

**IN THE COURT OF APPEAL FOR
THE STATE OF CALIFORNIA
SEVENTH APPELLATE DISTRICT
DIVISION ONE**

TOMMY M.,) Case No. 123456
)
Appellant)
)
v.)
)
MARY A.,)
)
Respondent)
_____)

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SAGEBRUSH
HONORABLE _____, JUDGE PRESIDING

RESPONDENT'S BRIEF

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I. INTRODUCTION

Tommy M. appealed the decision of the Sagebrush Superior Court of California denying him distribution rights to the estate of Fred M. Respondent prays that the appellate court affirm the judgment.

The trial court concluded as a matter of law, that

1) Tommy M. failed to meet the requirements of Probate Code section 6453 and Family Code sections 7611 and/or 7630 to establish the fact that he and decedent had a natural parent and child relationship; and

2) Public policy prohibits the disruption of family relationships that have been existing for years as would occur if Tommy M. were found to be the son of Fred M., relying on the *Estate of Cornelious* (1984) 35 Cal.3d 461 [198 Cal.Rptr. 543, 674 P.2d 245].

The judgment is supported by substantial evidence that Fred M. was not the natural father of Tommy M. because he did not receive Tommy M. into his home and he did not hold Tommy M. out as his own.

The judgment is also supported by public policy that shuns judicial juggling of family relationships for dubious claims of paternity solely for financial considerations.

II. STATEMENT OF THE CASE

On August 26, 1998, the Public Administrator for Sagebrush County, Ricardo Hernandez, filed a Petition for Probate, requesting letters of administration and appointment as administrator of the estate of Fred M. (hereafter "Fred"). (C.T. 6-9.) After a hearing on the Petition for Probate on October 6, 1998, the court appointed Hernandez administrator of Fred's estate (hereafter "Administrator"). (C.T. 13.)

The Administrator filed Inventory and Appraisal declarations finding that Fred's estate consisted of only personal property appraised at a total of \$853,476.65. (C.T. 26-33, 34-37, 144-147, 150-153.)

A "Copy Of An Entry In A Register Of Births Kept In The Colony Of Hong Kong" (hereafter "birth certificate") was found at Fred's residence indicating that Fred had a son named Tommy M. (hereafter "Tommy"). (C.T. 38.) Based on this birth certificate, on May 12, 1999, the Administrator filed a Petition to Determine Distribution Rights (hereafter "petition") alleging that Tommy is the sole heir of decedent and under the laws of succession is entitled to distribution of the decedent's entire estate. (C.T. 38-40.)

On June 22, 1999, the court was scheduled to conduct a hearing on the petition. (C.T. 46.) The hearing was continued to July 28, 1999

(C.T. 49); then continued to October 6, 1999 (C.T. 52); and again continued to November 10, 1999. (C.T. 137.)

On November 10, 1999, the court conducted a hearing on the petition. (C.T. 137.) On November 17, 1999, the court denied Administrator's petition and determined that Tommy was to receive nothing from the estate of Fred M. The judgment was entered on November 19, 1999. (C.T. 140.)

On January 14, 2000, Tommy timely filed a Notice of Appeal from the judgment order determining persons entitled to distribution of estate to the Court of Appeal for the Seventh Appellate District. (C.T. 140.)

III. STATEMENT OF THE FACTS

Fred's Death and Administrator's Subsequent Investigation

Fred M. died intestate and without a spouse in Cactus, California on July 6, 1998. (C.T. 7, 38.) An investigator from the Administrator's office conducted a search of Fred's residence and found all of Fred's important documents in the top drawer of the only dresser in the residence. (C.T. 133-134.) The investigator found Fred's birth certificate, his baptismal record, legal papers showing his name change from Buscaglia to M., his honorable discharge papers, and statements relating to his investments. (C.T. 134-135.)

On top of all these documents, the investigator found a "Copy Of An Entry In A Register Of Births Kept In The Colony Of Hong Kong." (C.T. 134-136.) This document indicated that Fred had a son named Tommy M. (C.T. 38, 40.) Through contacts made by the Administrator with the Hong Kong Economic and Trade Office, Tommy was found a few months later. (C.T. 38-39, 135.)

Tommy presented an Heirship Affidavit to the Administrator's Office claiming to be the son of Fred M. (C.T. 39, 41-45.) The Administrator petitioned to have Tommy recognized as the sole heir of Fred and thus, under the laws of succession, entitled to distribution of Fred's entire estate. (C.T. 39, 41-45.) A sister and numerous other nieces and nephews also presented proof of their relationships to Fred. (C.T. 39, 82-84, 98-99, 102-105.)

Fred's Travels and Relationship With Tommy

Fred was a musician and took the name of "Fred M." as his stage name. (C.T. 102.) In or about the late 1940's, Fred went to work for a cruise line. (C.T. 82, 98, 103.) Even though Fred took frequent trips

(C.T. 109), he maintained an apartment in Cactus, California. (C.T. 103.)

From approximately 1957 to 1962, while Fred worked for the cruise line, Fred purportedly lived with Au Yin Ling (hereafter "Ling") in Hong Kong. (C.T. 56, 79, 122.) Ling's brother believed the relationship to be monogamous during that time. (C.T. 122.) Ling worked in a restaurant but gave up this job after setting up household with and being supported by Fred. (C.T. 55-56.) It is undisputed that Fred and Ling were never married (C.T. 83, 99, 104, 109), or ever attempted to marry. (C.T. 74, 79, 109.) On August 6, 1959, while Ling and Fred were living together, Tommy was born. (C.T. 40, 56, 73, 77.) Tommy's birth certificate shows Ling as the mother and Fred as the father, although Fred's signature does not appear on the birth certificate. (C.T. 40.) Ling's family members claim that Fred acknowledged and treated Tommy as his son before Ling's family and the Hong Kong community, and that it was common knowledge among them that Fred was Tommy's father. (C.T. 56, 122.)

