

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

TIAN WEI LIU aka DAVID LIU,

Plaintiff and Appellant,

v.

CHANG H. YU, et al., as Trustees, etc.

Defendants and Respondents.

A133286

(San Francisco County  
Super. Ct. No. PTR11294475)

**I. INTRODUCTION**

Appellant Liu appeals from an order of the San Francisco Probate Court denying his amended petition to determine the validity of a trust established by Frank and Teresa Liu Yu, his allegedly adoptive parents, and for an order declaring him to be an omitted child heir under Probate Code section 21620 (section 21620).

**II. FACTUAL AND PROCEDURAL BACKGROUND**

Frank and Teresa Yu (hereafter the Yus) were residents of Oakland, Alameda County. Although they had no natural children, they did have one nephew, namely appellant Liu, who they arranged to bring over to the Bay Area from China in 1980, with the apparent intention of adopting him as their son.

Appellant was born in 1967 in Tientsin, China, to a couple which included Teresa's brother, who died in an earthquake in that province in 1976. Thereafter, appellant's natural mother wrote to the childless Yus "indicating her willingness to relinquish [appellant] to them for the purpose of immigration and adoption due to financial hardship."

Although the Yus were then both in their 60's, they apparently wanted to bring their nephew to their home in California and adopt him as their son. Accordingly, in early 1980 they applied for permission to the United States Immigration and Naturalization Service (INS) and the California Department of Social Services (DSS) for approval of a plan to bring their 13-year-old nephew, appellant, to the United States.

This process included: (1) a February 1980 "home study" conducted by an "Adoptions Worker" at the Berkeley office of the DSS; (2) a February 8, 1980, report thereof forwarded by that person to the federal INS recommending "[c]onditional approval" of the immigration of appellant; (3) a trip by the Yus to China in April 1980 to see their nephew; (4) the May 1980 acquisition of various documents relating to appellant's age and location in China from the Chinese Consulate General in San Francisco; (5) a June 2, 1980, filing with the DSS of a form pertaining to the admission to the U.S. of an orphan beneficiary; (6) a July 9, 1980, filing with the INS of another DSS document recommending admission of appellant and his placement, for later adoption, with the Yus; (7) a July 15, 1980, filing with the United States Department of Justice of a "Petition to Classify Orphan as an Immediate Relative" (wherein the Yus stated that appellant was "coming to the U.S. for adoption"), a petition which was approved by the INS in September 1980; and, finally (8) an October 31, 1980, letter from the Yus to the U.S. Embassy in Beijing offering further evidence of their financial ability to provide for the support of appellant.

Apparently, appellant came to California from China and took up residence with the Yus in Oakland in December 1980.

On April 27, 1993, the Yus executed a 33-page "Frank Shou Yu and Teresa Liu Yu Revocable Trust." Before their deaths, they amended this trust document four times, the first time being in 1995 and the last in 2005.

Neither the original trust document nor any of the amendments thereto mentioned appellant much less left any property or money to him. Rather, the Yus directed that their property and monies should be distributed to a wide variety of funds, charitable

institutions, and also to other relatives, namely several nieces and brothers of one of them.

Teresa Yu passed away in December 2009 and her husband, Frank Yu, passed away “on date uncertain” in 2010.

On April 5, 2011,<sup>1</sup> appellant filed an initial petition to determine the validity of the Yus’ trust document. An amended petition, the operative document for purposes of this litigation, was filed on June 9. The latter filing alleged that appellant had been adopted by the Yus “in early 1980 in the Republic of China,” and that he was “the sole heir to the decedents’ estate and residuary beneficiary to the Yus’ trust estate.” It also alleged that the “subject trust was premised on the decedents’ belief that they did not have any living or deceased children,” and concluded with a prayer for relief that the trust be “declared null and voided” and “any assets distributed be returned to” appellant.

Appellant attached a copy of the original trust instrument and its four amendments as the first exhibit to his petition, and also various of the 1980 documents (cited above) from both the INS, DSS, the Chinese Consulate General, etc., as the second exhibit thereto. The final exhibits consisted of a notification to appellant by the respondent trustees of his right to receive a copy of the trust instrument, and his request for such.

