

CANADA / JUDGMENT

Chung v. Chung

2024 BCSC 1939

COURT

Supreme Court of British Columbia

DECIDED

22 October 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 1939 Chung v. Chung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chung v. Chung,

2024 BCSC 1939

Date: 20241022

Docket: S209737

Registry: Vancouver

Between:

May Lau Chung and Belinda Tam Chung, The Estate of the

Late Raymond Yam Man Chung

Plaintiffs

And:

Ken Chung

Defendant

And:

Jennifer Chung

Defendant by Counterclaim

- and -

Docket: S200706

Registry: Vancouver

Between:

Jennifer Chung

Plaintiff

And:

Ken Chung, The Estate of Raymond Yam Man Chung, Deceased, The Canada Trust Company, Executor of the Estate of Raymond Yam Man Chung, Deceased, May Lau Chung, Belinda Tam Chung, Don Jing Rong, Yin Mai Zhong a.k.a. Emily Chi-Ling Leake, Zhong Ting, Zhong Ying, Shan Chung a.k.a. Shan Jade Harte

Defendants

And:

Jennifer Chung, The Estate of Raymond Yam Man Chung, Deceased, The Canada Trust Company, Executor of the Estate of Raymond Yam Man Chung, Deceased, May Lau Chung, Belinda Tam Chung, Don Jing Rong, Yin Mai Zhong a.k.a. Emily Chi-Ling Leake, Zhong Ting, Zhong Ying, Shan Chung a.k.a. Shan Jade Harte

Defendants by Counterclaim

- and -

Docket: S201726

Registry: Vancouver

Between:

May Lau Chung and Belinda Tam Chung

Plaintiffs

And:

Ken Chung, Jennifer Chung, Dong Jing Rong, Yin Mai Zhong a.k.a. Emily Chi-Ling Leake, Zheng Xiang Zhong by his personal representative John Doe, Shan Chung a.k.a. Shan Jade Harte, and The Canada Trust Company in its capacity as Executor of the Estate of Raymond Yam Man Chung

Defendants

And:

Jennifer Chung, Dong Jing Rong, Yin Mai Zhong a.k.a. Emily Chi-Ling Leake, Zheng Xiang Zhong by his personal representative John Doe, Shan Chung a.k.a. Shan Jade Harte, and The Canada Trust Company in its capacity as Executor of the Estate of Raymond Yam Man Chung

Defendants by Counterclaim

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiffs May Lau Chung and Belinda Tam Chung in Actions S209737 and S201726:

M. Gianacopoulos

C.A. Bush

Counsel for the Defendant Ken Chung in Actions S209737, S200706, and S201726:

J. Dubas

Jennifer Chung, the Plaintiff in Action S200706 and the Defendant by Counterclaim in Actions S209737 and S201726, appearing in person:

J. Chung

Counsel for the Attendee, The Canada Trust Company as the Executor and Administrator of the Estate of the Late Raymond Yam Man Chung, in Actions S200706 and S201726:

M.B. Nakatsu

(May 6, August 22-23, 2024 only)

Place and Dates of Trial:

Vancouver, B.C.

May 6-10, 13-17, 21, 27-31,

June 3-7, 10, 12, 14, 17-20, 24-28,

July 2-5, 8-9,

August 19-20, 22-23, 2024

Place and Date of Judgment:

Vancouver, B.C.

October 22, 2024

Table of Contents

Introduction.. 5

The Parties and the Proceedings. 5

Family Background.. 7

A Note on Hearsay.	10
Ken's Return to Canada..	11
The Wills and the Property Transfer..	12
Joint Tenancy and the Presumption of Resulting Trust.	18
Ken's Involvement Between 2008 and 2013.	26
Changes to the Accounts.	28
The Accounts and the Presumption of Resulting Trust.	30
The Accounts and Undue Influence.	32
The Amount Ken Must Account For..	36
The Wills Variation Action..	41
Ken's Claim for Damages.	46
Costs and Proportionality.	47
Summary.	53

Introduction

- [1] Raymond Yam Man Chung ("Raymond") died leaving a will that divided his estate equally among four adult children, but the estate did not include all of his assets. Raymond's son, the defendant Ken Chung ("Ken"), had previously been added to the title of a condominium as joint owner and to various bank and investment accounts as joint account holder or designated beneficiary. Full legal ownership of those assets passed directly to Ken on Raymond's death.
- [2] Ken says that those assets were intended to be a gift to him. The plaintiffs, who are Ken's three sisters, say he received them in trust for Raymond's estate. They rely on the presumption of resulting trust that applies in these circumstances and say Ken has failed to rebut that presumption.
- [3] The condominium on Patterson Avenue in Burnaby (the "Condominium" or "Patterson") had an assessed value of \$688,000 as of 2023. The amount that was or should have been in the bank and investment accounts (the "Accounts") when Raymond died is in dispute, but was more than \$200,000.
- [4] Even in the absence of those assets, about \$2.2 million remains in the estate to be divided equally under Raymond's will, subject to any variation of the will that may be ordered in these proceedings. Those funds are the proceeds of sale of a mixed residential/commercial building that Raymond owned on East 10th Avenue in Vancouver (the "East 10th Building") and are currently held in trust by the executor.

The Parties and the Proceedings

- [5] In these reasons, I refer to members of the Chung family by their first names, as did counsel during trial. This is for clarity and ease of reference with no disrespect intended.
- [6] Raymond died on December 16, 2018 at the age of either 103 or 105. (The date of his birth in China may have been two years earlier than what is shown on Canadian documents.) His wife, Hsiu Nung Helen Chung ("Helen"), predeceased him on April 22, 2012 at the age of 89.
- [7] The eldest of Raymond and Helen's four children, the plaintiff May Lau Chung ("May"), died at the age of 75 on May 1, 2024--two days before trial. The action on her behalf is continued by her own estate. The other two daughters are the plaintiffs Belinda Tam Chung ("Belinda"), 73, and Jennifer Chung ("Jennifer"), 69. Ken is 71.
- [8] Three actions were tried together. The first was commenced by Jennifer, acting on her own behalf, on January 21, 2020 ("Jennifer's Action"). She seeks "just and equitable division of the residue" of the estate, including the value of the Condominium and the Accounts. On February 13, 2020, counsel for May and Belinda commenced a second action seeking variation of Raymond's will under s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] (the "Wills Variation Action"). Section 60 reads:
- 60 Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.
- [9] On September 9, 2020, May and Belinda commenced a third action, which alleges that Ken holds the Condominium and the Accounts in a resulting trust for Raymond's estate (the "Trust Action"). That claim was later amended to add an alternative allegation of undue influence. Because May and Belinda are not the executors of the estate, they were required by s. 151(1) of WESA to obtain leave to maintain an action on behalf of the estate. That section reads:
- (1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person
- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
- (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
- [10] The application for leave was the subject of a seven-day hearing before Justice Majawa in May 2022. Justice Majawa granted leave in reasons for judgment dated August 15, 2022 and indexed as 2022 BCSC 1396.

- [11] The Trust Action became the main one in these proceedings. May and Belinda maintained their Wills Variation Action only as an alternative claim. Jennifer's Action, as pleaded, could be interpreted as either a wills variation claim or a trust claim. She characterizes it as a trust claim, but there was no separate application or order for leave under s. 151 in that action. As a beneficiary of the estate, Jennifer will still benefit from any success her sisters have in the Trust Action.
- [12] Ken has filed counterclaims in all three actions, including a claim for variation of the will in his favour if the plaintiffs succeed in the Trust Action and a claim for damages for alleged abuse of process.
- [13] The Canada Trust Company ("Canada Trust") is the executor of Raymond's estate and is a nominal defendant in Jennifer's Action and the Wills Variation Action. The naming of the executor as a party to a wills variation action is required by Rule 21-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules].
- [14] Ken's counterclaim in the Trust Action named Canada Trust as a defendant by counterclaim, but in reasons dated April 26, 2024 and indexed as 2024 BCSC 863, I granted Canada Trust's application to be removed as a party to that action. There is no requirement for the executor to be named as a party in an action under s. 151 of WESA, and I held that Canada Trust was not a necessary party in the Trust Action.

Family Background

- [15] When Raymond and Helen were married in China, Raymond had three children from a previous marriage. Those children or their survivors received specific bequests in Raymond's will and are not parties to these actions.
- [16] May, Belinda, Ken and Jennifer were all born in Guangzhou, China. Members of the family came to Canada and settled in Vancouver at different times over a period of almost two decades. Raymond and May arrived together in or about 1963. In the years that followed, Raymond built a practice as a leading tai chi master. Belinda joined her father and sister in Vancouver in 1969. Helen, Ken and Jennifer remained in China, with Raymond remitting money to them. They were finally able to leave China and come to Vancouver in 1979.
- [17] When Helen, Ken and Jennifer arrived in Vancouver, Raymond had recently purchased the East 10th Building. This was a four-storey building where Raymond taught tai chi classes in a studio on the ground floor while living in one of the three residential units on the upper floors.
- [18] By that time, May and Belinda had both married and were no longer living with their father. May married Albert Lau in 1973, and by 1979 they had both begun careers as pharmacists. They both worked as pharmacists until retirement in 2007.

