

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Syukur v. Yeh*,
2018 BCSC 1826

Date: 20181023
Docket: S169730
Registry: Vancouver

Between:

Yumin Syukur

Plaintiff

And

**Daniel Chih-Hsiu Yeh and Paul Po-Yih Yeh, as
Executors of the will of Ruey-Chang Yeh, Decased, Daniel Chih-Hiu Yeh
and Paul Po-Yih Yeh**

Defendants

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

D.A. Frenette
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Counsel for the Defendants:

K.G. McKenzie

Place and Dates of Hearing:

Vancouver, B.C.
October 2-5, 2018

Place and Date of Judgment:

Vancouver, B.C.
October 23, 2018

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Introduction

[1] This action involves a dispute between the widow of Ruey-Chang Yeh and his two adult sons. Specifically, it involves a dispute as to the ownership of the most substantial asset of the estate, the matrimonial home (the “Home”) in North Vancouver.

[2] In these reasons, I refer to the parties by their first names in English and to the deceased, Ruey-Chang Yeh, by the first name he commonly used in English, “Perry”. This is to make the reasons easier to follow and I intend no disrespect to any of the parties or the deceased.

[3] Perry died on January 26, 2016, following a brief illness. He was 66 years old. The plaintiff (“Yumin”) is Perry’s widow. She holds legal title to the Home, subject to a mortgage. She says that she holds it in trust for the defendants as to 40% of the equity. At present, Yumin is living in the Home.

[4] The defendants are Perry’s sons, Daniel and Paul. They say that, under Perry’s will made on December 31, 2015 (the “Will”), the Home is supposed to belong to them.

[5] This matter comes before the Court on Yumin’s application for judgment on a summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*. Daniel and Paul say that the case is not suitable for determination on a summary trial.

Background and procedural history

[6] Perry and Yumin met in 2008 and became engaged in February 2013. They married on August 25, 2015.

[7] Daniel and Paul are Perry’s children by a previous marriage. Daniel lives in Toronto and Paul lives in Richmond, B.C. Both are independent adults.

[8] On January 27, 2015, before he married Yumin, Perry bought the Home, a property located at 950 Glenora Avenue in North Vancouver, for \$2.375 million. The purchase was financed by a \$450,000 mortgage loan from the CIBC. Yumin and

Perry did not live together in the Home until they were married, at which point Yumin moved in together with her adult son and daughter.

[9] On November 25, 2015, Perry was diagnosed with stage 4 metastasized rectal cancer.

[10] On December 30, 2015, Perry and Yumin attended at Perry's bank, the CIBC, and gave instructions for her to be added as a borrower on the mortgage and on title to the Home.

[11] On December 31, 2015, Perry and Yumin went to the office of a lawyer, Mr. Lundrie. Perry met with Mr. Lundrie privately and gave instructions for the preparation of a will and a power of attorney which were drawn up and executed on the spot. Mr. Lundrie's evidence is important and I will address it in more detail later in these reasons. For now, it suffices to say that Mr. Lundrie took instructions and prepared the will on the basis that Perry intended immediately to transfer to Yumin a 60% interest in the Home. Yumin understood that this was what Perry intended.

[12] The will provided as follows:

- a) Yumin was appointed executrix. Daniel and Paul were appointed alternate executors.
- b) Daniel and Paul were to receive "all of my right, title and interest" in the Home.
- c) Daniel and Paul were to receive a property owned by Perry in Taiwan.
- d) Yumin was to receive the residue of the estate, so long as she survived Perry for 30 days, failing which the residue would be paid to Daniel and Paul.

[13] By the power of attorney, Perry appointed Yumin his attorney in fact "to do on my behalf anything that I can lawfully do by an attorney". It was unrestricted but did not expressly state that Yumin could transfer Perry's property to herself.

[14] On January 8, 2016, Perry was hospitalized for palliative care.

[15] The CIBC took some time to approve the addition of Yumin as a borrower. It finally did so and, on January 21, 2016, instructed a notary, Ms. Roohani, to prepare documentation for a rush refinancing and transfer of the title to the Home. It specifically instructed her that Yumin was to be made a joint tenant on the property. This was not Perry's intention, as he had expressed it to Mr Lundrie, Yumin, and others. The source of the bank's misunderstanding is unclear.

[16] On January 22, 2016, Ms. Roohani scheduled an appointment to meet with Perry and Yumin at the hospital to sign documents she had prepared. The appointment was rescheduled to January 25, 2016 because Yumin told Ms. Roohani that Perry was not feeling well. On January 23, Perry fell into a coma from which he did not recover.

[17] On January 25, Yumin met with Ms. Roohani and they discussed what could be done. That day, the following land transfer documents were prepared by Ms. Roohani and executed:

- a) A transfer signed by Yumin as Perry's attorney transferring the Home to her daughter, Ms. Boivin; and
- b) A transfer signed by Ms. Boivin transferring the Home to Yumin.

[18] The transfer of the Home was done in two stages in this way because Ms. Roohani considered that Yumin did not have the authority to transfer the Home directly to herself in the absence of an express permission contained in the power of attorney (presumably having regard to s. 20(2) and (3) of the *Power of Attorney Act*, RSBC 1979, c. 370). Ms. Roohani believed that these transfers gave effect to what she understood was Perry's intention that the Home should pass to Yumin.

[19] On January 26, 2016, Perry died.

[20] On February 9, 2016, the transfers executed by Yumin and Ms. Boivin were registered in the Land Title Office.