Fred took frequent trips away from Hong Kong during this time but sent money for Tommy. (C.T. 80, 109, 122.) Tommy has only vague memories of his relationship with Fred. (C.T. 78, 109.) When Tommy was two or three years old, Fred inexplicably left and never returned. (C.T. 56, 109, 122.) He never re-established contact with Tommy. (C.T. 56.) Ling and Tommy then moved to another apartment, and Tommy's cousin believes that even if he had tried, Fred probably would not have been able to find them. (C.T. 56.)

Tommy's Relationship With Tsang Luk

A year or two later, Ling married Tsang Luk (hereafter "Luk"). (C.T. 56, 79, 109, 122.) As his stepfather, Luk helped raise Tommy. (*Ibid.*) There was never any adoption. (C.T. 56, 79, 109.) However, Tommy's name was informally changed by Luk and he began using the name "Tsang Chiu Sing" on most official records, after his stepfather. (C.T. 77, 109, 123.) Ling said very little about Fred thereafter. (C.T. 109-110.) When Tommy would ask about Fred, Ling responded that it was very disrespectful to Luk to discuss Fred. (C.T. 110.) Tommy's mother died in 1976 while he was still a minor of age sixteen (C.T. 110, 114), and Tsang Luk died in 1978 when Tommy was eighteen. (C.T. 110, 115.)

When Tommy was seventeen or eighteen, he applied for a Hong Kong identification card under his old name of Tommy M. but was told that after having used his stepfather's name for so long it would

be difficult to change now without more information about Fred M. (C.T. 110, 114, 115.) At that time, Tommy made inquiries about finding Fred, but immediately abandoned his efforts. (C.T. 110.) Only upon being notified by the Public Administrator's Office about Fred's death did Tommy learn anything more about Fred. (*Ibid.*)

Fred's New York Family Relationships

In contrast to his estrangement from Tommy, Fred maintained a close, intimate relationship with his sister, Mary A. (hereafter "Mary"), throughout her life. (C.T. 103.) This relationship continued until the time Fred died at age eighty-four. (C.T. 38, 102.) Fred and Mary spoke frequently on the telephone throughout the year and exchanged correspondence approximately every three months. (C.T. 103.) Fred often sent gifts, packages, and cards to Mary and all the family members in Buffalo, New York, where Mary lived. (C.T. 98, 103.) All packages were sent from Cactus, California. (*Ibid.*) No calls or correspondence were ever received by Mary from Hong Kong (*ibid.*), including during the period between 1956 and 1962 when Fred purportedly lived in Hong Kong. (C.T. 83, 98.)

In the late 1950's, in 1964, and again in 1977, Fred visited family members in Buffalo, New York, for six to eight weeks. (C.T. 83, 99, 103.) The 1977 trip included visits to the immediate family and, at Fred's request, the distant cousins as well. (C.T. 83.) During that time, Fred had intimate conversations with his sister (C.T. 103), niece (C.T. 99), and nephew. (C.T. 83.) At no time did Fred ever mention any committed relationship with Ling or that he had a son. (C.T. 83, 99, 104.) When Mary teased Fred about not having any children to care for him in his old age, Fred again never mentioned having a son. (C.T. 104.) Fred also never spoke of any monetary obligation or support payment for any child. (C.T. 104.)

Fred was extremely generous with his entire family, and especially generous to the kids. (C.T. 83, 99.) New York family members believe that if Fred had any children of his own he would have never abandoned them. (*Ibid.*)

IV. ISSUES PRESENTED

1. Did substantial evidence support the trial court's judgment that Tommy failed to meet the test under Probate Code section 6453, subdivision (a) and Family Code section 7611 that he and Fred had a natural parent and child relationship?

2. Did substantial evidence support the trial court's judgment that, under Probate Code section 6453, subdivision (b) and Family Code section 7630, Tommy failed to establish that Fred openly held Tommy out as his own, and failed to meet public policy prohibiting the disruption of family relationships?

V. STANDARD OF REVIEW

Judgments of the trial court are presumed to be correct. (*Interinsurance Exchange of the Automobile Club of Southern California v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [37 Cal.Rptr.2d 126].)

In reviewing the judgment of the trial court in the case at bar, the proper standard of review is the substantial evidence standard. Here, in order to determine intestate succession, the trial court considered whether a parent and child relationship was established between Tommy and Fred. Foundational facts necessary to determine this relationship included the location of Fred's home, whether Fred received Tommy into his home, and whether Fred openly held Tommy out as his own natural child. (Prob. Code, § 6453; Fam. Code, § 7611, subd. (d).) When a question involves establishment of historical or physical facts, the substantial evidence standard applies. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139, 782 P.2d 278].)

The substantial evidence standard is also the proper standard when the question involves the application of experience with human affairs. (*20th Century Insurance Company v. Garamendi* (1994) 8 Cal.4th 216, 271 [32 Cal.Rptr.2d 807, 878 P.2d 566].) Here, the issue involves the determination of a parent and child relationship, the quintessential human affairs experience, and thus is a question of fact.

Under the substantial evidence standard, the trier of fact is in the better position to weigh evidence and that function is entitled to great deference from the appellate court. (See *People v. Louis* (1986) 42 Cal.3d 969, 984-987 [232 Cal.Rptr. 110, 728 P.2d 180].) Consequently, the appellate court's determination must be confined to a determination of whether there is any substantial evidence in the record that will support the factual conclusions of the trial court. (*Foreman & Clark Corporation v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr. 162, 479 P.2d 362].)

