

CANADA / JUDGMENT

Chan v. Lee (Estate)

2004 BCCA 644

COURT

British Columbia Court of Appeal

DECIDED

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2004 BCCA 644 Chan v. Lee (Estate)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chan v. Lee (Estate),

2004 BCCA 644

Date: 20041216

Docket: CA030328

Between:

Margaret Chan and Maureen Fong

Respondents

(Appellants by Cross-Appeal)

(Plaintiffs)

And

Gordon Yuen Lee, William Yen Lee and Gilbert Tong Lee,

Executors of the Estate of Peter Wah Lee,

and Gordon Yuen Lee,

William Yen Lee and Gilbert Tong Lee

Appellants

(Respondents on Cross-Appeal)

(Defendants)

And

Yen Kam Lee

Respondent

(Appellant by Cross-Appeal)

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Low

The Honourable Madam Justice Levine

J.B. Rotstein

Counsel for the Appellants

C.A. Millar

Counsel for the Respondents Margaret Chan and Maureen Fong

C.N.L. Chui

Counsel for the Respondent

Yen Kam Lee

Place and Dates of Hearing:

Vancouver, British Columbia

October 26 and 27, 2004

Place and Date of Judgment:

Vancouver, British Columbia

December 16, 2004

Dissenting Reasons in part by:

The Honourable Madam Justice Newbury

Written Reasons in the Majority by:

The Honourable Mr. Justice Low (Page 53, para. 63)

Concurred in by:

The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The two daughters of Peter Wah Lee seek a variation of his will on the ground that it failed to make just and equitable provision for them and unfairly favoured their three brothers. Despite the mounting of a strong defence by the brothers, it is clear they were substantially favoured by their father in his will, as well as during his lifetime; that the daughters are equally deserving but much less well off than their brothers; and that some variation of the will is warranted under the Wills Variation Act, R.S.B.C. 1996, c. 490. But due to certain arrangements made between the sons and their parents many years ago, a conventional redistribution of the estate is not likely to constitute more than a minor improvement in the daughters' lot, at least when viewed in the context of the total assets now controlled by the sons. On the other hand, the order made by the trial judge -- requiring as it did the transfer to the daughters of the shares representing voting control of what has for many years been the sons' business -- effected a result that is also less than ideal and which may well lead to more family controversy. It is this "all or nothing" dilemma that makes this case so interesting -- and so difficult to resolve.

FACTUAL BACKGROUND

- [2] The trial judge's Reasons on all aspects of the case except costs are reported at (2002) 47 E.T.R. (2d) 163, 2002 BCSC 678. They provide a very detailed review of the evidence given by all witnesses during the 10-day trial, the trial judge's findings of credibility, and his conclusions of fact. I therefore propose not to rehearse the facts at length here. It will, I hope, be sufficient to recount that Peter Wah Lee, the testator, died on August 21, 1996 at an advanced age (either 89 or 92), leaving his five children and widow, Yen Kam Lee, whom he had married in 1973. Mr. Lee and his first wife, Mabel Lee, had had five children, three boys (defendants in this action) and two girls, the plaintiffs herein. The children were born between 1938 and 1945 and were raised by Peter and Mabel Lee in a frugal manner which paralleled the manner in which many British Columbia families were brought up in those days. The family operated a grocery store at various locations on Pender Street in Vancouver, and later also operated a restaurant. The children were all involved in the businesses, working part-time when they were not attending school. The trial judge noted that although they were not given allowances or a wage for the work they did, their parents provided them with money when it was needed for any reasonable purpose.
- [3] It was common ground, however, that the daughters "worked more, and longer hours, than the three defendant sons", partly because two of the sons attended university while the daughters did not. The daughters received secretarial training at a business school and eventually married. Margaret Chan, whose husband was a millworker, worked for a bank but left the workforce when she had her three children. In 1971, she returned to work and was employed by the Post Office until she retired, at age 59, in September 2000. Her sister, Maureen Fong, married an auto mechanic, and they operated an autobody shop and a number of car rental businesses, relying in part on financial assistance provided by Mabel

Lee.

- [4] The oldest son of the family, Gordon Lee, did not graduate from high school. As noted by the trial judge at para. 14 of his Reasons, he continued to work in the grocery business, which the father eventually gave to him for a nominal sum. He operated that business until he retired in 1986. The other two sons, William and Gilbert Lee, became pharmacists and continue to practise their profession through a company called Clairling Holdings Ltd. ("Clairling"). The pharmacy is carried on from premises leased without charge from the family holding company, Nam Wah Tong Holdings Ltd. (the "Company"). The trial judge found that generally speaking, the sons had received more assistance from their father than the daughters over the years: in his words, ". . . in helping the children financially, Mr. Lee, and apparently his first wife as well, favoured the sons substantially; and it appears that any help that a daughter received had to be paid for, either by services or monthly payments." (Para. 18.)
- [5] Although all the children have long been financially independent, the trial judge also found that the three sons are "much better off" than the two daughters, particularly Margaret. Gordon, now retired, owns some commercial real estate and has received funds over the years from the Company, even though he has never worked for it. Gilbert still works in the pharmacy part-time and owns a condominium worth about \$220,000. William and his wife have a real estate portfolio worth over \$2,500,000 which provides them with rental income of some \$180,000 per annum. This is quite apart from Clairling, which throws up another \$6,800 per month. Margaret, on the other hand, lives with her husband (who is disabled) on pension income that totals about \$3,100 per month gross. They have a home worth about \$150,000 and RRSPs worth about \$60,000. Her sister is more comfortable: Maureen has an annual income of about \$35,000 and she and her husband own real estate valued at about \$1,800,000.
- [6] After Mabel Lee's death in 1969, Mr. Lee married again, in 1973, to the defendant Yen Kam Lee, whom I shall refer to as "Mrs. Lee." It is common ground that this marriage was a happy one and that she cared for her husband in an exemplary manner until his death. Since her husband paid all the couple's expenses, she was able to save some money while he was alive and became the sole owner of the matrimonial home, which has a value of approximately \$330,000. Aside from what was left to her by Mr. Lee in his will, she had savings and securities worth approximately \$300,000 at the date of his death. Mrs. Lee is an active person, in good health, and there is no reason to think she will not live for many more years.
- [7] Pursuant to a promise they made their father to support their stepmother after his death, the sons have caused the Company to pay Mrs. Lee approximately \$1,000 per month, supplementing her pension income of about \$1,000. When she was asked at trial whether it was her understanding the sons would continue to make money available to her in future, she replied, "Well, it's hard to say. Sons are taking care of me now but in the future, who knows? They may not have enough money to take care of me." (Para. 180.)

