

CANADA / JUDGMENT

Kan v. Cheong

2024 BCSC 1633

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1633 Kan v. Cheong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kan v. Cheong,

2024 BCSC 1633

Date: 20240904

Docket: S215645

Registry: Vancouver

Between:

Celina Kan aka Cheong I Cheng aka Kan Yee Ching

aka Celina Yee Ching Kan

Plaintiff

And:

Ina Jeanne I Hang Cheong aka Ina Cheong,

personally and as administrator of the estate of Tat Kwan

Cheung aka Tat Kuan Cheong, deceased, I Man Cheong aka

Sophia Cheong, Emilia Cheong Xavier, and Lei Ng

Defendants

Corrected Judgment: The cover page of the judgment was corrected on September 9, 2024.

Before: The Honourable Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:

D. Hobbs

M. McGarry

Counsel for the Defendants Ina Jeanne I Hang Cheong aka Ina Cheong and I Man Cheong aka Sophia Cheong:

K. Belani

Place and Dates of Trial:

Vancouver, B.C.

March 11-15 and 26, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 4, 2024

Table of Contents

Introduction.. 3

Background.. 4

Assessment of the Evidence. 14

Legal Principles. 17

Analysis. 21

Conclusion.. 27

Introduction

- [1] This is a wills variation proceeding pursuant to s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. To avoid confusion, I will refer to the parties by their first names.
- [2] The testator, Tat Kuan Cheong ("Tat Kuan"), died on April 22, 2021. He was the biological father of three daughters; the plaintiff Celina Kan, also known as Cheong I Cheng ("Celina"), the defendant Ina Jeanne I Hang Cheong ("Ina"), and the defendant I Man Cheong ("Sophia").
- [3] When Celina was four years old, she was taken from her home in Macau to live with Tat Kuan's sister, Kan Kit Gee ("Kit Gee"), and her husband, Kan Chik Yin ("Chik Yin"), in Hong Kong. Kit Gee and Chik Yin did not have children of their own, and they raised Celina as their daughter.

- [4] In his will executed February 22, 2021 (the "Will"), Tat Kuan left three specific bequests and stipulated that the residue of his estate be divided equally between Ina and Sophia. The specific bequests were:
- \$10,000 U.S. to Celina, who was referred to in the Will as Tat Kuan's "niece";
 - \$10,000 U.S. to Tat Kuan's sister, Emilia Cheong Xavier; and
 - \$20,000 Cdn. to Tat Kuan's "goddaughter", Lei Ng.
- [5] At the time of Tat Kuan's death, his estate had a value of approximately \$584,000. By the time of the trial it was worth about \$730,000. After the specific bequests are satisfied, Ina and Sophia will each receive about \$340,000 under the Will unless it is varied in this proceeding.
- [6] Emilia Cheong Xavier and Lei Ng are named as defendants but their interests are not affected by the relief sought and they took no position at the trial.
- [7] Initially, Ina and Sophia took the position that Celina was adopted by Kit Gee and Chik Yin and, as a result, she had no standing to apply to vary the Will pursuant to s. 60 of WESA, which applies only to testator's "spouse or children". By the end of the trial, Ina and Sophia conceded that Celina had not been adopted by Kit Gee and Chik Yin, that she remained a "child" of Tat Kuan for purposes of the application of s. 60 of WESA, and that she had standing to apply to vary the Will. In the result, their position is that the Will made adequate provision for Celina in all the circumstances such that the court's discretion to vary the Will is not engaged.
- [8] Celina says the specific bequest to her of \$10,000 U.S. was not adequate, and she seeks a variation so as to divide the residue of Tat Kuan's estate equally between her, Ina, and Sophia.

Background

- [9] Celina's recollection of certain aspects of her childhood differs from that of Ina and Sophia, but I was satisfied that the differences are attributable to their individual perceptions which were shaped by their own experiences and observations as children decades ago, and the evolution of their memories over those many years. Despite these differences, there is little actual dispute about the core facts that found this proceeding. This background section of these reasons largely reflects undisputed evidence.
- [10] Tat Kuan had an older brother, Tat Wai, and an older sister, Kit Gee. All three of them were born in or about the 1920's in Macau. Tat Kuan also had a half-sister, Emilia.

- [11] Tat Wai had a physical disability that limited his earning capacity. As an adult, he worked but did not earn much income. He married and had seven children, including Paul Cheung and Felicity Chu, each of whom testified at the trial. During their childhoods, Tat Wai's children most often resided with Tat Wai's wife and Tat Kuan's mother in Macau. Tat Kuan provided them with financial support.
- [12] As mentioned, Kit Gee married Chik Yin. He came from a wealthy family based in Hong Kong. As an adult, Chik Yin did not work. He and Kit Gee were supported by his family.
- [13] Celina, Ina and Sophia were all born in Macau, to Tat Kuan and his then wife, Chu P'ui Lun ("P'ui"). Celina was born on July 24, 1951, Ina was born on December 30, 1953, and Sophia was born on February 1, 1955.
- [14] In about 1955, when Celina was about four years old, she was taken by Tat Kuan to live in Hong Kong with Kit Gee and Chik Yin, who raised Celina as if she was their daughter. Tat Wai's daughter, Felicity Chu, who was about the same age as Celina, also lived with them for about two years but she was sent back to Macau to live with her mother and paternal grandmother when she was about six years old.
- [15] Initially, Celina referred to Kit Gee and Chik Yin using the Chinese equivalent of "aunt" and "uncle" but when she started school Kit Gee instructed her to refer to them using the English terms "mommy" and "daddy". Celina testified this was confusing for her because she knew that Kit Gee and Chik Yin were not her parents, but she followed the direction. Celina also started to refer to Tat Kuan using the Chinese term for "second uncle" when speaking publicly, but for some period she continued to refer to Tat Kuan as "papa" and to P'ui as "ma" when speaking privately to them. As an adult, Celina referred to Tat Kuan using the Chinese term for "second uncle" and to Kit Gee as mommy or mother.
- [16] As a child, Celina started using Kit Gee's surname, "Kan", but Kit Gee told her she had never actually been adopted. Celina has continued to use the surname "Kan" throughout her life.
- [17] About a year after Celina started living with Kit Gee and Chik Yin, Tat Kuan, P'ui, and Ina moved from Macau to Hong Kong. Sophia, who was a baby, was placed with another relative because P'ui was working and not able to care for her.
- [18] Tat Kuan and P'ui divorced in about 1958. P'ui moved to Sweden. Ina was sent back to Macau to live with her paternal grandmother and Tat Wai's children.
- [19] Tat Kuan subsequently married "Louise" in Hong Kong. Sophia moved in with them when she was in grade one.
- [20] Tat Kuan worked as an auxiliary police officer, driving instructor, and accountant in Hong Kong. He sent money to his mother in Macau to provide for Ina and his nieces and nephews (Tat Wai's children). He did not provide any financial support for Celina.

