

# Decoding the puzzle: Chinese culture, familial transfers, and disputes in Western courts

Zhixiong (Leo) Liao  <sup>1\*</sup>

<sup>1</sup>Te Piringa – Faculty of Law, University of Waikato, Hamilton, New Zealand

\*Corresponding author: E-mail: [zliao@waikato.ac.nz](mailto:zliao@waikato.ac.nz)

## ABSTRACT

More and more Chinese live in Western countries nowadays and many disputes over transfers between Chinese family members are brought to Western courts. Generally, little documentary evidence on such transactions is available and the oral evidence is commonly divergent as to what was agreed and what happened. Western judges are faced with the puzzle whether the transfer was a gift, a loan, or an equity investment. This article elaborates on the relevant Chinese cultural dimensions and the recent developments. It discusses the cultural relevance in determining the nature of such transfers and investigates whether clearly established Chinese cultural norms could be admissible evidence aiding the interpretation, or even implied terms, of the transaction. It argues that Chinese culture should be seriously considered in assessing the credibility of Chinese witnesses. This article critiques the prevailing common law presumptions, and proposes an analytical model aiming to assist Western judges and lawyers to assess the cultural influence properly for better answers to the puzzles.

**KEYWORDS:** Chinese, Family, Transfer, Gift, Loan, Equity, Culture, Common law, Law

## I. INTRODUCTION

More and more civil litigations involving Chinese parties are brought to Western courts. Such litigations are highly challenging to judges and lawyers in Western jurisdictions.<sup>1</sup> Recommendations made for changes include improving translation and court interpretation quality, increasing judges from minority ethnicities, and training judges and lawyers.<sup>2</sup> This article discusses the most challenging transactions between Chinese parties—transfers between Chinese family members. Where disputes arise from such transfers, commonly there is little

<sup>1</sup> M. Chen, *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study* (Wellington: Superdiversity Institute for Law, Policy and Business, 2019).

<sup>2</sup> *Ibid* 33–61.

contemporaneous documentary evidence available and testimonies are significantly divergent.<sup>3</sup> The trial judge(s) would be faced with the puzzle: Was the transfer a gift, a loan, or an equity investment? How should the parties' intention be ascertained and on what bases? Whether, to what extent, and how, should their cultural backgrounds be taken into account?

This article explores how and to what extent Chinese individuals involved in a particular familial transfer in dispute were most likely influenced by which aspects of Chinese culture and proposes a matrix aiming to assist Western judges and lawyers to decode the puzzle. It focuses on litigations brought by a Chinese party to a New Zealand Court for disputes arising out of transfers between Chinese family members, and in particular transfers from Chinese parents to their adult children in New Zealand. The conclusions may be, largely, applicable to similar litigations between Chinese or other Asian family members brought to courts in other Western jurisdictions.

## II. THE PUZZLE AND CHINESE CULTURE

### 1. Illustration—gift, loan, or equity investment?

H and W, both from China, started living together as a couple in New Zealand. H's parents in China transferred to H's bank accounts \$800,000 which was used to purchase the family home of the young couple. Later, the young couple separated. W claimed half share of the family home, arguing that the money from H's parents was a *gift* to them. H, however, argued that his parents are the *equitable owners* of the house, or at least the \$800,000 was a *loan*.

This is a classic scenario illustrating a common feature of transfers between Chinese family members—the lack of contemporaneous documentation and divergent statements regarding the intention of the transfer.<sup>4</sup> Where some documents are available, they may not meet 'the requirements of the Evidence Act 2006 or the relevant High Court Rules' for admissibility of evidence.<sup>5</sup> These factors render determining the nature of the transfer a challenge.

### 2. Decoding the puzzle and Chinese culture

The nature of the transfer depends on what the parties or the transferor intended at the time of transfer. In ascertaining the intention, judges have to find the facts, select the applicable legal principle, and apply the legal principle to the facts, which inevitably involves judicial discretion.<sup>6</sup> Culture influences judges' value judgments which 'may, consciously or unconsciously, influence the courts' application of discretionary standards, finding of facts, and selection of applicable rules'.<sup>7</sup> Culture also influences the parties' intention and the way of transfer as manifestation of the intention.

Cases show that for transfers between family members ascertaining intention is more difficult.<sup>8</sup> The inherent connection between family members gives them the feeling of trust and confidence so that their transactions are less likely to be documented.<sup>9</sup> This happens not only to *Chinese* families. A Chinese family, however, 'no doubt because of its cultural background', sees familial transactions 'as a natural part of family life in which legal formalities

<sup>3</sup> E.g. *[RH] v [SY]* BC200469717 (NZFC); *Li v Xing* BC 201162089 (NZHC); *Zhou v Yu* [2015] NZFC 76668; *Gao v Jiang* [2015] NZFC 6255; *Zhang v Li* [2017] NZHC 129; *Zhao v Huang* [2014] NZHC 132; *Tian v Zhang* [2019] NZHC 2231; *JX v CY* BC200894827 (NZFC).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Li v 110 Formosa (NZ) Ltd* [2018] NZHC 3418 [8].

<sup>6</sup> M. Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or A Working Misunderstanding?' (2013) 62 *The International and Comparative Law Quarterly* 1, 25.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Cases* (n 3); *Berghan v Berghan* [2017] QDC 47, [2017] QCA 236.