The Company

- [8] As mentioned earlier, the Company was used as the vehicle for the Lees' investments in real estate. By the time it was incorporated in 1963, Peter and Mabel Lee (who was evidently an astute investor) had acquired six parcels of land, which they transferred to the Company in return for promissory notes. As at the end of that year, the book value of the Company's assets was shown as \$385,416. On the liability side, there were shareholder loans due to the Lees totalling \$294,658, and mortgages in the amount of \$74,335. There was no direct evidence as to the fair market value of the real estate held by the Company at that time.
- [9] The authorized capital of the Company consisted of four classes of shares -- Class A voting shares (of which 15 were issued to each of Peter and Mabel Lee), and Class B, C and D non-voting shares (of which 1,650 of each class were issued to each of Peter and Mabel Lee). Except for the voting rights, all classes were equal and ranked *pari passu* in respect of dividends and in respect of the distribution of assets on winding-up. Evidently, it was "known and accepted" by the entire family that in 1964 the parents had transferred their non-voting (B, C and D) shares to the sons. However, the ownership of those shares proved to be a contentious issue at trial, because after the litigation had commenced, it was discovered that various documents in the Company's records prepared in connection with the 1964 transfer were unsigned. Signed versions have not been found. For example, minutes of a directors' meeting that had been prepared to approve the transfer are unsigned; and the parents' share certificates have not been endorsed for transfer. Nor had new share certificates been signed and sealed on behalf of the Company in the names of Gordon, William and Gilbert Lee. On the other hand, the stubs to some of the share certificates representing the B, C and D shares in the names of Mr. and Mrs. Lee had been marked "cancelled" in the Company's share certificate book, and the names of the three sons had been entered in the register of members as the holders of the B, C and D shares respectively. A 1973 annual report signed by the father stated that the sons were the owners of Class B, C and D shares. Further, when Mabel Lee died, she left her Class A shares to Peter Lee, but no mention was made in her will of any of the non-voting shares that might have remained in her name. This is consistent with the fact that the family had all acted on the basis that the non-voting shares had been transferred to the sons. Indeed, there was evidence that Maureen Fong confronted her father on two occasions about the fact that the shares had been transferred to her brothers. His reply was, "How could the transfer be changed or reversed after 30 years?"
- [10] As the trial judge noted at para. 20 of his Reasons, when Mabel Lee died in August 1969, she bequeathed \$10,000 to each of her daughters and left nothing to her sons. The residue of her estate -- including her 15 Class A shares in the capital of the Company -- was left to her husband. After Mr. Lee's re-marriage in 1973, he transferred one of his 30 Class A shares to Yen Kam Lee.

- [11] The trial judge seemed to accept (see for example para. 35 of his Reasons quoted *infra*, at para. 22) that after 1969, William and Gilbert Lee had become involved with their father in the Company's business and that indeed the father participated only in "the earlier years." In 1986, when one of the Company's buildings burned down, the two sons took the initiative of advancing a re-development proposal and obtaining financing for it. The Company was successful both in that venture and a second one which began in 1998. As part of their efforts on behalf of the Company, each of the sons personally guaranteed a loan of \$3,500,000, made by the Company in the late 1980s. Under their direction, what had been a small holding company became a successful real estate investment and development company.
- [12] According to two expert valuations in evidence at trial, the fair market value of the Company's business as at the date of the testator's death (August 21, 1996) was somewhere between \$3,200,000 and \$4,900,000. (In this regard, I note that the trial judge referred to the Company as having had a value of \$5,500,000, but counsel agreed that this number did not take into account the liabilities of the Company. Furthermore, this was clearly not the value in 1969, as suggested by the trial judge at para. 153 of his Reasons.) The "mid-range" value at the date of Peter Lee's death, agreed by both counsel, was pegged by the experts at \$4,050,000.
- [13] At trial, the question of the value of the 29 Class A shares held by Peter Lee at the date of his death was the subject of conflicting expert opinions. The plaintiffs' expert, Mr. Mynett, allocated the entire value of the Company to the Class A shares. He was not called to testify. On the other hand, the defendants' expert, Mr. McMann, opined that using the mid-point value of \$4,050,000 for the Company as a whole, the Class A shares had a value of 29/9930 of that amount, or \$407.85 per share, giving the 29 Class A shares a total value of only \$11,828. The trial judge noted that Mr. McMann was cross-examined in some detail, but that counsel had made little headway in moving him from the view that the Class A shares should not have ascribed to them any premium to reflect the voting rights attached to them. The trial judge accepted Mr. McMann's opinion. He wrote:

In his conclusions, Mr. McMann states:

I do not believe that a willing, fully informed and prudent purchaser would pay \$3,915,000 for the 29 Class A voting shares owned by the late Peter Wah Lee because:

- a) All classes of share rank *pari passu*.
- b) Any salary or benefits the purchaser may envisage would be expected to be commensurate with the service provided and not in excess of reasonable market rates.
- c) Even if the company were to prosper under the guidance of the purchaser, his equity return is limited to 29/9930 of any equity growth.

- d) A prudent purchaser would also consider alternative returns available to him on a potential \$3,915,000 investment and choose accordingly. For example, at a low risk yield at 6%, the return on \$3,915,000 is \$234,900 annually. Given the share structure of the Company, I believe it impossible to envisage such a return to the Class A shareholders.

Mr. McMann then provided his estimates as follows:

En Bloc Value

\$4,050,000.00

Rateable Value Per Share

\$407.85

Value of 29 Class A Shares

\$11,828.00

He concludes his report by noting that it does not follow that all residual value would be allocated to the Class B, C and D shares; that it is frequently the situation in valuation, given certain share structures, that the sum of the parts need not equal the whole.

At trial on direct, the witness explained his latter statement saying he did not want to leave the impression with the court that the difference in value between the \$4,050,000 value of the company less the \$11,828 value of the 29 Class A shares would be the market value of the Class B, C and D shares. He pointed out again that he wasn't asked to value the Class B, C and D shares and he didn't want to leave that impression in terms of value, "because it is very common in valuation where you have different classes of shares that when you value them, and I stress the word value, the sum of the parts frequently will not equal the whole."

* * *

While the purpose of expert evidence is to assist the court in determining the issues before it, and the determination of the value of the 29 Class A shares is mine alone, I find Mr. McMann's evidence to be most persuasive, and I prefer it over that of the equally qualified expert for the plaintiffs, Mr. Mynett. While in a given case, a particular purchaser of the 29 Class A shares might be prepared to pay some form of premium for those shares over and above Mr. McMann's estimated value of \$11,828, there is simply no evidence before me on which I could fix such a premium, or even on which I could safely assume that such a purchaser exists. And I have no way of estimating with any certainty the value of those shares to the three brothers. In these circumstances then, I fix the value of the 29 Class A shares at \$11,828. And I add the caution emphasized by Mr. McMann that it must not follow that the value of the Class B, Class C and Class D shares is simply the difference between \$4,050,000 and \$11,828. [paras. 163-165 and 168; emphasis added.]

I emphasize that Mr. McMann's valuation was not contested on appeal. We were told that his approach was supported by this court's decision in *Re Mann* [1973] 4 W.W.R. 223, aff'd [1974] 2 W.W.R. 574 (S.C.C.), a case decided under the Succession Duty Act, R.S.B.C. 1960, c. 372. In connection with shares of any kind, that statute defined the term "value" for succession duty purposes to mean fair market value.