Respondents, the trustees of the trust, filed two in pro per responses and oppositions to the amended petition, the first on May 12 and the second on June 23.

In their May 12 opposition to appellant’s petition, the trustees (one of which was apparently related to one of the Yus) represented that (1) the Yus had a “difficult and contentious relationship” with appellant, had thus sent him back to China in 1981, (2) the Yus were then persuaded to allow appellant to return to California in 1983, but that (3) their relationship again “became strained” and he moved out of their house when he turned 18, i.e., around 1985.

In their second, more formally prepared opposition of June 23, they stated that the Yus had made “no mistake in omitting [appellant] as a beneficiary” and had done so

---

<sup>1</sup> Unless otherwise stated, all further dates noted are in 2011.

because he was “not getting along with them in the United States and so he was sent back to China,” and that although “trustors had started a petition for adoption in the United States in 1980” they “decided to abandon the adoption for reasons that are detailed in papers retrieved from trustors’ adoption attorney’s office. Respondents are informed the adoption petition filed in 1980 was dismissed in 1982. . . . [¶] . . . Trustors’ relationship with petitioner did not rise to the level where trustors would have named him as a beneficiary of their assets.”

Attached to the June 23 opposition by respondent trustees was a May 3, 1982, “Report of the State Department of Social Services” in Alameda County Superior Court Action No. 15820. That report, prepared by another “Adoptions Worker,” recited that, since his December 1980 arrival in the U.S., “the minor has lived with [the Yus] in their two bedroom apartment in Oakland’s Chinatown.” Since then, the report continued, the DSS had made “four supervisory visits to the home to review the adjustment of the family.” That adjustment, the report concluded, had been problematic: “[H]is behavior [in school] has been less than satisfactory. At times, he has spoken out of turn or played around in class. He received an ‘F’ from one teacher because of this occasional disruptive behavior.”

More importantly, the report stated that the Yus themselves were having problems with appellant, who “tends to be very stubborn, preferring to do everything his own way. This has been hard for them to handle . . . . [T]he boy, being a typical teenager, often chooses to disregard their parental advice. . . . [The Yus] find his ‘bad attitude’ rather discomforting. . . . [¶] [They] feel no animosity toward the child and are fully willing to support and raise him until he is an adult. However, they feel that by keeping the relationship of aunt and uncle to nephew, they would be better able to control him.” (Id., p. 2.) As a result, the DSS report concluded, the Yus “have decided to withdraw their petition for adoption.” The May 3, 1982, report concluded with the recommendation that the “independent adoption petition of [the Yus] be dismissed.”

On June 27, appellant filed a memorandum of points and authorities in support of his petition to declare the trust void and him to be the lawful, albeit omitted, heir. In it,

his counsel argued that (1) appellant had, prior to coming to California, been legally adopted in China<sup>2</sup> and (2) albeit under the “seminal case” on the application of section 21620, *Estate of Mowry* (2003) 107 Cal.App.4th 338 (*Mowry*), “a child born or adopted before the execution of the will/trust by its parents must show that the parents did not know of or did not believe that they had the child,” that statute was inapplicable here because, when the Yus dismissed their petition to adopt appellant in 1982, they did not know that he had previously been adopted by them in China.

The matter was argued to the probate court (Commissioner Sue Kaplan) on July 11. Some of that argument will be noted hereafter.

On July 22, the probate court issued an order denying appellant’s petition, stating that the court found “that the trust, as amended, is valid, and [appellant] is not an omitted heir.”

On September 19, appellant filed a timely notice of appeal.

### **III. DISCUSSION**

#### *A. Our Standards of Review.*

This case involves both issues of fact, i.e., was there sufficient evidence before the probate court that appellant had in fact been legally adopted in China in 1980, and questions of law, e.g., the proper interpretation and application of the “omitted child” statute, i.e., section 21620 and whether the application of that statute articulated in *Mowry, supra*, 107 Cal.App.4th 338, was both correct and pertinent here. Thus, our standard of review is a combination of substantial evidence and de novo review. (See, e.g., *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-801 and *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271.)