- [21] Celina saw Tat Kuan, Ina and Sophia fairly regularly during her childhood. They came to visit Kit Gee on special occasions and during school holidays. Celina referred to Ina and Sophia as her "cousins", but she knew they were her biological sisters. Ina and Sophia eventually became aware that they and Celina were sisters. Ina learned this from her father when she was in her teens. Sophia learned this when she was seven or eight years old, from her maternal grandmother.
- [22] As a result of the visits, Celina was able to maintain a relationship of sorts with Tat Kuan who, on all accounts, was a kind and loving man. However, as the years passed, their relationship came to resemble an uncle/niece relationship more than a parent/child relationship. Kit Gee and Chik Yin provided for all Celina's needs and made all decisions about her upbringing.
- [23] As mentioned, Kit Gee and Chik Yin were supported financially by Chik Yin's wealthy parents. When Celina started living with them, they had a small house but about two years later, they moved into a large house that had been given to Chik Yin by his parents. Kit Gee and Chik Yin collected rent from tenants who lived in a suite in that house.
- [24] In about 1962, Celina's cousin, Paul Cheong (the son of Tat Wai), moved in with Kit Gee, Chik Yin, and Celina. He was about 17 years old at the time, and he resided with them for about ten years.
- [25] Celina described her lifestyle with Kit Gee and Chik Yin in more modest terms than did Ina, Sophia, Paul, and Felicity. However, on all accounts Celina's childhood was privileged, in a material sense, in comparison to that of Ina and Sophia. The house Celina lived in was located in a prestigious Hong Kong neighbourhood. It was spacious, with modern amenities (including plumbing, hot water, and appliances), servants' quarters, and a large yard and garden. Celina had access to abundant and nutritious food. She had her own air-conditioned bedroom (although sometimes she shared it with Kit Gee). She had stylish clothing and lots of toys. Chik Yin drove a convertible. Celina took piano lessons for about a year. She attended private school.
- [26] In contrast, from about the age of five, Sophia lived with Tat Kuan, Louise, and Tat Wai in a small studio apartment in Hong Kong. Tat Kuan's mother's home in Macau, where Ina resided with several of Tat Wai's children, was a two-bedroom apartment, without flush toilets, hot water, a refrigerator, or a television. As many as seven or eight people lived there. Ina shared a bed with several cousins. There were times when food was scarce.
- [27] Although Ina and Sophia lived in impoverished circumstances, each of them received a good education, they enjoyed holidays with their father, and they were surrounded by a loving extended family. As a child, Sophia struggled in school and was rebellious, but later she attended a boarding school and successfully completed high school. In her later teens and early twenties, she developed a very close and loving relationship with Tat Kuan. Ina attended a good Catholic school in Macau. Although she did not live with her father as a child, she too developed a very close and loving relationship with him.

- [28] Celina had a close and loving relationship with Kit Gee. However, Celina testified that Chik Yin was unkind to her at times, and violent with Kit Gee when he had been drinking. There is no real dispute that Chik Yin was an alcoholic. Celina said Chik Yin was often depressed, and would scream and yell at night when he was drunk. She said she saw him physically beat Kit Gee. She said she lived in fear of him, and Kit Gee was also scared so she often slept in Celina's room to get away from Chik Yin. Ina admitted that Chik Yin was an alcoholic and sometimes violent, and that Kit Gee slept in Celina's room to get away from him.
- [29] When Celina was about 16 years old, Chik Yin died.
- [30] In 1970, when Celina was about 18 years old, she moved to Toronto. She testified that she was traumatised and confused by having been "given away" as a young child. She said she felt she did not belong with the Kan family, and she was unhappy in Hong Kong.
- [31] After arriving in Canada, Celina completed two years of high school and then she attended Queens University, in Kingston, where she studied mathematics and computer science. She said Kit Gee gave her \$200 when she left Hong Kong, but no further financial support towards her living or education expenses. She worked after school and on weekends to support herself.
- [32] After Celina moved to Canada, Sophia moved in with Kit Gee. Tat Kuan paid Kit Gee \$150 HK per month for Sophia's support. Sophia stayed with Kit Gee for about three years and then returned to live with her father.
- [33] In 1972, Ina moved to Toronto. Celina testified that she paid for Ina's first term at Seneca College. Ina disputed that and said Celina did not assist her financially at all. Whether and to what extent Celina assisted Ina has no bearing on the issues.
- [34] Celina did not graduate from Queens. She married Felix in 1974.
- [35] In about 1975, Kit Gee sold the large house in Hong Kong that had been given to Chik Yin by his family. She then bought an apartment in Hong Kong. Shortly thereafter, she moved to Toronto, leaving the apartment empty. Celina sponsored Kit Gee's immigration application and referred to Kit Gee as her mother on the application. Kit Gee initially lived with Celina in Canada but, by then, Paul Cheong had moved to Toronto and Kit Gee later lived with him.
- [36] In 1977, Sophia moved to Toronto to go to school. There is no dispute that Celina assisted her with the logistics and paid a portion of her tuition.
- [37] About this time, Ina and Celina had a falling out. They had agreed to each contribute financially to Sophia's tuition at a post-secondary institution in Toronto. Celina paid the tuition and Ina was to reimburse Celina for her share, but she did not do so promptly. Ina was very offended when Celina demanded the money, and she resolved to cut Celina out of her life. Ina moved to British Columbia in about 1978 and she and Celina did not see each other again, until this trial nearly 50 years later.

