

S266033

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January 4, 2021

Mr. Frank A. McGuire, Clerk Administrator
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Alternative Request for Depublication (Cal. Rules of Court, rule
8.1125(a)(1))
Conservatorship of the Person and Estate of O.B.
Second District Court of Appeal No. B290805
Opinion filed December 2, 2020; petition for review filed
contemporaneously herewith
Related to Supreme Court Nos. S254938 and S266033

Dear Mr. McGuire:

Pursuant to Cal. Rules of Court, Rule 8.1125(a)(1), petitioner and appellant O.B. (“appellant”) requests depublication of the opinion of the Court of Appeal, Second District, Division Six, filed in this case on December 2, 2020. In that opinion, the court affirmed the trial court’s order imposing a limited conservatorship upon appellant. Appellant requests depublication in the alternative, in the event that this Court declines to review this case, pursuant to the petition for review filed by appellant on January 4, 2021 (Case No. B290805).

The facts of this case, including grounds for depublication, are set forth at length in appellant’s petition for review, which is incorporated by this reference. In particular, the opinion should be depublished because it misstates the law and could cause confusion among the trial courts, in the following respects:

- 1. The Court of Appeal’s Determination That The Trial Court Had Jurisdiction To Modify Or Alter Appellant’s Individual Education Plan (IEP), And That Such Jurisdiction Was Not Preempted By The**

Federal Individuals With Disabilities Act (IDEA), Is Erroneous.

In its opinion, the Court of Appeal rejected appellant's argument that the trial court lacked the jurisdiction or authority to modify or alter the Individual Education Plan (IEP) of appellant, who is autistic, because the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. sections 1400 *et seq.*, preempted the state conservatorship statute, and require that parties resolve all educational disputes through the procedures prescribed by that Act. In doing so, however, the court failed to address any of the arguments or federal authorities cited by appellant, including the provisions of the Act giving rise to such preemption. The court's opinion, therefore, ignores relevant authority and creates a false impression as to the power of the trial courts to order a conservatorship in cases involving special needs students. In addition, the court purported to hold that the trial court did not modify or alter appellant's IEP, even though, by imposing a conservatorship, it authorized the transfer of appellant's residence to that of the appointed conservator, which also resulted in appellant's transfer to an entirely different school district. As a result, the court's opinion is poorly reasoned, and would cause confusion as to what constitutes a modification or alteration to a student's IEP.

2. The Court Of Appeal's Decision Does Not Properly Apply The "Clear And Convincing Evidence" Standard, As Ordered By This Court.

In its prior decision (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, Case No. S254938 (hereafter "*O.B. I*"), this Court held that the "clear and convincing evidence" standard required in conservatorship matters (*see* Probate Code section 1801, subdivision (e)) applies at the appellate stage, and in particular to claims of insufficiency of the evidence to support a conservatorship. In doing so, the Court reversed the Court of Appeal, which had erroneously held that the "clear and convincing evidence" standard "disappears" once the trial court issues its decision, and that appellate review is instead governed by the deferential, "substantial evidence" standard applicable to all cases, regardless of the specific standard of proof.

Although the Court of Appeal on remand purported to reevaluate its prior decision and apply the proper standard, as identified by this Court in *O.B. I*, it essentially merely reissued its prior decision and found that the evidence was sufficient, even under the "clear and convincing evidence" standard. In doing so, the Court of Appeal hopelessly misapplied that standard, by artificially crediting the nature and extent of the evidence offered by the petitioner while ignoring conflicting evidence. For example, the only direct evidence presented in support of the requested conservatorship consisted of the testimony of petitioner (appellant's mother) herself, which was clearly biased and self-serving, and was contradicted by several third party experts. Moreover, although the Court of Appeal emphasized that Mother had "nearly daily" contact with appellant for the past ten years, it ignored the fact that appellant resided during that time not with Mother

(who essentially abandoned her while in childhood), but with her great-grandmother, who opposed conservatorship and testified that appellant was not in need of it.¹ Similarly, the court artificially minimized the testimony of two experts that had examined appellant and determined that she did not require conservatorship by observing that their opinion differed from those contained in the reports of two other experts, who did not testify at trial, and whose reports were not introduced as evidence. (See Slip Opinion, pp. 12-13.)