#### *B. There was no Plausible Evidence that Appellant had been Adopted in China.*

The probate court’s order denying appellant’s petition clearly rests on the implicit premise that appellant had not been legally adopted by the Yus in China in 1980. That

---

<sup>2</sup> This pleading did not, however, cite to anything in the court record so indicating.

issue was argued in the pleadings filed by the parties below (albeit with no citation to either the record or any legal authority by either).

Both the evidence and the law regarding the recognition in California of foreign adoptions supports this conclusion.

First, regarding the evidence presented to the probate court, the record includes five documents citing, either directly or indirectly, the Yus' representations that (1) they had no children as of the date of their initial trust, i.e., 1993, or (2) they intended to adopt appellant as and when he got to California. Thus, their 1993 trust document specifically states: "The settlors have no living or deceased children."

More significantly, the documents derived from the INS and DSS, the federal and state agencies involved with the immigration of the then teenaged appellant, suggested that it was either likely or certain that appellant would be adopted by the Yus when he arrived in California. Thus, on February 8, 1980, the first DSS "Adoptions Worker" assigned to this matter wrote the federal INS to advise them that the Yus had left the U.S. for a trip to South East Asia, including an April 1980 visit to China. It continued: "According to Mr. and Mrs. Yu, they have plans to adopt the child legally while they are in China, although it is not clear to us whether they are able to accomplish this. Otherwise, they understand they will have to provide us with the necessary legal documents before we can certify that they have met the pre-adoption requirement of the State of California."

The reasons for that Adoption Worker's concern about the Yus ability to effect a legal adoption in China was set out in the attached "Home Study" prepared by that worker in February 1980. That document stated that, in 1979, the worker had attempted to determine, via a Hong Kong-based social services agency, whether such an adoption was possible. That agency got "no reply at all" from the Chinese authorities: "As far as they know, there is no legal adoption in China, [and thus] the International Social Service of Hong Kong was not encouraging at all in regard to Mr. and Mrs. Yu's adoption plan." As a result, the Adoption Worker and his or her superior had determined to keep working on the "home study" with the understanding that the Yus would provide the DSS with

“the mother’s consent to the adoption in writing.” That portion of the “Home Study” concluded by stating: “Mr. and Mrs. Yu also agree that once the child is here that they will complete a legal adoption in California.”

Several months later, i.e., in July 1980, the same DSS Adoption Worker sent a completed form to the INS the subject of which was “Home Approved for Placement of Foreign-Born Child.” The form recited the key facts regarding the Yus, and then stated in a heading for a paragraph to follow: “Child to be adopted in California.” The text that followed that heading “favorably recommend[ed] the adoptive placement of the child named by the petitioners” (in, apparently, an INS form) and concluded by stating that “supervision will be provided, including replacement if necessary, until the child has been legally adopted.”

A few days later, i.e., on July 15, 1980, the INS sent a one-page “Petition to Classify Orphan As An Immediate Relative” to the Secretary of State (presumably of the United States). That document stated that the petition was filed by a “Married Petitioner,” i.e., Ms. Yu, and had been approved for an orphan “coming to U.S. for adoption [¶] Preadoption requirements have been met.” This petition was stamped “Approved” by the San Francisco office of the INS on September 23, 1980.

There were only two items of evidence in the record before the probate court on the other side of the coin, i.e., evidence that appellant might have been adopted in China before his immigration to the U.S. The first was an undated “Certificate” issued by “The Notary office of Tientsin, The People’s Republic of China” certifying the names of appellant’s natural father and mother and identifying the Yus (by their Chinese names) as his “adoptive father” and “adoptive mother.” The other was the October 31, 1980, letter sent by the Yus to the U.S. Embassy in Beijing forwarding two letters from California banks regarding their “ability for the support” of appellant; the first sentence of that letter reads: “We, Frank Shou and Teresa Liu Yu, have the pleasure to furnish sponsorship [sic] of our adopted son Tian-Wei Liu.”