[21] On March 16, 2016, Daniel and Paul petitioned this Court in Vancouver Registry, Action S162459 for an order that Yumin be removed as executrix, they be substituted as executors, and the Home be conveyed to Perry's estate.

[22] The petition came on for hearing before Williams J. on July 7, 2016. He issued written reasons for judgment on August 23, 2016; *Yeh Estate (Re)*, 2016 BCSC 1550. He granted the first two orders sought, removing Yumin and appointing Daniel and Paul as co-executors, and declined to make a further order that the Home be transferred back to the estate. He stated:

[10] The underlying dispute will not be resolved in this application. That will be accomplished by either agreement of the parties or a judgment following litigation deciding whether the will should stand as drafted, how it will be construed, and how the estate will be distributed.

[11] For now, my preliminary observation, and this is not in any way intended to be determinative of or binding on any subsequent trier of fact, is that there appears to be some merit to the position advanced by [Yumin]. She has filed a substantial body of material that supports that view.

...

[25] Therefore, by virtue of my order that the petitioners [Daniel and Paul] be appointed to act as executors and trustees of the deceased's estate, the assets of the estate necessarily vest in them.

[26] That will not, of course, vest any interest in the Property [the Home] in the petitioners as it is no longer part of the estate. Further, an order as sought by the petitioners that that Property be transferred back into the name of the estate, or that the respondent holds the Property in trust for the estate, would require an analysis that is far beyond the scope of this petition. There will, however, be a proviso: there shall be no transaction regarding the Property by any party unless there is either agreement between the parties or the Court's approval has been sought and obtained in advance.

[27] My expectation is that substantive litigation will be initiated with respect to the dispute at bar. Specifically, I would anticipate that the respondent [Yumin] will commence an action. ...

[23] Williams J.'s entered order includes a term that no transaction be made with respect to the Home without the agreement of the parties or further order of the court. It does not otherwise address Daniel and Paul's claim in the petition proceeding to recover the Home for the estate.

[24] Yumin commenced this action by notice of civil claim filed on October 31, 2016. In her pleading, she seeks the following relief:

- a) Rectification of the Will pursuant to s. 59 of the *Wills, Estates and Succession Act*, SBC 2009, c. 13 [WESA];
- b) Alternatively, a declaration that Yumin is entitled to a 60% interest and a life estate in the Home and holds a 40% interest in the Home in trust for Daniel and Paul “pursuant to the doctrine of constructive trust”;
- c) In the further alternative, a declaration that the transfer of the Home to Yumin was completed upon Yumin assuming the position of executrix, pursuant to the rule in *Strong v. Bird*, and that she presently holds a 40% interest in the Home in trust for Daniel and Paul;
- d) In the further alternative, variation of the will pursuant to s. 60 of WESA.

[25] In oral submissions, counsel for Yumin advised that she is not pursuing the claim for a life estate in the Home.

[26] Daniel and Paul filed a response to civil claim on November 17, 2016. They oppose all the relief sought. They admit the validity of the Will and have not pleaded that Perry acted under duress or undue influence.

[27] The parties exchanged document lists and obtained file materials from Mr. Lundrie, Ms. Roohani and the CIBC. All three parties were examined for discovery in November 2017.

[28] On March 26, 2018, Yumin filed her notice of application seeking judgment on a summary trial. It was adjourned twice, once at the defendants’ request, and again because no judge was available to hear the application, before coming on for hearing before me beginning on October 2, 2018.

[29] Shortly before the hearing, in September 2018, the defendants obtained and served on the plaintiff expert reports from a handwriting analyst addressing the

authenticity of certain banking documents apparently signed by Perry on January 22, 2016. Yumin objected to this evidence and I admitted it subject to cross-examination which took place in court on the first day of the hearing. I address this evidence below.

[30] On the third day of the hearing, Daniel and Paul filed a counterclaim and applied to extend the time within which a counterclaim may be brought. The proposed counterclaim seeks declarations that Yumin holds the Home in trust for the estate or for Daniel and Paul personally and an order that the Home be transferred back to Perry's estate. Yumin opposed the application for an extension of time. I reserved judgment on that application and will address it in these reasons.

[31] The issue of suitability for summary trial dominated the hearing. An assessment of suitability requires definition of the issues, and they depend on the pleadings. I therefore turn first to the application to extend the time to bring the counterclaim.

Application to extend the time for bringing the counterclaim

[32] Pursuant to Rule 3-4(1), the counterclaim should have been filed within 21 days of service of the notice of civil claim. The application for an extension of time requires me to exercise my discretion pursuant to Rule 22-4(2). The considerations that should guide me in the exercise of my discretion are not in dispute; they are set out in *Raven v. A&W Ranching Ltd.*, 2014 BCSC 1359 at para 31, and in *Dead Level Construction Ltd. v. Ritchie*, 2018 BCSC 119 at para 18. The considerations and my assessment of them are as follows.

a) What was the length of the delay between receiving the notice of civil claim and proposing the draft counterclaim?

[33] The notice of civil claim was filed in October 2016. The counterclaim should have been filed with the response to civil claim in November 2016. I agree with Yumin's counsel that the delay of 23 months until the counterclaim was proposed on October 3, 2018 was inordinate.

b) What were the reasons for the delay?