- [19] Belinda married Wilson Tam in 1975, and by 1979 he was practicing as a family physician while Belinda worked in his office. Dr. Tam's medical practice continued until he retired in 2018. Belinda says she stopped working in the office prior to that, when she turned 65. May and Belinda each have two adult sons, all now in their 40s and living in the U.S.
- [20] After arriving in Vancouver, Jennifer and Ken both taught tai chi in Raymond's studio. Jennifer also studied to obtain high school equivalency, then obtained a university degree in computer science. She moved out of the East 10th Building around the time she married Raymond Leung in 1984, then worked as a computer programmer until her retirement. Her husband worked in the same field and is now semi-retired. They have one daughter who is now 35 and is a software engineer. As a teenager, their daughter was an Olympic level figure skater, and Jennifer was heavily involved in supporting that career.
- [21] Ken continued to work with Raymond in the tai chi studio, including teaching classes with his own group of students and, he says, travelling with Raymond to teach tai chi classes in Victoria and Seattle. At the same time, Ken says, he worked in a series of other jobs and eventually worked for businesses that assembled computers. He also began investing in the stock market at some point, apparently with some success.
- [22] Ken is the only one of the four siblings with no post-secondary education. He testified that the cultural revolution in China closed schools when he was in the equivalent of grade five or six, and he had no formal education after that, other than some English language classes when he came to Vancouver.
- [23] In 1996, Raymond and Helen purchased a condominium in Vancouver but resold it only a few weeks later. They then purchased Patterson later that year for \$212,000, which they were able to pay without the help of a mortgage.
- [24] During the same year, Ken married Johanna Harte, with whom he had been living for several years. They had met at the tai chi studio, where Ms. Harte was Raymond's student. Shortly after their marriage, they adopted a daughter from China, but they separated in 1999 and were divorced in 2002. Although the separation and divorce were not entirely amicable, Ms. Harte continued to be close to Raymond and Helen.
- [25] In 2000, after his separation from Ms. Harte, Ken moved back to Guangzhou, China, where he had grown up. His tax return for 1999, the year before that move, showed a total income of \$14,115, consisting of investment, interest and business income. There was no employment income
- [26] In 2002, Ken married Yan Yang, now known as Nicole Chung ("Nicole") in Guangzhou. Their first child was born later in the same year, and a second was born in 2004. Ken moved back to Canada with his new family in late 2008. The reasons for that move are in dispute.

- [27] In early 2008, Raymond gave up his driver's licence following a motor vehicle accident at the beginning of the year. Dr. Tin Tang, who was Raymond and Helen's family physician, testified that Raymond was beginning to have difficulty walking in 2008.
- [28] Helen had surgery on March 1, 2008, after fracturing her hip in a fall. She had previously had a stroke in 2005, but Dr. Tang said she recovered well from the stroke except for some right leg weakness.
- [29] Dr. Tang continued to be Helen's family physician until 2012 and Raymond's until 2015. He testified that there is nothing in his clinical notes to indicate that either suffered from cognitive decline while they were his patients. That is consistent with the evidence of all the parties and all non-party witnesses who knew Raymond and Helen at the relevant times.
- [30] Raymond and Helen continued to live together at Patterson until Helen moved into a care facility shortly before her death. Raymond continued to live there until he moved to a care home in 2015. Ken and his family then moved into the Condominium and continue to live there.

A Note on Hearsay

- [31] During this trial, I heard a great deal of evidence about things allegedly said by Raymond and/or Helen at various times. That evidence came from Ken, the plaintiffs, spouses of the parties and other witnesses. The alleged statements relied upon by the plaintiffs include negative allegations about Ken, and those relied upon by Ken include similar allegations about the plaintiffs.
- [32] In estate litigation, statements of the deceased may be admissible under a traditional exception to the hearsay rule as evidence of the deceased's state of mind, or under the general "principled approach" to hearsay evidence if they satisfy the tests of necessity and reliability. On either approach, the evidence must have some trustworthiness before it is held to be admissible: *Peterson v. Welwood*, 2018 BCSC 1379 at paras. 70-79; *Pavlovich v. Danilovic*, 2019 BCSC 153 at para. 33.
- [33] Under the principled approach, the onus is on the party tendering a hearsay statement to establish its necessity and reliability. Where the declarant is dead, necessity is clearly established, but evidence from interested parties reporting statements of the deceased raises a concern about reliability. That evidence must be carefully scrutinized: *Anderson v. Anderson*, 2010 BCSC 911 at paras. 56-57.
- [34] In this case, much of the hearsay evidence includes statements allegedly made by Raymond or Helen many--sometimes 15 or more--years ago. Aside from the risk of memories being coloured over time by subsequent events, there is an obvious self-serving character to evidence from the parties. Evidence from non-party witnesses sometimes consists of their recollection of very brief statements in casual conversations.

- [35] Although I chose to hear that evidence without first determining its threshold reliability, I give it no weight except where it is clearly consistent with other, more reliable evidence.

Ken's Return to Canada

- [36] Ken testified that by 2008, his parents had begun asking him to move back to Canada in order to care for them. Raymond was by then over 90 and Helen was in her mid-80s. Ken said he was reluctant to return to Canada for a number of reasons.
- [37] He said he had moved to China in 2000 because he had never fully adapted to life in Canada and had never become fluent in English. Because of the lower cost of living in China at the time, he says he could live off his Canadian investment income and, if necessary, capital, without having to work and could live a lifestyle that he enjoyed, functioning in the culture and language he was familiar with. By 2008, he had a new wife who had never been to Canada and two young children who had been born in China.
- [38] Ken's evidence about his life in China is supported by his friend Dan Proulx, who had also known Raymond since the mid-1970s. Mr. Proulx said he visited Ken in China both before and after Ken married Nicole. He said Ken appeared to have a stable life and was very comfortable speaking his language in the city where he had grown up. After Ken married Nicole, Mr. Proulx said he visited them in their home, which he described as a large, modern apartment in a three-tower complex. Another friend, Robert McBurney, also testified that he visited Ken in China on two occasions and found him to be "the most relaxed I ever saw him."
- [39] Nicole testified that in 2008, they owned their three-bedroom apartment in Guangzhou, and their older son was attending Kindergarten. She said she did not want to move to Canada because she did not speak English and was concerned about starting over in a strange land. She also said she didn't know where they would live if they moved.
- [40] Ken testified that in order to persuade him to come back, his parents promised that he would get the Condominium and the Accounts when they died. He also said that, in order to ensure the permanence of his move, his parents demanded that he sell his condominium in China. He says he did so, but the plaintiffs say he has failed to produce any documents to prove that he ever owned that or any other property in China.
- [41] The plaintiffs say Ken has failed to prove there was any arrangement for him to care for their parents, deny that he provided significant care, and say he likely returned to Canada for other, unrelated reasons.
- [42] Ken returned to Canada with his family at or around the end of 2008 and rented an apartment in a building across the street from Patterson.

The Wills and the Property Transfer

- [43] Raymond and Helen had executed mirror wills on March 16, 1999 (the "1999 Wills"), naming each other as executor and sole beneficiary. On the death of the second of them, each of the three children of Raymond's first marriage was to receive a specific legacy of \$50,000, with the balance of the estate to be divided equally among May, Belinda, Ken and Jennifer.
- [44] In April 2008, they consulted Teresina Beretta, a Canada Trust estate and trust counsellor working with TD Bank, for purposes of estate planning. They had been referred to her by the TD Bank branch where they had accounts. (Canada Trust and TD Bank are related companies, and the two names were sometimes used interchangeably or in combination in documents and at trial.)
- [45] After meeting with Raymond and Helen, Ms. Beretta referred them to Grace Lai, a lawyer at the firm of Chen & Leung, in order to update their wills. In a letter to Ms. Lai dated April 23, 2008, Ms. Beretta said that Raymond and Helen wanted to appoint Canada Trust as alternate executor, give Canada Trust a power of attorney over their property and appoint one of their daughters as representative for personal care. The letter also said:
- They have four children: May, Belinda, Ken and Jennifer. Their children are the beneficiaries of the estate.
- [46] A note in Ms. Lai's file, dated April 25, 2008, and apparently based on a conversation with Ms. Beretta, says: "Clients want to appoint TD (because) don't want kids arguing." (A 43-day trial shows how well that worked out.)
- [47] Ms. Lai subsequently met with Raymond and Helen to take instructions for the new wills. She testified that they also told her that they wished to transfer the Condominium to Ken. She said she advised placing the property into joint tenancy with Ken because he would automatically become sole owner after their deaths, while a bequest of the property to him in a will could be more easily challenged under the predecessor legislation to s. 60 of WESA.
- [48] At the time, Ms. Lai had been a lawyer for four years and had been practicing at Chen & Leung for two years. Her practice was in the area of wills and estates, and she said about half of her clients were of Chinese origin. She said she is fluent in Cantonese and spoke to Raymond and Helen in that language.
- [49] Ms. Lai testified that she remembered Raymond and Helen because Raymond was unusually spry for his age, while Helen spoke proudly of her granddaughter's achievements as a competitive figure skater. She also said she remembered Helen because Helen reminded her of her own grandmother.
- [50] Ms. Lai prepared new wills, while conveyancing staff in the office prepared the "Form A" Land Title Act document that would be registered to add Ken to the title of the Condominium as a joint tenant with Raymond and Helen.

- [51] There are no notes in the Chen & Leung file of the conversation in which Ms. Lai said she received instructions to transfer the Condominium. But it is clear that the idea originated with Raymond and Helen, not with Ms. Lai, and that Ken was aware of his parents' plans although he was still in China at the time.
- [52] On May 6, 2008, Ms. Lai sent an email to Ken stating that his parents, as part of their estate plan, "will be adding your name onto the title of their property as a joint tenant." The email also requested information about his citizenship and country of residence for tax purposes.
- [53] Ken's reply two days later expressed no surprise about the proposed transaction, but said he didn't understand the query about taxes and residency. He told Ms. Lai that, although he was living in Guangzhou, he was still a Canadian citizen, paid Canadian income tax, and:

My mother and father are simply adding my name to the title of the property they own. What is the difference to the situation?

- [54] Aside from the Form A transfer document, that email exchange is the only reference to the property transfer in Ms. Lai's file.
- [55] Counsel for May and Belinda points out that Ken's email refers only to him being added to the title and does not refer to joint tenancy or to the transfer being a gift to him. I find there is nothing to be gained from attempting to closely parse the words of that email. It was actually composed for Ken by Mr. Proulx, based on his understanding of what Ken had told him. I also find it likely that a non-lawyer referring to being on title to a property would understand that as meaning some ownership interest.
- [56] Raymond and Helen attended at Chen & Leung for the second and final time on June 5, 2008, when they reviewed the wills with Ms. Lai and signed them along with the Form A transfer document.
- [57] The new wills were more detailed than the 1999 Wills but were generally similar. They still provided for the residue of the estate, after the death of the second of Raymond and Helen, to be divided equally among their four children. The only significant differences were:
- Where the 1999 Wills provided gifts of \$50,000 each to the three children of Raymond's first marriage, the new wills reduced that amount to \$30,000. One of those children had died by 2008, and the gift went to his surviving spouse;
 - A further gift of \$30,000 was given to the adopted daughter of Ken and Ms. Harte;
 - Canada Trust was appointed executor; and
 - The new wills included an "ademption clause" reading:

I direct that no spouse, child or issue of mine taking any interest or otherwise benefitting under this my Will shall be liable to bring into account any sum or sums of money or the value of any property or interest which I have already paid or transferred to or settled on such person or which I may hereafter pay or transfer to or settle upon such person.