Peter Lee's Estate and Will

[14] Accepting Mr. McMann's opinion of the value of the Class A shares, the trial judge proceeded on the basis that Mr. Lee's estate was worth about \$550,000 at the date of his death, comprised as follows:

29 Class A shares

\$ 11,828

Other Stocks

\$ 19,850

Bonds

\$ 41,487

Bank accounts

\$363,952

Loan receivable from Clairling

\$ 24,500

Shareholder's loan to Company

\$ 91,507

TOTAL

\$553,124

[15] By his will (executed in late 1992), Mr. Lee left a cash gift to each of his daughters in the amount of \$50,000, and a cash gift of \$10,000 to each of three grandsons. (No objection was taken by any party in these proceedings to the latter bequests, although I note that no bequest was made to Margaret Chan's three sons.) The testator's shares in the Company were to be divided equally among his three sons; his personal and household effects were left to Mrs. Lee (who also became the sole holder of the matrimonial home by operation of law); and the residue of the estate was to be divided equally amongst the widow and the three sons. The distribution contemplated by the will was therefore as follows:

Beneficiary

Will

Margaret Chan (daughter)

\$50,000.00

(9%)

Maureen Fong (daughter)

\$50,000.00

(9%)

William Lee (son)

\$106,767.11

(19%)

Gordon Lee (son)

\$106,767.11

(19%)

Gilbert Lee (son)

\$106,767.11

(19%)

Yen Kam Lee (spouse)

\$102,824.44

(18%)

Raymond Lee (grandson)

\$10,000.00

(2%)

Michael Lee (grandson)

\$10,000.00

(2%)

Gregory Lee (grandson)

\$10,000.00

(2%)

TOTAL

\$553,125.77

THE CLAIMS AS PLEADED

- [16] The plaintiffs Margaret Chan and Maureen Fong commenced their action on May 20, 1999 -- almost three years after their father's death. Section 3(1)(a) of the Wills Variation Act imposes a limitation period of six months from the date of the issue of probate of the will in British Columbia. Since probate was issued on September 30, 1997, the six-month period expired on March 31, 1998.
- [17] The plaintiffs' Statement of Claim advanced causes of action both under the Wills Variation Act and in unjust enrichment, although the latter was stated rather obscurely. It was not pursued vigorously at trial, and since it was not referred to by the trial judge in his main Reasons, one may assume it was dismissed as statute-barred. In any event, no appeal was advanced on the issue of unjust enrichment.
- [18] With respect to the claim under the Wills Variation Act, however, the plaintiffs pleaded specifically at para. 16 of their Statement of Claim that their brothers as executors of the deceased's estate and personally were estopped from relying on the six-month limitation. In response to a demand for particulars, they elaborated that immediately prior to their father's death Gilbert Lee had confirmed to Margaret Chan that he and William Lee had discussed the distribution of the Company shares, that it was unfair to the plaintiffs, and that the brothers "would see something done to rectify the imbalance." After the father's death, Margaret Chan said she was told by Gilbert Lee to wait until "after the Will is settled." The particulars, which the trial judge ultimately found to be true, continued as follows:

Margaret Chan would see Gilbert Lee from time to time and asked him about dealing with the issues. Gilbert Lee consistently told Margaret Chan to wait until they had finished with the Will. None of the Executors ever told the Plaintiffs, or either of them, that Probate had been granted and neither of the Plaintiffs were aware of the fact that Probate had been granted until November, 1998. In [or] about the Summer of 1998, Margaret Chan asked Gilbert Lee about having a meeting to discuss the imbalance in the distribution of the Testator's property both before and after his death. Gilbert Lee again put Margaret Chan off saying that he had to talk to the Defendant, William Lee. Late in 1998 both Plaintiffs pressed the Defendant brothers for a meeting. They were put off by the Defendant brothers, being told that it was too close to Christmas. There eventually was a meeting in the Spring of 1999. At that meeting William Lee admitted to Maureen Fong that the Plaintiffs had been treated unfairly and that the proposed settlement of Maureen Fong was fair. The Plaintiffs did not press the Defendant brothers for a resolution of these matters with the time limit imposed by the Wills Variation Act because:

- (i) they were unaware of the time limit imposed by the Wills Variation Act,
- (ii) they were unaware of the fact that the Grant of Probate had been issued;

(iii) they wanted to maintain family harmony; and

(iv) they accepted the brothers at their word when they said that they would address the issue of the imbalance.

[19] In their Statement of Defence, the sons denied that they were estopped from relying on the limitation period in s. 3(1)(a) of the Act, denied that they had agreed to rectify any alleged unfairness resulting from their father's will, and contended that the allegations made in respect of the Company were not properly the subject of an action under the Wills Variation Act. On the merits of the claim, they denied that the will had failed to make adequate provision for the proper and maintenance and support of the plaintiffs. In the alternative, they pleaded:

. . . if the Deceased did leave a will which did not make adequate provision for the proper maintenance and support of the plaintiffs, then it is not just or equitable that any provision (beyond that already made in the Deceased's will) should be made out of the Deceased's estate. There are circumstances which exist which negate or diminish the Deceased's legal and moral obligations to the plaintiffs beyond the provisions already made in the Deceased's will. Those circumstances include, but are not limited to, the Deceased's significant benevolence to the plaintiffs during the Deceased's lifetime and the indifference which the plaintiffs displayed to the Deceased during his lifetime.

[20] In her Statement of Defence, Mrs. Lee also denied that the will had failed to make adequate provision for the proper maintenance and support of the plaintiffs. Consistent with this, she allied herself with the position taken by the sons at trial. In the alternative, however, she pleaded that if the will did not provide properly for the daughters, it had not made adequate provision for her. Although Mrs. Lee did not file a formal counter-claim, the trial judge (at para. 6 of his Reasons) treated her alternative pleading as a counter-claim. On this point, I note that s. 4 of the Wills Variation Act provides that an action commenced by any person entitled to apply under the statute is deemed to be a representative action on behalf of all persons entitled to apply. Counsel took no objection to the trial judge's treatment of Mrs. Lee's indirect claim.

THE TRIAL JUDGMENT

[21] The trial judge dealt with the issue of estoppel, reviewing the evidence in detail at paras. 35-122 and counsel's submissions at paras. 123-43 of his Reasons. He referred to *Macdonald v. Macdonald Estate* (1996) 21 B.C.L.R. (3d) 379 (B.C.S.C.), where Harvey J. held that although there are two contrary lines of authority, the preferable view was that promissory estoppel may be applied to permit a court to grant relief under the Wills Variation Act even though the action was not commenced within the prescribed time. In the case at bar, the Court found that estoppel by conduct rather than promissory estoppel applied, as formulated in cases such as *Litwyn Construction (1973) Ltd. v. Pan, Nicholson and Nicholson* (1988) 29 B.C.L.R. (2d) 88 (B.C.C.A.) and *Charles v. Insurance Corp. of British Columbia* (1989) 34

B.C.L.R. (2d) 331 (B.C.C.A.). The trial judge concluded that it would be "wholly inequitable" to permit the sons to succeed on their defence that the daughters' action was statute-barred. In his analysis:

And this is so in the first instance without having to consider or analyze the evidence in detail, particularly that of the defendants, with regard to such matters as knowledge, reliance, detriment, acquiescence or encouragement and so on. Without more the evidence clearly supports a finding that the circumstances of the conduct and behaviour of the three brothers are such that it would be wholly inequitable that they should succeed. Finally, if inducement, reliance and detriment or harm need to be established, either as indicators of inequities, or as essential ingredients of the estoppel, they are overwhelmingly proven by the evidence. [para. 145; emphasis added.]