<sup>9</sup> *Lalanah Brujah v Taras King Wolf* (VCC, CI-17-01850).

were unnecessary and which were flexible and based on mutual assistance and trust'.<sup>10</sup> Western judges and lawyers may think 'foreign' how Chinese people deal with persons with a close connection.<sup>11</sup>

Chinese culture's influence on Chinese familial transactions has been seriously considered by common law courts in Hong Kong<sup>12</sup> and Singapore,<sup>13</sup> where Chinese is the majority of its population, and in New Zealand,<sup>14</sup> where Chinese is a minority. A New Zealand judge comments, 'it could be inappropriate to evaluate such transactions . . . without appreciation of the cultural context in which they occur'.<sup>15</sup> For Western judges and lawyers, a proper understanding and assessing evidence on the Chinese cultural context may be a key to decoding the puzzle.

### III. CHINESE CULTURE: DIMENSIONS AND RECENT DEVELOPMENTS

A comprehensive approach should be taken in considering Chinese culture<sup>16</sup> and its impact on a party in a particular transaction. National/ethnic culture, with regional variations, interacts and changes with the changing economic, social, legal, and political contexts. The way and extent of national/ethnic culture's influence on a particular party to a transaction is personal.<sup>17</sup>

Hofstede identified four dimensions of a national culture,<sup>18</sup> and later added the fifth.<sup>19</sup> Indexes or scores are given to each of the dimensions of a country. The table below is a comparison between China and New Zealand regarding the five dimensions<sup>20</sup>:

Dimension	Power distance	Individualism	Masculinity	Uncertainty avoidance	Long-term orientation
China	80	20	66	30	118
New Zealand	22	79	58	49	30
World Mean	63	39	49	70	39

In contrast to New Zealand culture, a Western culture, Chinese culture can be characterized by long-term orientation, high-power distance, high collectivism, and high uncertainty avoidance (low score).<sup>21</sup> This section will first discuss these dimensions of Chinese culture

<sup>10</sup> *Speller v Chong* [2003] NZFLR 385 [8].

<sup>11</sup> Chen (n 1) [67].

<sup>12</sup> J. Bourgon, 'Historians at the Court: How Cultural Expertise in Qing Law Contributes to the Invention of Hong Kong "Chinese Customary Law"' (2020) 38(1) *Law and History Review* 85.

<sup>13</sup> Chen-Wishart (n 6).

<sup>14</sup> Cases (n 3); *Speller v Chong* (n 10). In *Deng v Zheng* [2021] NZSC 43, [2022] NZSC 76, the Supreme Court (NZ) seriously considered the effects of Chinese culture on the Chinese parties who are not family members but business associates.

<sup>15</sup> *Speller v Chong* (n 10) [8].

<sup>16</sup> Chinese culture could be national or ethical, depending on what 'Chinese' or 'Chinese people' or 'China' mean. Chinese culture in this article refers to the prevailing culture of the dominant Han ethnicity in Mainland China unless indicated otherwise.

<sup>17</sup> See Section VI(1) for discussions.

<sup>18</sup> G. Hofstede, 'National Cultures in Four Dimensions: A Research-based Theory of Cultural Differences Among Nations' (1983) 8 *International Studies of Management and Organization* 46.

<sup>19</sup> G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations across Nations* (2nd edn, Thousand Oaks: Sage, 2001) 359.

<sup>20</sup> G. Hofstede's Cultural Dimensions <<http://www.geert-hofstede.com>> cited in J. Barkai, 'Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution' (2008) 8 *Pepperdine Dispute Resolution Law Journal* 403.

<sup>21</sup> D. Zhang and S. J. Wu, 'Achieving Successful Business in China: Assessing the Changing Chinese Culture' (2014) 15(4) *Journal of Asia-Pacific Business* 307; G. Hofstede, 'Cultural Constraints in Management Theories' (1994) 5 *International Review of Strategic Management* 27.

with relevant Chinese culture traditions, and then their recent developments, which, collectively, should provide Western judges and lawyers with a 'pattern of basic assumptions'<sup>22</sup> on Chinese culture. Regional variations and influences on different groups and individuals will be discussed in Section VI(1).

## 1. Chinese culture dimensions

### A. Long-term orientation, *mianzi* and *guanxi*

Long-term orientation is a cardinal feature of Chinese culture.<sup>23</sup> Chinese people are more willing to give up short-term gains for the preservation of long-term goals or plans. The notions of '*mianzi*' (face) and '*guanxi*' illustrate this.

The 'face' in the West is neutral, referring to a person's identity in a particular situation,<sup>24</sup> whereas '*mianzi*' in Chinese culture represents a positive social value and the self-image earned from social interactions.<sup>25</sup> *Mianzi* must be maintained for feasible *guanxi* (relationships).<sup>26</sup> *Guanxi* may be originated from kinship, or established during long-term networking, and maintained by 'long-term favour exchange'.<sup>27</sup> *Guanxi* are regarded as a long-term investment for future help and support,<sup>28</sup> and its popularity 'reflects the strong long-term orientation feature of Chinese culture'.<sup>29</sup>

*Guanxi*, especially long-term *guanxi*, between Chinese parties influences not only the substantive terms and conditions but also the formality and procedural matters of the transaction. Based on the closeness of the relationship, transactions between Chinese parties may be put into the following categories:

- A. Transactions between parents and their adult children. Most involve parents' transfers to an adult child for purchasing a property or other use of the child's family,<sup>30</sup> or without identifying a particular use of the money.<sup>31</sup> Disputes are generally on whether the transfer was a loan or a gift.<sup>32</sup>
- B. Transactions between partners or spouses (to be). A party transfers to the other, or a family member of the other, during the partnership, or intending/planning for marriage or living together as partners,<sup>33</sup> or to a person with whom the transferor intends to start or maintain an intimate relationship.<sup>34</sup>
- C. Transactions between extended family members or close relatives. It may be a transfer from an uncle to his niece or nephew,<sup>35</sup> or transfers between two couples where the wives are sisters.<sup>36</sup>
- D. Transactions between friends or other social relationships. The term 'friend' is broad, and varies in a variety of contexts. The social relationships may include *shisheng*

<sup>22</sup> Zhang and Wu (Ibid) 309.

