia] from the school and then long-term just protect her"); 1 R.T. pp. 214 (stating that she "know[s] better than what's in the [IEP] report"), 217 (stating that the new IEP is not in Olivia's "best interest"); 2 R.T. p. 539 (arguing that the special education attorney Knox will not work with Olivia's counsel or the guardian ad litem if the conservatorship is denied).)

II. THIS COURT SHOULD REVERSE THE CONSERVATORSHIP ORDER, BECAUSE SUCH ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND BECAUSE THE TRIAL COURT'S ACTIONS AND ORDERS VIOLATED BASIC PRINCIPLES UNDER THE STATE CONSERVATORSHIP STATUTE.

Should this Court find that the trial court's educational and conservatorship orders were within its jurisdiction or otherwise authorized, it should nonetheless reverse those orders, because the facts of this case, together with the applicable law, establish that no conservatorship was necessary, and because the trial court, in reaching its determination and imposing a conservatorship upon Olivia, violated numerous principles under the state conservatorship statutes. In addition to the fact that the conservatorship petition was motivated by an issue – i.e., Olivia's educational options – that is nowhere mentioned in the conservatorship statute and for which the trial court lacked jurisdiction, petitioners failed to meet their burden of establishing, by clear and convincing evidence, that Olivia lacked the competency or capacity to manage her own personal and financial affairs. Moreover, in granting the petition and imposing the conservatorship, the trial court improperly ignored numerous relevant factors, including the unanimous testimony and recommendations of expert witnesses, the availability of less drastic and restrictive alternatives to conservatorship, and Olivia's own wishes. As a result, the trial court's conservatorship order was both

procedurally improper and substantively flawed, and should be reversed by this Court.

A. A Conservatorship May Be Imposed Only In Limited Circumstances, And Only Where The Party Lacks The Capacity To Manage His Or Her Financial, Health, Or Other Basic Personal Affairs.

Probate Code section 811, subdivision (a), permits the trial court to determine that a person is of unsound mind, or lacks the capacity to make certain decisions or perform certain acts, including "the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts." Thus, for example, Probate Code section 1801 authorizes the appointment of a conservator for persons who are "unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter" (subdivision (a)) or are "substantially unable to manage his or her own financial resources or resist fraud or undue influence" (subdivision (b)). Similarly, although Probate Code section 1801, subdivision (d) separately authorizes the appointment of a conservator for a developmentally disabled adult, that section provides in pertinent part that "[t]he conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator."

As a result, the courts have characterized a limited conservatorship as "an alternative and less intrusive form of conservatorship." (*People v. Karriker* (2007) 149 Cal.App.4th 763, 779; *see also Board of Regents v. Davis* (1975) 14 Cal.3d 33, 43; *Conservatorship of Hume* (2006) 139 Cal.App.4th 393, 399 (purpose of a conservatorship is to enable a competent person to "assist the conservatee in the management of his property").)

B. To Justify The Imposition Of A Conservatorship, The Proposed Conservator Must Overcome A Presumption Of Capacity And Show, By Clear And Convincing Evidence, That The Proposed Conservatee Lacks Basic Capacity By Reason Of His Or Her Disability, And That No Other Less Restrictive Alternatives Are Reasonably Available.

The general legal provisions governing proceedings involving an individual's legal mental capacity are set forth in Probate Code sections 810 through 813. Probate Code section 810, subdivision (a) provides for a rebuttable presumption, affecting the burden of proof, that "all persons have the capacity to make decisions and to be responsible for their acts or decisions." In addition, although Probate Code section 810, subdivision (c) permits a court to determine that a person is "totally without understanding, or is of unsound mind, or suffers from one or more mental deficits" so as to lack the capacity to perform certain specific act(s), that provision requires that the deficit be "substantial," and "should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a

person's mental or physical disorder." Probate Code section 811, subdivision (a) further requires that such determination be based on and supported by evidence of a deficit in certain specified mental functions, as well as evidence of a correlation between those deficit(s) and the subject decisions or acts of which the proposed conservatee is incapable. And, section 811 further requires (subdivision (b)) that a defect in mental function may be considered only if that deficit, alone or in combination with other deficits, "significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question," and (subdivision (d)) that "[t]he mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act."