[22] On the issue of the ownership of the Class B, C and D shares, the trial judge found that "in fact the three sons became the owners of the . . . shares probably in 1964." He stated:

I am satisfied that in January of 1964, Mr. and Mrs. Lee effectively gave his company to the three sons by transferring the Class B shares to Gordon, the Class C shares to William and the Class D shares to Gilbert; retaining only their Class A shares. And over the years it was known and accepted by the members of the family that the Lees had in fact given the company to their sons to the exclusion of the daughters, the plaintiffs. And over the years, William and Gilbert took over and ran the company, although with some participation by their father in the earlier years. While I will return to the issue in a moment, I will say here that I am satisfied that Mr. and Mrs. Lee effectively gave the company to their sons.

It is common knowledge that over the years the plaintiff daughters were very unhappy with what they considered to be this unfair distribution of the father's primary asset. In this regard, for my purposes, I look upon the transfer of the shares in the company to the three sons as simply an early disposition by Mr. Lee, and Mrs. Lee, of the primary part of their estates. [paras. 35-36; emphasis added.]

This conclusion is the subject of the daughters' cross-appeal, to which I will return below.

[23] The trial judge found he was entitled to take into consideration "the fact that the three sons were given the shares in the company which owned properties having a value of at least \$5,500,000." (Para. 153.) He made no reference in this context to the fact that since about the late 1960s, the sons had taken over the direction of the Company, contributed time and effort, and provided personal guarantees to its lenders when necessary to carry out new ventures. Their sisters had no involvement in these efforts, nor was there evidence they were offered the opportunity to participate.

[24] The trial judge next turned to Mrs. Lee's claim under the Wills Variation Act. After reviewing her evidence in some detail, he considered the applicable law, beginning with the decision of the Supreme Court of Canada in *Tataryn v. Tataryn Estate* [1994] 2 S.C.R. 807. There the so-called "bad son", as perceived by the testator, had been disowned and the "good son" had

received the testator's entire estate except for certain dispositions in favour of the testator's widow. The Court held that the testator's first obligation was to maintain the widow -- a legal responsibility during his life that continued after death. As for the moral claims on the testator, McLachlin J. (now C.J.C.) for the Court said it could not be just and equitable to deprive the widow of the benefit of the estate "simply because her husband died first. To confine her to such sums as her son may see fit to give her, as the testator proposed, fails to recognize her deserved and desirable independence and constitutes inadequate recognition of her moral claim." (At 825.)

- [25] In the case at bar, the trial judge noted that Yen Kam Lee's marriage to Mr. Lee -- the second marriage for both -- had lasted 23 years, and that her present standard of living "seems to be the same as that which she enjoyed while she was married to Mr. Lee." (Para. 194.) She had been content with the arrangements made by Mr. Lee until the plaintiffs had brought their action. The trial judge noted that she had not contributed to the assets acquired by her husband, although she had looked after him very well during their marriage. The sons had promised their father to look after her, and had done so through the Company, a "family obligation" that the trial judge was confident they would continue to meet. Considering all the factors relevant to the testator's moral and legal obligations towards the widow as formulated in *Tataryn*, he then concluded:

... it was Mr. Lee's first wife who contributed substantially to the amassing of the estate, not his present widow. Both plaintiffs also contributed substantially to that estate. And it would seem that the desirability of independence here is not as important a factor. Further, the principles of unjust enrichment reflect a legal duty by the testator to the plaintiffs, although independent children, by reason of their substantial contribution to the estate. And the determination of what is adequate, just and equitable as regards Yen Kam Lee cannot be made in a vacuum. The fact that the plaintiffs have competing claims, legal as well as moral, must be considered as well. In my opinion, having considered the legal and moral obligations pertaining to the various claimants, as well as the gifting of the Class B, Class C and Class D shares to the three sons, I have concluded that adequate, just and equitable provisions for each claimant is met by dividing the residue of the estate equally among Yen Kam Lee, Margaret Chan and Maureen Fong; which brings me to the claim of the plaintiffs. [para. 200; emphasis added.]

- [26] In connection with the daughters' claims, the trial judge referred to this court's decision in *Morris v. Morris* (1982) 41 B.C.L.R. 239, in which the testator had left his entire estate to his second wife. His two younger children had previously received shares valued at \$79,000 from him, but the two oldest children had not. They applied under the Wills Variation Act for provision out of their father's estate. The trial judge held that the testator had discharged his parental duty by providing for the maintenance, education and support of all the children until they were established in life and that the testator felt that "too much money was no good for children." This court disagreed on appeal, however, and found that the testator had overlooked whether the children had been treated equally and had failed to "recognize the legitimate expectations of [the plaintiffs] to share his capital assets to some

degree." (At 254.) The will was varied to provide cash gifts to them, but not to the other children.

[27] Applying this reasoning to the case at bar, the trial judge concluded that a judicious spouse and father of a family seeking to discharge both his marital and parental duties in the circumstances existing at the date of Mr. Lee's death would have considered the situation as follows:

"The boys were given the shares in the company or the company long ago. The company continues to do well, as have the boys. That gift will constitute their inheritance.

As for the girls, I will give to them my 29 Class A shares. And after giving the grandsons \$10,000 each, the girls will share the residue of my estate with my wife." [para. 204]

In the circumstances, the trial judge held that one-half the 29 Class A shares and one-third of the residue of the estate would be adequate, just and equitable provision for each of the daughters. Similarly, one-third of the residue, together with the articles of personal and household use, would be appropriate for Mrs. Lee. Thus the Court made the following order regarding the will:

- (1) The legacies to the plaintiffs in sub-paragraphs (i) and (ii) are deleted. The legacies to the three grandsons of \$10,000 each remain.
- (2) Clause 3(d) is amended to provide as follows: To divide all my Class A shares in Nam Wah Tong Holdings Ltd. equally among my daughters, Margaret Chan and Maureen Fong.
- (3) Clause (e) will remain in favour of the wife, Yen Kam Lee.
- (4) Clause (f) is amended to provide for the division of the residue of the estate equally among the wife, Yen Kam Lee, and the daughters, Margaret Chan and Maureen Fong. [para. 206]

I will return below to the trial judge's later order regarding costs.

ON APPEAL

[28] I propose to deal with what I see as the five main subjects of the appeal (and cross-appeal) in logical order, rather than in the order in which they were addressed by counsel in this court.

The Statutory Limitation Period and Estoppel by Conduct

[29] I have already briefly noted the trial judge's conclusion that estoppel can apply to disentitle a defendant from relying upon the six-month limitation period imposed by s. 3(1)(a) of the Wills Variation Act. It would appear that the only British Columbia case on point is Macdonald Estate, supra. There, the Court reviewed the two conflicting lines of authority on the issue and concluded:

In my opinion, the case and textual authority favours the position that estoppel is available as an argument whenever a limitation period is relied upon regardless of the source. It is admittedly easier to use the estoppel argument where the statute gives the court discretion to extend the limitation period. However, the absence of such statutory jurisdiction in the Wills Variation Act, in my opinion, does not preclude the court from exercising its equitable jurisdiction in considering the remedy of estoppel. [para. 54]

The defendants did not challenge this conclusion on appeal, and I am in general agreement with the trial judge's preference for the line of authorities in favour of the application of estoppel to a limitation period contained in the Wills Variation Act. I make no comment on whether estoppel may be applied to extend or postpone a limitation period contained in the Limitation Act of this province, which has been said to provide a complete code and contains a series of detailed postponement provisions.

