2d Civil No. B182232

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FOUAD SAID,

Petitioner and Appellant,

vs.

HENRIETTA JEGAN and FOUAD SAMIR SAID,

Respondents.

Appeal from the Superior Court of Los Angeles County
Honorable Wendy L. Kohn
Los Angeles Superior Court No. BF022743

APPELLANT'S OPENING BRIEF

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INTRODUCTION

> "The acid test of statutory interpretation based on principles of statutory construction is always whether the interpretation yields an absurd result." (*County of Orange v. FST Sand & Gravel, Inc.* (1998) 63 Cal.App.4th 353, 360.)

According to the trial court, the only way appellant Fouad Said (Fouad) can have standing to prove that he is *not* the father of his former wife's son is by first proving that he *is* the father.

This palpably absurd result is no exaggeration. Unfortunately, however, the governing statute is so poorly drafted that it led the trial court to erroneously dismiss Fouad's paternity action for lack of standing. Under a correct interpretation, Fouad has standing and the case must proceed.

These are the basic facts: A year and a half after Fouad divorced Henrietta Jegan (Henrietta), Henrietta bore a son, Fouad Samir Said (Samir). On Samir's birth certificate, Henrietta named Fouad as the father. Upon learning this fact years later, Fouad filed this action, seeking a DNA test and an adjudication that he is not Samir's father. Although Samir and Henrietta insist that Fouad is Samir's biological father and that he held Samir out as his son, and although Fouad strenuously denies both contentions, the trial court found that Fouad lacked standing to litigate the dispute and granted summary judgment against him.

Why? Although its analysis is sketchy, the trial court seems to have concluded that in order to have standing, Fouad must demonstrate that he is Samir's "presumed father"—i.e., that he received Samir into his home and openly held him out as his natural child. (Fam. Code, § 7611, subd. (d).) In other words, the trial court found, Fouad had to plead and prove that he is *presumed* to be Samir's legal father—a legal conclusion that, under recent

Supreme Court authority, may be irrebutable—in order to have standing to demonstrate that he is *not* Samir's father.

It is a testament to the poor drafting of the Uniform Parentage Act that the statute is superficially amenable to the trial court's interpretation. But the interpretation can't be right. If it were, anyone could name a total stranger—Bill Gates, for example, or another man with money worth pursuing—as the father on a birth certificate, and the man could never rid himself of the false connection. His very denial of fatherhood would bar the courthouse doors.

Fortunately, the statute is amenable to another interpretation that avoids the absurdity of the trial court's conclusion. Under that interpretation, a man who is *alleged* to be a child's father in circumstances like those here—whether or not he is a statutory "presumed" father, and regardless of who makes the allegation—has standing to prove that he is not the father. Under this interpretation of the statute, Fouad has standing to bring the present action.

Requiring a party to allege or prove that he *is* a child's father in order to have standing to prove that he is *not* the father fails "[t]he acid test of statutory interpretation." Accordingly, the Court should reject the trial court's interpretation of the statute, hold that Fouad has standing to bring the present action, and reverse the judgment against him.

STATEMENT OF FACTS

A. Samir Is Born A Year And A Half After Fouad And Henrietta Divorce.

Fouad and Henrietta were married on June 15, 1974, separated on November 17, 1975, and divorced on December 21, 1977. (CT 14 [¶¶ 3, 6-7], 26-28.) About 18 months later, on April 8, 1979, Henrietta gave birth to Samir. (CT 14-15 [¶ 11], 29.)

B. Fouad Files The Present Petition To Establish The Nonexistence Of A Parent-Child Relationship With Samir.

Learning that Samir's birth certificate identified him as Samir's father, Fouad filed this paternity action under Family Code section 7630, seeking a determination that he is not Samir's father. (CT 1-2.)[1] Henrietta and Samir (collectively, respondents) filed responses denying the allegations of the petition. (CT 3-6; see CT 7-10 [amended petition and responses].)

C. Fouad Seeks DNA Testing.

Fouad filed a motion for DNA testing pursuant to section 7551. (CT 11-30.)[2] The motion and supporting declaration stated that Samir's

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[1] All further undesignated citations are to the Family Code.

[2] That section provides: "In a civil action or proceeding in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to genetic tests. If a party refuses to submit to the tests, the court may resolve the question of paternity against that party or enforce its order if the rights of others and the interests of justice so require. A party's refusal to submit to the tests is admissible in evidence in any proceeding to

(continued...)

birth certificate identified Fouad as Samir's father and that Henrietta had claimed in sworn declarations that she and Fouad had sexual relations at about the time Samir was conceived. (CT 14-20.) However, Fouad declared that Samir is not, and cannot be, his son. (CT 14-15 [¶¶ 4, 12, 13, 14].) He stated that after their divorce in December 1977, he and Henrietta never cohabited, had sexual relations, shared a residence, or lived as a family. (CT 14-15 [¶¶ 7-8, 12, 14].) Further, Fouad stated that he never authorized Henrietta to put his name on Samir's birth certificate. (CT 15 [¶ 12].) Accordingly, Fouad sought DNA testing, an adjudication that he is not Samir's father, and an order removing his name from Samir's birth certificate. (CT 15-16 [¶ 16-17], 18.)

Respondents opposed the motion. Although they asserted that Fouad is Samir's biological father, they opposed any genetic testing and urged that Fouad lacked standing to bring the motion. (CT 101-126.)

The court initially granted Fouad's motion for DNA testing. (CT 259.) But then it granted respondents' motion for reconsideration and ordered the matter to be reheard concurrently with their motion for summary judgment, described below. (CT 260-274, 275-283, 286-292, 293-294.)