However, should appellant allege, and the appellate court find, that this appeal is either a question of law regarding the proper interpretation of a statute, or a mixed question of law and fact concerning the application of the rule to the facts, respondent will show that the trial

court properly selected and interpreted the appropriate rule of law, and correctly applied that rule to the facts of this case. (*Crocker National Bank v. City and County of San Francisco*, *supra*, 49 Cal.3d at p. 888.) Any error would thus be harmless and not result in a miscarriage of justice. (See *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 [232 Cal.Rptr. 528, 728 P.2d 1163].)

In the event the appellate court finds that the trial court relied on an incorrect theory of law, respondent herein presents the argument using a correct theory of the law applicable to the issue, thus allowing the Court to affirm a “right ruling for the wrong reason.” (See *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [112 Cal.Rptr. 786, 520 P.2d 10].)

VI. SUMMARY OF ARGUMENT

Where there is substantial evidence in the record that supports the conclusion reached by the trier of fact the judgment must be affirmed.

In the case at bar, there is substantial evidence to support the trial court’s conclusion that there was no natural parent and child relationship between Tommy and Fred and therefore Tommy is not entitled to distribution rights of Fred’s estate.

To establish a natural parent and child relationship, Fred must *both* receive Tommy into his home *and* hold him out as his natural child. Fred did not receive Tommy into his home. Fred’s home was in Cactus, California. He established his home in the late 1940’s and maintained it until his death in the late 1990’s. Although Fred had temporarily resided in Phoenix, Buffalo, and Hong Kong, the center of his domestic life was Cactus, where he always intended to, and always did, return from these temporary stays. Fred never received Tommy into his home in Cactus.

Fred also never held Tommy out as his own natural child. Fred exhibited indifferent and equivocal conduct toward Tommy by actively concealing the relationship from his closest, intimate family members. Fred only sporadically lived with Tommy for two or three years and thereafter never provided any support or sought any contact with Tommy. *Some* familial relationship does not suffice to establish a natural parent and child relationship, it must be substantial, and here it was not.

Even if it could be argued that Fred did have a natural parent and child relationship and a presumed natural father status, so did Tsang Luk. Luk married Tommy’s mother, Au Yin Ling, and lived with Tommy and Ling from the time Tommy was three or four years old

until Luk's death when Tommy was eighteen. This was the more traditional, nuclear family relationship that was more prolonged, intensive, and continuing. When there are competing rebuttable presumptions of paternity, the weightier considerations of policy and logic control. The substantial state interest in preserving the integrity of existing families dictates that the weightier consideration of policy and logic tip in favor of Luk as the presumed natural parent and not Fred.

Further, public policy discourages dubious paternity claims made solely for the purpose of inheritance. To safeguard the just and orderly disposition of a decedent's property, a higher standard is imposed on an illegitimate child claiming distribution rights. He must show by clear and convincing evidence that the decedent openly held him out as his own child. There is substantial evidence in the record to show that Tommy has not met this test by even a preponderance of the evidence, let alone by clear and convincing evidence. Tommy arrives nearly forty years out of Fred's past for the sole purpose of claiming an inheritance. Fred neither openly held Tommy out as his own nor even acknowledged him as his natural child. Fred actively concealed and willfully misrepresented his relationship with Tommy to his closest family members, wholly inconsistent with openly and publicly holding Tommy out as his own natural child.

The trial court correctly relied on Probate Code section 6453 and Family Code sections 7611 and 7630 in reaching its decision that Tommy was not entitled to distribution rights to Fred's estate.

VII. ARGUMENT

A. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S JUDGMENT THAT TOMMY FAILED TO MEET THE BURDEN UNDER PROBATE CODE SECTION 6453, SUBDIVISION (A) AND FAMILY CODE SECTION 7611 TO ESTABLISH THAT HE AND FRED HAD A NATURAL PARENT AND CHILD RELATIONSHIP.

1. *Probate Code Section 6453, Subdivision (a) and Family Code Section 7611 Are the Appropriate Rules of Law*

When a California resident dies without a will, intestate succession is governed by California Probate Code sections 6400-6455. Section 6402 specifies that where there is no surviving spouse, the intestate estate first passes to the issue of the decedent. The "issue" of decedent is defined as a "lineal descendent . . . with the relationship of parent and child . . ." (Prob. Code, § 50.)

On July 6, 1998, Fred M. died intestate in Cactus, California. (C.T. 6, 38.) There was no surviving spouse. (C.T. 7, 138.) Tommy, appellant, was born and lives in Hong Kong. (C.T. 40, 45.) He alleges to be the illegitimate son of Fred (C.T. 108-109) and the sole heir of Fred's estate. (C.T. 41-45.) The right of a foreign-born illegitimate child to inherit from a father who dies as a resident of California depends exclusively on California law. (*Estate of Lund* (1945) 26 Cal.2d 472, 477 [159 P.2d 643].)

For an illegitimate child to prove his intestate succession, that person must establish that "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (Prob. Code, § 6450, subd. (a).) "A natural parent and child relationship is established where the relationship is presumed and not rebutted pursuant to the Uniform Parentage Act" (Prob. Code, § 6453, subd. (a).)

The Uniform Parentage Act is contained within the Family Code and establishes a framework for paternity determinations. "It provides for conclusive and rebuttable presumptions of paternity." (*In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1114 [113 Cal.Rptr.2d 669].)

The conclusive presumption is defined in Family Code section 7540. It specifies that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." (Fam. Code, § 7540.) Exceptions are provided if blood tests are performed within two years of the child's birth. (Fam. Code, § 7541.) Here, it is uncontested that Tommy's mother and Fred were never married. (C.T. 109.) There is no record of any blood tests ever being conducted. (C.T. 104.) Therefore, Tommy is not entitled to a conclusive presumption.