[30] The defendant sons did, however, advance as a ground of appeal that the trial judge had erred in finding that the plaintiffs' claims were not barred by s. 3(1)(a) of the Wills Variation Act. Mr. Rotstein acknowledged he had an uphill battle on this point, since the trial judge's conclusions are essentially factual, on which the appellants must show that the court below was clearly wrong. He emphasized, however, that although the sons as executors had failed to give the plaintiffs written notice (required by s. 112 of the Estate Administration Act, R.S.B.C. 1996, c. 122) that an application for probate had been made, and although they had sworn an affidavit stating that such notice had been given, the trial judge stopped short of finding they had intentionally sworn a false affidavit. Mr. Rotstein noted that the daughters had not taken any steps to set aside the grant of probate and suggested that their real complaint lay not so much in the disposition made by the will, but in their parents' transfer of the Class B, C and D shares of the Company to the sons in 1964 -- something no court has any authority to modify. As noted earlier, there is evidence that the daughters complained to their father on this subject during his lifetime; and shortly before suing, they told their brothers they were each hoping to receive \$500,000 -- in total, almost twice the stated value of the estate. Perhaps more to the point, Mr. Rotstein submitted that the conduct of the sons had not "lulled" the daughters into taking or failing to take any particular action: all they had done was express a general willingness to "work things out" in some way.

[31] Although this is one view of the evidence, the fact is that the trial judge found on all the evidence that a case for estoppel by conduct was "overwhelmingly" made out. He found as a matter of fact that from at least the time of Mr. Lee's death until February 1999, the sons had led the daughters to believe that they would address the "obvious unfairness or imbalance" in the distribution of the father's estate, while at the same time they "stalled and put off the uninformed plaintiffs whenever they could, and even later on when at least William had no intentions of doing anything." (Para. 134.) In all the circumstances described by the trial judge, I see no error in the conclusions he reached. I would not accede to this ground of appeal.

The Ownership of the Non-voting Shares

[32] The trial judge's finding that Mr. and Mrs. Lee had transferred the non-voting shares to their sons "probably in 1964" was the subject of a cross-appeal by the daughters. Again, this was a finding of fact which must be shown to be clearly wrong before this court would be justified in interfering -- although a presumption of regularity also arises by virtue of s. 67(2) of the Companies Act then in force, R.S.B.C. 1960, c. 67. Section 79(3) provided:

The register of members is prima facie evidence of any matters by this Act directed or authorized to be inserted therein.

[33] In challenging the trial judge's finding, Mr. Millar on behalf of the daughters noted that the Companies Act also stated that the memorandum and articles of a company were binding on all members thereof. The articles of the Company required any person transferring his or her shares to sign an instrument of transfer in prescribed form and deemed that the transferor remained the "holder of such share until the name of the transferee is entered in the register in respect thereof." Section 97 of the Act further stated:

Notwithstanding anything in the memorandum or articles of a company, it is not lawful for the company to register a transfer of shares in the company, unless a proper instrument of transfer has been delivered to the company; but nothing in this section shall prejudice any power of the company to register as a shareholder any person to whom the right to shares of the company has been transmitted by operation of law.

[34] Mr. Millar submitted that there was "ample evidence" to the effect that the transfer had not taken place in 1964 as found by the trial judge. With respect, however, he was not able to point to any such "evidence". There was only the absence of signatures on the various documents described above and the absence of evidence of the payment by the sons of the \$4,000 each was to have paid for his shares. In my view, this absence of evidence does not overcome the presumption that arises from the positive evidence of the register of members and the belief of the family over the years (described by Mr. Millar as "family legend") that the transfer had been carried out. If (as Mr. Millar suggested) Peter Lee had changed his mind before the transfer was completed, it would have been nonsensical for him to have asked, "How could the transfer be changed or reversed after 30 years?" when Maureen Fong complained about the transfer. Further, the fact that in 1969 when Mabel Lee died, only her Class A voting shares were transmitted to Peter Lee is inconsistent with the notion that she remained in possession of any non-voting shares.

[35] In all the circumstances, it has not been shown that the trial judge erred in finding that the non-voting shares were indeed transferred, probably in 1964, to the testator's three sons. I would dismiss the daughters' cross-appeal on this point.

The Daughters' Claims under the Wills Variation Act

- [36] I turn next to the main appeal in this case -- that brought by the three sons from the trial judge's redistribution of Mr. Lee's Class A shares of the Company equally to his daughters, and the division of the residue equally among Mr. Lee's widow and daughters. At the outset of his oral submissions, Mr. Rotstein on behalf of the sons said that this part of the appeal raised three important questions -- can it be that in considering a claim under the Wills Variation Act, a court of law will "ignore" the testator's wishes? Can it be that a court will "disinherit" beneficiaries who were to receive the residue of the testator's estate? And can it be that when the testator arranges his affairs in a certain way many years before his death, the court will consider that arrangement among the relevant circumstances to a determination under the Act? In Mr. Rotstein's submission, if the answer to these questions is "yes", then the wishes of all testators are "of no moment" and testators essentially retain no right to dispose of their estates as they choose.
- [37] Also at the outset of his submissions, counsel for the sons acknowledged that just as the court at first instance has a broad discretion as to how it will distribute a testator's assets once it has determined that he or she failed to make just and adequate provision for one or more persons entitled to apply under the Act, an appellate court also has a wide discretion to review the decision of the trial judge. Thus Martland J. stated in *Swain v. Dennison* [1967] S.C.R. 7, aff'g (1966) 54 W.W.R. 606 (B.C.C.A.):

In my opinion, in view of the special nature of the provisions of the Act in question and the specific right of appeal which it confers, it is not proper to impose any fetters on the powers of the Court of Appeal in considering appeals under this Act. The entire jurisdiction of the trial judge under this statute is discretionary in character. The relief which may be granted under it is completely dependent on his opinion, first, as to whether adequate provision for proper maintenance and support has been provided for the spouse and children under the will, and second, if adequate provision is not thought to be made, as to what provision should be made. Notwithstanding this, the Act, by s. 14, gives to any party deeming himself to be prejudicially affected, a right to appeal. I construe s. 14 as meaning that any person who considers himself prejudicially affected by the discretion exercised by the trial judge has a right to appeal, and, in consequence, the Act must contemplate a review of that discretion by the Court of Appeal. This being so, that Court has the power and the duty to review the circumstances and reach its own conclusion as to the discretion properly to be exercised. [at 12-13; emphasis added.]

Surprisingly in this day of narrow appellate review, this conclusion would appear to have been endorsed by the Supreme Court of Canada more recently in *Tataryn*, supra, at 813.