In addition to the above provisions applicable to mental health proceedings generally, the statutory provisions governing conservatorships similarly restrict the nature, purpose, and scope of conservatorship orders. Probate Code section 1800 states that the intent of a conservatorship is, among other things, to "[p]rotect the rights of persons who are placed under conservatorship" (subdivision (a)), to "[p]rovide that the health and psychosocial needs of the proposed conservatee are met" (subdivision (c)), and to "allow the conservatee to remain as independent and in the least

restrictive setting as possible" (subdivision (d)).

Moreover, and in addition to the limited scope of powers given to conservators generally (section A. *supra*), Probate Code section 1801, subdivision (d) provides that a limited conservatorship for a "developmentally disabled adult"[9] may be used "only as necessary to promote and protect the well-being of the individual," and "shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations." Similarly, Probate Code section 1828.5, subdivision (b) provides that "[i]f the court finds that the proposed limited conservatee possesses the capacity to care for himself or herself and to manage his or her property as a reasonably prudent person, the court shall dismiss the petition for appointment of a limited conservator," while subdivision (e) requires the trial court to "define the powers and duties of the limited conservator so as to permit the developmentally disabled adult to care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so."

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[9]Probate Code section 1420 defines "developmental disability" as "a disability that originates before an individual attains 18 years of age, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for the individual," and specifically includes autism, with which Olivia has been diagnosed.

In addition to the limited situations in which a conservatorship may be imposed, and the limitations placed on a conservator's powers and duties, conservatorship proceedings are subject to a heightened level of proof. Thus, in addition to the rebuttable presumption contained in section 810, subdivision (a), Probate Code section 1801, subdivision (d) provides that "[t]he conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator," while subdivision (e) provides that "[t]he standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence."

C. Because The Evidence Was Insufficient To Overcome The Presumption Of Capacity And To Clearly And Convincingly Establish Olivia's Inability To Manage Her Affairs, And Because The Trial Court's Actions Were Otherwise Improper, This Court Should Reverse The Conservatorship Order.

Applying the above law to the facts of this case, it is evident that the trial court order imposing a conservatorship upon Olivia was erroneous, in multiple respects, and should be reversed. In particular, the evidence establishes that the trial court materially prejudged the case and ignored numerous, relevant facts, and as a result imposed a conservatorship order that was factually and legally unsupported and contrary to basic principles

under the conservatorship statute.

1. The Evidence Failed To Show That Olivia's Deficit Was "Substantial," Or That She Lacked The Capacity To Make Financial Or Medical Decisions Or Provide For Her Basic Personal Needs.

Initially, the evidence adduced at trial was insufficient to support the conservatorship order, both because it failed to meet the required evidentiary threshold and other procedural requirements, and because it failed to address the proper subject matters or purposes for which a conservatorship can be ordered. As indicated above in section A., both the Probate Code in general and the conservatorship statute in particular are concerned primarily with an individual's competency to contract or marry or to make personal and financial decisions, and his or her basic capacity to feed, clothe, shelter or otherwise care for himself or herself. (*See* Probate Code section 811, subdivision (a); Probate Code section 1801, subdivisions (a) and (b).) However, as shown above in section I., the present conservatorship petition arose and centered around an intra-family dispute regarding education, a subject that is nowhere mentioned in the conservatorship statute, and is in any case preempted by federal law.