Rebuttable presumptions of paternity are contained in Family Code section 7611. The presumptions available under subdivisions (a), (b), and (c) require either a marriage or attempted marriage. Neither of those elements is present in this case. (C.T. 74, 79, 109.) Consequently, none of those presumptions are available to Tommy. Family Code section 7611, subdivision (d), however, provides that a rebuttable presumption of paternity is available if a man "receives the child into his home and openly holds out the child as his natural child."

To establish the rebuttable presumption in Family Code section 7611, subdivision (d), Tommy must show by a preponderance of the evidence the two elements of reception into the father's home and open acknowledgement of paternity. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652 [56 Cal.Rptr.2d 524].) An opponent may challenge the existence of the foundational facts of the presumption. (*Id.* at

p. 1653.) “[T]he trier of fact in this situation is required to determine only whether the proponent of the presumption has established, by a preponderance of the evidence, the existence of the foundational facts” (*Ibid.*)

2. *The Preponderance of the Evidence Does Not Support the Foundational Fact That Fred Received Tommy Into His Home*

“The word home is a relative term, whose meaning must often necessarily depend on the intent” (*Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 713 [199 Cal.Rptr. 546].) It has been defined as meaning “where a person residing intends to remain.” (*Ibid.*) It is “his settled or fixed habitation of which he is the head.” (*Estate of Baird* (1924) 193 Cal. 225, 279 [223 P. 974].) In determining whether a decedent ever received his illegitimate child into his home, the court in *Estate of Baird* considered such factors as whether the “decedent ever gave to his relatives . . . [the address] as his home or place of residence” (*id.* at p. 285), and whether “any communication was ever sent to him at the abode[.]” (*Id.* at p. 286.) There are also other factors that can determine whether a dwelling is one’s home. The Court in *Nadler* defined a “home” as “the place where a person dwells and which is the center of his domestic, social and civil life.” (*Nadler*, at p. 714, quoting Rest.2d Conflict of Laws, § 12)

“This does not necessarily mean that a person must spend all of his time at a location to establish it as his home.” (*Nadler v. California Veterans Board*, *supra*, 152 Cal.App.3d at p. 715.) Other factors important in determining a home include the “time spent therein,” the “mental attitude toward the place,” and the “intention when absent to return to the place.” (Rest.2d Conflict of Laws, § 12, com. c., pp. 50-51.)

In *Spencer W.*, the court reviewed the foundational fact of what constituted the presumed father’s home. There, the presumed father shared an apartment with the mother and her child for two years. The evidence led the court to find that the presumed father “did not receive the child into *his* home, but instead the mother permitted [the father] to reside in *her* home.” (*Spencer W.*, *supra*, 48 Cal.App.4th at p. 1653, original italics.)

Applying this reasoning to the case at bar, although a number of facts are somewhat dissimilar from *Spencer W.*, Fred likewise did not accept Tommy into his home, but instead resided with him in the mother’s home. (C.T. 109.) Fred established his home in Cactus, California in the late 1940’s. (C.T. 103.) He died in Cactus, California some 50 years later. (C.T. 38.) This was his settled and fixed habita-

tion. During much of this time, Fred worked for a cruise line. (C.T. 82, 98, 103.) He traveled frequently, residing for a time in Phoenix in the early 1950's (C.T. 83), and visiting the Buffalo, New York family for weeks at a time in the late 1950's, mid 1960's, and again in the late 1970's. (C.T. 99, 103.) He also spent time in Hong Kong with Tommy's mother and Tommy between approximately 1957 and 1962 (C.T. 122), during which time he took frequent trips away from Hong Kong. (C.T. 109.) Throughout this entire time, Fred always returned to Cactus, California. Cactus was Fred's home base, the center of his domestic life.

Fred's sister, Mary, was very close to Fred (C.T. 98, 103) and communicated regularly by telephone throughout the year and exchanged correspondence approximately every three months. (C.T. 103.) Fred's New York family assert that all correspondence and calls came from Cactus, California, including during the period between 1959 and 1962 (C.T. 83, 98, 103) when Fred purportedly lived with Tommy. (C.T. 122.) No correspondence to the relatives originated from Hong Kong during that time and Fred's family never directed any there. (C.T. 83, 98, 103.) Fred never held out to any family member that Hong Kong was his home, even temporarily. (*Ibid.*) The time spent in Cactus overwhelms the two or three year intermittent time spent with Ling and Tommy in Hong Kong. On the other hand, the Hong Kong residence was the only home Ling and Tommy knew between 1959 and 1962. (C.T. 56, 109, 122.) This clearly was *her* home.

The preponderance of this evidence clearly shows that Fred's home was in Cactus, California, not Hong Kong. Fred never received Tommy into his home in Cactus as Tommy admits he has never visited the United States. (C.T. 73, 78.)

Also, there is no merit to the argument that Fred constructively received Tommy into his home. Under this theory, it could be argued that Fred was prevented from receiving Tommy into his home in Cactus and therefore Fred constructively received Tommy into his home by living with Ling in her home in Hong Kong. When Fred left Hong Kong, he urged Ling to leave with him, but she refused. (C.T. 56.) Also, Fred's job, his frequent travel, and Tommy's Hong Kong family or cultural ties could be argued as factors preventing Fred from bringing Tommy to Cactus. However, a man cannot constructively receive a child into his home within the meaning of the statute by merely doing "all that he could do under the circumstances to receive the child into his home." (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 825, 839 [4 Cal.Rptr.2d 615, 823 P.2d 1216].) He must "*physically* bring the child into his home." (*Adoption of Michael H.* (1995) 10 Cal.4th 1043,

1051 [43 Cal.Rptr.2d 445, 898 P.2d 891], original italics.) Fred did not physically bring Tommy into his home in Cactus.

Consequently, the foundational fact that Fred received Tommy into his home has not been established.