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[2] (...continued)
determine paternity. For the purposes of this chapter, 'genetic tests' means any genetic test that is generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services."

D. Respondents Successfully Move For Summary Judgment.

Respondents moved for summary judgment, urging that Fouad lacks standing to bring the present action under section 7630. (CT 31-44.) According to respondents, only a "presumed father"—"a man [who] . . . 'receives the child into his home and openly holds out the child as his natural child'" (CT 42, quoting § 7611, subd. (d))—may bring an action to declare the nonexistence of a father-child relationship. (CT 39-40, 42-43.) Although respondents conceded that there was a factual dispute as to whether Fouad is Samir's presumed father, they contended that for purposes of the motion, the court was required to adopt Fouad's version of events. (CT 36-37.)[3] Accordingly, they said, because Fouad's declaration in support of his motion for DNA testing established that Fouad is *not* Samir's presumed father, Fouad lacked standing as a matter of law. (CT 35-44.)

In opposing the motion, Fouad contended that he need not be Samir's presumed father to have standing to pursue the present action under section 7630, subdivisions (b) and (c). (CT 303-305.) He further demonstrated that, in any event, there is a factual dispute as to whether he is Samir's father: Respondents' declarations assert facts suggesting that he is Samir's biological and presumed father, while he claims he is neither. (CT 302-303, 308-320; see also CT 78-81, 85-88, 324-329, 330-337, 338-341, 342-344,

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[3] Respondents' version of Fouad's relationship with Samir appears in various declarations filed in response to Fouad's motion for a DNA test and in connection with motions for attorney's fees. In essence, they assert that Fouad is Samir's biological father and that he has always held himself out as Samir's father through both family-like behavior and financial support. (See CT 195-196, 221-227, 324-327.) Henrietta concluded: "How can Fouad, who has been [Samir's] father for 24 years now walk into court and claim he is not his father?" (CT 227 [¶ 21].) Samir asserted that "Fouad has been my father since my birth. He is the only father I have ever known." (CT 195 [¶ 3].)

345-348.) Accordingly, Fouad contended, the issue could not be resolved by summary judgment. (CT 297-300.) Finally, Fouad urged that respondents' contentions, which if proven would effectively establish presumed fatherhood, were themselves sufficient to confer standing. (CT 303:14-19.)

The trial court granted summary judgment for respondents, finding as follows:

> "Petitioner contends he is seeking relief under Family Code § 7630(b). The Court finds that Petitioner does not have standing to sue for the relief sought in that no triable issues of material fact exist as to whether it has ever been established that Petitioner Fouad Said is Respondent Fouad Samir Said's 'presumed father' pursuant to Family Code § 7611(d). Because there is no Family Code § 7611(d) presumption of fatherhood to rebut, Petitioner cannot establish a prima facie case under Family Code § 7630(b). Indeed, the Court finds that Petitioner has admitted that he is not Respondent Fouad Samir Said's presumed father pursuant to Family Code § 7611(d). [Citation.] Petitioner has submitted no admissible, competent evidence to dispute this fact. [¶] Accordingly Respondent's Motion for Summary Judgment is GRANTED, and the action is dismissed." (CT 405-406.)

E. Judgment And Appeal.

Judgment was entered on January 28, 2005 and notice of entry of judgment was served February 9, 2005. (CT 403-404; Supplemental CT 3-6.) Fouad filed this timely appeal on March 25, 2005. (CT 407-408.)

STANDARD OF REVIEW

A trial court may grant summary judgment only where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) This Court independently reviews the trial court's order granting summary judgment, without any deference to the trial court's determinations. (*Plotkin v. Sajahtera, Inc*. (2003) 106 Cal.App.4th 953, 959; *Lushbaugh v. Home Depot U.S.A., Inc*. (2001) 93 Cal.App.4th 1159, 1165.) This Court also independently reviews questions of statutory interpretation, which are questions of law. (*Librers v. Black* (2005) 129 Cal.App.4th 114, 124.)

OVERVIEW OF THE STATUTORY SCHEME

The sole issue raised by this appeal is whether Fouad has standing to bring the present action under Family Code section 7630, subdivisions (b) and (c). The trial court believed that although these sections permit both "presumed fathers" and "alleged fathers" to prove the *existence* of father-child relationships, they permit only "presumed fathers" to prove the *nonexistence* of those relationships. Thus, the trial court concluded, because Fouad alleged that he was not Samir's "presumed father," he lacked standing.

Section 7630 is a part of California's version of the Uniform Parentage Act (Cal-UPA). Because familiarity with the statutory scheme will aid an understanding of this issue, we begin with a brief overview of the act.

A. The Uniform Parentage Act.

The Cal-UPA dates back to California's 1975 adoption of the 1973 version of the Uniform Parentage Act promulgated by the National Conference of Commissioners on Uniform State Laws (UPA).[4] (Stats. 1975, ch. 1244, § 11.) In 1992, the Legislature repealed and then reenacted this adoption, without substantive change as far as the present case is concerned.[5]

The UPA's section 6, subdivisions (b) and (c), are substantively identical to section 7630, subdivisions (b) and (c). The UPA's section 4,

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[4] The original 1973 text is available at http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa7390.pdf.

[5] See Cal. Law Revision Com. com., 29G West's Ann. Fam. Code (2004 ed.) foll. §§ 7611, p. 233, 7630, p. 274.

subdivision (a)(4), is in relevant part identical to section 7611, subdivision (d).[6]

B. The Parent And Child Relationship.

The Cal-UPA "provides the framework by which California courts make paternity determinations." (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 937.) It defines the "[p]arent and child relationship" as the "legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." (§ 7601; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 116.) It "includes the mother and child relationship and the father and child relationship." (*Ibid*.)