[34] In the petition proceeding, Daniel and Paul were pursuing a claim to recover the Home for the estate. That proceeding was resolved by the judgment of Williams J., who anticipated that their claim would be addressed in subsequent litigation. Yumin commenced this action for relief that includes a claim that Yumin holds the Home in trust for Daniel and Paul as to 40% of the equity. Yumin has legal title and, if her action is dismissed, the dismissal would leave her as the outright owner of the Home. I am satisfied that Daniel and Paul did not intend to abandon their claim that the Home is held in trust for them as to 100% of the equity and should be returned to the estate or to them. Their failure to advance their contention in a counterclaim filed in this action was an oversight on the part of counsel.

c) Would the counterclaim be time barred but for s. 22 of the Limitation Act, S.B.C. 2012, c. 13?

[35] The basic limitation period is two years running from the time the cause of action was discoverable. It was clearly discoverable no later than August 23, 2016, when Williams J. made his order. The basic limitation period would have expired by August 23, 2018.

[36] However, pursuant to s. 24 of the *Limitation Act*, the basic limitation period may be extended by an acknowledgement of liability in respect of the claim. By subsection (6), an acknowledgement of liability would qualify if it was made by Yumin in writing to the Daniel and Paul or their agent, and was signed by Yumin or her agent.

[37] Yumin's notice of application states, in Part 2:

50. Yumin remains ready, willing and able to transfer a 20% interest in the Matrimonial Home, as valued at the date of death of Perry, to each of Paul and Daniel, less the value of the Mortgage at the date of death.

And in Part 3:

9. As a result of the perfecting of the Planned Inter Vivos Transfer pursuant to the rule in *Strong v. Bird*, Yumin presently holds a 60% interest in

the Marital Home, and holds the remaining 40% interest in trust for Paul and Daniel. [Citations omitted]

10. In the still further alternative, good conscience requires that Perry's intentions be given effect through a declaration that Yumin presently holds a 60% interest in the Marital Home, and holds the remaining 40% interest in trust for Paul and Daniel pursuant to the doctrine of constructive trust.

[38] In my view, these statements constitute an acknowledgement of liability such that the running of the limitation period would be extended, at least as to Daniel and Paul's claim to a 40% interest in the equity in the Home. I will assume, however, that the balance of their claim would be time barred.

d) The connection between the proposed counterclaim and the plaintiff's claim

[39] Yumin's claim and the proposed counterclaim are very closely connected. Both arise out of the actions and dealings of Perry and Yumin in the period prior to Perry's death. Both engage considerations of Perry's intentions and the scope of the fiduciary obligations owed by Yumin as Perry's attorney in fact.

e) Will there be prejudice to the defendants, such as by preventing them from making full answer and defence to the claim brought against them?

[40] If Yumin's action fails on its merits and Daniel and Paul are not permitted to bring the counterclaim, there is a possibility that the Court would be unable to grant relief to which Daniel and Paul would naturally be entitled on the failure of Yumin's claim, had the counterclaim been brought in a timely way. In my view, this would constitute prejudice.

f) Will there be prejudice to the plaintiff?

[41] The relief sought by Yumin in her notice of civil claim, and pursued by her in oral argument, includes claims for rectification or variation of the Will. These claims only make sense if it is assumed that the Home is part of the estate. I take it from this that Yumin understood even as the hearing progressed that Daniel and Paul were pursuing a claim to recover the Home for the estate. The counterclaim Daniel and Paul now seek to bring formalizes that claim.

[42] The proposed counterclaim does not give rise to factual issues not already addressed in the pleadings and on the evidence. Yumin's counsel candidly acknowledged that he could not think of anything he would have done differently, had the counterclaim been advanced earlier. I conclude that there will not be actual prejudice to Yumin from an extension of time.

Assessment and disposition of the application

[43] In my opinion, the circumstances I have reviewed favour the application for an extension of time. While there has been inordinate delay, in the absence of actual prejudice to Yumin, Daniel and Paul should not be prevented by counsel's oversight from obtaining whatever relief they may be entitled to on the merits of this litigation. While a limitation defence will be lost, it is only a partial defence. The Court should not have its hands tied in the determination of a remedy. To refuse the application would not be in the interests of justice.

[44] Accordingly, the time for filing the counterclaim is extended to October 4, 2018 and the counterclaim filed on that day is presently before the Court for consideration in this summary trial. Yumin's counsel advised that, if leave to bring the counterclaim is given, he would stand on Yumin's existing pleading as stating her response to the counterclaim. This is reasonable in the circumstances.

Summary of the issues

[45] Having regard to the pleadings, the issues in this action may be summarized as follows:

1. How did Perry intend to dispose of the Home, prior to or on his death?
2. Having regard to Perry's intentions and Yumin's actions, does Yumin now hold the Home subject to a trust for Perry's estate or for Daniel and Paul personally?

3. Should the provision of the Will giving to Daniel and Paul “all my right, title and interest” in the Home be rectified pursuant to *WESA*, s. 59 to give to Yumin a 60% interest in the Home?
4. Should the Will be varied pursuant to *WESA*, s. 60?

[46] The first issue of Perry’s intentions is central to the determination of the other three issues.

Suitability for summary trial

The test of suitability

[47] Summary trials are governed by Rule 9-7. Subrule (15) provides:

- (15) On the hearing of a summary trial application, the court may
 - (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.

[48] A case is suitable for summary trial if the two criteria in subrule (15)(a) are satisfied. On the whole of the evidence, the Court must be able to find the facts necessary to decide the issues of fact or law. In addition, the Court must assess whether it would be unjust to decide the issues on the application.