[58] Ms. Lai also prepared representation agreements appointing May as Raymond and Helen's representative for purposes of personal care, health care and routine financial matters. Belinda was named as the alternate representative.

[59] Ms. Lai's file indicates that she left messages for both May and Belinda on July 3, 2008. May returned her call on July 7 and said she was unaware of the matter but would call Ms. Lai again after speaking to her parents. She never called back.

[60] Because May had died on the eve of trial, I gave both counsel leave to draw my attention to portions of her examination for discovery that they considered relevant. In one such portion, May said she called Helen who said she knew nothing about it and "there's nothing." She said she never called Ms. Lai back because "I don't know whether this lawyer is an imposter or not."

[61] That testimony suggests a degree of confusion and memory loss on the part of Helen that is inconsistent with all of the evidence about her mental state at the time. She was consistently described as being fully alert and oriented until the last months of her life. A statement by Helen to the effect that she did not recall seeing a lawyer a month earlier would also call into question her capacity to make a will at the time, but there is no suggestion in either evidence or pleadings that she lacked such capacity.

[62] I therefore do not accept the evidence from May on this point. Further, I find that if Helen made the kind of statement May described, it was likely because, for some reason, she did not want her daughters to know about her estate planning at the time.

[63] Ms. Lai left the firm of Chen & Leung a few months after dealing with Raymond and Helen. She had no reason to think about the work she had done for them until 2019, after Raymond's death.

[64] Charles Anderson, a lawyer representing the executor, Canada Trust, wrote to Ken on May 29, 2019, asking him to provide, among other things:

An affidavit from a lawyer at Chen & Leung confirming your father's intention that the beneficial ownership of the property would be solely yours on his death.

[65] Ken took that letter to Chen & Leung and asked for such an affidavit on May 30, 2019. David Chong, an associate who had joined the firm long after Ms. Lai's departure, spoke to Mr. Anderson who referred to the presumption of resulting trust, and said the executor, while not taking a position on the matter, wanted some written documentation.

[66] Mr. Chong retrieved the file and asked Gina Fung, a legal assistant, to contact Ms. Lai. The notes of that telephone conversation indicate that Ms. Lai said an affidavit could be prepared for her signature. They also say:

The transfer was prepared according the parents' instruction. It's the lawyer's practice to explain to the parents the effect of J/T (add Ken's name on title)

[67] On June 20, 2019, Ms. Lai went to Chen & Leung's office and signed a brief, three-paragraph affidavit that had been drafted by Ms. Fung. She testified that she first reviewed the file. The affidavit says that "the Transferors gave me instructions to add the name of Ken Chung as joint tenant to the title" of Patterson and that:

I explained to the Transferors the nature and effect of joint tenancy. It was the Transferors' intention that the property be transferred to Ken Chung, resulting in Ken Chung having the sole legal and beneficial ownership of the Property upon the death of the Transferors.

[68] In January 2020, and then again in May 2020, Ms. Lai was contacted by a lawyer at the firm of May and Belinda's counsel. In those conversations, she indicated she had very little or no recollection of her dealings with Raymond and Helen.

[69] Asked about that at trial, Ms. Lai said that she had neither her previous affidavit nor the Chen & Leung file in front of her at the time of those conversations. She said she was not careful in her answers because it was a stressful time for various personal reasons, and she "just wanted to get (the lawyer) off the phone." She said she was not told that the lawyer would be swearing an affidavit about their conversation.

[70] More than a year later, after she had become more aware of the nature of this litigation, Ms. Lai swore another affidavit, drafted by her own counsel, on August 6, 2021. In that affidavit, she said that since speaking to the plaintiffs' lawyer, she had further opportunity to consider the matter and review the file. She said:

It was very clear to me during my meetings with the Chungs that they wished to gift beneficial interest in their home at [Patterson] in Burnaby (the "condo") to their son Ken so that he would receive it in its entirety outside the estate.

[71] Ms. Lai had previously declined to sign a much more detailed affidavit that had been prepared for her by Ken's counsel.

[72] At trial, Ms. Lai was emphatic that she recalled Raymond and Helen and their instructions. She added additional details, including some that cannot be correct. For example, in addition to recalling how proud Helen was of her granddaughter Mira's accomplishments as a figure skater, Ms. Lai said she remembered seeing Mira on television during the 2010 winter Olympics and telling someone that was her client's granddaughter. In fact, Mira competed in the 2006 winter Olympics, but not in the 2010 games.

- [73] I accept that Ms. Lai was honestly attempting to assist the court, but find her evidence is likely a mixture of independent recollection, evidence of her normal practice, recollection that has been refreshed through her involvement in this matter, and reconstruction based on what she believes must have happened.
- [74] I also cannot ignore the fact that Ms. Lai is to some extent an interested party. She has recently been named as a defendant in another action commenced on Ken's behalf where she is alleged to have been negligent in not properly recording the instructions she received. That action will obviously not proceed if Ken is successful here.
- [75] But although I have found many of the details in Ms. Lai's evidence to be unreliable, I find it likely that she at least explained the nature and effect of joint tenancy to Raymond and Helen, including that the Condominium would become Ken's sole property after their deaths. That is consistent with the advice any reasonable solicitor would be expected to give in the circumstances, because the right of survivorship is the defining and principal feature of joint tenancy.

Joint Tenancy and the Presumption of Resulting Trust

- [76] The nature of joint tenancy was explained by the Court of Appeal in *McKendry v. McKendry*, 2017 BCCA 48:
- [28] The principal characteristic of joint tenancy is the right of survivorship. When a joint tenant dies, his or her interest in property is extinguished. If there is more than one surviving joint tenant, they continue to hold the property as joint tenants. The last surviving joint tenant takes full ownership of the property.
- [29] So long as the requirements of a binding gift are met, the owner of property may, during his or her lifetime, make an immediate gift of a joint tenancy, including the right of survivorship. This is so regardless of whether the donee of the gift is to hold it for the benefit of the donor while he or she is alive. When gifted inter vivos, the right of survivorship is a form of expectancy regarding the future. It is a right to what is left of the jointly-held interest, if anything, when the donor dies [citations omitted].
- [77] Joint tenancy is distinguished from a half interest or other defined ownership share in property held under a tenancy in common. Upon death, the interest of a tenant in common passes into his or her estate while survivors retain their proportional interest. The legal title of a joint tenancy, including the right of survivorship, vests at the time the joint tenancy is created. Therefore, the gift of a joint interest in real property is an inter vivos gift, rather than a testamentary gift, and cannot be retracted by the donor. It is a "complete and perfect inter vivos gift": *Fuller v. Harper*, 2010 BCCA 421 at para. 53.
- [78] However, parties may hold legal title to property as joint tenants while beneficial ownership is held differently. The beneficial owner of property has been described as "the real owner of property even though it is in someone else's name": *McKendry* at para. 27.

- [79] The question in this case is whether Raymond and Helen intended to give Ken both legal and beneficial interest in the condominium, or whether they intended only to give him legal title while they retained the beneficial interest. In the latter case, he would hold the beneficial interest in trust for them or their estate: McKendry at para. 36.
- [80] Where a parent makes a gratuitous transfer of property to an adult, independent child, the presumption of resulting trust applies. The recipient is presumed to hold the property in trust for the parent or the parent's estate unless the recipient proves, on the balance of probabilities, that the parent intended the transfer to be a gift: Pecore v. Pecore, 2007 SCC 17 at paras. 36-44.
- [81] A gift is a gratuitous transfer made without consideration. Two requirements must be met for an inter vivos gift to be legally binding: the donor must have intended to make a gift and must have delivered the subject matter to the donee: McKendry at para. 31.
- [82] The transfer to Ken was clearly gratuitous in that he paid nothing for an interest in the property. Although there is evidence from which it may be inferred that Ken expected to receive the property in exchange for his assistance to Raymond and Helen, that evidence falls short of establishing the existence of a contractual agreement with clear terms and defined consideration. The presumption of resulting trust therefore applies, and Ken must establish on the balance of probabilities that his parents intended to give him a gift of the property.
- [83] Whether the presumption is rebutted is a question of evidence. The Court in Pecore said at para. 44:

44 As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

And at para. 55:

55. Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted
- [84] Those passages are important in this case because, during the course of trial and argument, the plaintiffs suggested a number of hypothetical other reasons why Ken may have returned to Canada (e.g. so his children could be educated here), or why Raymond and Helen may have given him a legal interest in the Condominium (e.g. to save probate fees or to allow Ken to use a parking stall that Raymond no longer needed). Ken's obligation is to put forward evidence of his parents' intention that the court can consider, in the context of all of the

evidence, and weigh on the balance of probabilities. He is not required to positively disprove every alternate theory that may be suggested.

- [85] Pecore was a case involving joint bank accounts, but the presumption of resulting trust is also applied to transfers of real property in British Columbia: Fuller at para. 43; McKendry at para. 37; Simard v. Simard Estate, 2021 BCSC 1836 at para. 34. In Fuller, the Court said at paras. 47 and 50 that evidence capable of rebutting the presumption may include circumstantial evidence of surrounding circumstances:
- [47] The effect of the presumption only becomes evident after all the evidence, both direct and circumstantial, on the surrounding circumstances in which the transfer was made, has been weighed. Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer, will the presumption be applied to tip the scales in favour of the transferor or his estate: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) at page 159, § 4.60.
- [50] Where a dispute arises over the characterization of a gratuitous transfer after the death of the transferor the evidence of the transferor's intention at the time of the transfer is likely to be circumstantial. However, where it is available, the best evidence of the transferor's intention will be the direct evidence of the transferee as to the circumstances in which the transfer occurred (Pecore at para. 26).
- [86] In Pecore, the Court referred to the "traditional rule" that evidence adduced to show the intention of the transferor at the time of the transfer "ought to be contemporaneous, or nearly so". The Court rejected rigid application of that rule and said evidence of intention that arises subsequent to a transfer should not automatically be excluded if it is relevant to the intention of the transferor at the time of the transfer. The trial judge must assess the reliability of such evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention (at paras. 56-59). In Fuller, the Court noted at para. 49 that an assessment of post-transfer conduct should include "an assessment of the reasonableness of any inferences that are sought to be drawn from that conduct, including the inherent probability or improbability of competing explanations as to the transferor's intent".
- [87] Although there was a great deal of non-contemporaneous evidence in this case, I find most of it to be unhelpful and have given it little weight. For example, Ken gave evidence that at a family dinner shortly after his return to Canada, Raymond announced to all present, including the plaintiffs and their spouses, that Ken would receive the Condominium and the Accounts after he and Helen died. That evidence is denied by the plaintiffs and their spouses. Ken's testimony on that point raises the concern about self-serving evidence that the Court in Pecore alluded to.