<sup>23</sup> China has the highest long-term orientation score in the world. Hofstede (n 20); Hofstede (n 21).

<sup>24</sup> C. Alexander and J. Rudd, 'Situating Identities and Response Variables' in J. Tedeschi (ed.), *Impression Management Theory and Social Psychological Research* (New York: Academic Press, 1981); L. Lin, 'Cultural and Organizational Antecedents of Guanxi: The Chinese Cases' (2011) 99(3) *Journal of Business Ethics* 441.

<sup>25</sup> Lin (Ibid).

<sup>26</sup> I. Yeung and R. Tung, 'Achieving Business Success in Confucian Societies: The Importance of *Guanxi* (Connections)' (1996) 25(2) *Organizational Dynamics* 54.

<sup>27</sup> Chen-Wishart (n 6) fn 125.

<sup>28</sup> Ibid.

<sup>29</sup> Zhang and Wu (n 21) 313.

<sup>30</sup> E.g., *Zhang v Li* (n 3); *Li v Xing* (n 3); *Zhou v Yu* (n 3); *Gao v Jiang* (n 3).

<sup>31</sup> E.g., *[RH] v [SY]* (n 3).

<sup>32</sup> E.g., *Zhou v Yu* (n 3); *Zhang v Li* (n 3); also cases in Chinese Courts discussed in Section V(3).

<sup>33</sup> E.g., *Tian v Zhang* (n 3); *JX v CY* (n 3); *D v T* [2017] NZHC 904; *Song v Jiang* [2018] NZHC 2321.

<sup>34</sup> E.g., *Zeng v Cai* [2019] NZHC 2548; *Zhao v Huang* [2014] NZHC 132.

<sup>35</sup> E.g., *Chang v Lee* [2014] NZHC 1091, [2017] NZCA 308.

<sup>36</sup> E.g., *Zheng and Yu v Qiu and Yu* BC200761243 (NZHC).

(teacher–student), *tongxue* (classmates), *zhanyou* (peer soldiers), and *tongxiang* (migrants from the same hometown/region).

- E. Transactions between business associates, including a variety of persons involved in business activities. They could be long-term or short-term business partners, previous employer–employee,<sup>37</sup> long-term customers or suppliers, or a business person recommended by a family member, relative, a friend, or other business-related persons.
- F. Transactions between strangers, without existing or potential familial, social, or stable business relationships between them.<sup>38</sup>

The closer the relationship, the less likely the terms are clearly stated and written records were requested. Requesting something in writing from a closely connected person may be seen as distrust and disrespect, which could hurt *mianzi* and the *guanxi* between them. Doing so would mean acting against the long-term orientation of Chinese culture. Written records are uncommon for transactions falling within the above categories (A), (B), and (C).<sup>39</sup>

### B. Collectivism and family

Traditionally, Chinese families and the society were organized in a hierarchical structure for harmony and obedience in accordance with the cultural norms based on Confucianism.<sup>40</sup> In contrast to the Western notions of individual rights and autonomy, ‘Confucianism emphasizes the importance of kinship relationship, mutual dependence and the maintenance of the security and well-being of the collective over individual interests’.<sup>41</sup> The term ‘individualism’ connotes a negative meaning in the Chinese language.<sup>42</sup> An individual is encouraged to give up his or her personal interests for the greater good of the family, organization, and society.

Family is important in all cultures, but how the importance attributed thereto could have cultural differences. In traditional China, ‘family life was the indisputable nexus of the social system’.<sup>43</sup> Family, as a collective, rather than each individual, is the basic ‘unit’ of Chinese society. An individual is ‘insignificant without the family and wider community’.<sup>44</sup>

People in a collectivism culture are at a higher degree oriented towards acting as part of a group, rather than as individuals.<sup>45</sup> People are positional rather than personal.<sup>46</sup> People compare the overall social status and achievements between families over individuals. An individual is more like one of the athletes in a relay race, a member of the family team.

### C. Power distance

The Chinese culture has a high-power distance, which suggests a high level of inequality of power within the society, and a low expectation of the less powerful members for equal distribution of power.<sup>47</sup> In contrast to the West which generally relies more on agreements among equal individuals, Chinese families, organizations, and society seek harmony heavily relying on a strong hierarchical structure. Confucianism cultural norms laid down ‘a comprehensive code of conduct based on a hierarchy of generational sequence, age, and

<sup>37</sup> E.g., *Deng v Zheng* (n 14).

<sup>38</sup> Such transactions are most likely at-arm’s-length and in a formal way.

<sup>39</sup> This article discusses these and focuses on transfers of money.

<sup>40</sup> C.-M. Lam, ‘Confucianism and Critical Rationalism: Friends or Foes?’ (2017) 49(12) *Educational Philosophy and Theory* 1136.

<sup>41</sup> Chen-Wishart (n 6) 17.