3. *The Preponderance of the Evidence Does Not Support the Foundational Fact That Fred Openly Held Tommy Out As His Natural Child*

Under Family Code section 7611, subdivision (d), a man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he “both receives the child into his home *and* openly holds out the child as his natural parent.” (*Michael H.*, *supra*, 10 Cal.4th at p. 1051, original italics.) It is undisputed that Fred neither legally married nor attempted to legally marry Ling. (C.T. 83, 99, 104, 109.) Therefore, Tommy must establish both of these elements. Respondent has already cited substantial evidence that Tommy does not meet the first element of reception into the home, and respondent also contends that there is substantial evidence that Tommy does not meet the second element either.

To meet this second element, a presumed father must “openly and publicly admit paternity.” (*Michael H.*, *supra*, 10 Cal.4th at p. 1051.) “[A] court should consider all factors relevant to that determination” (*In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1230-1231 [69 Cal.Rptr.2d 521].) “[T]he totality of the circumstances [should show] a consistent commitment to assume the burdens of parenthood.” (*In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1653.)

The court in *Spencer W.* examined the level of commitment to parenthood necessary to establish a rebuttable presumption of paternity. There, the court found that “equivocal” conduct and “indifference” toward asserting a parental relationship fails to establish presumed father status by a preponderance of the evidence. (*In re Spencer*, *supra*, 48 Cal.App.4th at pp. 1651, 1654.) Spencer’s father had lived with Spencer’s mother and Spencer for two years. He told friends, relatives and neighbors that he was Spencer’s dad. Spencer called him “daddy.” He took Spencer on outings, provided childcare, and disciplined Spencer. However, he took no legal action to establish paternity, denied paternity when there might have been some cost to him, and after leaving the family home provided no support and showed indifference toward establishing or maintaining a parental relationship. (*Id.* at p. 1650-1651.) The court said that they “do not believe that ‘some’ familial relationship suffices . . . presumed father

status is earned based on a commitment toward developing a 'substantial familial relationship to the child' (Id. at pp. 1654-1655.)

Indifference and equivocal conduct was also exhibited by Fred in the case at bar. As in *Spencer W.*, Fred also lived with the child, Tommy, for approximately two years (C.T. 109) and it was common knowledge in Ling's family and the Hong Kong community that Fred was Tommy's father. (C.T. 122.) Although Fred's name was on Tommy's birth certificate, as in *Spencer W.* there is no evidence that Fred ever took other important legal actions regarding Tommy such as establishing paternity (C.T. 74, 79), naming Tommy in a will (C.T. 38), or listing him as a beneficiary on Fred's Prudential securities account. (C.T. 129.) As in *Spencer W.*, Fred was equivocal in admitting paternity, as he told none of his family in the United States about Ling or Tommy. (C.T. 83, 99, 104.) It cannot be said that Fred "openly" or "publicly" held Tommy out as his own when Fred's own family had absolutely no knowledge of Tommy's existence.

Furthermore, after Fred left the family dwelling in Hong Kong, similar to *Spencer W.* there is no evidence that Fred showed any interest in re-contacting Tommy or providing financial support. (C.T. 109.) This represents clear evidence of indifference toward the parent and child relationship and a lack of substantial familial relationship to the child. As in *Spencer W.*, this demonstrated a lack of a preponderance of the evidence to establish a presumption of paternity status.

In contrast, unlike the present case, the court did find presumed parent status in *Comino v. Kelley* (1994) 25 Cal.App.4th 678 [30 Cal.Rptr. 2d 728], where there was care of the child and unequivocal acknowledgement to the entire family. In *Comino*, the father lived with the mother and child for two and one-half years, participated in the delivery of the baby, sent out birth announcements to his family, sent photos identifying the child as a family member, and shared caregiving responsibilities. (Id. at p. 730.) Despite not having a biological link to the child, the court found an unquestionable statutory presumption of paternity.

In the present case, however, Fred did not participate in Tommy's upbringing to the extent of the fathers in either *Comino*, where presumed paternity was found, or even *Spencer W.*, where presumed paternity was not found, as he was frequently away as part of his job on the cruise line. (C.T. 109.) Also, Fred did not notify his family of Tommy's birth or even admit to them Tommy's existence. (C.T. 83, 99, 104.) Fred had two sisters as well as numerous nieces and nephews yet admitted paternity to none of them. (*Ibid.*) This concealment stands in stark contrast to *Comino*, who established a presumption of

paternity, and who virtually advertised the parent and child relationship to his family, while here, Fred did nothing of the kind.

The totality of the circumstances demonstrates that Fred did not openly and publicly hold Tommy out as his own. Fred exhibited indifference or equivocal conduct toward Tommy: he did not tell his closest relatives or anyone else outside of the immediate Hong Kong community about Tommy; he was frequently gone from Hong Kong so did not fully participate in Tommy's upbringing; he did not include Tommy as a dependent or beneficiary on any securities accounts or estate documents; he provided no financial support after he left Hong Kong; and he made no effort to re-establish contact over the next forty years. Although Fred may have had "some" familial relationship, that does not suffice. There needs to be a substantial familial relationship by a preponderance of the evidence and that test has not been met.

When a claimant "has failed to show by a preponderance of the evidence the existence of either foundational element required for presumed father status . . . it [is] unnecessary . . . to rebut the presumption." (*In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1655.) Therefore, no further analysis by the trial court was required.

4. *The Weightier Considerations of Policy and Logic Favor Tsang Luk As Tommy's Presumed Natural Father*

Should the appellate court find a lack of substantial evidence to uphold the trial court's judgment that Fred was not a presumed natural father under Family Code section 7611, there is still substantial evidence that policy and logic would preclude Tommy from inheriting Fred's estate.