- [88] Mr. Proulx, Mr. McBurney and Ms. Harte all gave evidence of conversations with Raymond in which he said something to the effect of Ken getting the Condominium. That evidence is based on their recollection of brief statements made many years ago in the context of conversations that were primarily about other matters.
- [89] In terms of contemporaneous evidence, counsel for May and Belinda emphasized the lack of written records in which either Raymond or Helen state an intention to gift the property to Ken. There are, for example, no emails or other communications in which the matter is referred to.
- [90] Written communication would be ideal evidence of intention, but it is not always to be expected in a family setting. While some families may be in the habit of discussing such matters as future plans for property in writing, others may not be. In this case, all witnesses who gave evidence about their communications with Raymond and Helen, including the plaintiffs, referred only to conversations. There is no evidence of Raymond and Helen ever communicating to their children or anyone else in writing on any subject.
- [91] It would also have been helpful if Ms. Lai had taken more detailed notes of the instructions she received, but that was outside Raymond and Helen's control.
- [92] I do not read Pecore or cases that followed it as establishing an absolute requirement for written documentation of intention. Fuller makes clear that the evidence to be considered will often be evidence of the circumstances surrounding the transfer. In this case, I find that there is a body of evidence, much of it circumstantial, from which inferences can be drawn.
- [93] At the time of the 2008 property transfer, Raymond was at least 93 and Helen was 85--ages at which they could reasonably anticipate an increasing need for assistance. Both were having increasing mobilization difficulties--in Helen's case, because of a recent hip fracture. Because Raymond had given up his driver's licence, they needed transportation assistance for any activities outside their home.
- [94] Although they had three daughters living in the Vancouver area, there were reasons why each might be limited in their ability to assist. May had surgery for lung cancer in 2007, and Belinda had spinal surgery the same year. Jennifer was still actively involved in supporting her daughter's competitive skating career. None of them lived in close proximity to Raymond and Helen's condominium in Burnaby. Belinda and Jennifer lived on the west side of Vancouver, while May lived in Richmond. On the other hand, when Ken returned from China, he and his family rented an apartment across the street from Patterson.
- [95] Raymond and Helen were aware that Belinda and Jennifer each owned, with their respective spouses, a house on the west side of Vancouver, while May and her husband owned a house on a large property in Richmond and another large property adjacent to it. They knew that Ken would be returning to a city where he did not own a home and did not have any employment to return to. They also knew that Ken had two young children--grandchildren who they had not yet met--while their daughters' children were independent or at an age

when they soon would be.

- [96] I therefore find it likely that Raymond and Helen wanted Ken to be available to assist them in their last years and were likely aware that he would require some assistance or future benefit to be able to do so.
- [97] I accept Ken's evidence that he was happy in China and had no desire to return to Canada. He had a comfortable lifestyle, a new wife who had never been to Canada and did not speak English, and two young children born in China. I find that he would not have returned to Canada when he did if his parents had not asked him to.
- [98] I have found that Ms. Lai likely explained the right of survivorship to Raymond and Helen. It is a simple concept that can be briefly explained. Ms. Lai would only have needed to say, in Cantonese, something to the effect of: "This means that you can't sell the condominium without Ken's permission and it will become his property after you have both died".
- [99] While he may not have been a sophisticated businessperson, Raymond had acquired significant assets, including a four-storey building, in the years after he arrived in Vancouver as a refugee. He did so while teaching tai chi classes for modest fees. By 1996, he and Helen had been able to purchase Patterson in an all-cash transaction. All of the evidence, including from his daughters, portrayed him as a man who kept a very close watch on his money and property.
- [100] Raymond and Helen had purchased both Patterson and the Vancouver condominium they briefly owned before it in joint tenancy. Adrian Wong is a notary who acted for them in both of those transactions and had long known Raymond as a prominent tai chi master. Like Ms. Lai in later years, Mr. Wong was fluent in Cantonese and testified that he would have spoken to Raymond and Helen primarily in Cantonese in the course of those transactions. He said it was his practice to explain joint tenancy and the right of survivorship to couples purchasing property and believes he would have done so to Raymond and Helen.
- [101] Raymond and Helen signed the property transfer the same day they signed new wills. That in itself is consistent with a specific intention that the property be dealt with outside the will. The plaintiffs' suggestion that Raymond and Helen may have simply wanted to reduce probate fees is not supported by any evidence.
- [102] The wills included the ademption clause, stating that no beneficiary under the will would be liable to account for any money or property they had previously received. No such clause had appeared in the 1999 Wills, and there is no evidence of any significant gifts or transfers in or prior to 1999 that would have needed to be protected by one.

- [103] Ms. Lai agreed that the ademption clause, like many other parts of the will, was a standard provision generated by the law firm's precedent system, but said it was still necessary to consider which of those standard provisions should be included. The ademption clause does not in itself override the presumption of resulting trust, but its inclusion in the wills is at least consistent with consideration of property transfers or gifts outside the wills.
- [104] There is no evidence that either Raymond or Helen suffered from any cognitive decline that would have made them incapable of understanding the simple explanation of the meaning of joint tenancy. All of the evidence is that they remained fully competent at the time. They signed 11-page wills on the same day, and there is no suggestion that they lacked testamentary capacity. I agree with Ken's counsel that it is inconsistent for the plaintiffs to assert that Raymond and Helen were not capable of understanding joint tenancy while accepting the fact that they had capacity to understand the sometimes more complex provisions in their wills.
- [105] None of the facts I have set out are individually conclusive, but in combination, I find that they create a body of circumstantial evidence sufficient to rebut the presumption of resulting trust and to support an inference that Raymond and Helen had reasons for wanting Ken to have the Condominium on their deaths and intended to give him that interest.
- [106] That evidence and the inference it leads to could be countered by evidence to the contrary, but there is no such persuasive evidence. There is simply an assertion that Raymond and Helen did not and could not understand the concept of joint tenancy. That assertion is entirely speculative and appears to be based primarily on stereotypical assumptions arising from their age at the time and the fact that English was not their first language.
- [107] I therefore find, on the balance of probabilities, that Raymond and Helen signed the property transfer document knowing that it would give Ken full ownership of the Patterson condominium upon their deaths and with the intention of giving Ken a gift of that survivorship interest. The claim that he holds the Condominium in trust for the estate is dismissed.

Ken's Involvement Between 2008 and 2013

- [108] As said above, Ken and his family moved to Vancouver late in 2008 and rented an apartment across the street from Patterson. At the time, Raymond and Helen had a caregiver who assisted them for a few hours a day. Although the caregiver did the cooking for Raymond and Helen, Ken said he and his wife did so on weekends and other times when the caregiver was off.
- [109] Nicole testified that the caregiver worked three hours a day, did not do heavy housework and stopped working in or around 2011. After that, she said she and Ken did Raymond and Helen's laundry, and she did the heavy housework for them. Nicole testified that she bought groceries for Raymond and Helen, and helped Helen with bathing and dressing. She said

Helen still had "a very clear mind," but her physical condition was deteriorating. Nicole said she had a part-time job and did not start working full time until 2015, after Helen had died and Raymond had entered a care home.

- [110] Ken testified that he would go to the Condominium every morning to provide any assistance that was necessary and would drive his parents anywhere they wanted to go, including to frequent dim sum lunches. He also said he would sometimes get calls in the middle of the night if his parents were having difficulty, and sometimes he had to clean up in the morning after one or the other had been incontinent.
- [111] Lorraine Martin, another long-time tai chi student, testified that from about 2008, she frequently took Raymond and Helen to restaurants, shopping, doctors' appointments and banks. However, she said her availability to provide that help was reduced around 2011 or 2012 when she became more involved with her own grandchildren.
- [112] None of the plaintiffs gave evidence of providing regular direct care or assistance to their parents. Their evidence of interaction with Raymond and Helen primarily described telephone conversations, social visits to Patterson and dinners together at restaurants on special occasions. Those dinners generally included May and/or Belinda, but not Jennifer. The plaintiffs' evidence was to the effect that they would have helped if they had been asked to. I accept that they would have, but find they likely were not asked because Ken was more readily available.
- [113] Ken testified that, after returning from China, he also took over management of the East 10th Building, including maintenance, repairs and dealing with tenants. Ms. Harte testified that she had performed that function when Ken was living in China, but that involvement ended when Ken returned. Both Mr. Proulx and Mr. McBurney gave evidence of seeing Ken doing work in and around the building, although they and other long-time tai chi students often assisted.
- [114] While I do not accept that the job of managing the property was necessarily as onerous or as time-consuming as Ken now suggests, I accept that he had become the logical person to assume overall responsibility and that he did so.
- [115] David Yau was a financial advisor at Canada Trust and dealt with Raymond under the power of attorney in favour of Canada Trust that Raymond signed in 2008. He testified that power of attorney was used primarily for efficiency of bill payments, and Raymond continued to make his own financial decisions. Mr. Yau said he never used Helen's power of attorney.
- [116] In or about 2014, Raymond cancelled the power of attorney. Mr. Yau's understanding was that Raymond wanted to deal with matters himself, with Ken's help. He said he had no concerns about that because Raymond had capacity to do so. Ken was not given a formal power of attorney.

- [117] Helen suffered a stroke in early 2012 and entered a care home in February 2012, a little more than two months before her death. Following her death, Raymond continued to live at Patterson until he entered a care home in 2015. Records from Raymond's care home show that Ken was by far the most regular and frequent family visitor. I find that was likely a continuation of a close relationship that had existed from at least the time of Helen's death.