Moreover, as to the matters as to which conservatorship may properly be sought, the evidence adduced at trial was at best inconclusive, and in any case failed to either rebut the presumption of competency set forth in Probate

Code section 1801, subdivision (d) or the presumption of capacity set forth in Probate Code section 810, subdivision (a). The undisputed evidence, including the expert testimony of Khoie and Butterfield, was that Olivia was of at least average intelligence and not cognitively impaired and, although autistic, was high functioning. (*See* 1 R.T. pp. 226, 236-37, 248; 2 R.T. pp. 367-71.) As a result, both experts, as well as probate investigator Donati, stated that the normal circumstances in which conservatorship was appropriate – i.e. an impaired perception of reality or an inability to communicate – did not apply, either in autism cases in general, or where, as here, Olivia understood and was opposed to the concept of a conservatorship, and where there were no allegations of abuse or similar issues. (*See* 2 R.T. pp. 368-69, 371, 395, 425-26.) That testimony was not only uncontroverted, but entirely consistent with the Probate Code which requires that a deficit must be "substantial," and must not based solely on a diagnosis of autism or other disorder. (*See* Probate Code section 811, subdivisions (a) and (d).)

In addition to the evidence establishing Olivia's general intelligence and high functionality, the evidence at trial belied any claim that she lacked competency or the capacity to perform the tasks set forth in the conservatorship statute, or was at best inconclusive. The only evidence that Olivia lacked the basic ability to manage financial transactions or care for

herself came, predictably, from Teri (*see* 1 R.T. pp. 79-80), who lived only part time with Olivia, and who, as the petitioner, clearly had a vested personal and monetary interest in the outcome of the petition. (*See* 1 R.T. pp. 177-81.) However, Teri herself conceded that Olivia is able to shower and get dressed, and Lanor, with whom Olivia resided for approximately 14 years, testified that Olivia prepares her own foods and can take care of herself "as much as any teenager can." (*See* 2 R.T. pp. 463-65.) Similarly, Dr. Khoie, who independently evaluated Olivia, found that she is able to perform basic hygiene and has assisted in paying medical bills and could, with proper training, such as that offered by the local regional center or school district, perform other basic shopping and financial tasks. (*See* 2 R.T. pp. 382, 383, 370.)

As a result, and as reflected by the testimony of investigator Donati (*see* 2 R.T. pp. 428-29), the evidence with respect to the non-educational, financial, and personal care matters that are properly considered in determining whether to impose conservatorship was at best inconclusive, and therefore failed to meet the "clear and convincing" threshold under Probate Code 1801, subdivision (e). Accordingly, the conservatorship order was unsupported by substantial evidence, and should be reversed by this Court.

2. The Trial Court Failed To Consider Olivia's Wishes Or The Testimony Of Third Party Expert Witnesses.

In addition to the insufficiency of the evidence to support a conservatorship (section II.C.1.), and the improper consideration of Olivia's education plan as grounds for conservatorship (section I.), it is also evident that the trial court failed to consider various factors that were demonstrably relevant under the conservatorship statute, and that directly bore upon the issue of whether a conservatorship was justified in this case. Initially, and as indicated above, the trial court's order disregarded the unanimous opinion of the expert witnesses, with years of experience in special education, that interviewed Olivia, and whose opinions were critical in light of the predictably offsetting testimony of the competing proposed conservators.

In addition, and of particular significance, the trial court's conservatorship order ignored or disregarded the wishes and desires of Olivia herself, contrary to both the letter and the spirit of the conservatorship statutes. As indicated above in section B., under Probate Code section 1800, subdivisions (c) and (d), the goals of a conservatorship include to "[p]rovide that the health and psychosocial needs of the proposed conservatee are met," and to "allow the conservatee to remain as independent and in the least restrictive setting as possible." Similarly, Probate Code section 1801, subdivision (d) provides that the proposed conservatee shall not be presumed

to be incompetent, and shall retain all legal and civil rights other than those specified by the court, and that conservatorship orders "shall be designed to encourage the development of maximum self-reliance and independence of the individual." And, Probate Code section 1828.5, subdivision (b) provides that a conservatorship order should permit a developmentally disabled adult to manage his or her resources commensurate with his or her ability to do so, and that the individual's capacity to care for himself or herself may justify the dismissal of the petition.

