



The Unknown Child: DNA Testing and Estate Planning and Trust Administration

Orange County Estate Planning Council

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A long
time ago
in a
galaxy far,
far away



Not so long ago, right here at home...

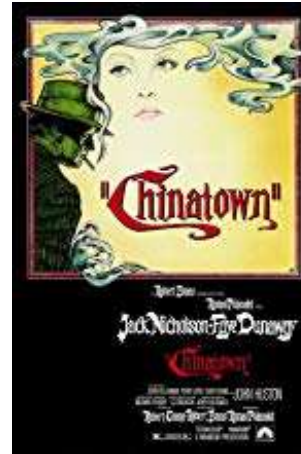




- **Story 1:** Son (a biologist) gives father 23andMe test as a gift. Turns out, father had son (Thomas) who had been adopted out at birth. Thomas had spent his life looking for his birth parents. The revelations led to the family shunning the father and the parents divorcing.
 - <https://www.vox.com/2014/9/9/5975653/with-genetic-testing-i-gave-my-parents-the-gift-of-divorce-23andme>
- **Story 2:** Woman's DNA test from 23andMe comes back showing Italian ancestry that woman knew nothing about. After speaking with relatives, Woman discovers that her birth father was her mother's senior prom date, not the man she had grown up knowing as her father.
 - <https://www.theguardian.com/lifeandstyle/2018/sep/18/your-fathers-not-your-father-when-dna-tests-reveal-more-than-you-bargained-for>
- **Story 3:** Parents had fertility problems prior to conceiving daughter. After father passed away from ALS, it was revealed that parents had used a sperm donor to father child and had agreed to keep it secret until the father had passed away. Daughter found her genetic father via 23andMe and Ancestry.com.
 - <https://www.fastcompany.com/3063447/she-found-her-biological-father-on-ancestry-and-23andme>
- **Story 4:** A man fathered a daughter when he was a teenager and gave her up for adoption. Daughter used 23andMe to try to locate her father. Father's niece had used the 23andMe services, which matched the daughter to the niece. Through that connection, daughter discovered father. Daughter had previously been told that her birth father was dead.
 - <https://www.latimes.com/socal/daily-pilot/news/tn-wknd-et-father-daughter-reunion-20180628-story.html>

DNA & Probate:

A brief history (of Probate Code §6453(b)(3))



- Prior to 1975, California (like many other jurisdictions) recognized *different* inheritance rights for legitimate and illegitimate children.
- *Estate of Ginochio* found that there were three reasons for this:
 - (1) No succession right; legislature decides.
 - (2) State interest in encouraging marriage and discouraging illegitimate children.
 - (3) Not unreasonable to presume decedent's desire was to disinherit where father did not acknowledge the child.

DNA & Probate: 1980's

- 8 short years later...



- California probate code § 6408 adopted
 - Recognized heirship regardless of marital status
- Three possible proofs:
 - (1) Presumed under Uniform Parentage Act
 - (2) Court order establishing paternity
 - (3) Clear and convincing evidence child was held out

Late 1980's & Early 1990's

- 1989, *Estate of Sanders*
 - GAL sought DNA testing from decedent's adult children
 - Trial court denied request
 - Appellate court affirmed (1992)
 - §6408 does not allow proof of paternity via DNA evidence



Impossibility...
the early 90's
evolution??

- §6408 incorporated into §6453(b)
 - Court order re paternity;
 - Clear and convincing evidence father held child out; or
- **Impossible** for the father to hold out the child AND paternity clearly/convincingly established



*DRIVING
MISS DAISY*

Impossibility: Defined



- Impossibility was intended to apply to the situation where a parent dies before the child is born. *Cheyanna*, 66 Cal.App.4th 855 (1998)
 - Automobile accident
 - Murder
- It was no longer determinative that no steps had been taken to hold the child out while the child was in utero.

Present Day...



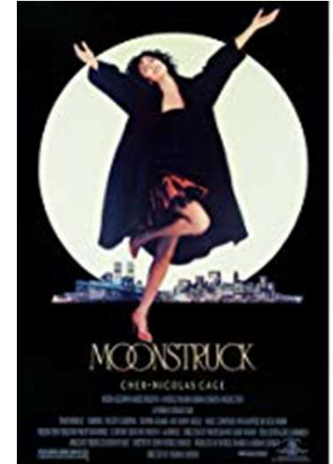
- § 6453(b) amended, effective 1/1/19
- Now includes the *possible* use of DNA evidence
 - Court order re paternity;
 - Clear and convincing evidence father held child out; or
 - **Impossible for the parent to hold out the child AND parentage clearly/convincingly established, including genetic DNA evidence ACQUIRED DURING the parent's lifetime**

§ 6453(b), now with DNA.

- Two prong test:
 - It was impossible for the parent to hold the child out

AND

- Parentage established by clear and convincing evidence
 - May include DNA evidence
 - As long as it was acquired during the parent's lifetime
- Original proposal allowed DNA to be collected at any time



The future.



References

- Cal. Probate Code §6453
- Cal. Probate Code §6408
- *Estate of Ginochio*, 43 Cal.App.3d 412 (1974)
- *Estate of Sanders*, 2 Cal.App.4th 462 (1992)
- *Cheyanna v. A.C. Nielson Co.*, 66 Cal.App.4th 855 (1988)
- “Who’s Whose: DNA, Parenthood and Inheritance,” Nancy Reinhardt and Mark A. Lester, *Valley Lawyer*, March 2019

Questions?



We protect the Davids
and the Goliaths.

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PROBATE LITIGATION

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