- [38] *Tataryn* is of course now the leading Canadian case on wills variation statutes. The Court declined to return to the previous "need-based analysis" that had been rejected in *Walker v. McDermott* [1931] S.C.R. 94, and stressed the broad content of the phrase "adequate, just and equitable" which appears at s. 2 of the British Columbia statute. McLachlin J. for the Court set out the correct analysis to be followed:

If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

The first consideration must be the testator's legal responsibilities during his or her lifetime. The desirability of symmetry between the rights which may be asserted against the testator before death and those which may be asserted against the estate after his death has been noted by the dissenting member of the British Columbia Law Reform Commission in its 1983 report on the Act, Report on Statutory Succession Rights (Report No. 70). Mr. Close argues (at p. 154):

A person is under a legal duty to support his or her spouse and minor children. If this duty is not observed then it may be enforced through the courts. That a testator's estate should, therefore, be charged with a duty similar to that borne by the testator in his lifetime is not troublesome.

It follows that maintenance and property allocations which the law would support during the testator's lifetime should be reflected in the court's interpretation of what is "adequate, just and equitable in the circumstances" after the testator's death.

The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts. . . .

The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.

For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that,

if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made: [at 820-23, citations omitted; emphasis added.]

[39] The Court then addressed how conflicting claims were to be "balanced" against each other and suggested that where the size of the estate permits, all such claims should be met. Where on the other hand priorities must be considered, claims which would have been recognized as legal obligations during the testator's life generally take precedence over only moral claims, of which some might be stronger than others. McLachlin J. continued:

It falls to the court to weigh the strength of each claim and assign to each its proper priority. In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children. [at 823; emphasis added.]

[40] Finally, McLachlin J. in *Tataryn* noted that where the testator has chosen one option which is within a range of appropriate options, the will should not be disturbed. It is only where the testator has chosen an option which falls below his or her obligations "as defined by reference to legal and moral norms" that the court should "make an order which achieves the justice the testator failed to achieve." She added, "It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires." (At 824; emphasis added.)

[41] Counsel for the testator's sons emphasizes this final sentence, which he characterizes as an endorsement of testamentary autonomy and as indicating that any interference with that autonomy should be minimized whenever possible. (See also *Clucas v. Clucas Estate* (1999) 25 E.T.R. (2d) 175 (B.C.S.C.) at para. 12.) In this case, he says, the trial judge went much farther than was necessary to redress any unfairness, and in distributing the Class A shares to the daughters, not only "disinherited" the sons but deprived them of control of the company they have worked to build up for the last 40 years. Counsel cites various passages from the trial judge's reasons where the circumstances are described as though the testator had given \$100,000 to his daughters and over \$5,000,000 to his sons, simply comparing the cash bequest made in the will to each plaintiff with the current value of the Company's assets. In counsel's submission, this ignores the extent to which the Company's value now is attributable to the sons' own efforts, misconstrues the actual value of what was given to them in 1964, and overlooks the value of the cash bequests made to each of the daughters by their mother in 1969. Mr. Rotstein says those bequests were at least of equal value to what the sons received in the form of non-voting shares (then worth only a few thousand dollars) of the Company in 1964, so that a rough equality was achieved at that time. The Court should respect testamentary autonomy and should not attempt indirectly to undo or modify an

inter vivos transfer made 40 years ago.

- [42] As Mr. Millar noted, however, the purpose of the Wills Variation Act is indeed to override testamentary autonomy when necessary to ensure that "adequate and proper provision" is made for those having legal and moral claims on the testator's estate. There is clear authority, including *Morris v. Morris*, supra, in British Columbia for the proposition that the court may consider actions taken by the testator during his lifetime, and in fact the entire relationship between the testator and claimants, in order to analyze the overall fairness of the will for those claimants and the intended beneficiaries. Mr. Millar did not suggest that all children must be treated equally, but that when one or more children have been substantially and unfairly favoured, the court should redress the inequity in a manner that a reasonable and judicious testator would. In Mr. Millar's submission, a judicious testator in Mr. Lee's position would have recognized that his sons' retaining the substantial value of the Company (represented by the Class B, C and D shares) and receiving the voting shares, was unfair to the daughters. Having only the (fair market) value of \$550,000 in the estate at the Court's disposal to redress the inequity, the trial judge had taken the only course open to him, which was to redistribute the Class A shares, and part of the residue, to them. The daughters urged in their factum that the trial judge's decision recognized their contribution to the family enterprise and gave them a small share in it, leaving open "the opportunity for the parties to achieve, as between themselves, post-judgment, a final resolution of the matters being explored by the parties prior to the commencement of the action."
- [43] I accept the principle that judicial interference with testamentary autonomy should be minimized: the court should not start with a blank slate and write a will designed to right all the perceived wrongs of the past, nor interfere only to improve upon the degree of fairness of a will if the testator has met his obligations under the Act. If, and only if, he has not made "adequate provision" (as explained in *Tataryn*) for his spouse or children should the court act under s. 2 to vary the disposition of his estate. I also accept that, as stated by this court in *Swain v. Dennison*, supra, at W.W.R. 612, "the greatest care should be taken to appreciate the motives which swayed [the testator] in the disposition of his property or the justification which might be apparent for his decisions, and not merely to make a new will for the testator." (Parenthetically, I note that the trial judge made no findings of misconduct on the part of either daughter or ill-will on their part towards the testator that would, in the mind of a judicious father, have warranted the substantial inequality in treatment between his sons and daughters in his will. If the daughters became less close to their father during his lifetime, it would appear this occurred because they were conscious of, and expressed to him, the unfairness of their position vis-à-vis their brothers.)
- [44] *Tataryn* mandates that "societal norms" be considered in determining what is "adequate, just and equitable" once a court has determined that a variation is necessary. Aside from legal norms (which are here engaged only by the claim of Mrs. Lee, discussed below), these were said to include society's "reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards." (At 821.) *Tataryn* and

other cases indicate that such standards are informed by a wide variety of factors in each instance -- including the testator's wishes, the size of his estate, the relationship between him and the claimants and between him and his intended beneficiaries, the needs and means of the claimants and the intended beneficiaries, and the relative treatment of those persons in the will.

- [45] Applying these factors, the trial judge concluded, and I agree, that the daughters have a significant moral claim upon their father's estate which, when one considers all the relevant circumstances, was not adequately recognized by his will. They were left a cash gift of \$50,000 each -- a small proportion, in terms of fair market value, of the estate. The father's moral obligations to his sons, on the other hand, were generously recognized during his lifetime and in his will. They were given an opportunity to build wealth -- an opportunity of a different quality from the gift of cash the daughters received from their mother in 1969. The sons expended effort and undertook risks to make the most of that opportunity, and they received many benefits as a result. The daughters also worked hard, but with less success, especially in Margaret's case. She is dependent on pension income and has little savings and her husband is disabled. In my view, the testator did not, in his testamentary dispositions, treat his daughters equitably or in the manner that a wise and judicious father would.
- [46] Having said this, I am also of the view that the sons' substantial contributions to the growth of the Company over the years were also among the factors that should have properly been considered by the trial judge. The Company was not an empty shell when the non-voting shares were transferred to the sons, but its growth to a \$4,000,000 undertaking was substantially their doing. This would normally be an important factor in determining a just and equitable distribution of this estate -- even though a fair market value of only \$11,828 was allocated to the voting shares.
- [47] This brings me to the central and most vexing question of this appeal -- whether the trial judge erred in addressing the inequity in Mr. Lee's will by ordering that the daughters (with their stepmother) were entitled to the residue of the estate, and to the Class A shares. Considering (as I believe he was bound to do) that the sons had already had the benefit of the non-voting shares (and the substantial equity they represented) since the 1960s, together with university educations (in the cases of William and Gilbert) which also gave them professional qualifications and incomes, and considering the daughters' contributions and present means, would a wise and judicious father have left those shares to his sons? Again, Mr. Rotstein urges that any inequity in the testator's will was adequately addressed by the redistribution of the residue, and that Mr. Lee properly bequeathed to his sons the shares representing voting control of "their" business. Emphasizing that the Class A shares were found to have a fair market value of only some \$11,000, he implies that it would be only a minor modification, in financial terms, of the trial judgment to return the Class A shares to the sons, while at the same time a substantial injustice to them would be alleviated.