[49] A summary trial is a mode of trial. The plaintiff bears the burden of proving her case and the defendants bear the burden of establishing any affirmative defences; *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31 [*Gichuru*]. In *Gichuru*, Madam Justice Smith summarized the approach taken by the court and relevant considerations:

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so” (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[50] A determination as to suitability for summary trial involves the exercise of discretion; *Gichuru* at para 34. That discretion must be exercised having regard to the object of the Supreme Court Civil Rules, as stated in Rule 1-3, to secure the just, speedy and inexpensive determination of every proceeding on its merits.

The parties' positions

[51] Yumin maintains that the requirements of Rule 9-7(15) are satisfied. Acknowledging some disputes in the evidence, she submits that they are not central. The essential question, she says, is a determination of Perry's intentions, and they are established by the evidence of five independent lay witnesses as well as Mr. Lundrie, Yumin, her sister, Yudyana Sukyur, and her daughter, Arianne Boivin. She says that it is not unjust to decide the issues on this application.

[52] Daniel and Paul challenge Yumin's evidence and her overall credibility. They say that they have no direct knowledge of Yumin's dealings with Perry, Perry is dead, and it is particularly appropriate that they should have an opportunity to cross-

examine Yumin before the Court in these circumstances. Dealing with Perry's statements to Mr. Lundrie and independent witnesses, their theory is that Perry was lying to placate Yumin, upon whom he was dependent in his final illness, but his intention was always that his sons should have the Home. They rely on the Will as stating that intention. They say that Perry's inaction – that is, his failure to take steps to transfer to Yumin a 60% interest in the Home in the period after he made the Will on December 31, 2015 and before he fell into a coma on January 23, 2016 – speaks louder than his statements of his intentions to others.

Findings of fact

[53] I have already set out certain facts established by the evidence. I find that the following additional facts are established. I should say at the outset that, given the attack on Yumin's credibility, I approach her evidence with caution, paying close attention to whether it is supported or contradicted by other witnesses or documentation.

[54] Yumin says that her romantic relationship with Perry began in 2008. At this stage, Perry was married to but separated from Daniel and Paul's mother. They say that, so far as they were aware, their father had other girlfriends. However, it is not clear how much they were much involved in their father's life, particularly his romantic life. Perry did not tell them in advance that he was marrying Yumin and they did not attend the wedding. Yumin's evidence is supported by her sister, Yudyana Syukur, who says that Perry was introduced to her as Yumin's boyfriend in 2009. Yumin acknowledges that Perry was also dating other women until 2011. After that, she says their relationship was "exclusive". I find that a romantic relationship between Yumin and Perry preceded their marriage in 2015 for several years.

[55] Perry purchased the Home on January 27, 2015 with his own funds, and took title in his own name. However, beginning on February 27, 2015, it appears that Yumin contributed to a joint account from which the monthly mortgage payments were made. She moved in with her son and Ms. Boivin on the day that she and

Perry were married, August 25, 2015, and in September and October paid approximately \$36,000 for renovations. What I take from this is that, in the fall of 2015, while the marriage was recent, Perry and Yumin did not view the Home as solely Perry's house. They viewed it as their house.

[56] In the period following Perry's cancer diagnosis, he was in and out of hospital until he was finally admitted on January 8, 2016. Throughout this period, he and Yumin were aware that he did not have long to live. Increasingly, she took on a role as his caregiver and drove him to appointments.

[57] Perry took steps to wind up his affairs. He made Yumin a joint tenant on various bank and investment accounts and transferred his car, an expensive Mercedes, to her.

[58] On December 30, 2015, Perry and Yumin attended at a local branch of the CIBC and spoke with the manager, Ms. Tsao. They both signed an application form to add Yumin as a borrower on the mortgage. Ms. Tsao endorsed the application with the following recommendation:

Mr. Yeh would like to add his spouse or common law spouse, Ms. Youmin Syukur, to the property title. ... Co-borrower: she does not work. We recommend the adding of common law spouse to title & mortgage.

[Emphasis added]

[59] On December 31, 2015, Perry and Yumin attended at Mr. Lundrie's office. His evidence is contained in an affidavit confirming the contents of a witness statement dated February 11, 2016 that he prepared. It includes the following:

Mr. Ruey-Chang Yeh and his wife, Yumin Suyker, came to my office at 1:00 o'clock in the afternoon on December 31, 2015 to give instructions for the preparation of a Last Will and Testament for Ruey-Chang Yeh and a Power of Attorney.

After an initial outline of the essential terms of the Will, Yumin Syukur left the room. I spoke with Ruey-Chang Yeh for approximately 20 minutes alone and in the absence of his wife, Yumin Syukur. Mr. Yeh confirmed directly to me his instructions as follows:

1. He currently was the sole registered owner of a house and land located at 950 Glenora Avenue, north Vancouver, B.C. (the "House").

2. He intended to leave my office, immediately after his Will was prepared and signed, and go to a Notary Public's office to transfer title to his house such that he would continue to be the registered owner of a 40% share in the House and his wife, Yumin Syukur would become the registered owner of a 60% share in the House.
3. He instructed me to prepare a will that left his interest in the House (which he intended would shortly be a 40% share) equally to his two sons, Daniel Yeh and Paul Yeh, with the effect that they would then each receive a 20% share in the House.
- ...
7. Mr. Yeh also instructed me to prepare a general Power of Attorney, appointing his wife, Yumin Syukur as his attorney, and with continuing authority for the attorney to act in the event of mental infirmity on his part.