- [38] Sophia and Celina did not have a close relationship either. Sophia returned to Hong Kong in 1981 and she and Celina had no contact after that.
- [39] Celina and Felix had their first child, Kathy, in 1976, and their second child, Leslie, in 1980. During this period, Celina was working as a data processing technician and completing her degree at night. She graduated with an arts degree, with a major in mathematics, from York University in 1981 or 1982.
- [40] As mentioned, Sophia returned to Hong Kong in 1981. She moved into Kit Gee's apartment there. She paid the monthly management fee, but did not pay rent. In 1985, she bought the apartment from Kit Gee for \$340,000 HK (in the range of \$60,000 to \$70,000 Cdn). Sophia lived and worked in Hong Kong, in the travel industry, until 1999 when she too moved to Canada.
- [41] By 1984, Celina and Felix had separated. Celina got a job with AT&T in Arizona. Initially, Kathy and Leslie stayed in Toronto with Kit Gee, but in 1986 they moved to Arizona to live with Celina. Kit Gee then divided her time between Celina's home in Arizona, and Paul's home in Toronto.
- [42] In 1987, Tat Kuan and Louise moved to British Columbia. Initially, they resided in an apartment owned by Ina, but in about 1990 they purchased an apartment in Richmond, where they lived for the rest of their lives.
- [43] Ina testified that in the early years after Tat Kuan and Louise moved to Canada, she assisted them financially. She also said she gave Tat Kuan and Louise about \$100,000 when they bought the Richmond apartment. Whether she actually did so is in dispute.
- [44] Sophia assisted Tat Kuan and Louise financially. Among other things, she sent them money every two months until she moved to Canada.
- [45] Celina did not assist Tat Kuan and Louise financially. Celina testified that she offered assistance but Tat Kuan told her they were financially stable and did not need her help.
- [46] In 1988, Celina married Daniel Holton.
- [47] In 1991, AT&T moved Celina to Orlando, Florida. That became and remains her home base in the sense that she continues to own a home there, and Kathy and Leslie still reside there. After the move to Orlando, Kit Gee continued to divide her time between Paul's home in Toronto and Celina's home in Orlando.
- [48] In 1999, Sophia moved to the Vancouver area. She continues to reside here with her spouse, Vincent.
- [49] Daniel Holton died in 2007.

- [50] Between 1994 and 2008, Celina worked full time in the United States under contracts for a variety of companies in Tampa, Jacksonville, Memphis, Georgia, and San Francisco. She agreed that she was successful in her career, eventually earning a "6-digit income", but she said that her income was spent on day to day expenses such as her mortgage payment and providing for her children.
- [51] Celina stopped working in 2008. She testified that she suffers from depression and panic attacks, that have left her unable to work. Initially, she received disability benefits, which converted to retirement benefits when she turned 65.
- [52] Over the years, Celina maintained a close relationship with Kit Gee and she continued to refer to Kit Gee as her mother. Her relationship with Tat Kuan was much more distant.
- [53] Celina and Tat Kuan saw each other only a few times after Celina moved to Canada. She saw him on a visit to Hong Kong in 1976. Tat Kuan and Louise visited Celina in Arizona in 1985 and again in 1986, and Celina saw them in about 1987 at a birthday party for Louise's wealthy uncle in San Diego. Tat Kuan attended Kathy's wedding in 2008.
- [54] Celina never visited Tat Kuan in Richmond. She said she and Tat Kuan spoke on the phone regularly - about five times a year - and he sent modest amounts of money to her for Christmas and New Years' gifts.
- [55] In 1992, Celina wrote a letter to Tat Kuan in which she was highly critical of him and she asked him not to call her anymore. Celina testified that this was prompted by her grandmother (Tat Kuan's mother) complaining to Celina about the way she had been treated by Tat Kuan and Tat Wai. Celina testified that she and her father subsequently reconciled, noting that he later attended Kathy's wedding.
- [56] Although Celina remained in touch with Tat Kuan and Louise, she did not communicate with Ina or Sophia at all. She testified she tried to contact Sophia by phone a few times, but the first time she called Sophia hung up and thereafter did not answer her calls. Sophia gave similar evidence. She clearly did not want a relationship of any kind with Celina.
- [57] After P'ui moved to Sweden, Celina saw her on only two occasions, once when P'ui visited Hong Kong in about 1961 or 1962, and again in 1971 when Celina travelled to Sweden for a visit. Since then, Celina's contact with P'ui has been minimal. In more recent years, Celina and Pui have exchanged text messages and emails from time to time.
- [58] In contrast to Celina's limited relationship with Tat Kuan, both Ina and Sophia have enjoyed a close and loving relationship with him. Ina lived in close proximity to him in Richmond for more than 30 years, and she spent all holidays and special occasions with him and Louise. In the last few years of Tat Kuan's and Louise's lives, Ina took them to doctors appointments, helped them with the activities of daily living, and arranged for in-home care for them. After Sophia moved to Canada in 1999, she did the same.