Changes to the Accounts

- [118] Sandra Lui was the manager at the TD Bank branch that Raymond dealt with. She first met Raymond at a time when she understood Helen had already died. She said she spoke to Raymond frequently--he and her father were from the same village in China.
- [119] Ms. Lui recalls Ken bringing Raymond to the bank and waiting in the lobby while Raymond did his own banking. She said she never had any concern about Ken being inappropriately involved in Raymond's banking, although she has had other clients where that concern arose and she needed to do "due diligence".
- [120] Raymond and Ken went to the bank together on December 13, 2013. On that occasion, they didn't deal with Ms. Lui but with Frankie Kong, a financial services representative at the bank. They signed signature cards that converted two bank accounts, previously in Raymond's sole name, to joint accounts with Ken. One of those accounts was a savings account with a balance at the time of \$270,474, and the other was a U.S. dollar account with a balance of \$1,350 USD.
- [121] Another chequing account appears to have been held jointly by Ken and Raymond since at least 2010--the date of the earliest statements from that account that were put into evidence. That account received rents from tenants of the East 10th Building and paid some expenses related to that building. The fact that it was a joint account is consistent with Ken's evidence that he was managing the building on Raymond's behalf. The balance in that account in December 2013 was \$6,024.
- [122] The forms that converted the two accounts into joint accounts in December 2013 included a section about whether the joint accounts would include the right of survivorship, with a choice of checking a box stating "yes," "no," or "not applicable." The "yes" box was checked on both documents.
- [123] Mr. Kong does not specifically recall Raymond and Ken but identified his writing on the documents. He said he is fluent in Cantonese and spoke to clients in that language if they wished him to.
- [124] Mr. Kong said that when a customer wanted to change an account from single to joint, standard practice at the bank required the bank representative to explain to both parties that they had a choice about whether survivorship would apply and to explain that it meant one person would get the entire account if the other dies. He said he would also explain that if survivorship was not chosen, the deceased's portion of the account would go to the estate.

He added that, if he had any concern about whether the clients understood anything, he would ask them to give the matter further consideration and obtain legal advice if necessary.

- [125] Ms. Lui could not say if she was involved in the change of accounts, although account managers in Mr. Kong's position sometimes sought a second opinion. She also said it was standard bank practice to make sure customers, particularly seniors, fully understood transactions where they were changing account ownership.
- [126] On December 24, 2013, Raymond and Ken attended again at the bank, and Raymond signed beneficiary designations naming Ken as beneficiary under two tax free savings accounts (TFSAs). One of those accounts had originally belonged to Helen and apparently passed to Raymond on her death. It had a balance of \$10,299. The other had a balance of \$20,750.
- [127] Each of the beneficiary designation forms contained a statement that, upon the account holder's death, the funds would be "distributed in accordance with the operative beneficiary designation, if any." It also said that the funds would go to the estate "if no designated beneficiary survives me." Raymond signed both forms immediately below that statement.
- [128] Mr. Kong identified his employee number on the beneficiary designation forms, indicating that he had also dealt with Raymond and Ken on that occasion. He explained that TFSAs are registered accounts that cannot be held jointly. A customer may designate a beneficiary at any time, if they wish to do so.
- [129] Mr. Kong said his practice was to go over the form and explain that "if you pass away the money will go to the beneficiary", and he would not process the form if the account holder appeared to have any doubts. He added that he understood the need to be particularly patient with seniors and explain everything to them.
- [130] On January 10, 2014, Raymond and Ken jointly opened a new mutual fund account and transferred \$100,000 into that account from what had recently become one of the joint savings accounts. On the same day, Raymond opened a new TFSA account, also naming Ken as beneficiary, with \$32,356 transferred from one of the chequing accounts and one of the existing TSFA accounts.

The Accounts and the Presumption of Resulting Trust

- [131] As with the condominium, the plaintiffs rely on the presumption of resulting trust to argue that Ken received the funds in the Accounts in trust for the estate. In the alternative, they argue that he obtained his interest in the Accounts through undue influence.
- [132] Clearly, the presumption of resulting trust applies to the joint banking and investment accounts (Pecore at paras. 1-7), but the law in Canada is unsettled as to whether naming a designated beneficiary on a registered account, in this case the two TSFA accounts, engages the presumption.

- [133] In *Chung v Chung*, 2022 BCSC 1396 at paras. 69-73, Justice Majawa noted that this Court has in some cases applied the presumption of resulting trust to designated beneficiary assets but there does not appear to have been a full consideration of whether the presumption applies in light of s. 95 of WESA. That section says that "A benefit payable to a designated beneficiary under a benefit plan on the death of a participant does not form part of the participant's estate "; see also *Chappell v. Chappell*, 2024 BCSC 268 at paras. 43-49.
- [134] For purposes of May and Belinda's leave application, Justice Majawa held that there was an arguable case for application of the presumption, but it was for the trial judge to decide whether it applies. I find it is unnecessary to decide the issue here because Ken has rebutted the presumption in any event.
- [135] Mr. Kong, supported by Ms. Lui, gave evidence of the standard bank practice to explain the meaning and effect of survivorship and beneficiary designations.
- [136] Professionals and others who deal with large numbers of clients cannot be expected to remember the details of every transaction and frequently must rely on describing their usual practice on similar occasions. For example, such evidence often arises in regard to evidence of medical witnesses. In *Friedsam v. Ng* (1993), 86 B.C.L.R. (2d) 335 (C.A.), 1993 CanLII 1129 at para. 53, the Court of Appeal said trial judges may give considerable weight to records and evidence of usual practice followed in their creation. In *Canadian Imperial Bank of Commerce v. 3L Trucking Ltd.*, 176 A.R. 245, 1995 CanLII 9226 (AB KB), the Court accepted a bank manager's evidence regarding his conversation with a customer based on his standard practice even though he had no independent recollection of the meeting (at para. 21). In the same vein, there is no reason why the experienced bank employees here should not also be able to rely on usual practice in giving evidence about business records.
- [137] Usual practice is sometimes preferred over independent recollection, although each case turns on an assessment of the totality of the evidence and on the evidence itself in determining what weight to give to usual practice evidence: *McKerr v. CML Healthcare Inc.*, 2012 BCSC 1712 at para. 8. The evidence must be weighed in light of the available objective evidence of the surrounding circumstances: *Steinbach v. Fraser Health Authority*, 2010 BCSC 832 at para. 50.
- [138] The court's task is to determine whether the standard practice was likely followed on the occasion at issue. A standard practice may be overlooked or forgotten on a single occasion if, for example, there were many other pieces of advice being given or steps being taken at the same time, or if there was some evidence that the witness may have been distracted.

- [139] In this case, I accept the evidence of Mr. Kong and Ms. Lui as to the standard practice that existed, and there is nothing in the surrounding circumstances to suggest that it would not have been followed. As was the case with Ms. Lai's explanation of joint tenancy, explanation of survivorship and/or beneficiary designation was at the heart of the transactions that Mr. Kong was carrying out with Raymond and Ken and was one of the only things of importance he needed to explain.
- [140] Although there is no evidence Ms. Lui was directly involved on these occasions, I accept her evidence based on other transactions with Raymond that he understood and was in control of his banking needs.
- [141] I therefore find that on the date the relevant documents were signed, Raymond understood and intended that the Accounts would pass to Ken on his death.

The Accounts and Undue Influence

- [142] However, in addition to rebutting the presumption of resulting trust, Ken must also rebut the presumption of undue influence.
- [143] The doctrine of undue influence was developed to prevent victimization: *Sandu v. Sandu*, 2023 BCSC 323 at para. 54. Equity allows a court to set aside a gift procured through undue influence since there "can be no gift where the transfer was under undue influence": *Bostrom v. Bigford*, 2019 BCSC 79 at para. 99.
- [144] A presumption of undue influence arises where the party's relationship "gives rise to the potential domination of one party by another." Once a presumption of undue influence arises, the onus moves to the defendant to rebut the presumption, on a balance of probabilities, by showing that the plaintiff entered into the transaction as a result of their own "free, full and informed thought": *Lorintt v. Boda*, 2014 BCCA 354 at paras. 75-76, citing *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 1991 CanLII 69 at paras. 42-45.
- [145] In *Geffen*, the Court said at para. 41:

when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. I disagree with the Court of Appeal's decision in *Goldsworthy v. Brickell*, *supra*, that it runs contrary to human experience to characterize relationships of trust or confidence as relationships of dominance. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing per se reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

- [146] A gratuitous transfer from a parent to an adult child does not automatically create a presumption of undue influence. This is because a relationship between parent and adult child does not necessarily involve dependency and the potential for domination: *McMaster Estate v. McMaster*, 2021 BCSC 1100 at para. 50. While the presumption of undue influence does not normally apply to transfers between a parent in good health and in possession of their faculties and an adult child, it can arise in situations where "the parent is dependent, vulnerable to manipulation, or has been historically dominated by the adult child": *Bostrom* at para. 99." The relationship between an independent adult child and an elderly ailing parent may be one of dependency and the potential for domination sufficient to trigger the presumption of undue influence: *Young v. Veselic*, 2022 BCSC 697 at paras. 80-81, citing *Modonese v. Delac Estate*, 2011 BCSC 82 at paras. 104-106.
- [147] The initial inquiry required by the presumption of undue influence is different from that required by the presumption of resulting trust. The presumption of resulting trust deals with the donor's intention at the time of a transaction, while the presumption of undue influence deals with the process by which that intention was formed. A donor may have decided and intended to make a gift but may have been persuaded into that intention by undue influence: *Cowper-Smith v. Morgan*, 2016 BCCA 200 at para. 63. Of course, the end result may be the same because property obtained by undue influence will be found to be held in trust.
- [148] As to how the presumption of undue influence can be rebutted, the Court in *Geffen* said at para. 46:
- 46 Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, i.e., that apart from the details of the particular impugned transaction the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed, the onus moves to the defendant to rebut it. As Lord Evershed M.R. stated in *Zamet v. Hyman*, *supra*, at p. 938, the plaintiff must be shown to have entered into the transaction as a result of his own "full, free and informed thought." Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice, and so on. Additionally, I agree with those authors who suggest that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised.
- [149] In *Cowper-Smith* at para. 50, the Court set out the following factors to consider in assessing whether a donor entered into a transaction as a result of their own "free, full and informed thought": "(i) the lack of actual influence or opportunity to influence the donor; (ii) the receipt of or opportunity to obtain independent legal advice; (iii) the donor's ability to resist any such influence; and (iv) the donor's knowledge and appreciation about what she was doing."