Considerations of policy and logic are weighed when there are multiple presumptions of paternity. Here, Luk also meets the test of a presumed natural father under Family Code section 7611, subdivision (d). Where a conflict of rebuttable presumptions exist, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls." (Fam. Code, § 7612, subd. (b).)

In the present case, there are conflicting rebuttable presumptions. Luk meets the criteria of Family Code section 7611, subdivision (d) to be declared Tommy's presumed natural father. He received Tommy into his home and openly held Tommy out as his natural child. Luk's circumstances are similar to *In re Kiana A.*, *supra*, 93 Cal.App.4th at p. 1109, where the court held such presumption was established. There, it was not clear whether the presumed natural father was the biological father. (*Id.* at p. 1112.) However, the presumed natural father began living with the child and mother after the child was about four

years of age, and he provided the necessities of life and acted as the child's parent. (*Id.* at p. 1116.) Although his name did not appear on the child's birth certificate (*id.* at p. 1113), and he took no formal legal actions to claim paternity (*id.* at p. 1116), he had "always been a part of [the child's] life." (*Id.* at p. 1112.) The court found this to qualify as a presumption of paternity.

Here, Luk married Ling and lived with Tommy and Ling starting from the time Tommy was three or four (C.T. 79), similar to *Kiana A.* Ling died when Tommy was still a minor of age sixteen (C.T. 56, 110, 123) and it is evident that Luk continued to live and care for Tommy until Luk's own death when Tommy was eighteen. (C.T. 56, 122-23.) There is no evidence that Luk had any other home during this time. Similar to *Kiana A.*, there was never any adoption or formal legal actions. (C.T. 56, 79.) However, Luk wanted Tommy to use Luk's name, so Luk and Ling exercised their parental authority over Tommy and informally changed Tommy's name on most official records to "Tsang Chiu Shing." (C.T. 109.) More significantly, Luk helped raise Tommy during this entire time. (C.T. 56, 122.) This relationship most closely "resembled the traditional nuclear family. There is, in this record, nothing to suggest that it was intended to be temporary." (*Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1218 [92 Cal.Rptr.2d 294].) The evidence is uncontroverted that Luk received Tommy into his home and openly held him out as his natural child. Thus, assuming *arguendo* Fred's presumption of paternity, both Luk and Fred have rebuttable presumptions of paternity.

"Although more than one individual may fulfill the criteria that give rise to a presumption of paternity, there can be only one presumed father." (*In re Kiana A.*, *supra*, 93 Cal.App.4th at p. 1115.) Family Code section 7612(b) resolves competing presumptions in favor of the one with the "weightier considerations of policy and logic."

Public policy holds that the enduring relationship of familial stability is a substantial state interest. (*Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 363 [216 Cal.Rptr. 748, 703 P.2d 88].) Further, preservation of the integrity of the family is an important social policy. (*Estate of Cornelious*, *supra*, 35 Cal.3d at p. 465; *Michelle W.*, at p. 362.) However, "there is no constitutionally protected interest in a parental relation where the basis for that relation is the genetic or biological connection created by impregnation alone." (*Michael M. v. Giovanna F.* (1992) 5 Cal.App.4th 1272, 1279 [7 Cal.Rptr.2d 460].) "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." (*Lehr v.*

Robertson (1983) 463 U.S. 248, 260 [103 S.Ct. 2985, 77 L.Ed.2d 614].)

When weighing public policy to resolve competing presumptions of paternity, as exists here, “the courts have repeatedly held . . . that the extant father-child relationship is to be preserved at the cost of the biological ties.” (*Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1116 [39 Cal.Rptr.2d 535].) In *Steven W.*, the court found that when there is an older child, over two years of age, “the familial relationship between the child and the man purporting to be the child’s father is considerably more palpable than the biological relationship of actual paternity.” (*Ibid.*) There, the court found that the presumption of paternity to be controlling was the one that had the “more prolonged, intensive and continuing relationship” with the child. (*Id.* at p. 1113.)

In the case at bar, Luk’s relationship with Tommy began when Tommy was an older child, about four years old (C.T. 123), and lasted approximately fourteen years, throughout Tommy’s remaining minority, until Luk’s death. Fred, however, was with Tommy only for the first two or three years of Tommy’s life until Fred voluntarily left Hong Kong. (C.T. 109.) There is no evidence in the record that Luk was ever away from Tommy during this time, but Fred was frequently away during the short time he was with Tommy. (C.T. 109.) Luk married Tommy’s mother and officially became Tommy’s stepfather (*ibid.*) but Fred took no legal actions whatsoever to officially bond with Tommy. (C.T. 74, 75, 79, 80.) Luk, Ling, and Tommy lived together in their home as a typical nuclear family while Fred maintained a separate permanent residence in Cactus, California during the time he lived with Tommy. (C.T. 83, 98.) Luk participated in child rearing (C.T. 123) but Fred was frequently away from Hong Kong and Tommy’s only memories of his relationship with Fred are vague. (C.T. 109.) Luk wanted Tommy to use his name so he informally changed Tommy’s name on most official records (C.T. 109, 123) while Fred actively concealed Tommy’s relationship to him from his closest relatives. (C.T. 83, 99, 104.) Luk’s relationship with Tommy was clearly more prolonged, intensive and continuing than Fred’s. The weightier consideration must go to Luk.

There is no other reason in policy or logic for Tommy to seek a declaration for paternity nearly forty years after the relationship with Fred ended. There is no longer any legal stigma of “illegitimacy” since the Uniform Parentage Act “has rendered such a consideration to be without any legal effect.” (*Michelle W.*, *supra*, 39 Cal.3d at p. 362, fn. 5.) Furthermore, a child’s interest in a legal determination of the biological father has been deemed to be “abstract” and not war-

ranting of “a judicial juggling of . . . family relationships.” (*Id.* at p. 363.) In the present case, Tommy’s financial interests are abstract when compared to the interests of existing familial stability, and a determination that Fred was Tommy’s presumed father would juggle the established family relationships of Fred’s close knit American family. (C.T. 103.)