C. "Presumed" And "Alleged" Fathers.

1. Presumed fathers.

Section 7611 describes categories of men who are "presumed" to have fathered children. The presumptions created by this section "affect[] the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence." (§ 7612, subd. (a); *In re Nicholas H.* (2002) 28 Cal.4th 56, 58.)

The presumption relevant to the present appeal is created by section 7611, subdivision (d) (section 7611(d)). It provides that a man is presumed to be the natural father of a child if he acts as the child's father—specifically, if he "receives the child into his home and openly holds out the child as his natural child."

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[6] The commentary accompanying the UPA does not shed any light on the issues presented here. (See fn. 4, *ante*.)

(See also *In re Zacharia D.* (1993) 6 Cal.4th 435, 449 ["a natural father may become a presumed father if '(h)e receives the child into his home and openly holds out the child as his natural child'"].)[7]

2. Alleged fathers.

A man is an "alleged father" if he "may be the father of a child, but [his] biological paternity has not been established, or, in the alternative, [he] has not achieved presumed father status." (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596, quoting *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15.)

[7] Other provisions of section 7611 create presumptions of paternity in contexts not applicable here. Under subdivisions (a)-(c), a man is "presumed to be the natural father of a child" if his marriage to the child's mother ended less than 300 days before the child's birth (§ 7611, subd. (a)), if he and the child's mother attempted to marry prior to the child's birth "by a marriage solemnized in apparent compliance with law" (§ 7611, subd. (b)), or, if they married after the child's birth, if the man is named on the child's birth certificate or is obligated to support the child (§ 7611, subd. (c)). Under subdivisions (e) and (f), a man is presumed to be the natural father of a child if he executes a voluntary declaration of paternity (§ 7611, subd. (e)), or, if a child is conceived after his death, he specified in writing that his genetic material was to be used for the posthumous conception of a child and the conditions of Probate Code section 249.5 are met (§ 7611, subd. (f); Prob. Code, § 249.5).

D. Actions To Determine Whether The Father-Child Relationship Exists.

Section 7630, which we discuss in detail in the Argument, describes who may bring an action to determine whether a father and child relationship exists. Two subdivisions, (b) and (c), are relevant here:[8]

- Section 7630, subdivision (b) (section 7630(b)) states that "[a]ny interested party" may bring action "for the purpose of determining the existence or nonexistence" of the parent-child relationship that is presumed under section 7611(d) (i.e., when a man has received the child into his home and openly held the child out as his natural child).[9]
- Section 7630, subdivision (c) (section 7630(c)) states that "a man alleged or alleging himself to be the father" may bring "[a]n action to determine the existence of the father and child relationship" where there is no presumed father.[10]

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[8] Subdivisions (a) and (d) address situations not present here—where there is a presumed father by virtue of the marriage or attempted marriage of the parties (subd. a) and where there is an adoption (subd. (d)).

[9] In full, subdivision (b) reads: "Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d) or (f) of Section 7611."

[10] In full: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 or whose presumed father is deceased may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor."

E. Genetic Testing To Determine Paternity; Order For Issuance Of A New Birth Certificate.

In any civil action "in which paternity is a relevant fact," the court may order "the mother, child, and alleged father to submit to genetic tests." (§ 7551.) "If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly." (§ 7554, subd. (a).)

If the judgment or order in a paternity action is at variance with the child's birth certificate, the court "shall" order that a new birth certificate be issued. (§ 7639.)

ARGUMENT

Fouad bases his paternity action on sections 7630(b) and 7630(c). He has standing under those sections because *either* (1) he is alleged to be Samir's presumed father, so he has standing because he is a party "interested" in the adjudication of Samir's paternity (§ 7630(b)), *or* (2) Samir has no presumed father, so Fouad has standing as "a man alleged . . . to be [Samir's] father" (§ 7630(c)).

The trial court's conclusion that Fouad lacks standing was apparently based on its belief—supported by a single, sparsely-reasoned decision (*Robert J. v. Leslie M.* (1997) 51 Cal.App.4th 1642)—that in order to have standing to *disprove* the existence of a father and child relationship, a man must first allege that he *is* a child's presumed father. We will demonstrate that this interpretation of the statute is not compelled by its plain language and, more importantly, it permits an absurd result: A man must allege that he has acted as a child's biological father in order to have standing to prove that he is *not* the child's biological father.

If standing under section 7630 is limited as the trial court believed it to be, a man may never be able to disprove paternity. If he alleges that he is *not* a child's presumed father, he lacks standing to bring a nonpaternity action. If he alleges that he *is* a child's presumed father, he makes a judicial admission of paternity that he may have no legal right to rebut. Common sense and the statute's plain language make clear that this cannot be what the Legislature intended. Rather, as we now show, the statute grants standing to bring a "nonpaternity" action like the present one to a man who *someone else alleges* is a "presumed father" or, if there is no presumed father, to any man who is alleged to be the father.

I.

SECTION 7630(b) CONFERS STANDING BECAUSE FOUAD IS AN "INTERESTED PARTY" WHO IS ALLEGED TO BE SAMIR'S PRESUMED FATHER.

Under section 7630(b), "*[a]ny interested party* may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d) or (f) of Section 7611." (Emphasis added.)

Despite language that expressly confers standing on "any interested party," the trial court focused on the statute's reference to a "presumed" father and child relationship. It held that Fouad lacked standing under this section because "no triable issues of material fact exist as to whether it has ever been established that [Fouad] is [Samir's] 'presumed father' pursuant to Family Code § 7611(d)." (CT 405-406.) In other words, the trial court believed that in order to have standing, Fouad had to "establish[]" that he is Samir's presumed father.