<sup>42</sup> China ranked the lowest individualism in the world. Hofstede (n 20); Hofstede (n 21).

<sup>43</sup> J. Stacey, ‘When Patriarchy Kowtows: The Significance of the Chinese Family Revolution for Feminist Theory’ (1975)

2(3) *Feminist Studies* 64.

<sup>44</sup> *Ibid.*

<sup>45</sup> Zhang and Wu (n 21) 309; Hofstede (n 21).

<sup>46</sup> Chen-Wishart (n 6).

<sup>47</sup> Zhang and Wu (n 21) 309, 311.

gender<sup>48</sup> within a family and extended family, which defines a member's 'status, role, privileges, duties and liabilities within the family order'.<sup>49</sup>

The hierarchy is also a system of reciprocity, in that the superior has the duty to provide members in inferior positions with benefits and protection in exchange for their obedience, respect, and support. Within a family, parents are expected to be a model, and a protector, of the children, and children must respect and support their parents. Honoring one's parents is required in many cultures, but the Confucian tradition is more stringent in this regard.<sup>50</sup> The tradition of *xiaodao* (filial piety) is regarded as an important merit of a person in Chinese communities. Chinese adult children, worldwide, think adhering to the principles of filial piety and looking after their elderly/sick parents is not only *tianjingdiyi* (a natural responsibility),<sup>51</sup> but would set up a good example for their own children, enhance their reputation in the community, and build up credits for reciprocity of intergenerational bonds.<sup>52</sup>

The high-power distance in Chinese culture is also reflected by greater gender inequality, with male dominance, in contrast to Western culture. This tradition could be illustrated by the *zongci* (temples of extended families) and *zupu* (genealogy books showing the family trees), both hinged on lineage positions of only male members of the (extended) family.<sup>53</sup> Traditional parents may give their sons significantly favorable treatments over their daughters in wealth distributions.<sup>54</sup>

#### D. Uncertainty avoidance

Chinese culture presents a high uncertainty avoidance character. Chinese people are generally less comfortable with situations they perceived to be unstructured, unclear, or unpredictable.<sup>55</sup> Historically, China was an agriculture-based society with its stability highly dependent on the quality of soils, temperature, rains, and other natural conditions. The time and scale of natural disasters were highly unpredictable. This created a fear of uncertainty and instability.

The high avoidance of uncertainty may explain many Chinese cultural phenomena, including the 'habit of saving', the notions of '*yangerfanglao* (raising sons to make sure one could be looked after when gets old)' and '*duoziduofu* (the more sons you have, the happier your life would be)', the emphasis of *guanxi*; and the willingness to surrender short-term, individual rights for long-term benefits and harmony of the family, community, and society. These aspects together functioned like a 'safety net' in the absence of a formal social security system, or worked as an 'insurance' by pooling the risks, not only among as many as possible members of a family, extended family, community and the society, but also among good and poor years of harvest and even generations.<sup>56</sup> Following the social and cultural norms was not only necessary for moral requirements, but was also desirable for social, economic benefits, including greater certainty of available protection and assistance when they were in need.

<sup>48</sup> Chen-Wishart (n 6) 14.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Adult children's obligation to support old/sick parents is also recognized by PRC Constitution (art 49), Civil Code (art 1067), and the Rights and Interests of Older Persons Protection Law (art 13).

<sup>52</sup> L. He and K. Heugten, 'Chinese Migrant Workers' Care Experiences: A Model of the Mediating Roles of Filial Piety' (2020) 30(11) *Qualitative Health Research* 1749.

<sup>53</sup> In Hong Kong, only the *male* indigenous villagers in the New Territories are allowed to build small village houses on the family's land, as a traditional entitlement of the indigenous Chinese inhabitants. This colonial-era policy was a recognition of the Chinese tradition in the Qing Dynasty. The Hong Kong Court of Final Appeal recently upheld this policy in *Kwok Cheuk Kin v Director of Lands, Secretary for Justice & Heung Yee Kuk* [2021] HKCFA 38.

<sup>54</sup> This is the case of the author's parents-in-law.

<sup>55</sup> Zhang and Wu (n 21); Hofstede (n 21).

<sup>56</sup> The notions of '*yangerfanglao*' and '*duoziduofu*' reflect the transgenerational long-term planning and avoidance of uncertainty.

### E. Masculinity

This dimension indicates the degree to which a culture reinforces traditional male values and gender, such as achievement, control, power, money, recognition, dominance, ambition, and the accumulation of money and wealth.<sup>57</sup> The core is ‘assertiveness’ to ‘win at any cost’.<sup>58</sup> China has a masculine culture.<sup>59</sup> Chinese people seem to be more driven by success, willing to give up short-term enjoyments, and accept poor working and living conditions for professional success. Parents work hard ‘for the family’, leaving little time for leisure or even for staying with the family. Males dominate a significant portion of the society and power structure.<sup>60</sup>

### 3. Recent changes to Chinese culture

Culture changes over time. Confucianism is the root of Chinese culture, with long-lasting effects on the Chinese ethnic communities, as illustrated by recent court decisions in Singapore,<sup>61</sup> Hong Kong,<sup>62</sup> Taiwan,<sup>63</sup> and some legislation in mainland China.<sup>64</sup> However, some dimensions of Chinese culture have changed drastically within decades, with the rapid change in the economic, political, social, and legal environments.<sup>65</sup>