The policy and logic of maintaining familial stability, preserving the integrity of the family, favoring the more prolonged, intensive and continuing relationship over biological paternity, and disfavoring abstract claims of paternity for strictly financial advantage, clearly tip in favor of Luk’s presumption of paternity as the more weightier, controlling presumption.

B. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT’S JUDGMENT THAT, UNDER PROBATE CODE SECTION 6453, SUBDIVISION (B) AND FAMILY CODE SECTION 7630, TOMMY FAILED TO ESTABLISH THAT FRED OPENLY HELD TOMMY OUT AS HIS OWN, AND FAILED TO MEET PUBLIC POLICY PROHIBITING THE DISRUPTION OF FAMILY RELATIONSHIPS

1. *Probate Code Section 6453, Subdivision (b)(2) Is the Appropriate Rule of Law and Is Not Satisfied by Clear and Convincing Evidence That Fred Openly Held Tommy Out As His Own*

Probate Code section 6453, subdivision (b)(2) and Family Code section 7630, subdivision (c) read together provide that to establish a natural parent and child relationship where a presumed father is deceased, “paternity is established by clear and convincing evidence that the father has openly held out the child out as his own.” (Prob. Code, § 6453, subd. (b)(2).) Respondent has already identified substantial evidence in the record supporting the trial court’s judgment that, in the context of the Family Code, Tommy cannot make this showing by even a preponderance of the evidence. It is especially evident that Tommy cannot show by clear and convincing evidence that Fred openly held him out as his own, as required by the Probate Code.

While there is no definition in the Probate Code, Family Code, or common law for the term “openly held out,” courts have provided some guidance in its usage. Of late the courts have used the concept of “acknowledgement” to help describe the term “openly held out.” (*In re Kiana A.*, *supra*, 93 Cal.App.4th at p. 1115; *In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1652.) Although the term “acknowledgement” is also not defined (*Estate of Griswold* (2001) 25 Cal.4th 904, 911 [108 Cal.Rptr.2d 165, 24 P.3d 1191]), the California Supreme

Court in the *Estate of Griswold* catalogued interpretations in California Appellate and Supreme Court cases to include within its meaning situations where a parent publicly confessed in a judicial proceeding (*ibid.*), repeatedly told family members that he was the child's father (*id.* at p. 913), signed the birth certificate (*id.* at pp. 914-915), and "shouted it from the house-tops." (*Id.* at p. 916.) Examples of when acknowledgement was not made was when the parent "actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations [and when the parent] affirmatively denied paternity to a half brother." (*Id.* at p. 918.)

Here, Fred did not meet any of the above criteria to establish that a natural parent and child relationship existed. There is no evidence of any judicial proceeding where paternity was admitted or where child support was ordered. (C.T. 74-75, 79-80, 104.) Fred never told family members that he had a son, even during intimate conversations about child rearing with close family relatives. (C.T. 104.) Although Fred's name appears on Tommy's birth certificate, Fred never signed it. (C.T. 112.) Tommy's family claims that Fred did not deny paternity to the Hong Kong community (C.T. 122), however Fred never openly admitted it either. Fred's active concealment from his close relatives could hardly be said to be "shouting it from the house-tops."

Also, Fred's conduct was similar to the criteria catalogued in *Griswold* showing no parent and child relationship. He actively concealed his paternity and relationship with Ling to his closest family relatives despite frequent contact with them, frequent visits, and long, intimate conversations with them. (C.T. 83, 99, 104.) When Fred's sister would tease him that it was too bad that he never had any children, he never responded or admitted his relationship to Tommy. (C.T. 104.) The court in *Griswold* stated that "a distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity." (*Estate of Griswold, supra*, 25 Cal.4th at p. 918.)

Here, it is clear that Fred willfully misrepresented and purposefully concealed his relationship to Tommy. This is far below the test of clear and convincing evidence that Fred affirmatively held Tommy out as his own.

2. *Public Policy Prohibits the Disruption of Familial Relationships*

Public policy and legislative intent also provide no support for Tommy's claim of inheritance of Fred's estate. In *Estate of Sanders*

(1992) 2 Cal.App.4th 462 [3 Cal.Rptr.2d 536], the court reviewed the legislative intent of the predecessor sections of the Probate Code governing intestate succession and determination of a natural parent and child relationship (recodified without substantive change). The court noted that the legislative intent was “to discourage dubious paternity claims from being made after the father’s death for the sole purpose of inheritance.” (*Id.* at p. 474.) The court recognized that this “has a harsh effect on children born out of wedlock. At least, in part, the statute invokes a sanction against the child for the laches of the mother in not securing a court decree of paternity during the lifetime of the father.” (*Id.* at p. 475.) No matter how harsh, however, the court noted that the legislature “has repeatedly reaffirmed this determination.” (*Ibid.*)

The court also noted with approval that the United States Supreme Court, in *Lalli v. Lalli* (1978) 439 U.S. 259 [99 S.Ct. 518, 58 L.Ed.2d 503], upheld an even more restrictive statute in New York regulating how an illegitimate child may inherit from his intestate father, because it provided for a “just and orderly disposition of a decedent’s property in cases involving paternity claims, which present difficult problems of proof when the father is no longer alive.” (*Estate of Sanders, supra*, 2 Cal.App.4th at p. 476, citing *Lalli v. Lalli, supra*, 439 U.S. at pp. 268-271.)