- [150] The plaintiffs raised the alternative submission of undue influence in relation to the transfer of the Condominium but did not strongly argue it. Ken was not present on either occasion when Raymond and Helen met with Ms. Lai and was in fact in China at the time. The evidence does not establish a relationship of potential dominance in those circumstances.
- [151] However, the plaintiffs strongly argue undue influence in relation to the Accounts, and I agree that the situation was very different when Ken was given an interest in them. By that time, Ken had been back in Canada for five years. He was providing some physical care to Raymond and assisting him with various aspects of his life. He describes that assistance and care as occurring on a daily basis. I find that relationship was one of potential dominance sufficient to raise the presumption of undue influence.
- [152] I further find that the presumption of undue influence has not been rebutted. There is no evidence of any circumstances that would have caused Raymond to want Ken to take an interest in the Accounts and to make a "full, free and informed" decision to do so in December 2013.
- [153] Ken testified about a promise that he would eventually receive the Accounts having been made in 2008 at the same time the decision was made to put him on title to the Condominium. But if that was the case, I would have expected the transaction to have taken place by at least a date shortly after Helen's death in 2012, when Ken could have replaced her as joint account holder and beneficiary.
- [154] If Raymond needed help with his banking--which, according to Ms. Lui he did not--Ken could have been given signing authority without the right of survivorship. To the extent that Raymond may have wanted Ken involved in day-to-day financial transactions as a matter of convenience, there was already a joint account available for that purpose.
- [155] Ken may have been in a better position to rebut the presumption if there was evidence that Raymond gave instructions about the Accounts and answered any questions about his intention in Ken's absence. Ms. Lui testified that was what occurred in her own dealings with Raymond, but it does not appear to have been the case when the account documents were presented by Mr. Kong and signed. Mr. Kong described likely meeting with Raymond and Ken together on those occasions.
- [156] Undue influence does not depend on proof of reprehensible conduct or malicious intent. The transferee may have acted in the sincere belief of their honesty. It is sufficient to establish that the deceased was reliant on a person, and that person exercised dominance over the deceased's transactions through persuasive influence: *McMaster Estate* at para. 55.
- [157] I find that is the situation here. I do not find any reprehensible conduct or malicious intent on Ken's part. He has simply failed to rebut the evidentiary presumption arising from the nature of his relationship with Raymond at the relevant time.

The Amount Ken Must Account For

[158] Although Ken must account to the estate for the financial benefit he received as a result of undue influence, the amount of that benefit is less clear. May and Belinda seek an order that Ken return \$416,301.78 to the estate. Jennifer calculates the amount owing as \$233,036.64, plus an additional \$1,830.26 in U.S. funds. Two forensic accounting opinions have been provided, but I find them to be of limited usefulness.

[159] May and Belinda have introduced a report from Rosanne Walters dated August 28, 2023. She said that on reviewing the Accounts, she found \$533,000 in "unidentified transactions" over the period from 2010 to 2019. Ken had no authority over the Accounts, with one exception, until late 2013. The \$416,301.78 now sought by May and Belinda relates to "unidentified transactions" after 2013. Of that amount, almost half was spent while Raymond was still alive.

[160] Ken relies on a report from Emily Chee that purports to identify most of the transactions referred to by Ms. Walters, including amounts spent by or for the benefit of Raymond while he was alive. The difficulty with her report is that it relies heavily on what Ken told her, based on his recollection or assumptions. Her report clearly states:

We caveat that unless otherwise indicated, we have not been provided with any documents that the unidentified transactions were made for the purposes represented by Mr. K. Chung. As such we cannot confirm that the transactions were made for the purposes disclosed by Mr. K. Chung except based on his oral confirmation.

[161] Ken did not repeat, in his evidence, all the details he apparently communicated to Ms. Chee, and even if he had, its weight would have been limited. I say that while acknowledging that the allegation of unidentified transactions put Ken in a difficult position of having to explain or document transactions, many of which had been in cash, that had taken place over a 10-year period that ended more than three years before Ms. Walters produced her report. To the extent that transactions might have been of a type that could be explained by banking documents, Ms. Walters admitted in cross-examination that it can be difficult to obtain full documentation from banks for transactions that took place more than six or seven years earlier.

[162] Counsel for May and Belinda argues that Ken was in a fiduciary position from the time he became joint account holder with Raymond in 2013. In addition to specific relationships that have been found to give rise to fiduciary obligations, a fiduciary relationship may be imposed in specific circumstances if three general characteristics are found to exist. In *Frame v. Smith*, [1987] 2 S.C.R. 99, 1987 CanLII 74 at paras. 36-42, those characteristics are:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[163] Counsel relies on two Ontario cases for the proposition that the addition of the name of an adult child to an elderly parent's bank account is sufficient in itself to create a fiduciary duty on the child in relation to the parent's account: *Estate of Annie MacKay v. Dawn MacKay (Evans)*, 2015 ONSC 7429; *Borges v. Borges*, 2018 ONSC 3451.

[164] Both of those cases involved a parent whose capacity was at issue. The Court in both cases found that although a fiduciary duty was created, the party asserting that duty had failed to prove any breach of it. In particular, the Court in both cases found that the children did not breach their fiduciary duty by paying themselves reasonable compensation for care and companionship that they provided to the parent.

[165] Although she is not seeking to hold Ken accountable for expenditures prior to Raymond's death, Jennifer has referred to *Sull v. Pengelly*, 2019 BCSC 575 and *Sarzynick v. Skwarchuk*, 2021 BCSC 443. In both of those cases, the finding of fiduciary duty was based on the fact the defendant, in addition to being a joint account holder, held a power of attorney. The Court referred to statutory provisions that impose specific record keeping requirements on the holder of a power of attorney.

[166] Ken did not hold a power of attorney, and there is no evidence that, while Raymond was still alive, Ken unilaterally exercised his status as joint account holder to affect Raymond's interests. His evidence is that Raymond knew and approved of all transactions involving the Accounts, and that evidence is at least partially supported by Ms. Lui's evidence about Raymond's banking practices. There is no evidence to the contrary.

[167] The plaintiffs rely primarily on Ken's inability to produce documents that were not demanded until many years after the fact. I am not prepared to presume misappropriation solely on that basis.

[168] Even if I am wrong on that, a greater difficulty facing the plaintiffs is that there is no pleading that Ken breached any fiduciary duty while Raymond was alive. May and Belinda's second further amended notice of civil claim, filed two months before trial, added the allegation of undue influence but states in an unamended para. 21 that:

Since Raymond's death, Ken has also taken control and asserted ownership of a number of Raymond's Financial Assets...

[Emphasis added.]

And at para. 27:

as a result of having taken control of the Financial Assets, fiduciary relationships were formed

[Emphasis added.]

And at para. 29:

As a result of Ken refusing to return to Raymond's Estate the Financial Assets in these circumstances, and, further, as a result of Ken failing to disclose the value and/or accounts for the Financial Assets, Ken has breached his fiduciary duty.

[Emphasis added.]

[169] The allegations of breach of fiduciary duty and losses to the estate as a result of undue influence, as pleaded, are limited to transactions after Raymond's death, including Ken's assertion of the right of survivorship. I find that there is no pleading that properly puts transactions before Raymond's death in issue. Any amount that Ken must return to the estate is therefore limited to funds in Raymond's accounts at the time of his death, plus court order interest.

[170] The appendices to Ms. Walters' report include tables that show balances in each account at issue as of the beginning and the end of each year from 2010 to 2019. The year-end balances in the table for 2018 are the best evidence of what was in Raymond's accounts when he died because he died only two weeks before the end of that year. The only evidence of expenditure in that two-week period is a payment by Ken of \$6,646 for Raymond's funeral, although it is not clear which of the accounts, if any, that was paid from.

[171] The total balance in all the Accounts at the end of 2018, according to Ms. Walters' table, was \$319,177.53, but one account appears to have been counted twice to arrive at that figure.

[172] Ms. Walters refers to the joint mutual fund account, which she identifies by the account number 7510026, with a 2018-year end balance of \$115,331.75. A review of the quarterly account statements shows that was actually the balance earlier in the year, as of September 30, 2018. The opening balance as of January 1, 2019 was \$112,145.69.

[173] Ms. Walters' table also refers to a second account with a number ending in 0026, but identified only with those four digits. All other accounts listed in the table are identified with a full seven-digit account number. This second "0026" account is said to have had an estimated balance of \$107,774.85.

[174] If there was a second account ending in 0026, I have not been directed to any documents about it in the 27 volumes of documents that were put into evidence. The "estimated balance" in the second account is said in Ms. Walters' table to be based on a "last statement" dated May 2, 2016. I have not been directed to that document, and the document number referred to in Ms. Walters' report bears no relationship to the document numbers in the trial exhibits. However, I note that the balance Ms. Walters refers to is exactly the same amount shown in the April 1, 2016 statement for the account referred to by the full number of 7510026.

- [175] I therefore find that the amount of \$107,774.83 referred to as the balance of "account 0026", is a duplication and must be deducted from Ms. Walters' calculation of the total 2018 year-end balance.
- [176] The deduction of that duplicated amount and application of the correct year-end balance in the mutual fund account reduces the total balance in the joint accounts and the registered investment accounts at Raymond's death, rounded and increased by the small amount that was in U.S. funds, to have been \$208,700. I find that to be the amount which Ken must repay to the estate, along with court order interest from the date of Raymond's death. Of course, Ken is also one of four residuary beneficiaries under the will. Subject to any variation of the will, he will be entitled to have one quarter of what he pays refunded to him as part of the ultimate distribution.