The trial court erred. As we now demonstrate, the statute imposes no such requirement. Rather, Fouad only had to show (1) that he is an "interested party" and (2) that he has alleged a controversy over whether he is Samir's presumed father. Because Fouad meets these statutory criteria, he has standing.

A. Standing Generally.

Standing is "a 'party's right to make a legal claim or seek judicial enforcement.'" (*Librers v. Black, supra*, 129 Cal.App.4th at p. 124, quoting Black's Law Dict. (8th ed. 2004) p. 1442, col. 1.) It is a "threshold issue" that must be determined before a court can reach the merits of a claim. (*Ibid*.; see *Berclain America Latina v. Baan Co*. (1999) 74 Cal.App.4th 401, 404 [identifying standing as "threshold issue"]; *People v. Thompson* (1988) 205 Cal.App.3d 1503, 1507 [same].) Accordingly, standing ordinarily does not involve a merits determination—the issue is only whether a party has *the right to obtain* a merits determination. When standing and merits issues are based on common facts, the court cannot deprive a party of the right to a merits determination by a prejudging the merits under the rubric of standing. (See *People v. Superior Court (Plascencia)* (2002) 103 Cal.App.4th 409, 428 [where because of factual overlap "the question of standing and the merits of the forfeiture proceeding collapse into one and the same inquiry," the trial could not summarily resolve standing].)

"Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted." (*Librers v. Black, supra*, 129 Cal.App.4th at p. 124, internal quotation marks omitted.) Accordingly, Fouad's standing to bring the present action must be determined with specific reference to subdivisions (b) and (c) of section 7630.

B. Fouad Is An "Interested Party."

The trial court believed that in order to bring an action under section 7630(b), Fouad had to establish that he is Samir's presumed father. But that is not what the statute's plain language says. Rather, it permits "any interested party" to bring an action. (§7630(b), emphasis added.)

The statute does not define "interested party," but courts have held that the term includes persons with "an obvious interest in a legal determination" of a parent-child relationship. (*In re Karen C.* (2002) 101 Cal.App.4th 932, 935-936.) A man need not be a presumed father to be an "interested party" with respect to a child's parentage. Rather, the term embraces "a broad class of men, including 'alleged' fathers." (*Librers v. Black, supra,* 129 Cal.App.4th at p. 125, emphasis added, quoting *Miller v. Miller* (1998) 64 Cal.App.4th 111, 116-117, internal quotation marks omitted.) The *Librers* court noted that in contrast to section 7630(b), which grants standing to "any interested party," subdivision (a) expressly limits standing to "presumed fathers." Accordingly, the court concluded, the Legislature could not have intended to limit standing under section 7630(b) to presumed fathers. (*Librers v. Black*, *supra*, 129 Cal.App.4th at p. 125, quoting *Miller v. Miller*, *supra,* 64 Cal.App.4th at pp. 116-117; see also *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 938, fn. 5 [noting contrast between restrictive language of section 7630, subdivision (a), and more expansive language of subdivision (b)].)[11]

Fouad is indisputably "alleged" to be Samir's father. It would be enough to achieve this status that his name appears on Samir's birth

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[11] Indeed, the statute's broad language reaches well beyond potential fathers. For example, another type of "interested party" would be an intestate heir whose inheritance rights are threatened by the deceased biological father's presumed father-child relationship with someone else.

certificate. (E.g., *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1270 [plaintiff was child's alleged father because the mother "stipulat(ed) to (the alleged father's) paternity in numerous documents, including Matthew's birth certificate"].) In addition, however, Henrietta has alleged that Fouad is Samir's biological father in numerous documents, including declarations filed under penalty of perjury. (E.g., CT 327:28, 330:11-13.)

Moreover, Fouad unquestionably is "interested" in the adjudication of Samir's paternity: He contends that Henrietta has falsely accused him of fathering a child with her during his marriage to another woman; that Samir's birth certificate falsely names him as Samir's father; and that he cannot complete his estate planning under Swiss law without excluding Samir as his biological child because under Swiss law one cannot disinherit a biological child. (CT 249:18-22, 297:9-12.) Given Fouad's substantial wealth—respondents contend he is a "billionaire" (e.g., CT 35:4, 39:10, 334:11-25)—resolution of this issue is critical.

Fouad thus is an "interested party," and he has standing within the plain meaning of the statute.

C. Fouad Demonstrated A Controversy Over His Status As A Presumed Father.

In addition to demonstrating that he is an "interested party," Fouad also had to plead that there is a controversy within the terms of the statute—i.e., over the "existence or nonexistence of the father and child relationship presumed under [section 7611(d)]." He did so by demonstrating that respondents claim that he is Samir's presumed father, while he claims he is not. (CT 298, 303, 314-317.)

The trial court believed that he had to do more, however. According to the trial court, in order to bring himself within the statute's language,

Fouad had to show that it was already "established" that he was Samir's presumed father. (CT 405-406.) In doing so, the court failed to recognize that the presumption of natural fatherhood depends on the resolution of a *factual* question that is hotly disputed in this case—whether the man has, *in fact*, "receive[d] the child into his home and openly [held] out the child as his natural child." (§ 7611(d).) The court's ruling effectively inserts this language into the statute:

> "Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship <u>that has been found to be</u> presumed under subdivision (d) or (f) of Section 7611." (§ 7630(b), additional language underlined.)

But the statute's plain language is at least equally susceptible to another interpretation:

> "Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship <u>alleged to be</u> presumed under subdivision (d) or (f) of Section 7611." (§ 7630(b), additional language underlined.)