The influence of Confucianism was significantly reduced during 1949–1976. The Chinese Communist Party (CPC), after taking power in 1949, took a ‘critical inheritance’ approach towards Confucianism,<sup>66</sup> abolished some traditional practices that discriminated against women, and promoted equality for everyone in a socialist society.<sup>67</sup> During the Cultural Revolution (1966–1976), CPC declared Confucianism as one of the ‘Four Olds’, namely, ‘old thought, old culture, old tradition and old custom’, that must be eliminated.<sup>68</sup> Children were encouraged to report to the government their parents’ words and conducts that might be interpreted as an attack against the Communist Party, Socialism, or Chairman Mao. These policies and practices significantly reduced the influence of Confucianism in mainland China.<sup>69</sup>

The ‘Reform and Opening-up’ policy since the late 1970s significantly changed China. The initial phrase primarily focused on (i) allowing farmers to work as members of a family rather than members of a collective,<sup>70</sup> which resumed the importance of family as the basic unit of the society and (ii) obtaining investments and learning advanced technologies and management from the developed countries.<sup>71</sup> Foreign-invested and private enterprises increased significantly. The ‘overseas investors’ at this stage, however, were primarily from Hong Kong, Macau, and Taiwan<sup>72</sup> who mostly operated in the form of family business, with

<sup>57</sup> Hofstede (n 20).

<sup>58</sup> Barkai (n 20) 414.

<sup>59</sup> Hofstede (n 21); Zhang and Wu (n 21).

<sup>60</sup> Hofstede (n 20).

<sup>61</sup> E.g., many cases discussed in Chen-Wishart (n 6).

<sup>62</sup> E.g., *Kwok v Director of Land* (n 50).

<sup>63</sup> E.g., *Zhu v Luo*, ROCSC 106 (2017) Tai App 2718; *Luo v Zhu*, ROHC 103 (2014) Chongshanggeng (1)130.

<sup>64</sup> E.g., statutory provisions in n 48.

<sup>65</sup> E.g., the one-child policy, with other changes in China, has resulted in Chinese young generation’s departure from the traditional notions of ‘*duoziduofu*’ and ‘*zhongnaqingnu*’ (placing more weight on males over females). The Chinese government amended the Population and Family Planning Law in 2021 to encourage young Chinese couples to have more children (arts 18(1), 25(2), 26, 27, 28, 29, and 30).

<sup>66</sup> An approach of taking only the ‘correct’ part of Confucianism, depending on the policies at the time. T. Zhang and B. Schwartz, ‘Confucius and the Cultural Revolution: A Study in Collective Memory’ (1997) 11(2) *International Journal of Politics, Culture, and Society* 189, 197.

<sup>67</sup> Although some policies actually created new inequalities, such as those against the previous ‘ruling classes’ including landlords and capitalists.

<sup>68</sup> Zhang and Schwartz (n 66) 197.

<sup>69</sup> Confucianism seems to be more preserved in Chinese communities in Hong Kong, Taiwan, Macau, and Singapore, which were not significantly impacted by these events.

<sup>70</sup> Decisions on Further Strengthening Agricultural and Rural Work (CPC Central Committee, 1991).

<sup>71</sup> X. Deng, *Selected Works of Deng Xiaoping* (Vol. 3, Beijing: People’s Publishing House, 1993) 130.

<sup>72</sup> The four ‘special economic zones’ set up in 1980 were Shenzhen, Zhuhai, Xiaomen, and Shantou. They are close to Hong Kong, Macau, and Taiwan. Many overseas Chinese were originally from these areas.

some from Japan and South Korea.<sup>73</sup> These investors were either overseas Chinese, or Asians whose culture was historically influenced by Confucianism. There was a ‘revival’ of Confucianism at this stage.<sup>74</sup>

The market-oriented economy, officially adopted by Chinese government in 1993, brought more fundamental changes to Chinese society and culture. Many important statutes<sup>75</sup> were enacted to meet the needs of a market-oriented economy. Investments from the USA, UK, and Europe significantly increased. They introduced into China Western management styles, philosophies, and values which drastically changed ‘the fundamental value system in Chinese people’.<sup>76</sup>

China became more open to adopt ‘international practices’ after it acceded to the WTO in 2001. Twenty-more years thereafter, China, overall, has changed from an agricultural-and-rural-based society to an industrial-and-urban-based society.<sup>77</sup> The large-scale industrialization and urbanization converted half-a-billion villagers into employees of foreign-invested and private companies and residents of industrial zones and cities.<sup>78</sup>

These changes, coupled with the development of a social security system, reshaped the national culture of China.<sup>79</sup> Zhang and Wu’s 2014 study suggested that the ‘current’ national culture profile of China was ‘dramatically different’ from the one in 1994.<sup>80</sup> Power distance dropped drastically, individualism increased substantially and masculinity score became higher.<sup>81</sup> The uncertainty avoidance score increased and became close to the Asian average and the world average.<sup>82</sup> These suggest that Chinese people became less tolerant of inequality of power and wealth distributions, but more open to take risks and uncertainties and placed greater value on individual rights and personal success. Long-term orientation decreased but remained high and was still the highest in the five dimensions, indicating this part of Chinese national culture did ‘not change much’.<sup>83</sup>

The above observation of Chinese culture and its recent developments is significant in ascertaining the intention of the parties to transactions between Chinese parties including family members. It would be problematic simply assuming Chinese culture equates with Confucianism, ignoring the significant changes brought about by the large-scale industrialization and urbanization, which ‘fundamentally reshaped’ Chinese society in the past 30 years.<sup>84</sup> The changes inevitably influence Chinese people’s behaviours and decision making.<sup>85</sup> A more comprehensive approach is required for assessing Chinese culture and its influence on a party to a particular transaction between Chinese parties including family members.<sup>86</sup>

<sup>73</sup> J. Liu, ‘70 Years of Foreign Capital Utilization in New China: History, Effects and Main Experiences, Management World’ (2019) <<http://chinawto.mofcom.gov.cn/article/ap/p/201912/20191202923754.shtml>> accessed 5 September 2022.