In sum, the evidence at trial was: (1) one of appellant's relatives believed she required a conservatorship while another, with considerably greater contact, believed she did not; and (2) two neutral third party experts personally testified that appellant did not require conservatorship and explained the reasons for their opinions, while two other experts, whose opinions were not explained, through either live testimony or through written reports, did not. That evidence at best created a conflict between the parties; it did not constitute "clear and convincing evidence" so as to justify a conservatorship. The Court of Appeal's poorly reasoned and apparently preordained decision affirming the trial court's decision therefore not only adds nothing to the law governing conservatorship, but would actively undermine this Court's holding in *O.B. I*. For this additional reason, republication is appropriate.

3. The Court Of Appeal's Decision Gives Improperly Short Shrift To The Statutory Requirement That The Trial Court Expressly Find That No Less Restrictive Alternatives Exist, Prior To Ordering Conservatorship.

The petition for review filed contemporaneously with this request argues that the trial court's conclusory statement that it considered less restrictive alternatives to conservatorship was inadequate to fulfill statutory and due process requirements (*see, e.g.,* Probate Code section 1800.3, subdivision (b); Probate Code section 1821, subdivision (a)(3)). That argument was rejected by the Court of Appeal, which instead presumed that the trial court had complied with the statute, even though it did not identify, for example, the less restrictive alternatives that it considered, or the reasons why those alternatives were not feasible or effective.

¹As evidence of its poor reasoning, the Court of Appeal compared Mother's daily contact with that of the experts that evaluated appellant, when the proper comparison would, as noted above, have been with appellant's great-grandmother, whose contacts were clearly greater and more extensive than Mother's, and who opposed conservatorship. *See* Slip Opinion, p. 12 (stating that "[b]ecause mother was in nearly daily contact with appellant for the past 10 years, mother was in a far better position than [the experts] to evaluate appellant's capacity to function independently").

As a result, appellant incorporates the arguments made in her petition for review. Appellant also incorporates and joins in the arguments of the Disability and Guardianship Project of the Spectrum Institute, which filed a request for depublishation on December 8, 2020 (Case No. S266033).

For the reasons set forth above, this Court, in the event it declines review, should, in the alternative, depublish the Court of Appeal's decision in this case.

Very truly yours,

GERALD J. MILLER

PROOF OF SERVICE BY MAIL

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: January 4, 2021

DOCUMENT SERVED: Alternative Request for Depublication (Cal. Rules of Court, rule 8.1125(a)(1))

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 additionally declare that I served the Court of Appeal, Second District, Division Six, per Supreme Court TrueFiling policy.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 4, 2021 at Liberty Hill, Texas.

GERALD J. MILLER

ATTACHMENT A – Service List

<p>Tammi L. Faulks Guardian Ad Litem 937 Main Street, Suite 208 Santa Maria, CA 93454</p>	<p>Laura Hoffman King, Esq. Law Offices of Laura Hoffman King 241 S. Broadway, Suite 205 Orcutt, CA 93455 (Attorneys for Respondents Mother B. and Cleo B.)</p>
<p>Neil S. Tardiff, Esq. Tardiff Law Offices P.O. Box 1446 San Luis Obispo, CA 93401 (Appellate Counsel for Respondents)</p>	<p>Lana J. Clark, Esq. Law Office of Lana Clark 1607 Mission Drive, Suite 107 Solvang, CA 93463 (Trial Counsel for Respondents)</p>
<p>Susan Sindelar, Esq. Office of the Public Defender County of Santa Barbara 1100 Anacapa Street Santa Barbara, CA 93101 (Trial Counsel for Petitioner)</p>	<p>Jay Kohorn, Esq. California Appellate Project 520 S. Grand Ave., Fourth Floor Los Angeles, CA 90071</p>
<p>Clerk, Superior Court County of Santa Barbara 1100 Anacapa Street Santa Barbara, CA 93121</p>	<p>Shaun P. Martin, Esq. University of San Diego School of Law 5998 Alcalá Park, Warren Hall San Diego, CA 92110</p>
<p>Clerk, Court of Appeal Second Appellate District, Division Six 200 East Santa Clara Street Ventura, CA 93001</p>	<p>Thomas Coleman, Esq. 555 S. Sunrise Way, Suite 205 Palm Springs, CA 92264</p>