Two Courts of Appeal have adopted the latter interpretation of the statute where a man sought to prove that he *was* a child's father. The reasoning of these cases shows that the same rule should apply when a man seeks to prove that he is *not* a child's father. We will first show how these cases establish that allegations of presumed-father status are sufficient in themselves to confer standing in a petition to *prove* fatherhood. We will then demonstrate why the same result must follow in a petition to *disprove* fatherhood, when *someone other than the alleged father* makes the presumed-father allegations.

1. An allegation of presumed fatherhood is sufficient to demonstrate standing to establish paternity.

In order to have standing to seek to *prove* a parental relationship—i.e., to establish that "the father and child relationship" *does* exist—a man need not obtain an adjudication that he has, in fact, received the child into his home and held the child out as his natural child. Rather, the "relevant inquiry" for purposes of standing is whether he "can *allege* facts that bring him within the statutory language of that subdivision." (*Librers v. Black*, *supra*, 129 Cal.App.4th at p. 125, emphasis added.) A man meets this standard when he alleges facts that, if proven, would show that he is a child's presumed father—regardless of whether he ultimately prevails on that issue.

For example, in *Librers v. Black*, *supra*, 129 Cal.App.4th 114, the plaintiff, Joseph, filed a petition to establish a parental relationship with a child born to his former live-in girlfriend, Maria. The trial court dismissed the action for lack of standing, apparently because it concluded that Joseph had not established that he was the child's presumed father. (*Id*. at pp. 121, 126.) The Court of Appeal reversed and remanded for a determination on the merits. It explained that the relevant inquiry for determining standing is whether a plaintiff "can *allege facts* that bring him within the statutory language of" section 7611, subdivision (d). (*Id*. at p. 125, emphasis added.) Accordingly, because "[t]he *allegations* of" Joseph's petition brought him within that section, Joseph "was entitled at least to a determination on the merits." (*Id*. at pp. 125-126, emphasis added.) According to the court:

> "[The trial court's findings] imply that the court denied Joseph standing *for the very reason* that it had *already determined* that Joseph was not a presumed father. If that is what the court in fact did, it was putting the cart before the horse in violation of section 7630, subdivision (b) which plainly confers standing

> on 'any interested person' in order to *determine* whether the presumption of paternity created by section 7611, subdivision (d) does or does not exist." (*Id*. at p. 126, emphasis in original.)

The court reached a similar result in *Craig L. v. Sandy S*. (2004) 125 Cal.App.4th 36. There, Sandy S. conceived a child, Jeffrey, with Craig L. during her marriage to Brian A. (*Id*. at p. 44.) For the first year of his life, Jeffrey lived with Sandy and Brian but regularly visited Craig and his wife. (*Ibid*.) Thereafter, Sandy and Brian attempted to discontinue Craig's visitation, and Craig filed a petition to establish his paternity. (*Ibid*.) On Brian's motion, the trial court quashed the petition, concluding that Craig lacked standing. (*Id*. at p. 45.)

The Court of Appeal reversed. It concluded that "[t]he level of contact Craig *has alleged* during the first year of Jeffrey's life is sufficient to establish paternity under section 7611, subdivision (d)." (*Id*. at p. 45, emphasis added; see also *id*. at p. 47 ["Craig *alleges facts* which would give rise to the presumption provided by section 7611, subdivision (d)," emphasis added].) Thus, although the trial court "made no factual findings about the nature of Craig's relationship with Jeffrey" (*id*. at p. 53), "Craig had standing to initiate paternity proceedings under section 7630, subdivision (b)" (*id*. at pp. 45-46).

Craig thus met the threshold requirement of standing. His *allegations* that he met the requirements of section 7611(d)—i.e., that he had "receive[d] the child into his home and openly [held] out the child as his natural child" (§ 7611(d))— were sufficient to require the trial court proceed to a determination of "whether Craig *is in fact* a presumed father under section 7611, subdivision (d)." (*Id*. at p. 53, emphasis added.)

These cases reach the correct result, consistent with the general law of standing. As we have noted, standing is a threshold issue that must be determined *before* a court can reach the merits of a claim. (See Section I.A., *ante*.) If section 7630(b) referred to an *already-adjudicated* presumed father status rather than *alleged* presumed father status, it would require the court to "put[] the cart before the horse" (*Librers v. Black*, *supra*, 129 Cal.App.4th at p. 126)—the court would have to find that a man is, in fact, a child's "presumed father" in order to decide whether the man has standing to seek that very determination. Where the facts are in dispute, this could require a trial on the questions of whether a man has "receive[d] the child into his home" and "[held] out the child as his natural child" as a predicate to determining whether the petitioner can pursue the action *at all*. Nothing in the statutory language suggests that the Legislature intended such a backwards result.

2. An allegation of presumed fatherhood by anyone should also be sufficient for standing to *disprove* paternity.

We have shown that an *allegation* of presumed fatherhood—rather than *proof* of presumed fatherhood—is sufficient to establish standing under section 7630(b). However, because in the cases discussed above the man sought to prove that he *was* the child's father, the courts did not consider what a man must allege to have standing to prove that he is *not* the father.

Respondents argued in the trial court that regardless of whether a man seeks to prove or disprove paternity, in order to have standing he must plead and prove that he is the child's presumed father. (CT 35-44.) Accordingly, they concluded, Fouad "has no standing to bring this action because, by his own admission, he does not meet the definition of presumed father . . . ." (CT 40.) But while the statute appears to require an allegation of presumed

fatherhood *by someone*, nothing in the statute suggests that the allegation must be *by the alleged or presumed father*. Rather, the statute's neutral language—an action "for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d)" (§ 7630(b))—easily embraces the interpretation that an allegation by *any person* that the man has "receive[d] the child into his home and openly [held] out the child as his natural child" (§ 7611(d)) is sufficient to establish standing.