<sup>74</sup> Zhang and Schwartz (n 66) 202–205.

<sup>75</sup> E.g., the Company Law (1993), Guarantee Law (1995), Securities Law (1998), and Contract Law (1999).

<sup>76</sup> Zhang and Wu (n 21) 311.

<sup>77</sup> In 2021, 7.3% of China’s GDP was from the primary (agriculture) industry, 39.4% from manufacturing and related industries, and 53.3% from commerce and services industries; 64.7% of China’s residents live in urban areas (under 20% in 1978). PRC Statistical Communiqué on National Economic and Social Development in 2021 (National Bureau of Statistics, 28 February 2022).

<sup>78</sup> Worldbank, *Urban China: Toward Efficient, Inclusive, and Sustainable Urbanization* (Washington, DC: Worldbank, 2014).

<sup>79</sup> Zhang and Wu (n 21) 311.

<sup>80</sup> Ibid 318.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> E.g., *fuweizigang* (father is the master of his sons), and *fuweiqigang* (husband is the master of his wife), two fundamental principles of Confucianism, are no longer the prevailing cultural norms in today’s China, especially in cities and the developed regions.

<sup>85</sup> Zhang and Wu (n 21) 319.

<sup>86</sup> For convenience of discussions, unless otherwise indicated, Chinese culture in this paper refers to the traditional Han-ethnicity-based Chinese culture with Confucianism as its root. The recent developments and the geographical and ethnical variations are discussed in Section VI as reasons justifying the proposed analytical model.

## IV. DETERMINING THE NATURE OF FAMILIAL TRANSFERS

### 1. Framework for decoding the puzzle

The ultimate task of the trial judge is to ascertain the intention of the transfer, which is to be inferred from the contemporaneous documentary evidence (if available), reliable oral evidence, or admissible evidence in other forms. The strategic steps for decoding the puzzle should be<sup>87</sup>:

- a) Interpret the documentary evidence, if available, taking into account culture norms as part of the context. Where the documentary evidence is very limited, consider whether the clearly established prevailing culture norms could be implied terms of the transaction.
- b) Look at the oral evidence. Where the testimonies of the parties and other witnesses are consistent, turn to the interpretation step. Where they are divergent,<sup>88</sup> assess credibility taking into account the cultural backgrounds and the effects on the particular person giving evidence.<sup>89</sup>
- c) Apply the presumptions where neither contemporaneous documentary evidence nor reliable oral evidence is available, taking into account cultural influence if possible.

### 2. Chinese culture in interpreting and fixing the documents

For some familial transfers, some contemporaneous documents may be available. The Court interprets them to ascertain the intention of the parties. Written agreements between Chinese parties, if available, are generally in Chinese, brief, and commonly 'in an informal way' and 'without legal input'.<sup>90</sup> It would be even more so where the parties are members of a Chinese family. These render interpretation of them difficult.

Culture should be taken into account in the interpretation of the documentary evidence. First, translation must be done in the linguistic context, including the cultural context in which the documents were formed.<sup>91</sup> The true meaning of the original Chinese texts could only be properly understood and translated into English in its cultural context.

Secondly, culture is part of the context in which a document is interpreted. Interpretation of contract rules are different between civil law and common law. The primary task of civil law judges is to ascertain the *true* meaning of the parties, and all relevant evidence is admissible,<sup>92</sup> hence the cultural context of the contract and the pre- and post-conducts of the parties, influenced by their culture, are admissible. Common law takes a more objective approach and only some categories of extrinsic evidence are admissible in the interpretation of contractual documents. One of which is the background 'which would be reasonably available to the parties' when the contract is made—the 'matrix of fact'.<sup>93</sup> Could it be argued that the shared cultural background of the parties falls within this category? Lord Hoffman stated that:

... the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' ... there is *no conceptual limit to what can be regarded as background*.<sup>94</sup>

<sup>87</sup> These steps also indicate the flow of discussions of the article hereafter.

<sup>88</sup> E.g., in *Zhou v Yu* (n 3), *JX v CY* (n 3).

<sup>89</sup> Assessing credibility of Chinese witnesses is difficult due to language and cultural barriers. Chen (n 1) [108].

<sup>90</sup> Chen (n 1) [363].

<sup>91</sup> V. Komissarov, 'Language and Culture in Translation: Competitors or Collaborators?' (1991) 4(1) *TTR: traduction, terminologie, rédaction* 33.

<sup>92</sup> Z. Liao, 'Contract Interpretation in Civil Law: Approach, Development and the Trend' (2018) 4 *SISU Law Review* 27.

<sup>93</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912–913.

<sup>94</sup> *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 [39] (emphasis added).

Could we argue that for a transaction between Chinese parties, especially family members, the ‘reasonable man’ should be someone sharing their cultural background?<sup>95</sup> In the interpretation of contracts, ‘the wider background and circumstances should always be considered, even if there is no ambiguity or other interpretive difficulty’.<sup>96</sup> The cultural background should be part of the ‘wider background and circumstances’ that ‘should always be considered’.