Mr Yeh advised me that he was suffering a serious illness and was about to undergo treatments, and wanted his will and the Power of Attorney to be prepared immediately during his visit to my office, and that he would wait in my office until they had been prepared.

I immediately prepared his Will in accordance with his instructions, reviewed the provisions of the Will with him, and he then read it through on his own and approved the contents. He then signed the Will in my presence and in the presence of my paralegal, and we signed the Will as his witnesses.

I immediately prepared his Power of Attorney in accordance with his instructions, reviewed the provisions of the same with him, and he then read it through on his own and approved the contents. Mr. Yeh signed the Power of Attorney in my presence as his witness.

Mr. Ruey-Chang Yeh and his wife, Yumin Syukur then took the originals of the Will and the Power of Attorney and left my office, saying they were heading to the Notary Public's office to effect the transfer of ownership in the House, as Mr. Yeh has previously told me he intended to do.

[Emphasis added]

[60] Mr. Lundrie's statement is consistent with his contemporaneous notes of the interview. I accept Mr. Lundrie's evidence.

[61] On the same day, Perry and Yumin attended again at the CIBC and signed additional documents in connection with the application to add Yumin as a borrower on the mortgage.

[62] In her first affidavit, sworn for the petition proceeding, Yumin said that she and Perry went to the bank from Mr. Lundrie's office and that it was at this time that the application to add Yumin as a borrower on the mortgage was initiated. She did

not mention the attendance at the bank the previous day. On discovery, she was cross-examined about the first attendance, which she described in some detail. She was not offered an opportunity to clarify her affidavit evidence and the matter is not addressed in her subsequent affidavits.

[63] I conclude that Yumin was mistaken about the timing and that her description in her first affidavit of her attendance with Perry at the bank on December 31 incorporates elements of the attendance on December 30. In her affidavit, she states that:

The CIBC loan staff said that to continue the loan with me as co-owner, the financing had to be restructured such that instead of Perry alone being the borrower and mortgagor, both Perry and I would be the borrowers and mortgagors. CIBC also said that their Lending Department needed to assess the financing restructuring and would call us when approved.

[64] This description of the discussion is consistent with the documents and the bank's subsequent actions. I find that this discussion probably occurred on December 30.

[65] It is clear from the documents that Perry told the bank that he wanted to put Yumin on title to the home. The bank's documents in this period do not specify the nature of the interest Perry intended that Yumin would receive: whether she would be a tenant in common, with a 60% interest, or a joint tenant, with a right of survivorship. Given Perry's contemporaneous instructions to Mr. Lundrie, I find that he intended a tenancy in common, but it is not clear that this was expressed to the bank.

[66] Perry did not then or subsequently attend on a notary to put Yumin on title with a 60% interest as a tenant in common. He had told Mr. Lundrie that this was his immediate intention and his failure to follow through is central to Daniel and Paul's argument that he did not truly intend to put Yumin on title. There is an alternative, more plausible explanation for Perry's inaction. Having taken steps with the bank to have Yumin added to the mortgage, it would have made sense to await the bank's approval of the change. Otherwise, there would be a risk that the bank

would treat the change as an event of default under the mortgage. This explanation is consistent with Yumin's evidence, and it makes sense.

[67] One further event on December 31, 2015 is that Perry telephoned Daniel and Paul and discussed his plans with each of them. Perry's side of these conversations was overheard by Yumin. There is some conflict in the parties' evidence of what Perry said. It is agreed that he mentioned a distribution of the Home 60% to Yumin and 40% to Daniel and Paul. Daniel and Paul say that Perry only described this as one possible distribution. I am unable to resolve this conflict in the evidence.

[68] On January 1, 2016, Perry had lunch with Paul and gave Paul a copy of the Will without discussing its contents. There is some suggestion in the evidence that this was at Paul's request and Perry viewed the request as presumptuous. If that is so, it does not appear to have affected Perry's intentions or his actions.

[69] That evening, Paul texted Daniel. He stated:

I have a copy of the will. I'll send you a copy. Lemme know what u think. I don't think he did 60/40. // The way I read it is all his equity in both properties goes to us. // Remainder of his estate goes to his wife. I think like business and other cash savings etc

[70] Paul was plainly unaware of Perry's intention to transfer a 60% interest in the Home to Yumin prior to his death. Notwithstanding his reading of the Will, he felt uncertain as to Perry's intentions.

[71] On January 4, 2016, Perry spoke with his good friend, Mr. Tian, who was visiting him every day. Perry told Mr. Tian that he had prepared his will and was leaving most of his assets to Yumin. He said that he felt bad for Yumin, because they had only been married a short time when he was diagnosed with cancer.

[72] On January 7, 2016, Paul telephoned Mr. Lundrie to obtain further information. It is slightly surprising that he took this step rather than telephoning his father. Mr. Lundrie's note of the conversation states that he only told Paul to speak to Perry about the title to the Home, but Paul took more than this from the discussion. Paul texted Daniel:

Give me a call when u can. I spoke with the lawyer about the will over the phone. Don't think we need to meet with them. But we need to talk to dad. // Lawyer said house in nv is already transferred title to her name so need to figure out with dad what that means.