This broader interpretation of the statute avoids a "heads I win, tails you lose" effect that could otherwise flow from the allegation of presumed fatherhood. Under our Supreme Court's recent decision in *Elisa B. v. Superior Court*, *supra*, 37 Cal.4th 108, presumed parent status is not merely an evidentiary presumption—it is a substantive conclusion that can saddle a presumed parent with parental responsibilities notwithstanding incontestable proof that the presumed parent "cannot be the [child's] parent." (*Id.* at p. 122 [woman who received children into her home and held them out as her own could not evade parental responsibilities even though she could not possibly be their biological mother].)[12] The result is that if one interprets the statute as respondents suggest, some men will never be able to disprove

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[12] See also 37 Cal.4th at p. 125 ("We conclude, therefore, that Elisa [the former partner of the biological mother] is a presumed mother of the twins under section 7611, subdivision (d), because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins' parent with proof that she is not the children's biological mother . . . ."); *In re Nicholas H.*, *supra*, 28 Cal.4th at pp. 58-59 (presumption of paternity could not be rebutted by evidence that the presumed father was not the child's natural father because doing so would produce the "harsh result" of leaving the child fatherless); *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1359 ("[W]e conclude this is clearly *not* an appropriate case to find respondent rebutted the presumption . . . . ," emphasis in original).

paternity: If a man alleges that he is *not* a child's presumed father, he lacks standing to bring a paternity action; but if, in order to achieve standing, he alleges that he *is* the child's presumed father, he makes a judicial admission of paternity that he may have no legal right to rebut, not even with conclusive biological evidence.

"The acid test of statutory interpretation based on principles of statutory construction is always whether the interpretation yields an absurd result." (*County of Orange v. FST Sand & Gravel, Inc.*, *supra*, 63 Cal.App.4th at p. 360; see also *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1009 [statutes must be interpreted to achieve "reasonable and practical results" and to avoid "absurd or adverse consequences"].) Requiring a party to allege—or even prove—that he *is* a child's father in order to have standing to prove that he is *not* the child's father is precisely the kind of absurd result that courts must avoid. Fortunately, here it is easy to avoid the result: One need only interpret section 7630(b) to provide that an allegation of presumed fatherhood *by any party* is sufficient to establish standing.

3. Respondents' allegations are sufficient to confer standing for Fouad to seek to establish that he is not Samir's father.

If standing under section 7630(b) requires only an allegation by *any* person of facts showing that a man is a child's presumed father, respondents' allegations easily suffice.

Although Fouad has alleged that he is not Samir's biological or presumed father, respondents contend that he is both. Samir declared that he spent summer vacations with Fouad throughout his childhood, including on Fouad's yacht, and that Fouad "has acted as *and held himself out to be* my father for my entire life[.]" (CT 195-196, emphasis added.) Henrietta made the same claim: According to her declarations, Fouad regularly spent time

with her and Samir, both on vacations and at home, and he "has been [Samir's] father for 24 years." (CT 221-222, 227.) Accordingly, respondents' allegations are sufficient to create standing under section 7630(b).

II.

SECTION 7630(c) AUTHORIZES THE PRESENT ACTION BECAUSE SAMIR HAS NO PRESUMED FATHER AND FOUAD IS "A MAN ALLEGED . . . TO BE" SAMIR'S FATHER.

Section 7630(c) provides in relevant part:

> "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 . . . may be brought by . . . a man alleged or alleging himself to be the father . . . ."[13]

Fouad's allegations bring him within the plain language of this section: Fouad alleges that he is "alleged . . . to be" Samir's father and that Samir has no presumed father.[14]

Although Fouad's nonpaternity claim thus fits easily within the plain language of section 7630(c), respondents contended in the trial court, and the

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[13] For the full text, see fn. 10, *ante*.

[14] As the prior section demonstrates, Fouad's standing depends on his *allegations*, not on what may ultimately be proven. In any event, it is undisputed that Fouad is Samir's alleged father and that no one besides Fouad is alleged to be Samir's presumed father. Thus, if Fouad is determined not to be Samir's presumed father, he has standing under section 7630(c); if he is determined to be Samir's presumed father, he has standing under section 7630(b).

trial court apparently agreed, that this section permits only actions intended to *prove* paternity, not to *disprove* it. The basis for this contention is that the section refers to actions to determine "*the existence of* the father and child relationship," in contrast to section 7630(b)'s description—actions to determine "*the existence or nonexistence of* the father and child relationship." (Both emphases added.)

That analysis, supported by just a few lines in a single decision (*Robert J. v. Leslie M.*, *supra*, 51 Cal.App.4th 1642, discussed in § II.D., *post*), is inconsistent with the plain language of the statute and generates an absurd result. The Court should reject it and hold that Fouad has standing.

A. The Plain Meaning Of "To Determine The Existence Of The Father And Child Relationship" Is To Determine *Whether Or Not* The Relationship Exists—Not Just That It *Does* Exist.