The Wills Variation Action

- [177] May and Belinda argue that if Ken is able to retain significant assets outside of the estate, Raymond's will should be varied in their favour. They rely on s. 60 of WESA, which allows the court to vary a will that does not "make adequate provision for the proper maintenance and support of the will-maker's spouse or children".
- [178] The will divides the residue of the estate equally among the four siblings. That residue has always included the proceeds of sale of the East 10th Building and, as a result of my decision, now also includes the balance that was in the financial Accounts as of the date of Raymond's death. The total residue therefore now exceeds \$2.4 million.
- [179] The plaintiffs and Ken will each receive approximately \$600,000 under the will if it is not varied. The question is whether Ken's receipt outside the will of the Condominium, with a current value of almost \$700,000, entitles the plaintiffs to a greater share of the residue.
- [180] The leading authority on application of s. 60, although decided under an earlier, similar statute, is *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 1994 CanLII 51. The Court referred at pages 815 and 816 to two statutory objectives: ensuring that adequate, just, and equitable provision is made for spouses and children of a will-maker and protecting the will-maker's autonomy. The second interest is subordinate to the first.
- [181] The question of whether a will-maker made adequate provision under a will to a spouse or children is assessed in light of current societal legal and moral norms. Legal norms are obligations owed to a spouse or dependent children and which would have been capable of being enforced during the testator's lifetime. Moral norms are obligations "found in society's reasonable expectations of what a judicious person would do in the circumstances by reference to contemporary community standards": *Tataryn* at 820-821.

[182] This case involves a claim by independent adult children. There is no legal obligation but, where the size of the estate permits and in the absence of circumstances that may negate a moral obligation, some provision for such children should be made: *Tataryn* at 822-823. Writing for the Court in *Tataryn*, Justice McLachlin added at pages 823-824:

In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. 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.

[183] A testator's moral duty to adult children is assessed from the perspective of a reasonable testator, that is, a "judicious parent": *Tom v. Tang*, 2023 BCCA 221 at para. 39, referring to *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213, 1993 CanLII 1262.

[184] In *Dunsdon v. Dunsdon*, 2012 BCSC 1274, Justice Ballance said:

[134] In the post-*Tataryn* era, the following considerations have been accepted as informing the existence and strength of a testator's moral duty to independent children:

- relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;
- size of the estate;
- contributions by the claimant;
- reasonably held expectations of the claimant;
- standard of living of the testator and claimant;
- gifts and benefits made by the testator outside the will;
- testator's reasons for disinheriting;
- financial need and other personal circumstances, including disability, of the claimant;
- misconduct or poor character of the claimant;
- competing claimants and other beneficiaries:

[citations omitted]

- [135] These considerations tend to overlap and are not approached in isolation as independent, air-tight categories.
- [185] That list of factors is similar to one that Justice Ballance previously set out in *McBride v. Voth*, 2010 BCSC 443 at paras. 129-135. At para. 134 of that case, Justice Ballance referred to authorities stating that different provisions among adult children in a will do not necessarily establish a moral claim, but there is a reasonable expectation that adult children will share equally in the absence of relevant reasons for unequal distribution. It should be noted that *McBride* dealt only with the distribution of an estate under a will. There was no issue about inter vivos transactions that took property out of the estate.
- [186] Equal distribution between independent adult children in a will demonstrates prima facie compliance with the moral duty requirement: *Inch v. Battie*, 2007 BCSC 1249 at para. 68; *Vielbig v. Waterland Estate* (1995), 121 D.L.R. (4th) 485, 1995 CanLII 2544 (B.C.C.A.) at para. 37. Jennifer in fact refers to that principle in opposing Ken's counterclaim for wills variation.
- [187] Inter vivos dispositions and assets passing outside the will through right of survivorship are not directly subject to a variation claim under the statute, but the court can consider them in assessing whether the parent has met moral obligations to an adult child: *Inch* at paras. 69-70; *Doucette v. McInnes*, 2009 BCCA 393 at para. 84.
- [188] In *Inch*, a will divided the residue of the estate equally between two children, but one of them had received almost \$200,000 through survivorship or inter vivos transfer. Justice Wilson found that the defendant had rebutted the presumption of resulting trust except in regard to one joint bank account with a balance of \$21,245. When that amount was added to the estate, the residue to be divided equally under the will was a little less than \$95,000.
- [189] In determining whether to vary the will, Justice Wilson considered the fact the testator had a closer relationship with the defendant than she had with the plaintiff, the size of the estate, and the relative financial position of the parties. He concluded at para. 80:
- 80 Considering all of those circumstances, I am not able to say that Ms. Stead breached her moral duty to Mr. Inch either by disposing of a significant part of her estate before her death by right of survivorship, or by not making greater provision for him in the Will. As noted, this is not a case in which one child has been disinherited. In fact, after the relatively minor specific bequests, the residue is to be divided evenly between the children. Ms. Stead did dispose of a considerable part of her property other than by Will, but that is something she was entitled to do. The claim that the Will be varied is thus dismissed.
- [190] In *Doucette*, the testator made only token bequests to two of her four adult children, left the family home to a third, and residue to a fourth. However, three of those children each held one or more investment accounts jointly with the testator. Those accounts were in differing amounts but totalled about \$400,000.

- [191] The trial judge held that the investment accounts formed part of the estate and divided the estate among the four children on a percentage basis of 35-25-25-15. The Court of Appeal reversed the trial judge's finding in relation to the investment accounts and, when those accounts were returned to the surviving joint holders, the total value of the estate, including the family home, was less than \$450,000.
- [192] The Court of Appeal held that the testator had fulfilled her duties to two of the children who received the investment accounts outside the will--one for \$264,000 and the other for \$150,000. The estate was divided between the other two on a 70-30 basis, although the child who received the larger share had also received \$44,000 outside the will.
- [193] Both of those cases dealt with assets of a total value that was considerably smaller than the value of assets in this case, and unlike this case the value of assets disposed of outside the will was roughly equal to or greater than the value of assets covered by the will.
- [194] As in *Inch*, no one in this case has been disinherited, and the will in fact provides for equal distribution among the adult children. The plaintiffs here make no argument based on financial need or any other personal circumstances. There is certainly no evidence that any of them will be left in a disadvantageous financial position as compared to Ken, even allowing for Ken's retention of the Condominium.
- [195] As I understand the argument made by counsel for May and Belinda, it is that a parent's *prima facie* moral obligation is to divide all assets equally among independent adult children, which may require variation of the will to offset the value of assets passing to one child outside the will.
- [196] Such an approach would leave little or no room for testamentary autonomy. Although Tataryn made protection of testamentary autonomy a secondary goal, it did not abolish it. I note that in *Doucette*, neither the trial judge nor the Court of Appeal approached the case with the goal of establishing absolute equality among children.
- [197] Belinda and Jennifer, who each appear to be financially secure in their retirement with no dependent children, will each receive approximately \$600,000 under the will. May was similarly secure financially before her death. Section 60 of WESA does not require consideration of the next generation, but May's estate will also receive approximately \$600,000. I see no basis for concluding that those amounts fail to satisfy Raymond's moral obligation or that they leave anyone without "adequate provision for proper maintenance and support".
- [198] As was found with the testator in *Inch*, I find that Raymond and Helen were entitled to dispose of some of their property outside of their wills, particularly as the total amount to be divided equally under Raymond's will is more than three times the value of the Condominium Ken received outside it.

[199] The plaintiffs' wills variation actions are dismissed. In view of Ken's success in retaining the Condominium, I presume there is no longer any basis for his own counterclaim for variation of the will, but I would dismiss that claim in any event, based on the will's equal division.

Ken's Claim for Damages

[200] Ken also counterclaims for damages for abuse of process, including damages for stress and depression arising from what he says were constant and unreasonable demands for production of documents that the plaintiffs knew or ought to have known would no longer be available or were likely irrelevant. That claim is most explicitly pled in the counterclaim to May and Belinda's Trust Action.

[201] The essential elements of tortious abuse of process are: a collateral and improper purpose; overt conduct in furtherance of that purpose; and damages to the plaintiff from the wrongful use of the legal process: *Oei v. Hui*, 2020 BCCA 214 at paras. 5-6.

[202] The abuse of process claim here is based on a theory that the plaintiffs advanced a claim that they knew to be false because Raymond directly told them at or around the time Ken returned to Canada that he intended to give the Condominium and the Accounts to Ken. I have not accepted Ken's evidence on that point.

[203] But even if I had accepted that evidence, it would not be sufficient. A knowingly false claim may be struck out as an abuse of process or be sanctioned through costs, but does not in itself give rise to a separate claim for damages. The Court in *Oei* said at paras. 36 and 37:

[36] The tort of abuse of process is narrow, intentionally so to foreclose the spawn of litigation wherein one failed action begets another action, which may beget another action, and so on.

[37] In the case of abuse of process advanced against a plaintiff, one action may beget another action only where the first action is brought for a purpose that is both improper and collateral (outside of what might be achieved against the person on whom the claim is made) I conclude that knowing falsity, by itself, is not a "purpose" as required for the tort, and a plea of knowingly false allegations cannot transform an acceptable purpose into a tortious purpose in respect of the tort of abuse of process.

[Emphasis in original.]

[204] I also agree with counsel for May and Belinda that it is difficult to conceive of how the Trust Action can be said to be an abuse of process when it could only proceed with leave of the court. Among the things that May and Belinda were required to prove in order to obtain leave was that they were acting in good faith. That requirement is contained in s. 151(3)(a) (iii) of WESA. Justice Majawa specifically found at para. 56 of his reasons that they had met the good faith requirement.

[205] Ken's counterclaim for abuse of process is dismissed.

Costs and Proportionality

[206] Ken seeks special costs on a full indemnity basis and an order that \$715,282.79 be held back from the plaintiffs' shares of the estate residue as security for those costs. I presume that very precise number reflects the actual legal fees Ken has incurred.

[207] May and Belinda say regular party and party costs at scale B should follow the event except that the disbursement costs for the court's daily hearing fees, initially paid by May and Belinda, be divided, with half payable by Ken and half payable by all three plaintiffs.

[208] Jennifer opposes the claim against her for hearing fees and seeks special costs against Ken.

[209] Canada Trust seeks the costs of two applications that it was involved in. I will deal with that claim separately after addressing the position of the other parties.