[73] On January 11, 2016, Paul visited Perry in the hospital. Yumin was present. There is some dispute as to what was said, but the following is clear. Paul had noted mistakes in the spelling of his name and Daniel's in the will. He wrote down the correct spellings on a piece of paper that was left with Yumin at the end of the discussion. He also noted the following:

House in NV. 60 – Yumin. 20/20 – Daniel Paul.
exact address for Taiwan 50/50 – Paul & Daniel

[74] Paul says that, so far as the Home was concerned, he was writing down what Yumin was telling him, and Perry remained silent. Daniel and Paul argue that it is significant that Perry was silent and that he was not really in agreement with the intended distribution. Paul's evidence must be read in conjunction with his text message to Daniel later that day. He said:

OK we talked about it with her cuz dad brought it up. // I don't think there's any point bringing up the 60/40. // Unless u want to. // I told Yumin to find out the full address of Taiwan property and add our proper names to the will.

[Emphasis added]

[75] I find that, at this point, Paul's understanding was that Perry intended that the Home be divided 60:40 between Yumin and his sons.

[76] On January 17, 2016, Perry was visited in the hospital by members of Yumin's family including her sister, Yudyana. Yudyana's evidence is that Perry discussed his desire that Yumin be well taken care of after his death and told her that the Home had been split 60/20/20 between Yumin and his sons.

[77] By January 18, 2016, it appears that Paul had obtained a title search which showed that the Home was still in Perry's name. He reported to Daniel, however, that a friend had told him that there might be a lag in the reporting of changes of up to 60 days. Paul's evidence is that he spoke privately with Perry at the hospital at

this time. Yumin was asked to leave the room so that this could take place.

According to Paul, it was an emotional conversation. He asked Perry whether he was the only person on title to the Home. As Paul recounted in his examination for discovery, Perry replied:

... don't worry son; I know what you're asking; I know what you're asking about, but I've taken care of you and Daniel.

[78] Paul seems to have taken this as a statement that Perry intended to leave the house to him and Daniel, but it is in fact ambiguous as to Perry's intentions with respect to the Home. Perry may well have meant that he had taken care of his sons by leaving them the property in Taiwan and 40% of the Home.

[79] On January 20, 2016, Perry was visited in the hospital by his friends, Pastor Wu and his wife, Ms. Wu. Pastor Wu is the pastor of the church Perry and Yumin regularly attended. He had officiated at their wedding. Perry told Pastor Wu that he was ready to meet Jesus, that he wanted to provide for Yumin after his death, and that he had decided to divide his house 60/40, with 60% for Yumin and 20/20 for his two sons.

[80] On January 21, 2016, Perry was visited in the hospital by his friends, Mr. Mu and Ms. Lin. Mr. Mu and Ms. Lin knew Perry and Yumin from their church. Yumin went off to do errands during this visit. In her absence, Perry expressed his appreciation of the care Yumin was taking of him and said that he had made good preparations for Yumin's future. He said that he had decided to divide his property 60/40, with 60% to Yumin and 40% to his sons.

[81] As I have already noted, it was also on January 21 that the CIBC instructed Ms. Roohani to prepare documents for a rush transfer and refinancing of the Home. The bank's instructions were to transfer title to Perry and Yumin as joint tenants. It is plausible that this was either an assumption or a mistake on the part of the bank.

[82] On January 21, the CIBC also prepared documents reflecting a joint credit application by Perry and Yumin for a personal line of credit to be secured by the

revised mortgage to be registered against title to the Home in conjunction with the transfer of title. The personal line of credit would be for up to \$565,496. Coupled with the existing mortgage balance, the application contemplated slightly less than \$1.0 million of indebtedness secured by the mortgage. The reason for this application is not addressed in the evidence. What is clear is that the application documents were picked up by Yumin on January 21 or 22.

[83] On January 22, 2016, Yumin signed the application documents. Each bears a second signature that purports to be Perry's. Yumin and Ms. Boivin say that Perry signed the application documents in their presence. Yumin held a general power of attorney. She was entitled to sign the documents as Perry's attorney, but her evidence is that she did not do that. The handwriting analyst, Mr. Kovacs, says that the signatures that purport to be Perry's were probably not signed by the same person as signed Perry's Will. There is no question that the Will was signed by Perry.

[84] If the January 22 application documents were not signed by Perry, then Yumin and Ms. Boivin's evidence is false and Yumin probably signed Perry's name on the documents.

[85] On this summary trial application, I am unable to determine whether Perry's signature on the January 22 documents is genuine. There are reasons to doubt Mr. Kovacs' opinion: he had only a limited supply of specimen signatures to work with, and only one of those was an original; he eliminated two candidate specimen signatures as showing excessive variation, acknowledging that the eliminated signatures are similar to the questioned signatures; he acknowledges that people's signatures vary from time to time, and all the specimen signatures he was left with were signed on a single day (December 31, 2015); on January 22, 2016 Perry was in the last stages of his terminal illness, which common sense dictates could be expected to affect his signature; and Mr. Kovacs' own assessment of his opinion was only that his conclusion was "probable" and not "highly probable". Yumin and

Ms. Boivin were not cross-examined on this point and it would not be safe to come to a conclusion reflecting directly on their credibility in the circumstances.

[86] January 22, 2016, was a Friday. As already noted, Ms. Roohani had prepared necessary transfer and mortgage documents and was prepared to attend at the hospital for Perry and Yumin to sign them that day, but Yumin suggested that the appointment be rescheduled to Monday, January 25, because Perry was not feeling well. He fell into a coma on the Saturday.