In oral argument before the probate court, appellant’s trial counsel effectively conceded that there was some problem with the evidence regarding the Yus’ alleged

adoption of appellant in China. The following dialogue, including a notable 180 degree shift in position by that counsel, then took place:

“THE COURT: Mr. Lam, are you taking the position that Mr. Yu and Mrs. Yu didn’t realize that there was an adoption in the People’s Republic of China?”

“MR. LAM: That’s correct. That’s why they filed the petition in 1982 I think.

“THE COURT: But isn’t there indication on that petition that was filed in the United States that indicates that there was not an adoption in China?”

“MR. LAM: No that’s not true.

“THE COURT: All right, Tell me why not.

“MR. LAM: Well, the petition stated—well, let me just back up a little bit. The Family Code, I think, allow a petition to be done here in the United States or completed in a foreign country. And when—when the Yus brought Mr. Liu to the United States as the adopted child, they already adopted him back in 1980 in the Republic of China. That was completed. So, there was no need for them to re-adopt him in the United States. And that’s why the petition was dismissed.

“THE COURT: If there was no need to adopt him in the United States, then wouldn’t the papers that were filed in the United States indicate that he had been adopted in China?”

“MR. LAM: Well—

“THE COURT: Because they don’t say that.

“MR. LAM: Well that’s precisely what I was saying, Your Honor, that the Yus thought they never adopted Mr. Liu in Republic of China, that’s why they have that mistaken belief when they set up the trust and when they filed the petition here.”<sup>3</sup>

---

<sup>3</sup> Appellant argues that, in the course of the same argument, “the Trustee himself admitted that the adoption went through in China and was valid.” This is clearly incorrect. In the passage cited by appellant, the trustee, Ms. Chang Yu, appearing in pro per, was specifically referencing the *Mowry* case, in which there was a valid adoption by the testator of a daughter named “Toni,” but referred to by the trustee in oral argument to the probate court as “Tony.” The trustee was, manifestly, not making any concession

In light of the evidence before the probate court, it clearly did not err in concluding that there had been no effective—or perhaps even attempted—adoption of appellant by the Yus in China. We thus reject appellant’s argument that there was a “valid adoption that took place in China.”<sup>4</sup>

Additionally, and as pointed out by respondents in their briefs to us, in California inter-country adoptions are specifically subject to the specific processes mandated by Family Code sections 8900 et seq. As of 1994, Family Code section 8900 (which continued in effect former Civil Code section 226.10 “without substantive change”) provided: “Intercountry adoption services described in this chapter shall be exclusively provided by private adoption agencies licensed by the department specifically to provide these services.” (Former Fam. Code, § 8900; see also Cal. Law Revision Com. com., 29G West’s Ann. Fam. Code foll. § 8900, p. 688.) Further, Family Code section 8919 regulates adoptions finalized in foreign countries and provides, in subdivision (a) that: “Each state resident who adopts a child through an intercountry adoption that is finalized in a foreign country shall readopt the child in this state if it is required by the Department of Homeland Security.”<sup>5</sup>

Nowhere in his filings in the probate court or in his briefs to us does appellant address these provisions or discuss whether or not they were complied with regarding his alleged adoption.

In his briefs to us, appellant argues that there is another reason why this court should rule that appellant should be accorded adoptive status, i.e., that the doctrine of

---

about the adoption at issue here, as she went on to state that the Yus “did dismiss the adoption in the United States.”

<sup>4</sup> This conclusion makes it unnecessary for us to deal with authority such as *Estate of O’Dea* (1973) 29 Cal.App.3d 759, 773, relied on by appellant. In that case, the Third District held that the “status of adoption . . . as established by a foreign jurisdiction must be recognized in California under principles of either comity or full faith and credit.”

<sup>5</sup> The former version of this statute referenced the INS instead of the Department of Homeland Security (see 1993 version of Fam. Code, § 8919, subd. (a)). This section continues former Civil Code section 226.69 in effect “without substantive change.” (Cal. Law Revision Com. com., 29G West’s Ann. Fam. Code foll. § 8919, p. 709.)