- [48] As mentioned earlier, the trial judge's conclusion concerning the value of the Class A shares was based on the reasoning in *Re Mann*, supra, a case concerned with the fair market value of shares of a private company structured similarly to the Company in this case. The Court adopted the opinion of an expert valuator that because no "hypothetical purchaser" for the shares of a private company could be identified, and all classes of shares ranked *pari passu*, the voting shares could only be said to have a value for succession duty purposes equal to their proportionate share of the "break-up value" of the company as a whole. But the fair market value of the Class A shares is of limited relevance in the present context. It cannot be doubted that in anything but academic terms, they have a value considerably greater than 29/9930 of the *en bloc* value of the Company. For two of the sons, for example, their father's control of the Company has allowed them to carry on Clairling's business without paying rent -- a benefit that by itself has probably been worth several thousand dollars per annum, whether or not it was reported for income tax purposes. The sons also purport to carry out their personal obligation to maintain their stepmother by using Company funds, presumably on the basis that she is being paid a salary. When Gilbert needed \$100,000 at the time of his divorce, it was readily made available from Company funds. Benefits of this kind are not the stuff of expert opinions regarding fair market value such as that discussed in *Re Mann*, but they are of real economic significance to any family that enjoys them. Conversely, the equal ranking of all classes of shares in respect of dividends or upon a winding-up fades in importance when corporate profits can be paid out as salaries or bonuses, and winding-up will not happen until a far-off date in the future. Thus notwithstanding my view that the trial judge should not have ignored the part played by the sons in bringing about the growth of the Company since the 1960s, I cannot agree with Mr. Rotstein that it would be a matter of small significance to set aside the trial judge's order that the Class A shares are to become the property of the daughters. Any court would be remiss in ignoring the fact that in this family context, these shares have a value well beyond \$11,000.
- [49] It is unfortunate indeed that the parties did not take up, or take up successfully, Mr. Millar's suggestion that "post-judgment discussions" among the parties might lead to a settlement that accomplished what a wise and judicious father in Peter Lee's position would have done. However, it is not open to us to impose one of many options that would have produced a fairer result than the alternatives that are open to this court. Since I do not believe anything would be accomplished by splitting up the voting shares, there are, realistically, only two such alternatives: they must go either to the sons or to the daughters.
- [50] The trial judge concluded that it was more unfair to leave the Class A shares in the hands of the sons, who as the owners of the non-voting shares are entitled to the lions' share of the \$4,000,000 equity of the Company, than to transfer them to the daughters, who would otherwise have only an estate of some \$500,000 to share with their stepmother. On anxious reflection, and even recognizing the sons' contribution to the growth of the business and the possibility of future controversy between the siblings regarding the management of the Company, I cannot say I would exercise my discretion differently. It seems to me that a wise and judicious father in Mr. Lee's position would have said to himself when considering his

will, "I gave my sons a substantial opportunity in 1964 and they have done well by it. They are all very comfortable, and certainly better off than my daughters, neither of whom has enjoyed the benefits the boys have from ownership of a private corporation. I could have caused the Company to issue non-voting shares to the girls but now it is too late to do so. If I were to leave the voting shares to the boys, the unfairness arising from my transfer of the non-voting shares to the boys in 1964 would only be compounded. If I leave the voting shares to the girls, the boys might offer to buy them, and the girls can bargain for a fair price, or for non-voting shares. Or the girls might try to run the Company, ideally with the boys' participation. If it becomes necessary to wind up the Company, the boys will still receive most of the equity because they own 9,900 shares. I will leave the 29 voting shares to the girls as the fairer of the two courses now open to me."

- [51] In the result, I would not accede to the sons' appeal with respect to the Class A voting shares. I will return to the disposition of the residue of Mr. Lee's estate presently.

The Claim of Yen Kam Lee

- [52] I turn next, however, to Mrs. Lee's claim, which was advanced at para. 6 of her Statement of Defence:

In the alternative, if the Will does not make adequate provision for the proper maintenance and support of the Plaintiffs as alleged in paragraph 15 of the Statement of Claim, which is denied, then the Will does not make adequate provision for the maintenance and support of Yen.

On appeal, Mr. Chui on behalf of Mrs. Lee submitted that the trial judge had erred in finding that it was adequate, just and equitable to award her only a one-third share of the residue of the estate plus the articles of personal, domestic and household use of the testator.

- [53] I have already described Mrs. Lee's financial circumstances. In general terms, she is partially dependent on the sons' continuing to cause the Company to pay her stipend, which together with her Canada Pension, enables her to save a small amount every month. Obviously, Mr. Lee trusted to his sons to continue doing so, and the trial judge was satisfied that they would do so. Nevertheless, on an application of the principles formulated in *Tataryn*, the widow's claim is of a higher order than that of the daughters, reflecting the principle that, as stated at 821 of that case, "maintenance and property allocations which the law would support during the testator's lifetime should be reflected in the court's interpretation of what is 'adequate, just and equitable in the circumstances' after the testator's death." Since Mrs. Lee's claim is now before the court, and it is likely she will survive for many more years, it is difficult to understand why she should continue to be subject to the goodwill (and financial capability) of the sons, even though they have obviously taken seriously their promise to their father.

- [54] In *Erlichman v. Erlichman Estate* (2002) 99 B.C.L.R. (3d) 26, the majority of this court applied *Tataryn* to hold that since the widow/claimant in that case would have been entitled to one-half of the family assets under the Family Relations Act, R.S.B.C. 1996, c. 128, immediately

prior to her husband's death, she had a "strong claim to at least one-half of the estate on the basis that the content of Mr. Erlichman's legal obligation to her, in these circumstances, was to leave Mrs. Erlichman at least that much." (Para. 49.) The trial judge in the case at bar distinguished Erlichman on the ground that the Lees' marriage was a second one for both and that Mrs. Lee had not contributed financially to the testator's estate. However, the marriage here was a long one by modern standards, and the size of the estate does permit a bequest to her of half the residue. I would therefore allow Mrs. Lee's appeal to the extent of providing that one-half the residue of the testator's estate shall be distributed to her. To my mind, this will relieve the sons from the necessity of making payments to her in future -- but that is up to them.

Residue

- [55] Finally, with respect to the residue, I believe a wise and judicious father would have left the remaining half of the residue to the daughters equally, recognizing in particular Margaret's needs and again, the substantial assets which the sons now control.

DISPOSITION

- [56] I would allow the appeal, then, only to the extent of providing that clause 3(f) of Mr. Lee's will be varied to provide for the distribution of one-half of the residue to Mrs. Lee and one-quarter to each daughter. I would dismiss the cross-appeal.