[87] On the Monday, January 25, 2016, Yumin met with Ms. Roohani and told her that Perry was in a coma. I find that Yumin now anticipated that Perry would not recover. With the transfer unaccomplished, she was facing the prospect that Home would pass through the estate to Daniel and Paul, contrary to her understanding of Perry's intentions and her own interests. On discovery, it was put to Yumin that she was in a hurry and she testified that she was not worried. I am sceptical of this evidence. Yumin must have been upset that Perry was failing so quickly and was probably worried that the Home would end up with Daniel and Paul, whom she barely knew.

[88] Ms. Roohani understood from the CIBC that a joint tenancy was intended. Ms. Roohani's evidence is that Yumin told her that Perry's intention was that the Home would be hers in the event that something were to happen to him. I accept Ms. Roohani's evidence on this point. It was in this context that they discussed the use of the power of attorney to transfer the Home to Yumin indirectly, through Ms. Boivin.

[89] Yumin says that she raised with Ms. Roohani the possibility of a transfer through Daniel and Paul, but Ms. Roohani said that property transfer tax would then be payable and it would not be payable if the transfer were through Ms. Boivin, because she was a member of the same household as Perry and Yumin. Ms. Roohani does not recall any reference to Perry's sons at this time. Yumin says that Ms. Roohani proposed that she proceed as they did. Whether or not that occurred,

Ms. Roohani approached the transaction with some caution, obtaining from Ms. Boivin an indemnity in the following terms undoubtedly drafted by Ms. Roohani:

This is to confirm that my stepdad has terminal cancer, and was supposed to sign the transfer documents as well as the CIBC mortgage documents further to the bank's instructs (*sic*), on Jan 25/16 for funding on Jan 26/16. The title was to have been transferred to my mother and step father as joint tenants. However since the POA as drawn up by my parents' lawyer did not address the transfer into my mother's name, my mother acting in the best interest of my step father has decided to transfer the title of the property into my name, because my step father went into a coma, on Jaunary (*sic*) 23, 16 before being able to sign the transfer over to himself and my mother. As such, my mother has instructed Katy Roohani, notary public to transfer the title into my name.

[Emphasis added]

[90] Ms. Boivin says that, in the three or four weeks prior to his death, Perry often mentioned his wish that the Home be divided with 60% going to Yumin and 40% going to his sons. To her knowledge, this was Perry's intention to the time of his death.

[91] I accept Ms. Boivin's evidence of her understanding of Perry's intentions because it is consistent with the evidence of Mr. Lundrie, Mr. Tian, Pastor Wu, Ms. Wu, Mr. Mu, Ms. Lin and Yudyana. I infer that she stated a different understanding in the indemnity given to Ms. Roohani because her mother asked her to.

[92] Yumin's evidence is that Perry told her on December 31, 2015, before they went to Mr. Lundrie's office, that he wanted her to live in the Home for as long as she wished. Giving effect to this intention is part of her explanation for taking title to the Home in her own name, acknowledging that Daniel and Paul would have their 40% interest, but taking the position that they would have to wait to receive it. In her examination for discovery, she said that she subsequently decided, contrary to Perry's intentions, that she did not want to make the boys wait.

[93] I think it is significant that Perry did not tell Mr. Lundrie that he wanted Yumin to live in the Home for as long as she wished. Nor does he seem to have mentioned this idea to others such as Ms. Boivin. While he may have hoped that Yumin's continued occupation of the Home would be something that Yumin, Daniel and Paul

would be able to agree upon, I do not accept that he intended to give to Yumin a legal right to occupy the Home for as long as she wished.

[94] I find that Yumin used the power of attorney on January 25, 2016 to achieve an outcome that was not the outcome she understood that Perry intended. Through the power of attorney and Ms. Boivin's subsequent transfer, she obtained a 100% interest in the Home, while her understanding was that Perry intended that she obtain only a 60% interest. Yumin took this step because Perry was about to die and she did not want the Home to pass into Daniel and Paul's hands through the estate. Either then or shortly afterwards, she thought she would be able to make things right with Daniel and Paul by acknowledging their 40% interest in the Home in accordance with Perry's wishes.

[95] Following Perry's death on January 26, 2016, at the funeral on February 9, Yumin proposed to Daniel and Paul that she would pay to them 40% of the value of the equity in the Home, based on the 2016 assessed value. She confirmed her proposal in an email on February 11, 2016. Daniel and Paul rejected the proposal.

Assessment of suitability

[96] While I have identified factual questions I cannot resolve, none of them bears directly on the central question of Perry's intentions. My assessment of that question does not depend on my assessment of Yumin's credibility generally. It is difficult to imagine what evidence she might give, in cross-examination at a full trial, that could detract from Perry's many statements of his intentions to independent third parties and members of his immediate and extended family. I am satisfied that, having regard to all the evidence, I am able to find the facts necessary to decide Perry's intentions and the other issues identified above.

[97] I am also satisfied that it is not unjust to decide the issues on this summary trial application and that I should exercise my discretion to do so. While the amount involved is significant, the case is not complex. It has already been outstanding for more than two years. Examinations for discovery have taken place, evidence has been gathered from 11 witnesses, and file materials have been obtained from third

parties. A full trial would require two to three weeks and could not be scheduled until 2020. While it is always possible that additional material evidence might emerge to cast a very different complexion on the case, it is a small possibility. That small possibility does not justify the substantially greater cost and delay entailed by a full trial in the circumstances of this case.