“equitable adoption” applies here. This argument fails for several reasons. First of all, it was never asserted in any way in the probate court and is, therefore, clearly forfeited. (See, e.g., *Dacey v. Taraday* (2011) 196 Cal.App.4th 962, 978-979; *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 400, 407-408, 413.)

The argument also fails on its merits. In support of the “equitable adoption” theory, appellant relies principally on authority such as *Estate of Ford* (2004) 32 Cal.4th 160 (*Ford*) and *Estate of Furia* (2002) 103 Cal.App.4th 1 (*Furia*). These cases do not, however, aid appellant in the slightest; they make clear that that doctrine applies only to intestate successions, which was clearly not the situation here. (See *Ford, supra*, 32 Cal.4th at pp. 172-173 and *Furia, supra*, 103 Cal.App.4th at p. 5; see also *Estate of Wilson* (1980) 111 Cal.App.3d 242, 247.) As our colleagues in Division Five of this district held in *Furia*: “[E]quity does not grant the equitably adopted child a right to inherit, and does not change her status as an heir. [Citation.] Instead, it supports the fiction that an adoption has transpired and grants the equitable child a portion of the *intestate decedent’s estate* as the measure of the consideration due for fulfilling her duties as a daughter. [Citation.] That grant emanates from a contractual right, not a right of inheritance under the Probate Code.” (*Furia, supra*, 103 Cal.App.4th at p. 5, emphasis added.)

### C. *The Probate Court Ruled Correctly Regarding the “Omitted Heir” Statute.*

Finally, appellant argues that (1) the probate court erred in ruling, under section 21620, that appellant was “not an omitted heir” and (2) the interpretation of that statute by the *Mowry* court is not applicable here.

Section 21620, the governing statute regarding omitted heirs, provides: “Except as provided in Section 21621, if a decedent fails to provide in a testamentary instrument for a child of decedent born or adopted after the execution of all of the decedent’s testamentary instruments, the omitted child shall receive a share in the decedent’s estate equal in value to that which the child would have received if the decedent had died without having executed any testamentary instrument.” (§ 21620.)

Section 21621 provides: “A child shall not receive a share of the estate under Section 21620 if any of the following is established:

“(a) The decedent’s failure to provide for the child in the decedent’s testamentary instruments was intentional and that intention appears from the testamentary instruments.

“(b) The decedent had one or more children and devised or otherwise directed the disposition of substantially all the estate to the other parent of the omitted child.

“(c) The decedent provided for the child by transfer outside of the estate passing by the decedent’s testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.” (Prob. Code, § 21621 (section 21621).)

In *Mowry*, an authority clearly applicable here,<sup>6</sup> our colleagues in the Second District rejected an effort by the appellant, an adopted daughter of the decedent, to be declared an omitted heir under section 21620, notwithstanding the fact that her adoptive father had, in a handwritten will, bequeathed all his property to his brother. The appellant argued that the exception to the rule of section 21620 provided by section 21621, subdivision (a), applied here, i.e., “that the only way subdivision (a) of section 21621 makes sense in the context of section 21620 is to apply section 21620 to children, like her, who are living at the time the testator executes his will. We cannot agree.” (*Mowry*, *supra*, 107 Cal.App.4th at p. 341.)

The *Mowry* court then explained why it did not agree with the argument of the appellant there—and, clearly, also the appellant here—by explaining the currently applicable law thusly: “Because section 21621 follows directly after section 21620, and is referenced within that section, it is manifest that section 21621 is meant to apply only when section 21620 is applicable: where a child is born or adopted after execution of the testamentary document. [¶] Appellant’s reliance on the long-standing policy of this state to protect omitted heirs is misplaced. That policy was recognized in connection with

---

<sup>6</sup> As appellant acknowledged to the Probate Court, where his counsel labeled it as the “seminal case” on this subject in his brief to that court, and cited it again in oral argument to that court.

prior section 90 and was legislatively repealed by enactment of sections 6570 and 6571. Those sections were themselves repealed in 1997 and replaced by sections 21620 and 21621, respectively. Except for the section numbers referenced in the statutes, the language of the two statutes remains the same.” (*Mowry, supra*, at pp. 341-342.)