Courts must "accord words their usual, ordinary, and common sense meaning based on the language the Legislature used and the evident purpose for which the statute was adopted." (*In re Rojas* (1979) 23 Cal.3d 152, 155.) The key language here is the phrase "to determine the existence of" a condition—here, the father and child relationship. The "usual, ordinary, and common sense meaning" of this phrase is to determine *whether* the condition exists—not, as the trial court apparently believed, to determine only that it *does* exist. This is by far the most common usage of the phrase by both the courts and the Legislature. (E.g., *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 732, 736-737 [affirming County Retirement Board's *denial* of retirement benefits notwithstanding Gov. Code § 31723, which permitted the Board to "require such proof . . . as it deems necessary . . . *to determine the existence of* the disability," emphasis added]; *Conservatorship of Irvine* (1995)

40 Cal.App.4th 1334, 1341-1343 [probate court had authority to *invalidate* a trust amendment pursuant to pursuant to Probate Code section 17200, which permits trustee to petition the court "*to determine the existence of* trusts"; under that section, "a probate court has jurisdiction over both inter vivos and testamentary trusts to entertain petitions for instructions regarding the validity (and thus, *invalidity*) of trust agreements or amendments," emphasis added].)

Applying this meaning here compels the interpretation that actions "to determine the existence of the father and child relationship" include actions that seek to determine *whether* such a relationship exists—not merely those seeking a declaration that the relationship *does, in fact*, exist. Regardless of whether the petitioner in a paternity case asserts that he is or is not the child's father, the trial court's function is the same—to decide *whether* there is a father and child relationship and to enter judgment accordingly. That is what "determine" means: to "settle or resolve (a dispute, question, etc.) by an authoritative or conclusive decision . . . to conclude or ascertain . . . ." (Random House Webster's College Dictionary (1992) p. 368, col. 2.) Accordingly, the plain language of section 7630(c) suggests no reason for distinguishing between an action seeking a declaration that a father and child relationship *does* exist and an action seeking a declaration that the relationship *does not* exist.

B. Under Well-Established Principles Of Statutory Construction, "Existence" Need Not Have The Same Meaning In Section 7630(c) That It Has In Section 7630(b).

Although it is tempting to assume, as respondents argued in the trial court, that "existence" in section 7630(c) must have a different meaning from "existence or nonexistence" in section 7630(b), that isn't the law. To the contrary, "'There is no rule of law that necessarily requires the same meaning to be given to the same word used in different places in the same statute.'" (*People v. Hernandez* (1981) 30 Cal.3d 462, 468.)

In *People v. Hernandez*, *supra*, 30 Cal.3d 462, the Court interpreted a section of the Penal Code that twice referred to offenses "not listed in subdivision (c) of Section 667.5." The Court concluded that although the quoted language appeared in consecutive sentences, the Legislature did not intend a uniform meaning. It explained:

> "It is presumed, in the absence of anything in the statute to the contrary, that a repeated phrase or word in a statute is used in the same sense throughout. [Citations.] *The rule is, however, quite flexible*: 'There is no rule of law that necessarily requires the same meaning to be given to the same word used in different places in the same statute.' [Citations.] 'When the occasion demands it, the same word may have different meanings to effectuate the intention of the act in which the word appears.' [Citations.]" (*Id*. at p. 468, emphasis added; see also *Service Employees Internat. Union v. City of Redwood City* (1995) 32 Cal.App.4th 53, 59 [same].)

The court reached a similar result in *Anderson v. City of Los Angeles* (1973) 30 Cal.App.3d 219. There, one section of a city charter defined "'Service'" as "'only those periods during which a member received

compensation from the city as an employee.'" (*Id*. at p. 223.) Another section of the same charter permitted a city employee who became disabled to seek early retirement by filing an application "'at any time within, but not exceeding, six months after the discontinuance of service of such employee . . . .'" (*Ibid*.) The City contended that "service" had a consistent meaning throughout the charter and, thus, that the plaintiff's retirement application—filed more than six months after the plaintiff ceased receiving City compensation—was untimely. (*Id*. at pp. 222-223.) The Court of Appeal disagreed and affirmed the trial court's holding that discontinuance of service did not occur until the conclusion of the employee's appeal of his discharge. (*Id*. at p. 225.) It explained that importing the definition of "service" from the prior section into the latter would be inconsistent with "the nature and purpose of" the latter section. (*Ibid*.) Thus, the court concluded, "service" had a more expansive definition in the second section than it did in the first. (*Ibid*.)

These principles apply here. If "existence" excludes "nonexistence" in section 7630(c), then an alleged father like Fouad has no statutory means of seeking a declaration of nonpaternity. Nothing in the legislative history of section 7630 suggests any reason, much less intent, to bar alleged fathers from bringing nonpaternity suits. Moreover, as we now show, respondents' interpretation of the statute ignores other statutory language and compels an absurd result.

C. Interpreting "Existence" To Exclude "Nonexistence" Renders Other Statutory Language Surplusage And Creates An Absurd Result.

The context of "existence" in section 7630(c) lends further support to an interpretation that the section permits any action that seeks to determine *whether* a father and child relationship exists—not merely actions that seek to establish that the relationship does, in fact, exist.

First, section 7630 provides that an action may be brought by "a man alleged or alleging himself to be the father." (Emphasis added.) If the section permitted only actions seeking to *prove* paternity, any man bringing such an action would necessarily be "a man . . . alleging himself to be the father." In that case, the remaining statutory language—"a man *alleged . . . to be* the father"—would be entirely superfluous, violating the interpretive canon that requires courts to "avoid any construction that would create such surplusage." (E.g., *Navellier v. Sletten* (2002) 29 Cal.4th 82, 95.) Only if section 7630(c) permits actions to both *prove* and *disprove* paternal relationships could there be a petitioner who is "alleged . . . to be the father" but who does not also "allege himself to be" the father.

This is just common sense. The passive-voice phrase "alleged . . . to be the father" not only denotes an allegation by anyone, but also connotes a denial by the alleged father. Such a person would never bring an action to *prove* paternity. The only action he would conceivably bring would be to *disprove* it.