Taken together, those statutes, as well as the remaining authority cited above, indicate that the wishes of the conservatee should, as stated in the testimony of the probate investigator Donati (*see* 2 R.T. pp. 424-26) be considered in determining whether and to what extent to impose a conservatorship. However, it is evident that the trial court disregarded those wishes in determining that Olivia should, upon reaching adulthood, be removed from the only home that, as all parties agreed, she had ever known, despite the trauma associated with such removal. (*See* 1 R.T. pp. 16, 74-76, 86-89; 2 R.T. pp. 430-33, 444-45.) As with the issue of her intelligence and lack of cognitive impairment, the evidence that Olivia wished to remain with Lanor and continue to attend Cabrillo High School was undisputed, and was reflected in the testimony of not only interested parties Lanor and Chelsea

(*see* 2 R.T. pp. 447, 452-53, 459, 476-77), but also Olivia's own statements to probate investigator Donati (*see* 2 R.T. pp. 422-25), as well as to the court itself.[10] Indeed, even Teri, while qualifying her testimony through self-serving claims that Olivia "goes hot and cold" and puts her school loyalty ahead of her own best interests, conceded that Olivia wanted to stay at Cabrillo High School. (*See* 1 R.T. pp. 185-86.) In disregarding those wishes, the trial court violated the above principles, and caused the exact type of disruption – i.e. the removal of Olivia from her home of 14 years, based on little more than an educational dispute – that the testifying experts warned would impede Olivia's educational and social progress.

3. The Trial Court Prejudged The Alleged Need For A Conservatorship, And Failed To Consider The Clear Availability Of Less Restrictive Alternatives To A Conservatorship.

Finally, it is evident that the conservatorship order in this case was not the product of a dispassionate analysis by the trial court of either Olivia's needs or the best means of fulfilling them. Instead, the statements and actions by the trial court demonstrate that it had already prejudged the case,

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[10] *See, e.g.,* 1 R.T. pp. 146-47 (stating among other things that "the reasons why I don't want to go is just that I'm happier here in Lompoc, and I don't want to be treated badly again. . . " and that "I just want to stay in Lompoc and spend time with my real friends"); *see also* 2 R.T. p. 312 (stating that she "can't go to Orange County" and that she does not want "mistreating" or "to be tortured again").

and the purported need for a conservatorship. Further, the court's acts of prejudging the case resulted in the improper rejection of less restrictive alternatives that would have addressed Olivia's personal issues while avoiding the total loss of independence and self-control inherent in a conservatorship.

As indicated above, a limited conservatorship is considered "an alternative and less intrusive form of conservatorship." As a result, the court, in imposing such conservatorship, is required to "allow the conservatee to remain as independent and in the least restrictive setting as possible" (Probate Code section 1800, subdivision (d)), and to permit a developmentally disabled adult to "care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so" (Probate Code section 1828.5, subdivision (e)). Together, those provisions, and others, require that a court consider whether less restrictive alternatives, not involving the total control of the proposed conservatee's affairs, are available before taking the drastic step of imposing a conservatorship.

Here, the testimony and record in this case reflect that the trial court, from the very outset of the proceedings, signaled its support for a conservatorship and, in doing so, disregarded the above principles and prejudged the issues in this case. In addition to imposing a temporary

conservatorship (C.T. pp. 83-84; 1 R.T. p. 3), the trial court, prior to hearing any evidence, effectively decided that a conservatorship was necessary, stating that it was "not going to try to solve Olivia's problems. . .by putting her on her own." (*See* 1 R.T. p. 53.) The court then, among other things, ordered Olivia's counsel to show cause why a permanent conservatorship should not be ordered (1 R.T. p. 99) and, while vacating the temporary conservatorship for technical reasons (*see* Statement of Facts, section B.2. and note 3), stated that it believed that Teri had "shown a prima facie case of why a permanent conservatorship is probably appropriate," and that it would "probably impose one, unless you change my mind." (*See* 1 R.T. pp. 99-100.) Such statements hopelessly effectively treated a conservatorship as a first rather than a last resort, and misstated and inverted the burden of proof to establish the need for a conservatorship, which as noted above is on the party seeking conservatorship, and requires "clear and convincing evidence."[11]