- [59] Kit Gee died in May of 2009, in Florida. Celina arranged and paid for the funeral, cremation, and other related expenses. The death certificate, issued by the funeral home, identifies Celina as Kit Gee's daughter.
- [60] In late 2020, Celina learned from Louise that Tat Kuan had lung cancer. In February of 2021, she sent an email to Ina and Sophia in which she offered to share the cost of hiring a caregiver for Tat Kuan and Louise. Neither Ina nor Sophia replied. Celina testified that having received no reply, she phoned Tat Kuan and asked if he needed financial help and he told her he did not.
- [61] Tat Kuan executed his will on February 22, 2021, in Richmond. Jessica Chung, the lawyer who took his instructions and drafted the Will, testified. She was a responsive and careful witness. She took detailed and contemporaneous notes of her dealings with Tat Kuan and Ina. No one challenged the reliability or credibility of her testimony and I accept it without reservation.
- [62] Ms. Chung was contacted by Ina, by phone, on February 4, 2021. Ina said she was inquiring about obtaining wills for her mom and dad. Ms. Chung informed her of the process and cost.
- [63] On February 8, 2021, Ina called Ms. Chung again and said she was inquiring about a will for her dad. Tat Kuan participated on this call. Ina was present for most of the conversation, but Ms. Chung asked her to step out of the room at one point. During this phone call and in subsequent communications, Ina told Ms. Chung that Tat Kuan had only two daughters (her and Sophia); that Louise was her mother; that Tat Kuan had not been married before; that Louise did not have a will; that Celina, who was to receive a specific bequest, was Tat Kuan's niece; and that Tat Kuan wanted the residue of his estate to be split equally between Ina and Sophia. There is no suggestion of undue influence or lack of capacity, and it is clear that Tat Kuan personally confirmed all of this information, but much of it was untrue.
- [64] During the February 8, 2021 phone call, when Ina was present, Ms. Chung briefly explained the law of "wills variation in BC" and specifically what a "biological child could do", but she was told that "it won't be necessary". Ms. Chung did not go further in her explanation and, in particular, did not discuss the concept of a parent having a "moral duty" to their child.
- [65] In a phone call to Ina on February 10, 2021, Ms. Chung explained that if Tat Kuan and Louise did not have wills and if Tat Kuan predeceased Louise, "the intestacy scheme will kick in, and she and her sister will be provided for anyways" (clearly assuming that Ina and Sophia were Louise's biological children, as she had been told they were). This advice prompted Ina to tell Ms. Chung that in fact Louise was not her biological mother. Ms. Chung then provided a more detailed explanation of the "intestacy scheme" and she advised Ina that a step-child who has not been formally adopted would have no entitlement to Louise's estate on an intestacy.

- [66] In subsequent phone calls, including calls where both Ina and Tat Kuan were present, Ms. Chung suggested preparing a will for Louise that would leave her estate to Ina and Sophia, in case Tat Kuan predeceased Louise. Ms. Chung made clear she would have to speak to Louise alone to confirm those instructions. At some point, Tat Kuan told Ms. Chung that, in fact, Louise had four biological children but had no contact with them for 60 years. Ms. Chung explained that those biological children would have the right to make a wills variation claim if Louise left everything to Ina and Sophia. Ina later told Ms. Chung not to prepare a will for Louise.
- [67] Ms. Chung prepared the Will for Tat Kuan. Tat Kuan and Ina came to her office on February 22, 2021. Ms. Chung reviewed the Will privately with Tat Kuan and confirmed that it reflected his instructions. During that conversation, he again claimed that Celina was his niece. Ms. Chung then witnessed his signature (with someone else present as the second witness).
- [68] Louise died on March 30, 2021. Tat Kuan died three weeks later, on April 22, 2021.
- [69] Ina organized Tat Kuan's funeral. Neither she nor Sophia advised Celina of the arrangements. Celina learned about the timing of the funeral on the morning it was happening, and managed to quickly arrange to have a rose delivered.
- [70] In May 2021, Celina sent an email to Ina and Sophia complaining about the obituary that had been published for Tat Kuan, which she referred to as a "distortion of the truth" because it referred to Tat Kuan as having had only two daughters.
- [71] Celina commenced this proceeding a few weeks later, in June 2021.
- [72] In the fall of 2021, Sophia moved into the apartment owned by Tat Kuan's estate. She spent \$60,000 renovating it. She does not pay rent, but she does pay the strata fees, utility expenses, and insurance costs.