A relevant issue is whether and in what circumstances cultural norms could be implied terms of a transaction. In some cases, the available documents together may suggest the formation of an agreement, but some terms are missing. For example, the limited documents, properly interpreted, may suggest the transfer be a loan, but nothing about interest; or they might suggest a gift, but nothing about whether it is subject to any conditions.<sup>97</sup> In these circumstances, could the relevant cultural norms be implied terms for fixing the gaps?

In common law, implying terms into a contract is allowed only in limited circumstances with stringent requirements. It is well established where a contract is impliedly made subject to well-known trade custom, the contract shall be read in the light of the established custom.<sup>98</sup> Is it arguable that the well-known and established cultural practice, widely accepted in a particular type of transaction such as those between parents and children, is a special type of such established custom? Would the cultural practice or custom have acquired the notoriety, certainty, reasonableness, and can be proved by clear and convincing evidence?<sup>99</sup>

In *Zhou v Yu*,<sup>100</sup> the parents of both sides transferred money to the young couple, without documentation. The applicant’s husband submitted that Chinese culture has a ‘filial piety’ tradition in that parents give their children money or property expecting that their children will look after or support them in old age. The respondent’s father also gave evidence to that effect and added that this is ‘essentially the case in a one-child family’, even though the child had emigrated overseas, ‘their parents would usually join them overseas and live together to help their children by looking after their grandchildren’.<sup>101</sup> The judge seemed to be open to consider this cultural expectation to be implied into the transaction had the parents’ residency application to Immigration New Zealand been proved to the Court.<sup>102</sup>

### 3. Chinese culture and assessing credibility

In the absence of contemporaneous documentary evidence and consistent testimonies, the judge sometimes may find the truth by assessing the credibility of the parties and other witnesses. This was what Judge Walker did in *Zhou v Yu*.<sup>103</sup> In that case, the young couple bought a house using the proceeds of sale of a house previously owned by the husband before the marriage, and a loan with a bank mortgage. The mortgage was paid off using money from the husband’s parents and aunt. The wife’s parents had also advanced monies to the wife respondent. When the parties separated, the applicant claimed that funds from his parents were loans, rather than gifts, and accordingly were a relationship debt. He produced

<sup>95</sup> It is argued that ‘the reasonable man is white, Anglo-Saxon, and Protestant (‘WASP’) enjoying ‘racial, religious, and class privilege’: L. Jewel, ‘Does the Reasonable Man Have Obsessive Compulsive Disorder?’ (2019) 54 *Wake Forest Law Review* 1049, 1060; and that the absence of context (social, racial, and cultural) in judicial decisions often produces shortsighted and tone-deaf outcomes: R. Austin, ‘“Bad for Business”: Contextual Analysis, Race Discrimination, and Fast Food’ (2000) 34 *John Marshall Law Review* 207.

<sup>96</sup> *Trustee Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608 [32]; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (NZSC); *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2015] 1 NZLR 432 [60].

<sup>97</sup> E.g., in *Zhou v Yu* (n 3), it was discussed whether, if the transfer was a gift, it might be subject to an implied condition that the parents would move to New Zealand and live with, and be looked after by, the child’s family.

<sup>98</sup> *Hutton v Warren* (1836) 1 M & W 466, 150 ER 157 (Exch).

<sup>99</sup> *Woods NJ Ellingham & Co Ltd* [1977] 1 NZLR 218 (NZSC).

<sup>100</sup> *Zhou v Yu* (n 3) [400], [401].

<sup>101</sup> *Ibid* [407].

<sup>102</sup> *Ibid* [406].

<sup>103</sup> *Zhou v Yu* (n 3)

some documents, none of which were found to be helpful evidence.<sup>104</sup> The oral evidence given at trial by the parties and other witnesses was significantly divergent.

The Judge heavily relied on assessing the credibility of the parties and other witnesses. After a detailed discussion about the oral evidence given, the Judge found that ‘the relationship between the applicant and his father is somewhat ambiguous’, ‘[m]ost of the evidence supports that they had protracted discussions’.<sup>105</sup> In particular, the Judge found that the applicant ‘denied having any shareholding in the father’s company in his name in China’.<sup>106</sup> These findings ‘raise[s] serious questions as to the applicant’s credibility’.<sup>107</sup> The judge denied the oral evidence of the applicant and his father and concluded that ‘the evidence relied on by the applicant does not displace the presumption’ that the monies were gifts.<sup>108</sup>

Assessing the credibility of the testimonies at trial given by Chinese witnesses is extremely difficult, due to the language barrier and cultural difference. A way of mitigating the difficulty is cultural awareness of the judges and lawyers involved, who should take into consideration the cultural background of the witnesses in assessing their credibility.