[210] Traditionally in estate litigation, Canadian courts ordered that all parties' costs were paid from the estate on a full indemnity basis, but that is no longer the case. Costs may be ordered to be paid out of the estate where the validity of a will is at issue or where litigation arises from difficulties or ambiguities in a will that were caused by the testator. But where the litigation is fundamentally an adversarial contest between beneficiaries, costs generally follow the event and are assessed on a party and party basis: *Jung Estate v. Jung Estate*, 2022 BCSC 2223 at paras. 11-14, 22-25.

[211] In *Kakavelakis v. Boutsakis*, 2017 BCCA 396 at para. 94, the Court noted that costs represent "an important instrument by which courts are able to promote or sanction litigation conduct". Regardless of the outcome of the proceeding, the court may consider the conduct of all parties in ordering that each bear their own costs: *Rhodes v. Myers*, 2021 BCSC 2043 at paras. 39-41. In exercising its discretion to deny costs, a court must only consider conduct that occurred during the proceeding and must base any decision "on sound principle": *Kakavelakis* at para. 95.

[212] Rule 1-3 (2) establishes proportionality as one of the objects of the Rules:

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
 - (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.

- [213] The civil litigation system is frequently criticized as being too expensive and too slow. That criticism is not always justified, but it becomes difficult to refute in the face of egregiously disproportionate proceedings like this one.
- [214] The trial of this case occupied 43 days, during which the parties presented the Court with 27 binders of documents, not counting binders containing transcripts of pre-trial examinations of parties and witnesses. Most of those documents have been of little or no assistance in deciding the matters at issue.
- [215] But the trial was only the last phase of the excessive and disproportionate proceedings. May and Belinda's application for leave under s. 151 of WESA took seven days. In his decision on that application, Justice Majawa said at para. 116:
- [116] In my view, the leave provision found in s. 151 of WESA could not have possibly contemplated a seven-day hearing, more than 25 affidavits and 2,000 pages of documents. In essence, the parties have invited me to decide on the merits of May and Belinda's action. That is not the role of the court in hearing a leave application under s. 151 of WESA.
- [216] In addition to the leave application, there were multiple pre-trial applications, including applications for production of documents, for amendment of pleadings and for examination of non-party witnesses.
- [217] At various times during the trial, portions of discovery transcripts were put to the parties, and portions of transcripts of pre-trial examinations of non-party witnesses were put to those witnesses. The transcripts that were handed up indicate the length of the examinations.
- [218] Ms. Lai had dealt with Raymond and Helen on only two occasions, but a pre-trial cross-examination on her affidavits lasted almost six hours. If that was intended to identify and perhaps narrow the evidence she could give at trial, it did not have that effect. Her examination in chief and cross-examination at trial took three and-a-half days.
- [219] At least Ms. Lai was the most important non-party witness. There were also pre-trial examinations of some less critical witnesses who had relatively little relevant evidence to give. Ms. Harte was examined for a full day, and Mr. Proulx and Mr. McBurney for about half a day each.
- [220] There were pre-trial examinations of at least three employees or former employees of TD Bank/Canada Trust. One of those examinations lasted a day and-a-half, the second a full day and the third almost a day.
- [221] Examinations for discovery of parties is governed by Rule 7-2(2), which limits discovery of a party by each party adverse in interest to seven hours, except by consent or court order. Counsel for May and Belinda obtained an order permitting examination of Ken for 21 hours and the examination, conducted over seven days, took approximately that amount of time. At trial, Ken was in the witness box for a total of about nine days.

- [222] Ken testified through an interpreter at discovery, as he did at trial, so some extension of the usual seven-hour limit was obviously appropriate (although the application that resulted in the order for extra time also appears to have included unsuccessful efforts by plaintiffs' counsel to deny Ken the ability to testify through an interpreter and to prohibit his counsel from making objections). But the examination for discovery of May was almost as long as that of Ken, although there is no indication that an interpreter was used, and there does not appear to have been any order for an extension beyond the seven-hour limit.
- [223] The goal of proportionality based on the amount involved is sometimes difficult to apply. Some cases are not just about money. Others may involve parties with such widely divergent views on the appropriate damages that the "amount involved" is only what the court eventually decides it to be.
- [224] That difficulty does not arise in this case. This was a case about specific assets with values that could be known with reasonable accuracy from the beginning. The value of the Condominium was known or easily determined at any stage of the proceeding through assessment notices or appraisals.
- [225] There was some dispute about the value of the Accounts that Ken received, but even when the highest number ever put forward by the plaintiffs is added to the value of the Condominium, the total value of all the assets in issue was in the range of \$1.2 million or \$1.3 million. Even if all of those assets had been returned to the estate, Ken would still have received 25 percent of their value under the will. The maximum amount involved was therefore about \$900,000.
- [226] That is not an insignificant amount of money, but it is likely to be exceeded by the legal costs incurred by the parties (except Jennifer who was self-represented). I do not know what all the parties are paying their respective counsel, but Ken's application for some \$750,000 in security for special costs appears to indicate the legal fees he has incurred. May and Belinda's legal expenses may be more than that, given that they were represented by two counsel throughout the trial.
- [227] In short, the known value of the assets at issue could not possibly justify the likely expense of this proceeding to the parties. The amount of court time used, both in trial and pre-trial proceedings, made a mockery of the concept of proportionality. Parties may be willing to spend more on litigation than they can hope to recover, but the system is not only about them. Every day they unnecessarily spend in court is a day that is not available to other litigants, including some whose matters are more urgent.
- [228] Proportionality is central to "the very fabric of civil litigation in British Columbia": *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 at para. 146. If proportionality is to fulfill that central role, it must have some practical enforceability.

- [229] In my view, the proportionality rule has little meaning if the court cannot at least consider it in exercising its discretion on costs in an appropriate case. I find this to be an appropriate case, given the excessive use of the court's and the parties' time and resources with no apparent consideration of what was reasonably justified by what was at stake.
- [230] I have no intention of attempting to parse the trial or pre-trial proceedings to determine if one party was more to blame than the others. There were excesses on all sides. It was the responsibility of counsel and of all parties to consider what was truly reasonable and necessary.
- [231] As between the plaintiffs and Ken, I order that each party bear their own costs.
- [232] Canada Trust, the executor of the estate, played a minimal role at trial. Its counsel was not present, except on a few brief occasions, and it does not seek costs related to the trial. However, it seeks costs, payable from the estate on a special costs, full indemnity basis, for its participation in two pre-trial applications.
- [233] Although adversarial parties are not generally entitled to recover costs from the estate, executors are in a different position and are ordinarily entitled to recoup from the estate the legal costs reasonably incurred in acting within the scope of their fiduciary duties: *Mawdsley v. Meshen*, 2011 BCSC 923 at paras. 39-40; *Leung v. Chang*, 2014 BCSC 1243, at para. 82.
- [234] In *Leung*, the executor who was awarded special costs was a family member. One may question why the same approach to costs should apply to professional executors who are already being paid for their services, but that distinction is not recognized in the authorities. In *Mawdsley*, the executor was a lawyer, and both *Leung* and *Mawdsley* referred to *Royal Trust Corp. of Canada v. Clarke* (1989), 60 D.L.R. (4th) 257 (B.C.C.A.), 1989 CanLII 2692, which involved a professional trustee.
- [235] But although the general rule favours Canada Trust's position, I find there are unusual circumstances here.
- [236] The first application for which Canada Trust seeks full indemnity was a two-day application heard by Justice Warren on June 20 and 21, 2023. On that application, Canada Trust was one of a number of organizations and individuals from whom May and Belinda were seeking extensive document production. Those included Ms. Harte, Chen & Leung, the manager of the Patterson strata, banks, and the care homes where Raymond and Helen spent their last years.
- [237] I have read the oral reasons of Justice Warren dated July 27, 2023. It appears that the most contentious issue was between the plaintiffs and Ken over the scope of document production from Ms. Harte and from Chen & Leung. In relation to the application respecting Canada Trust, Justice Warren said at para. 34:

Canada Trust largely consents to the application, but with one exception, some tinkering to the scope and provided it has 30 days to comply

[238] The documents sought by the plaintiffs included estate planning documents for both Raymond and Helen. Canada Trust agreed to produce those documents for Raymond, but not for Helen, arguing that it was not the executor of Helen's estate. Justice Warren did not accept that position and said at para. 39 that Canada Trust "wears two hats":

in addition to being the executor of Raymond's estate, it was involved in estate planning for both Raymond and Helen. In that capacity, it is like a third party in possession of Helen's estate planning files. In that capacity, it must produce those files.

[239] Canada Trust was successful in arguing that the order directed to it be expressly limited to "relevant and non-privileged documents".

[240] In those circumstances, I find it is not in the interest of the estate to pay all of Canada Trust's expenses, including attendance by counsel at a two-day hearing where the primary dispute was between other parties. I award party and party costs at scale B, payable by May and Belinda.

[241] The second application for which Canada Trust seeks full indemnity was the application before me on April 22, 2024 in which Canada Trust successfully applied to be removed as a party to the Trust Action. I said in my reasons that costs of the application would be determined following the trial.

[242] Like Justice Warren in the application before her, I find that Canada Trust "wore two hats" in the application before me. Its application to be removed as a defendant to Ken's counterclaim was not directly in furtherance of its duties as executor of Raymond's estate. It was in the same position as any party who has been brought into an action and seeks to be removed. Its success justifies only party and party costs at scale B, payable by Ken.

Summary

[243] The claims of all plaintiffs that Ken holds the Condominium in trust for the estate are dismissed.

[244] The Trust Action is allowed only to the extent that Ken must pay \$208,700 plus court order interest to the estate on account of the funds that were in the bank and investment accounts at Raymond's death, but that amount will become part of the residue of the estate, to which Ken is entitled to a 25 percent share on final distribution.

[245] May and Belinda's Wills Variation Action is dismissed. To the extent Jennifer's action is properly characterized as a Wills Variation Action, it is also dismissed.

[246] Ken's counterclaims in all actions are dismissed.

[247] The plaintiffs and Ken will each bear their own costs.

[248] Canada Trust will have party and party costs at scale B, payable by May and Belinda, for the application on June 20 and 21, 2023; and party and party costs at scale B, payable by Ken, for the application on April 22, 2024.

"N. Smith J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/19/2024BCSC1939.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/chung-v-chung-2024-bcsc-1939>

Prepared on 27 October 2026 · Esheria