Assessment of the Evidence

- [73] With one exception, I found all the witnesses generally credible. To the extent the accounts of their childhood differed, I am satisfied that reflected their different perspectives and the way people's memories shift and evolve over time. I believe they all tried to truthfully relay their childhood experiences.
- [74] I found Celina to be a credible and reliable witness. She was responsive, straightforward, and consistent in her testimony.
- [75] Defence counsel attempted to impeach Celina with allegedly inconsistent statements from her discovery but was unsuccessful. I will note some examples. The discovery transcript indicates that Celina said that when Tat Kuan and Louise bought an apartment in Richmond, they received \$10,000 from Louise's uncle, but in her direct examination Celina said that Tat Kuan told her, in a contemporaneously written letter, that the uncle had given them

\$100,000. When confronted with this in cross-examination, Celina said the transcriber must have made a mistake and she was sure it was \$100,000. There is no reason not to accept that explanation, particularly given that her account at trial was corroborated by the letter. Similarly, Celina testified that before she moved to the United States, she sold her Toronto townhouse and bought a home in Scarborough for about \$75,000. The transcript from her examination for discovery indicates that at that time she said she bought that home for \$170,000. Again, at trial, Celina was firm in testifying this was a mistake made by the transcriber. The transcript indicates that Celina also said during the discovery that she sold that home for \$100,000. At trial she testified she bought it in 1979 and sold it in 1986. In the circumstances, it is more likely that she bought it for about \$75,000.

[76] In contrast, I had some concern about the credibility of some of Ina's evidence. There are several reasons for this, including:

- Ina displayed intense animosity towards Celina, but did not provide any reasonable justification for it. She testified only that in 1977 she decided to have nothing to do with Celina because Celina confronted her about reimbursing Celina a portion of Sophia's tuition, which Ina acknowledged she had promised to pay. Even accepting that Celina was rude in the manner of which she demanded to be paid, that alone would not reasonably justify a more than four decade estrangement.
- Ina tended to stray from her own personal observations, experiences, and knowledge, and to argue about the plausibility and credibility of aspects of Celina's testimony. I had to remind her a couple of times to stick to her own personal observations.
- There were some inconsistencies in Ina's testimony. For example, she initially said that when Tat Kuan and Louise came to Canada they brought no money with them. Later she agreed that Tat Kuan had been collecting a pension in Hong Kong, she thought he took it as a lump sum, and she had "no idea" if he brought savings with him.
- Ina unreasonably attempted to rationalise the untrue statements she made to Ms. Chung. She repeated one of them during her examination for discovery. At that time, when asked if Louise had children from a previous marriage, her answer was:

I'm not sure about that. I've never heard her saying she had children or gone to see her children or anything.

This was plainly untrue. When asked at trial why she did not tell the truth during her examination for discovery, she said "because no one really talked about it and my father gets upset and Louise never mentioned it in all these years". While I appreciate that Tat Kuan and Louise may not have wanted to discuss the topic, they were, of course, deceased by the time of the discovery, and Ina was under oath.

[77] As mentioned, in a contemporaneous letter he sent to Celina, Tat Kuan advised her that he and Louise financed the purchase of their Richmond apartment with \$100,000 given to them by Louise's wealthy uncle and \$40,000 of their own money. The purchase price was \$144,000.

He did not mention having received an additional gift of \$100,000 from Celina. In the circumstances, and given my concerns about Ina's credibility, I concluded that it would not be safe to rely on Ina's claim to have given Tat Kuan and Louise \$100,000, in the absence of corroborating objective evidence, of which there is none.

- [78] I did not have concerns about the credibility of Sophia's evidence but some of it was not reliable. This is because she had a tendency to make factual assertions for which she later admitted she had no actual knowledge. For example, in her direct evidence she testified that Kit Gee and Chik Yin owned several apartments in Hong Kong, in addition to the big house where Celina lived. In cross-examination, she admitted that her father told her he collected rent for Kit Gee from the tenants of those apartments but she never saw him deliver the money to Kit Gee and she had no knowledge of who actually owned them. Sophia also had a tendency to offer unsolicited details, including on topics about which Celina had not been cross-examined.
- [79] Paul Cheong's evidence was not helpful. He had little if any personal knowledge of any disputed facts. For example, it was apparent that although he characterised Kit Gee as "rich" he actually had no personal knowledge of her financial circumstances, and that his son, Billy Cheong, had been directly involved in assisting Kit Gee with her finances. Another example concerned his testimony about the nature of Celina's relationship with Tat Kuan as an adult. He said he "thinks" Celina rarely contacted Tat Kuan, but again it was apparent that he had no personal knowledge of how often she and Tat Kuan were in contact.
- [80] Felicity Chu provided a heart-wrenching account of some aspects of her childhood. I have no doubt about the truthfulness of her stated recollections. However, much of what she said in this regard is undisputed (such as the significant difference in the standard of living enjoyed by Celina when she lived with the Kans and the standard of living of Felicity's household in Macau). Some of what she said in this regard (such as her perception that Celina was the preferred or chosen child) is not relevant. Ultimately, her evidence was of marginal assistance.
- [81] As I have already noted, Jessica Chung was a careful witness. I had no reason to doubt the credibility or reliability of her testimony, and I accept it without reservation.

Legal Principles

- [82] Section 60 of WESA gives the court the discretion to vary a will in favour of a spouse or child for whom the will does not make adequate provision:

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.