Further, the testimony and record reflects that numerous such

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[11]The trial court's prejudgement in favor of the imposition of a conservatorship continued during and after the presentation of evidence in this case. In addition to its statements regarding its likely determination of the education issue (section I.B. *supra*), the court, in response to a motion by Teri's counsel, threatened to exclude and not even consider the testimony of Dr. Khoie, because of the "failure" to complete an unrelated evaluation ordered by the court. (*See* 2 R.T. pp. 355, 506.) The court also again stated, prior to hearing argument, that counsel needed to show cause why it should not reimpose a temporary conservatorship. (*See* 2 R.T. pp. 507, 522.)

alternatives were proposed or offered, but that the trial court, having prejudged the matter in favor of Teri and the imposition of a conservatorship, consistently ignored or rejected them. Despite recommendations from the school district (through modifications to Olivia's IEP) and Tri Counties Regional Center, which would have enabled Olivia to continue to live with Lanor and attend Cabrillo High School, the court disregarded those recommendations, following the lead of Teri, who testified that she "know[s] better than what's in that report." (*See* 1 R.T. p. 214.) Similarly, Khoie and Butterfield testified that Olivia's social and psychological needs could be addressed by the continuation of Olivia's psychotropic medication, as well as through a power of attorney and additional training resources available from the Tri Counties Regional Center, which according to Khoie were less restrictive than a conservatorship, and consistent with Olivia's desires and ability to achieve the maximum self-reliance called for under the conservatorship statute. (*See* 2 R.T. pp. 228-29, 235, 369-74, 391-92, 409-10; Probate Code section 1801, subdivision (d).) Those suggestions too were rejected out of hand by Teri, who testified that she believed that a power of attorney was insufficient because it was revocable, and that she did not see any alternatives to a conservatorship (1 R.T. p. 275), as well as by the trial court. And, Olivia in fact executed a power of attorney and health care

directive (trial exhibits D and E), authorizing Lanor and Chelsea to act on her behalf (*see* 2 R.T. pp. 557-59), while Olivia's counsel and guardian ad litem proposed an arrangement by which, in lieu of a conservatorship, Olivia would retain her education rights and authorize her counsel to pursue her due process claims against the school district. (*See* 2 R.T. pp. 559-62.) All of those suggestions were rejected by Teri, whose counsel stated that the education attorney Knox would refuse to continue on the due process lawsuit if Olivia's counsel or guardian ad litem were involved (*see* 2 R.T. p. 569) and, ultimately, by the trial court, which imposed a conservatorship over the unanimous recommendation of experts, and Olivia's express wishes. (*See* 2 R.T. p. 571.)

In sum, the present action reflects the treatment of Olivia's situation as a family law matter affecting an underage child, rather than a conservatorship action against an adult that, although developmentally challenged, possesses both the tools and the available resources to live independently. In particular, the trial court's actions and order reflect the drastic use of the conservatorship remedy in a matter that it was never intended, and to address a purely intra-familial dispute on a subject over which the court had no jurisdiction or authority. Those actions and order further reflect the use of a conservatorship as a first rather than a last resort, while ignoring the limited nature of a conservatorship, and its drastic effects

upon an adult young woman whose ability to think and act for herself have been removed, and whose world has been turned upside down against expert advice and her own express wishes. This Court should remedy this unsupported and unsupportable result, by reversing the conservatorship order in this case.

CONCLUSION

For the reasons set forth above, this Court should reverse the conservatorship order in this case.

DATED: September 20, 2018

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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 11,355 words, according to the word count of the computer program used to prepare the brief.

DATED: September 20, 2018

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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: September 20, 2018

DOCUMENT SERVED: APPELLANT'S OPENING BRIEF

PERSONS SERVED:
See Attachment A

I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Liberty Hill, Texas.

PROOF OF SERVICE BY ELECTRONIC SERVICE

(Cal. Rules of Court, Rules 2.251(i)(A)-(D), 8.71(f)(1)(A)-(D))

I additionally declare that I electronically served the foregoing document on all listed parties under the Court's True Service filing program.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 20, 2018 at Liberty Hill, Texas.

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GERALD J. MILLER

ATTACHMENT A – Service List

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