In the case at bar, Tommy admits that it has been nearly forty years since he has had any contact with Fred. (C.T. 109.) Tommy knew that Fred was somewhere in the United States, but admits to making no effort to find him. (C.T. 110.) Tommy’s mother never took any legal action to establish the paternity of Fred and in fact refused to even speak of him during the remainder of her life. (C.T. 109-110.) It was not until the Administrator of the estate found Tommy in Hong Kong that Tommy indicated any interest whatsoever in Fred. (C.T. 41-44.)

The trial court properly relied on *Cornelious* as a basis for finding that, in the present case, public policy would be offended if Tommy were found to be the son of Fred for estate purposes, as it would disrupt existing family relationships. In *Cornelious*, the child was reared and supported by the non-biological father, who was married to the mother at the time of the child’s birth, and who lived with the child and her mother until the child became emancipated. The child learned of her biological father at age fifteen and visited him occasionally for several years thereafter until his death. When the child was twenty-seven years old, she sought to establish the biological father as her natural father upon his death so that she could inherit his estate. (*Estate of Cornelious, supra*, 35 Cal.3d at pp. 464, 467.) The court found

that “the alleged natural father is dead so that there is no possibility of an ongoing relationship. All that [the child] can hope to gain is the right to inherit [the] estate, an interest of a lower order.” (*Ibid.*)

Similarly, in the present case, Tommy lived with Luk, who had married Tommy’s mother, during his minority from age three or four until Tommy reached age eighteen. (C.T. 56, 122-123.) Tommy brought his action to inherit Fred’s estate nearly forty years after last having seen Fred, solely for financial considerations similar to *Cornelious*. (C.T. 41.) Here, Tommy has nothing to gain from a presumption that Fred is his natural parent except to inherit his estate. Fred is dead. There was no relationship for the past forty years and there is no possibility of any ongoing relationship. The only gain can be financial, which is a lower order interest that would disrupt the substantial familial ties already established with Tommy’s Hong Kong family, and the substantial familial ties existing with Fred’s New York family.

Although the issue in *Cornelious* was the constitutionality of a conclusive presumption, which is distinguished from the case at bar which involves a rebuttable presumption, the reasoning in *Cornelious* is instructive in interpreting public policy.

There is no support in policy or legislative intent for Tommy’s claim of a natural parent and child relationship that would justify his inheritance of Fred’s estate.

3. *Probate Code Sections 6453, Subdivisions (b)(1) and (3) Were Not Applicable Since It Was Not Impossible for Fred to Hold Out Tommy As His Own, and No Court Order Has Been Entered During Fred’s Lifetime Declaring Paternity*

Probate Code section 6453, subdivision (b)(3) and Family Code section 7630, subdivision (c) read together provide that to establish a natural parent and child relationship where a presumed father is deceased, paternity can be established if “[i]t was impossible for the father to hold out the child as his own . . . by clear and convincing evidence.” (Prob. Code, § 6453, subd. (b)(3).) This alternative “simply requires proof that [Fred] was [Tommy’s] biological father; it does not require proof of any specific conduct . . .” (*Cheyanna M. v. A.C. Nielsen Company* (1998) 66 Cal.App.4th 855, 867 [78 Cal.Rptr.2d 335].)

Shortly after Fred left Hong Kong for the final time, Ling and Tommy moved to another apartment. (C.T. 56.) There is testimony in the record that even if he had tried, Fred probably would not have been able to find them. (*Ibid.*) It could be argued that this factor meets the impossibility criterion of Probate Code section 6453, subdivision

(b)(3) and that therefore Fred should be found to be Tommy's presumed natural father regardless of Fred's conduct.

However, this is not the type of situation this provision was intended to address. The Court in *Cheyanna M.* fully examined the legislative intent of this section of the Probate Code. The court found that this provision was meant to apply in such situations as when the alleged unmarried father was killed while the mother of the illegitimate child was still pregnant. (*Cheyanna M.*, *supra*, 66 Cal.App.4th at p. 875.) In such cases, prior law would "bar[] the child from establishing paternity." (*Id.* at p. 876.) The court found that the legislative history intended to cover situations where "there was not enough time to obtain a court order establishing paternity between the time of the child's birth and the father's death." (*Ibid.*)

In the instant case, there was ample time to obtain a court order as Fred died some forty years after Tommy's birth. Also, Fred had possession of Tommy's birth certificate. (C.T. 134.) Armed with only this document, the Administrator of the estate was able to locate Tommy within a few months (C.T. 135), despite Tommy's nearly forty years of separation from Fred. There is no clear and convincing evidence that Fred could not have done the same. Consequently, this alternative for establishing paternity is not available to Tommy.

The final alternative for establishing paternity is available under Probate Code section 6453, subdivision (b)(1) if a court order is entered during the father's lifetime declaring paternity, but no such order has been entered here. (C.T. 74, 79.)

VIII. CONCLUSION

The trial court correctly relied on Probate Code section 6453 and Family Code sections 7611 and 7630 as the appropriate rules of law for determining intestate succession of an illegitimate child inheriting through a presumed natural father.

There is substantial evidence in the record to support the trial court's judgment that Tommy M. was not entitled to distribution rights from the estate of Fred M. pursuant to these laws. The trial court correctly found that there was no natural parent and child relationship between Tommy and Fred. Although he lived intermittently with Tommy and his mother, Fred never married Tommy's mother and never received Tommy into his home. Furthermore, Fred did not openly and publicly hold Tommy out as his own, as Fred willfully concealed Tommy's existence to Fred's entire family.

The court also correctly held that public policy would be offended if Tommy were found to be the son of Fred. Familial stability is a substantial state interest. Tommy's relationship with his stepfather, Luk, was the more prolonged, intensive, and continuing relationship and Luk, not Fred, is the one presumed natural father. Public policy discourages dubious paternity claims, such as this one, made solely for the purpose of inheritance.

For the foregoing reasons, respondent prays that the trial court judgment be affirmed.

Dated February 19, 2002

Respectfully submitted,

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