- [83] In *Bautista v. Gutkowski Estate*, 2023 BCSC 1485 at paras. 38 to 43, Justice MacNaughton summarized the applicable legal principles:
- [38] The leading authority on wills variation in British Columbia, albeit decided under an earlier statute, is *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 1994 CanLII 51. The provision considered in *Tataryn* is worded slightly different than s. 60 of WESA, but the concepts are the same: *Scurek v. Scurek*, 2021 BCCA 178 at para. 7.
- [39] In *Tataryn*, the Supreme Court of Canada said that a court has broad discretion to make orders that are just and equitable in the specific circumstances of the case, and in light of contemporary standards. The statute must be read in light of modern values and expectations in a search for contemporary justice: *Tataryn* at 814-816.
- [40] Certain principles emerge from *Tataryn* and the cases that followed it. As they apply to this case, WESA has two primary statutory objectives. The first is to ensure that adequate, just, and equitable provision is made for spouses and children of a will-maker, and the second is to protect the will-maker's autonomy. The second interest is subordinate to the main objective: *Tataryn* at 815-816.
- [41] The question of whether a will-maker made adequate provision under a will to a spouse or children is measured objectively, assessed in light of current societal legal and moral norms. Legal norms are obligations owed to a spouse or dependent children. 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 821.
- [42] In *Eckford v. Vanderwood*, 2014 BCCA 261, our Court of Appeal summarized the principles from *Tataryn*:
- [37] ... [*Tataryn*], remains the seminal authority. As explained therein, in the context of a wills variation action the court must first determine whether the testator has made "adequate provision" for his or her spouse and children and if it concludes he or she has not, the court must then determine what is adequate, just and equitable. As noted by McLachlin J. these are "two sides of the same coin": *Tataryn*, at 814.
- [38] [T]he Court explained that the main aim of the Act is adequate, just and equitable provision for the spouses and children of testators. The Act also protects testamentary autonomy; however, testamentary autonomy must yield to what is adequate, just and equitable: *Tataryn*, at 815-816.
- [39] The phrase "adequate, just and equitable" is to be viewed in light of current societal norms. In determining what is adequate, just and equitable, the court must consider both legal and moral obligations. The first consideration is a testator's legal responsibilities during his or her lifetime. Maintenance and property obligations which the law would support during the testator's lifetime should be reflected in the court's interpretation of what is "adequate, just and equitable". The court should also consider the testator's moral duties towards a spouse and children. While there is no clear legal standard by which to judge moral duties, the

jurisprudence suggests that subject to such considerations as the size of the estate and the absence of circumstances that may negate such moral obligations, a testator should make provision for both a spouse and children. Tataryn recognizes that in any particular situation there may be a number of ways of dividing the assets which are adequate, just and equitable, and provided the testator has chosen an option within the range, the will should not be disturbed: Tataryn, at 823-824.

...

- [50] In order to make the determination under both the first and second stage, it was necessary for the Court to select the relevant date for determination. The Court in Landy reviewed numerous authorities which had discussed the point and concluded that the date to be used in determining whether a testator has made adequate provision for the proper maintenance and support of a dependent is the date of death of the testator, that being the last chance that the testator had to make a proper will. In determining whether the testator had made adequate provision, a court should take into consideration the circumstances existing and reasonably foreseeable to the testator as of that date.
- [51] In regards to the second stage of the two-step process, the Court held that in determining the provision that the Court thinks adequate, just and equitable in the circumstances, the Court was entitled to take into account not only the circumstances existing and reasonably foreseeable at the date of the testator's death but in addition any substantial change in circumstance that may have occurred between the date of death and the trial in the circumstances of a person who may be entitled to make a claim or indeed a beneficiary.
- [43] In Hall v. Hall, 2011 BCCA 354 at para. 39, our Court of Appeal wrote that a testator will not generally have a legal duty to an independent adult child unless the child contributed to the estate. As to a moral obligation toward adult children, "these are tenuous, but may justify entitlement if the size of the estate is adequate and the circumstances do not negate such an obligation": Hall at para. 39; Tataryn at 820-823. 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, 75 B.C.L.R. (2d) 213 at para. 38, 1993 CanLII 1262 (C.A.). A moral duty may be negated where the testator has just cause, consisting of objectively valid and rational reasons, to disinherit the adult child: Tom at paras. 36, 39, 51.
- [84] From this summary and Justice Ballance's comprehensive review in Dunsdon v. Dunsdon, 2012 BCSC 1274 at paras. 129 - 138, I extract the following as the correct approach:
- a) WESA has two primary objectives: 1. to ensure that adequate, just and equitable provision is made for spouses and children of a will-maker; and 2. to protect the will-maker's autonomy. The second objective is subordinate to the first.

- b) The court must first determine whether the will-maker made "adequate provision" for the plaintiff spouse or child. This is measured objectively, assessed in light of current societal legal and moral norms, and in the circumstances existing and reasonably foreseeable to the testator at the time of the testator's death.
- c) Legal norms are obligations owed to a spouse or dependent children. A testator will not generally have a legal duty to an independent adult child unless the child contributed to the estate.
- d) Moral norms reflect society's reasonable expectations of what a judicious person would do in the circumstances by reference to contemporary community standards. Courts have considered several factors as informing the existence and strength of a testator's moral duty to independent adult children including the nature and strength of the relationship between the testator and claimant; the size of the estate; any contributions by the claimant; the reasonably held expectations of the claimant; the standard of living of the testator and the claimant; any gifts and benefits made by the testator outside the will; the testator's reasons for disinheriting; financial need and other personal circumstances, including disability, of the claimant; misconduct or poor character of the claimant; and the competing claimants and other beneficiaries. These factors tend to overlap and are not approached in isolation as independent, air-tight categories.
- e) Subject to the size of the estate and the absence of circumstances that may negate a moral obligation, a testator should make provision for both a spouse and children, but in any particular situation there may be a number of ways of dividing the assets which are adequate, just and equitable. Provided the testator has chosen an option within the range, the testator's autonomy should be respected and the will should not be disturbed.
- f) A moral duty may be negated where the testator has just cause, consisting of objectively valid and rational reasons to disinherit an adult child. In this context, valid means true and rational means there is a logical connection between the reasons and the act of disinheritance. In the absence of expressed reasons for an unequal division, there is a reasonable expectation that adult children will share equally in their parents' estate.
- g) If the court concludes that the will-maker has not made "adequate provision" for his or her spouse or child, the court must then determine what is adequate, just and equitable in the circumstances existing and reasonably foreseeable at the date of the testator's death and any substantial change in circumstance that has occurred between the date of death and the trial.
- h) The factors that inform the existence and strength of a testator's moral duty to independent adult children as set out in (d) above are also relevant to determining what constitutes adequate, just, and equitable provision in the circumstances of the case.