COSTS

- [57] The trial judge dealt with costs in separate reasons reported at (2003) 50 E.T.R. (2d) 197, 2003 BCSC 513. He rejected the argument that although they had not succeeded at trial, the sons' costs should be paid from Mr. Lee's estate. This was so even though the sons were the executors of the estate since, in the trial judge's words, "An Executor is only entitled to costs from the Estate where those costs were incurred in the execution of his duties as an Executor. Where he incurs costs wearing his other hat, that of a beneficiary, such costs ordinarily would not come out of the Estate." (Para. 7.) The judge also rejected the argument that since the testator had been found not to have discharged his obligations as a judicious spouse and father, he himself was "at fault" or in some way responsible for the action. On this point, reference was made to *Vielbig v. Waterland Estate* (1995) 1 B.C.L.R. (3d) 76 (B.C.C.A.); *Lee v. Lee Estate* (1993) 84 B.C.L.R. (2d) 341 (B.C.S.C.); and *Re Bowe Estate* [1971] 4 W.W.R. 234 (B.C.S.C.), a decision of Chief Justice Wilson. The sons did not challenge this principle on appeal.

[58] The trial judge noted the applicable law with respect to special costs, including *Stiles v. Workers' Compensation Board of British Columbia* (1989) 38 B.C.L.R. (2d) 307 (B.C.C.A.). He acknowledged that special costs are generally ordered only in respect of misconduct in the proceeding, but noted that that rule is not absolute. Here the conduct of the sons had commenced when the brothers became the executors of the estate and had continued "during the proceedings including the trial." In his analysis:

Broadly speaking, the Defendant brothers deliberately kept the Plaintiffs in the dark and misled them well knowing of the risk they faced in the event that the Plaintiffs commenced action under the Act, and they continued in this mode maintaining spurious positions or defences, some of which were [borne] of their pre-action conduct, and for which there was no basis. For these reasons, particularly the totality of their conduct, I am of the view that the Plaintiffs are entitled to special costs. [para. 28; emphasis added.]

[59] With respect to Mrs. Lee's costs, the trial judge declined to order them payable from the estate and declined to award her costs against the defendants, noting that her claim had succeeded because of the plaintiffs' efforts. The only costs to which she might be entitled, he said, were those incurred in setting out her background and the particulars of her claim, but this had taken less than one-half day of trial time.

[60] On appeal, most of the foregoing findings, especially the order for special costs, were the subject of extensive argument. I propose not to review counsel's submissions at length, however, since in my view, the unusual circumstances of this case warrant a somewhat unorthodox approach. I am persuaded that the "all or nothing" nature of the options that were available to the court, reflected in my conclusion that shares the sons would otherwise have legitimately expected to receive must be transferred to the daughters, militates against an award of special costs. Such an order, and the refusal to direct that the sons' costs qua executors be "separated" from those incurred by them qua beneficiaries and be paid from the estate (see, e.g., *Wilcox v. Wilcox* (2002) 8 B.C.L.R. (4th) 14 (B.C.C.A.), at para. 25) threaten to turn a result that is less than ideal into a punitive one. I would order that the sons pay the plaintiffs' costs in this court (excluding the costs of their cross-appeal) and the court below, but on the usual scale. Conversely, the daughters shall pay the sons' costs in respect of the cross-appeal, and the two sets of costs may be set-off against each other.

[61] Further, I am of the view that the trial judge should not have second-guessed the decision of counsel for Mrs. Lee to attend the entire trial. Once an application had been made under the Wills Variation Act, the matter of the will was "at large". Accordingly, Mrs. Lee should also have her costs of the trial and her appeal on the usual scale. But since her position was largely that taken by the sons, I would order that they be payable from the estate. I say this in the realization that this will diminish the size of the residue, but that is an unavoidable result in this instance.

[62] We are indebted to all counsel for their helpful submissions.

"The Honourable Madam Justice Newbury"

Reasons for Judgment of the Honourable Mr. Justice Low:

- [63] I have read in draft form the reasons of Madam Justice Newbury. I agree with the redistribution of the estate she proposes in favour of the testator's widow. I also agree with her conclusion on the issue of special costs awarded by the trial judge to the daughters against the sons as well as on the issues of trial, appeal and cross-appeal costs of the widow. I agree that the cross-appeal of the daughters ought to be dismissed.
- [64] I find myself in disagreement with my colleague's reasons on the issue arising out of the testamentary disposition of the 29 Class A shares in Nam Wah Tong Holdings Ltd. (the "Company").
- [65] In 1964 the testator and his then wife made an inter vivos gift to their three sons of the bulk of the shares in the Company, retaining for themselves voting control with a limited beneficial interest. The evidence does not permit an assessment of the value of this gift but it cannot be said to have been substantial. The sons did well with the assets of the Company and through proper management, personal guarantees and the benefits of inflation they greatly increased the value of those assets. In my opinion, the trial judge erred in apparently treating the substantial value of the Company at the date of Mr. Lee's death in 1996 as the equivalent of a testamentary disposition at that time of the Class B, C and D shares to the sons. The 1964 gift to the sons was partially offset by the bequests received by the daughters under their mother's will in 1969. I think the trial judge should have placed little or no emphasis on the 1996 value of the Company and he should have given more importance to the 1969 bequests to the daughters than he did when examining the relevant financial history.
- [66] I do not think it can be said that the 29 voting shares are worth more than the \$11,000 value assigned to them by the expert. The trial judge relied on the expert's opinion and found that per share they have the same value as each of the non-voting shares. There has been no attempt to disturb that finding on appeal. It follows that no purpose of the Wills Variation Act as interpreted by the authorities, particularly the *Tataryn* case, can realistically be achieved by altering the decision of the testator to leave those shares to his sons and giving them instead to his daughters. I do not think a judicious father would seek to compound a long-past financial imbalance of indeterminate proportions by giving sole voting control in the Company to shareholders who could have only a relatively nominal financial interest in the Company. To do so would serve no purpose other than to cause further family strife and risk protracted inter-shareholder litigation that would worsen the historical imbalance rather than improve it. A testator exercising his moral duty to his children would not deliberately create such a situation.

- [67] The difficulty with this case is that the assets of the estate excluding the value of the Class A shares in the Company are probably not sufficient to rectify the imbalance. The testator's legal obligation to his widow has to take priority and I agree with my colleague's reasons in that respect. All that can be done is to divide the balance of the estate equally between the daughters and exclude the sons from inheriting anything other than the Class A shares.
- [68] In summary, I would quash the order of the trial judge with respect to the disposition of the Class A shares in the Company; I would allow the cross-appeal of the testator's widow as proposed by my colleague; and I would dismiss the cross-appeal of the daughters.
- [69] As to trial and appeal costs, I would set aside the order of special costs made by the trial judge against the sons in favour of the daughters and substitute an order that the daughters recover trial costs on Scale 3; I would order that the widow recover from the residue of the estate her full costs of trial and her costs of both the appeal and her cross-appeal; and, finally, because of divided success in this court, I would order that the sons and the daughters bear their own costs of the appeal and the daughters' cross-appeal.

"The Honourable Mr. Justice Low"

I Agree:

"The Honourable Madam Justice Levine"

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