Analysis and determination of the issues

1 How did Perry intend to dispose of the Home, prior to or on his death?

[98] I am satisfied that Perry intended that Yumin should receive a 60% interest in the equity in the Home, and the balance of the equity should pass to Daniel and Paul through the estate. This was consistently his stated intention between December 31, 2015, when he expressed it to Mr. Lundrie, through January 21, 2016, when he stated it to Mr. Mu and Ms. Lin.

[99] Daniel and Paul's theory, based on the Will, is that Perry really wished them to have the Home but was not willing to say so because he wanted to placate Yumin. This is wholly implausible. Perry was volunteering his intention that Yumin would have 60% of the Home (or sometimes just his property) to independent third parties. He volunteered it to Mr. Lundrie, Mr. Mu and Ms. Lin when Yumin was not present. At various times he stated his intention to Yumin and members of her family. I find that he expressed this intention to Paul in Yumin's presence on January 11, 2016. There is no evidence at all that Yumin was putting pressure on Perry.

[100] The Will only states Perry's intention that Daniel and Paul receive Perry's interest in the Home at the date of his death. He intended to transfer to Yumin a 60% interest in the equity before he died. Up to the time he lapsed into a coma, Perry and Yumin were waiting to sign documents to accomplish the transfer. Having embarked on a plan in late December to have the documents prepared by the bank's notary, for almost all of this period they were waiting on the bank.

2. Having regard to Perry's intentions and Yumin's actions, does Yumin now hold the Home subject to a trust for Perry's estate or for Daniel and Paul personally?

[101] As the holder of a power of attorney from Perry, Yumin owed him a fiduciary duty to exercise it only in his best interests and according to his wishes; *Power of Attorney Act*, s. 19(2). In conveying the Home to Ms. Boivin in order that it might be conveyed to her, she breached that duty. In such circumstances, a court of equity may impose a constructive trust to remedy the breach; *Soulus v. Korkontzilas*, [1997] 2 SCR 217 at paras. 46-52.

[102] Equity is concerned with Perry's intentions and with Yumin's conscience. In light of Perry's intentions, it would be unconscionable for Yumin to receive 100% of the Home. On the other hand, it would not be right for Yumin to be forced to give up all of the Home when Perry intended that she should receive 60% of the equity. I conclude that Yumin holds the Home on a constructive trust as to 40% of the equity. The constructive trust must be taken as having come into existence when the power of attorney was exercised on January 25, 2016. At that point, Perry was the beneficiary. When he died, his estate became the beneficiary.

[103] In light of this conclusion, I need not consider Yumin's argument as to the application of the rule in *Strong v. Bird* (1874), [1874-80] All E.R. Rep. 230, L.R. 18 Eq. 315.

3. Should the provision of the Will giving to Daniel and Paul "all my right, title and interest" in the Home be rectified pursuant to WESA, s. 59 to give to Yumin a 60% interest in the Home?

[104] Section 59 of *WESA* provides, in part:

- (1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of
 - (a) an error arising from an accidental slip or omission,
 - (b) a misunderstanding of the will-maker's instructions, or
 - (c) a failure to carry out the will-maker's instructions.

- (2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).

[105] Perry's intention was not to convey to Yumin a 60% interest in the Home under the Will. It was to convey to her a 60% interest in the Home outside his estate, in advance of his death. He intended, by the Will, to convey to Daniel and Paul all of the 40% interest in the Home that he anticipated he would own on his death. This is not a case of an accidental slip or omission, misunderstanding of the testator's intentions, or failure to carry out the testator's intentions. The Will does what Perry intended it to do and s. 59 has no application in the circumstances.

[106] Yumin's application is moot in any event, because the Home is not part of the estate and the rectification sought would either have no legal effect or a perverse legal effect (if it resulted in Yumin receiving 60% of the 40% interest in the Home held by the estate). But I would come to the same conclusion even if Yumin had not succeeded in removing 60% of the equity in the Home from the estate before death. In my opinion, if a testator intends a certain distribution based on certain steps to be taken before death and those steps are not taken, it cannot be said that the will fails to carry out the testator's testamentary intentions.

4. Should the Will be varied pursuant to WESA, s. 60?

[107] Yumin argued for a variation in the alternative, in case the Home fell into the estate. That has not occurred.

[108] Section 60 of WESA provides:

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.

[109] With the constructive trust I have declared, and taking into account the vehicle and financial assets that passed to Yumin prior to death and by right-of-

survivorship, Yumin receives assets worth in excess of \$1.75 million (based on the assessed value of the Home in 2016). The marriage was one of short duration and Yumin has other assets, including a house, the details of which are not in evidence.

[110] On the evidence, the Will was the product of Perry's thoughtful assessment of his assets and his moral obligations to his wife and sons. I do not believe that he failed to make adequate provision for Yumin's proper maintenance and support. I dismiss Yumin's claim for a variation of the Will.

Disposition

[111] In summary, for these reasons:

- a) The time for filing a counterclaim is extended to October 4, 2018.
- b) The notice of civil claim stands as an affirmative pleading in response to the counterclaim and no further pleading on Yumin's part is required.
- c) I declare that Yumin holds the Home on a constructive trust as to 40% of the equity for the benefit of Perry's estate. The constructive trust is deemed to have come into existence on January 25, 2016.
- d) Yumin's claims for rectification or variation of the Will are dismissed.

[112] The parties may arrange through the registry to speak to costs.

"Gomery J."

The Honourable Mr. Justice Gomery