Analysis

- [85] Tat Kuan had no legal duty to provide for Celina once she became an adult. The question is whether he had a moral obligation to do so and, if so, whether a bequest of \$10,000 U.S. made adequate provision for her in the circumstances here.
- [86] Some of the factors that courts have viewed as informing the existence and strength of a testator's moral duty to an independent adult child are neutral in this case. These include the size of the estate (modest but large enough to provide a meaningful gift to each of Celina, Ina, and Sophia); the standard of living of the testator and the claimant (similarly average); gifts or benefits made by the testator outside of the Will (there were none that were material); reasonably held expectations of the claimant (there was no evidence of facts that could have created any particular expectation on Celina's part, other than the biological relationship); and misconduct or poor character of the claimant (there was no evidence of such).
- [87] Some of the factors weigh in favour of finding that such a duty existed, but only marginally. These include contributions by the claimant and the claimant's financial need.
- [88] Celina testified, and I accept, that she gave Tat Kuan \$10,000 in 1976 when he underwent surgery in Hong Kong and that she sometimes passed on her "lucky money" to him when she was a child. These are modest contributions.
- [89] Celina is of modest financial means and is no longer able to work. A more substantial monetary gift to her from Tat Kuan would make a real difference in her life. On the other hand, she receives retirement benefits and owns a home in Florida worth about \$300,000 U.S. While she owes about \$74,000 on a line of credit that is secured against the home, she is not impoverished.
- [90] The assessment of Celina's claim to have been owed a moral duty and the determination of whether Tat Kuan made adequate provision for her, turn primarily on the relationship between Tat Kuan and Celina and Tat Kuan's reasons for providing her with a bequest that was so much smaller than that which he provided to Ina and Sophia. In this case, these factors are inextricably linked.
- [91] Celina's relationship with Tat Kuan was permanently damaged by his decision to relinquish his parental role in her life when she was a young child. This alienated Celina from him and from the rest of her immediate family. It appears that Ina's and Sophia's perceptions, as children, of Celina's lifestyle, which they viewed as extremely privileged in relation to their own, caused deep resentment that entrenched the alienation.
- [92] On all accounts, Tat Kuan was a kind and loving man. Celina testified that he later told her he gave away her young self in order to create her adult self, implying that he thought that it was in her interests to be raised as the daughter of Kit Gee and Chik Yin. Sophia testified that when she was in her late teens or early twenties, Tat Kuan told her he gave Celina up to provide her with a better life. I accept that Tat Kuan acted with good intentions, but his

intentions do not alter the reality of the consequences of his decision. I accept Celina's evidence that being abandoned by her father and told to treat Kit Gee and Chik Yin as if they were her parents was very confusing for her, and caused her immense emotional pain that has remained throughout her life.

- [93] With the exception of the letter Celina wrote to Tat Kuan about his treatment of his mother, the adult relationship between Celina and Tat Kuan was cordial but distant. In the more than 50 years between Celina's move to North America in 1970 and Tat Kuan's death in 2021, they saw each other only a few times. I accept Celina's testimony that she spoke to Tat Kuan on the phone a few times a year. Ina and Sophia testified that they were not aware of regular phone calls between Celina and Tat Kuan, but neither of them had personal knowledge that the calls did not occur. Nevertheless, for the duration of Tat Kuan's life, his relationship with Celina continued to more closely resemble an uncle/niece relationship than a father/daughter relationship.
- [94] As an adult, Celina could have done more to foster her relationship with Tat Kuan. There is no evidence that Tat Kuan rebuffed any attempt on her part to strengthen their relationship. It is apparent that he did not discourage contact between them and, from the evidence as a whole, including the evidence about his kind disposition, it is likely that he would have welcomed visits from her. On the other hand, Ina and Sophia continued to harbour significant resentment towards Celina. Their ongoing rejection of her, particularly in the context of the lifelong emotional suffering she endured as a result of being given up by Tat Kuan, likely inhibited her from making greater efforts to improve her relationship with Tat Kuan. She cannot be faulted for this.
- [95] In the end, the shallowness of the relationship between Celina and Tat Kuan was Tat Kuan's fault and the result of his decision to relinquish his parental role in relation to Celina. In such circumstances, the relationship breakdown is unlikely to negate a testator's moral duty and may even enhance it, and the court may discern a moral duty as a means of rectifying the testator's childhood neglect of the claimant: *McBride v. Voth*, 2010 BCSC 443 at para 132. That is the case here. The absence of a close relationship significantly enhances the moral duty Tat Kuan owed to Celina.
- [96] The competing claims of Ina and Sophia do not diminish Celina's moral claim.
- [97] Tat Kuan did not owe either Ina or Sophia a legal duty. Their claims, like Celina's, are founded upon a moral obligation.
- [98] Both Ina and Sophia provided Tat Kuan with substantial support over the more than three decades during which he resided in British Columbia. Sophia provided both financial and emotional support. She gave Tat Kuan \$2,000 in about 1987 when he and Louise moved to British Columbia. Thereafter, she sent him \$500 to \$600 a month until she moved to British Columbia in 1999. In later years she gave Tat Kuan and Louise modest amounts of money as gifts, paid for restaurant meals for them, financed some of the trips they made back to Hong Kong, bought them a car and a television, and regularly cooked meals for them. For the

reasons I have already expressed, I am not persuaded that Ina gave Tat Kuan \$100,000 when Tat Kuan and Louise purchased their apartment in Richmond, but I have no doubt that she provided them with significant emotional support and, as they aged, she also assisted them physically.