Second, if section 7630(c) is limited to "existence" actions—only actions to *prove* paternity—it would create an arbitrary and absurd distinction between alleged fathers who know the identity of the child's biological father and those who do not. An alleged father who knew the identity of the child's biological father could disprove his own paternity

by bringing an action to prove the other man's paternity, since by proving the other man's paternity he would necessarily disprove his own—"there can be only one biological father." (*In re Nicholas H., supra*, 28 Cal.4th at p. 63.) In contrast, an alleged father who did *not* know the identity of the child's biological father could not pursue this kind of action, and he would be barred from bringing an action for the sole purpose of disproving his own paternity.

Once again, we return to the "acid test" of statutory interpretation: "whether the interpretation yields an absurd result." (*County of Orange v. FST Sand & Gravel, Inc.*, *supra*, 63 Cal.App.4th at p. 360.) Respondents' interpretation of section 7630(c) leads to precisely the kind of absurdity courts must avoid. An alleged father's ability to bring a nonpaternity action should not depend on whether he knows who the child's biological father is—his possession of the knowledge would likely be a matter of random chance. "The Legislature can hardly have intended such random results" (*People v. Anderson* (2002) 28 Cal.4th 767, 775), particularly where, as here, the result fulfills no identifiable legislative purpose revealed by either the statute or the legislative history.

Moreover, such an interpretation may raise equal protection problems because there is no rational basis for distinguishing between alleged fathers who can identify a child's biological father and those who cannot. (See, e.g., *Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 239, citing 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 599, p. 51 ["The equal protection clause guarantees equality under the same conditions and among persons similarly situated"].) The Court of Appeal sought to avoid a similarly irrational classification in *Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, in which a child's mother urged that a man who was indisputably the child's presumed father—he had received the child into his home and held him out as his own daughter—lacked standing to pursue an

action to establish paternity because another man was also a presumed father under section 7611(a). The court found it "highly anomalous" that such a man would lack standing as a petitioner but could nevertheless assert his claim as a respondent if the mother or the other presumed father were to bring an action to *disprove* his paternity:

> "Not only would that make the man's ability to enforce a constitutionally protected relationship depend on a fortuity (the wife's or husband's inclination to seek a declaration of his nonpaternity), but would appear to treat equals (similarly situated unwed fathers) unequally in an irrational way. Without deciding that question, of course, it is still safe to say that statutes should not be interpreted in a way that gratuitously reaches out to create at least the *appearance* of irrationality." (*Id*. at p. 1220, fn. 18, emphasis in original.)

Respondents' interpretation of section 7630(c) does just that—it "gratuitously reaches out to create at least the appearance of irrationality." (*Ibid*., emphasis omitted.) It must be rejected.

D. Respondents' Sole Authority Does Not Compel A Different Result.

Respondents' sole support in the trial court for their contention that section 7630(c) is limited to actions that seek to prove paternity is *Robert J. v. Leslie M., supra*, 51 Cal.App.4th 1642. According to respondents, this decision "unequivocally shut the door on 'nonpaternity' actions by persons not meeting the statutory definition of a presumed father." (CT 42; see also CT 40, 42-43.) While that indeed is *Robert J.*'s holding, the case was wrongly decided. This Court need not and should not follow the decision. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 ["(T)here is no 'horizontal stare decisis' within the Court of Appeal"].)

Robert J. sought a judicial declaration that he was not the father of Ryan, the child of a woman with whom Robert had had a brief sexual relationship. The Court of Appeal held that Robert lacked standing to bring a nonpaternity action because "only a presumed father, as defined by section 7611, may seek a declaration of nonpaternity" and Robert "is not, and has never been, a presumed father of Ryan." (51 Cal.App.4th at p. 1646.) Here is the entirety of the court's analysis of the standing issue:

> "In allowing appellant to maintain the action, the trial court did not follow the requirements of section 7630. The statute allows a broad class of men, including 'alleged' fathers, to bring an action to establish paternity. (§ 7630, subds. (b) and (c).) However, it expressly limits standing to presumed fathers in actions to establish nonpaternity. (§ 7630, subd. (a)(2).)" (*Ibid*.)[15]

Although *Robert J.* never fully explains this conclusion, it seems to be based on the language difference we discussed above—that is, that section 7630(b) describes "existence or nonexistence" actions, while section 7630(c) describes only "existence" actions. We have demonstrated not only that this distinction does not compel different meanings for the two phrases, but also that attributing different meanings has impermissible consequences—it treats statutory language as surplusage and generates absurd results. *Robert J.* therefore requires no deference.

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[15] Curiously, the court's authority for this proposition is section 7630, subdivision (a)(2), which describes who may bring an action to declare the nonexistence of the father and child relationship presumed under section 7611, subdivisions (a), (b), or (c)—i.e., presumed father relationships that arise out of the marriage or attempted marriage of the parties. Because it was undisputed that the parties in *Robert J.* "were never married but had a brief sexual relationship" (*id.* at p. 1644), this section was facially inapplicable.

CONCLUSION

Fouad has standing to bring the present action under section 7630(b) because he is an "interested party" who is alleged to be Samir's presumed father; or, alternatively, he has standing under section 7630(c) because Samir has no presumed father and Fouad is a man "alleged . . . to be [Samir's] father." Accordingly, the trial court erred in granting respondents' motion for summary judgment.

The Court should reverse the judgment and direct the action to proceed.

Dated: December 12, 2005

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14(c), I certify that this **APPELLANT'S OPENING BRIEF** contains 8,429 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: December 12, 2005

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Dana Gardner Adelstein