The *Mowry* court then quoted from an earlier case which dealt with a similar argument, i.e., *Estate of Della Sala* (1999) 73 Cal.App.4th 463, 468-469 (*Della Sala*), and then concluded its holding as follows: “Accordingly, a child living at the time of a parent’s execution of his or her will has the burden of proof regarding the parent’s intent in omitting the child from the will. [Citation.] Appellant failed to do so here, instead relying on the former presumption created by section 90. [¶] Citing *Estate of Katleman* (1993) 13 Cal.App.4th 51, appellant urges that the former presumption against unintentional omission of children remains. That case concerned an omitted spouse claim made by decedent’s wife. A year after decedent divorced her, he executed a will with a no-contest clause, that is, a provision disinheriting anyone who contested the will. Four years later, decedent *remarried* his wife. [Citation.] Quoting *Estate of Torregano* [(1960) 54 Cal.2d 234 (*Torregano*)], *Katleman* stated that the policy underlying pretermission statutes ‘guards against the omission of surviving spouses and children by reason of oversight, accident, mistake, or unexpected change of condition.’ [Citation.] This general statement is correct, but it was applied in *Katleman* because the will at issue was drafted before *Katleman*’s remarriage to his wife. The Court of Appeal explained: ‘[A] testator’s intention to disinherit his “heirs” or “legal heirs” is determined as of the date of execution of the will. A person who was not then an heir or legal heir, and whose subsequent relationship was not yet known or contemplated, could not then have been considered by the testator to be such.’ (*Estate of Katleman, supra*, 13 Cal.App.4th at p. 60.) This is consistent with our current statutes involving omitted children who are born or adopted after execution of the testamentary document. [¶] *Because appellant was adopted before execution of decedent’s will, and failed to prove mistaken omission, she does not qualify for treatment as an omitted heir.*” (*Mowry, supra*, 107 Cal.App.4th at

pp. 343-344, final emphasis added; see also *Della Sala*, *supra*, 73 Cal.App.4th at pp. 467-469.)

In this case, because appellant was living at the time of the Yus execution of their 1993 trust documents and the several amendments thereto, pursuant to the rule stated in both *Mowry* and *Della Sala* (a rule not contradicted or even questioned by any other authority) and assuming he had been, in fact, adopted sometime and someplace by the Yus, he still “has the burden of proof regarding the parent’s intent in omitting [him] from the [trust].” (*Mowry*, *supra*, 107 Cal.App.4th at p. 343.) He clearly did not carry that burden here.<sup>7</sup>

Appellant’s final argument is that, under *Torregano*, *supra*, 54 Cal.2d at page 248, he is entitled to be treated as a “pretermitted heir,” i.e., a child unintentionally not provided for (now denominated an “omitted heir”). But, as the *Mowry* court made clear, that case was decided before sections 21620 and 21621 (or even the earlier version of it, i.e., the now-repealed sections 6570 and 6571 of the Probate Code) were enacted. Additionally, the *Torregano* court expressly noted that the earlier Probate Code provisions providing protection for pretermitted heirs pertained only to “the omission of lineal descendants.” (*Torregano*, *supra*, 54 Cal.2d at p. 248.)

For both of these reasons—and, of course, the additional reason that there was no showing that appellant was ever adopted either in China or California—*Torregano* has no applicability here.

---

<sup>7</sup> Nor does appellant come close to explaining why the principles set forth in *Mowry* are inapplicable here. As noted above, he relied on that case in the probate court, but now attempts to distinguish it on the basis that the “Trustors were not aware that the adoption of Liu had been completed in China. They were under the incorrect impression that Liu’s biological parents would provide for him.” As noted above, the record before us does not support the premise that an adoption had “been completed in China.” And it completely demolishes appellant’s suggestion that his “biological parents would provide for him.” In fact, as of 1980, appellant had (1) no living natural father and (2) a mother who had implored the Yus to bring him to the United States due to her current “financial hardship.”

**V. DISPOSITION**

The probate court's order denying appellant's petition is affirmed.

---

Haerle, Acting P.J.

We concur:

---

Lambden, J.

---

Richman, J.