- [99] In stark contrast to Celina's experience, however, each of Ina and Sophia enjoyed a life-long, loving, and close relationship with Tat Kuan. This is so even though, as children, they did not always reside with him. Each of them described their childhood as challenging largely due to poverty, but each of them also had happy memories of the time they spent with Tat Kuan, and they developed strong and positive relationships with him that persisted into their adulthood and throughout his life.
- [100] Ina and Sophia suggested that the benefit to them of their close relationships with Tat Kuan and the detriment to Celina of the absence of such a relationship were off-set in some way by the privileges Celina enjoyed while living as if she was Kit Gee and Chik Yin's daughter, and by financial benefits she received from Kit Gee as an adult. I was not persuaded by that suggestion.
- [101] Although there were differences in the parties' accounts of the extent of Kit Gee and Chik Yin's wealth, there is no doubt that Celina lived in financially privileged circumstances as a child in comparison to Ina and Sophia. However, she also lived with the emotional pain and confusion of having been taken from her immediate family. While she had a close relationship with Kit Gee, she lived in fear of Chik Yin. In any event, no positive aspect of her life with Kit Gee could make up for the loss of her relationship with Tat Kuan.
- [102] Much was made at the trial about the prospect of Celina having benefited financially from Kit Gee, but the evidence did not bear that out. Celina denied it, and I had no reason not to accept that denial. Sophia testified that after Celina moved to Canada, Kit Gee sent Celina money and Sophia sometimes accompanied her to the bank to arrange the wire transfers. However, Sophia did not say how much money was sent or how often this happened. If these money transfers were made, they may have been insignificant. Further, in cross-examination, Celina was not asked about Kit Gee sending her this money and, in the circumstances, I cannot give much if any weight to Sophia's evidence in this regard. Similarly, it was suggested by the defence that Celina must have inherited money from Kit Gee. Celina denied this, and I have no reason not to accept her denial. It is apparent that Paul Cheong's son, Billy, was the person with the most knowledge of Kit Gee's financial circumstances at the time of her death and, while the defence called Paul Cheong as a witness, Billy was not called. In the circumstances, I accept Celina's denial.
- [103] Ina and Sophia are in relatively better financial positions than is Celina. Ina and her spouse own real estate in Richmond and Sweden worth, in total, about \$2.7 million, and Ina has financial assets of about \$160,000. Sophia recently sold a property in Richmond for \$689,000. Her partner has retained the proceeds from that sale for her benefit. In addition, she has financial assets of about \$180,000.

- [104] While Ina and Sophia each have a strong moral claim to a share in Tat Kuan's estate, their claim is not stronger than is Celina's claim.
- [105] For the reasons expressed above, Celina has a strong moral claim. The next question is whether that strong moral claim is negated by objectively valid and rational reasons for Tat Kuan to have treated Celina so significantly differently than her sisters in the Will. In the absence of valid and rational reasons for an unequal division, there is a reasonable expectation that adult children will share equally in their parents' estate.
- [106] Tat Kuan did not express his reasons in so many words but, in my view, the reason is clear from the fact that he told Ms. Chung that Celina was his niece and he referred to Celina as such in the Will. The only reasonable inference in all the circumstances, is that he treated Celina differently because, unlike his relationship with Ina and Sophia, he did not consider his relationship with Celina to be a parent/child relationship. In my view, this is not an objectively valid and rational reason to virtually disinherit Celina. She was not Tat Kuan's niece. She was his daughter. Referring to her as his niece portrays only a small fraction of the truth about his relationship with her.
- [107] In all the circumstances of this case, Celina's moral claim is a strong one and it is not negated by valid and rational reasons. I have no difficulty concluding that Tat Kuan failed to make adequate provision for Celina.
- [108] The next step in the analysis requires me to determine what is adequate, just and equitable in the circumstances.
- [109] As noted, the factors that inform the existence and strength of a testator's moral duty to independent adult children are also relevant to determining what constitutes adequate, just, and equitable provision. I have already discussed the factors that are relevant in this case. In the end, they lead to the conclusion that there is no material difference in the strength of the moral claims of Ina, Sophia, and Celina.
- [110] This leaves the question of whether there is a legitimate basis for departing from the reasonable expectation that adult children will share equally in their parents' estate. Having given that matter considerable thought I have concluded there is not.
- [111] I am mindful of the objective of interfering with the testator's autonomy as little as possible. However, as a result of Ina and Tat Kuan telling Ms. Chung that Tat Kuan had only two children and that Celina was his niece, Tat Kuan made the Will without the benefit of legal advice about his moral obligation to Celina. In these circumstances, I have given less weight to his autonomy than I would otherwise.

Conclusion

- [112] Tat Kuan's Will is varied to provide Celina a one third equal share in the residue of the estate, with each of Ina and Sophia to also receive a one third share.

[113] In addition to defending the claim, Ina and Sophia filed a Counterclaim. However, it did not assert any affirmative claim. Rather, it merely sought dismissal of the claim. In the circumstances, the Counterclaim is dismissed.

[114] Subject to further submissions, Celina is entitled to her costs. If the parties cannot agree or if there are circumstances of which I am unaware, they may make arrangements through Supreme Court Scheduling to speak to that issue.

"Warren J."

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