The language barrier is an obvious issue. Poor-quality interpretation may distort the meaning of what the witnesses say in the courtroom. Even if in good quality, it may still lose the ‘flavour’ of the original statements.<sup>109</sup> The credibility may only be correctly assessed in connection with the demeanour. The demeanour of Chinese witnesses, however, is hard to perceive for Western judges. The process of examination and cross-examination could be helpful, but the practice in China is different and most Chinese people are not familiar with these. They may look shy, unconfident and seem to avoid answering questions and eye contact in answering questions.<sup>110</sup> Some Western judges may think that such demeanours suggest the witness is telling a lie.<sup>111</sup> This may not be fair, if the witness is highly influenced by traditional Chinese culture that eye contact with a person in a superior position would be seen as disrespectful, threatening, or insulting.<sup>112</sup>

The absence of outsiders in Chinese familial transactions renders assessing credibility even more difficult. Chinese familial transfers are very unlikely to be seen, heard, or known by an uninterested party. The available witnesses are either the parties, or their family members, or those who have a close connection with them. The Chinese cultural concern of *guanxi* (relationships) may interfere with what they say in the courtroom. In *Zheng and Yu v Qiu and Yu*, the Judge stated:

Except for . . . all the witnesses . . . had an interest in the outcome of the proceedings. I gained the distinct impression that these witnesses were intent in presenting to the Court their version of what happened in a way that would best suit their individual purposes. This does not mean that I think that they were deliberately telling lies with the aim of misleading the Court. Rather, however, they *did not appear to appreciate the difference between giving truthful evidence and advocating their own respective causes*.<sup>113</sup>

<sup>104</sup> The documents were found either ‘irrelevant’, or merely ‘a delayed attempt’. Ibid [391], [395].

<sup>105</sup> Ibid [345].

<sup>106</sup> Ibid [346].

<sup>107</sup> Ibid [347].

<sup>108</sup> Ibid [431].

<sup>109</sup> *Ming Shan Holdings Ltd v Ma & Ors* (HC Auckland CIV-2000-404-1597, 31 July 2008) [33].

<sup>110</sup> M. LaFrance and M. Clara, ‘Racial Differences in Gaze Behaviour during Conversations: Two Systematic Behavioural Studies’ (1976) 33 *Journal of Personality and Social Psychology* 547; H. Li, ‘Communicating in Conversations: A Cross-cultural Comparison’ (1999) 23 *International Journal of Intercultural Relations* 387.

<sup>111</sup> Western culture sees avoiding eye contact as insincere or dishonest. O. Watson, *Proxemic Behaviour: A Cross-cultural Study* (The Hague: Mouton, 1970); Li (Ibid).

<sup>112</sup> Ibid; A. McCarthy, K. Lee and D. Muir, ‘Cultural Display Rules Drive Eye Gaze During Thinking’ (2006) 37(6) *Journal of Cross-cultural Psychology* 717.

<sup>113</sup> *Zheng and Yu v Qiu and Yu* (n 33) [7] (emphasis original).

In Chinese culture, domestic affairs are kept inside the family. This is more so for the bad news that may bring negative perceptions of the outsiders to the family.<sup>114</sup> This culture and its effects on assessing credibility were recognized by Judge Inglis OC in *Speller v Chong*, who considered the Chinese cultural context and found that the husband's failure to refer to loans from his family in a bank mortgage application 'not as a dishonest attempt to deceive the bank, but as resulting from no more than a belief that such matters were strictly family affairs and of no concern to a lending institution'.<sup>115</sup> In *JX v CY*, Judge Walker stated:

Although I accept that Counsel for the Applicant had some difficulty in extracting direct answers from both Mr Yuan and his sister on occasions, it did not appear that this was any deliberate attempt to evade questions but rather unfamiliarity with Court procedure, the language difficulties and difficulties in traversing matters through an interpreter. Of course, one must not forget that, for cultural reasons, these witnesses may not have been particularly enamoured with the concept of airing perceived private affairs in front of strangers.<sup>116</sup>

The legal culture in China is also relevant. Some New Zealand judges observed that witnesses from PRC lack understanding of their duty as a witness but come to New Zealand 'solely for the purpose of giving evidence to support a family member'.<sup>117</sup> They may mix up the role of a witness and that of an advocate. They may not understand that hearsay evidence is generally inadmissible.<sup>118</sup> Therefore, if they 'advocate' or give opinions in the courtroom, it might be the influence of the culture, rather than dishonest conduct. Such statements may be ignored by the Court, but should not easily be inference of dishonesty.

## V. CHINESE CULTURE AND THE PRESUMPTIONS

### 1. Presumption of resulting trusts and presumption of advancement

In New Zealand, as with other common law jurisdictions, the presumption of resulting trust and the presumption of advancement are applied in proceedings involving familial transfers, where there is no contemporaneous documentary evidence or reliable oral evidence to prove the intention of the transfer. The presumption of resulting trust has been applied in cases concerning Chinese familial transfers other than parent-to-child transfers.<sup>119</sup> The presumption of resulting trust imputes 'an intention to a person'<sup>120</sup> in two circumstances. A resulting trust arises:

A. Where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which *presumption* is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer . . .

<sup>114</sup> The Chinese saying is '*jiachou buke waiyang*' (shameful family matters should not be made known to outsiders).

<sup>115</sup> *Speller v Chong* (n 10) [8].

<sup>116</sup> *JX v CY* (n 3) [86].

<sup>117</sup> Mai chen (n 1) 372.

<sup>118</sup> *Hemu Trade Company Ltd v Le* [2018] NZHC 982 [6].

<sup>119</sup> E.g., *Tian v Zhang* (n 33); *Hemu v Le* (Ibid); *Zeng v Cai* (n 34), and *Li v 110 Formosa* (n 5); but in *D v T* (n 33), D's transfer to T during a short relationship was held a loan.

<sup>120</sup> *Pettitt v Pettitt* [1970] AC 777 (HL) 823.

B. Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest . . . <sup>121</sup>

For the purposes of this article, only Category (A) is relevant. A Category (A) presumption of resulting trust can be rebutted by direct evidence of the transferor's true intention, the counter-presumption of advancement, or a constructive trust.<sup>122</sup> The direct evidence could be evidence proving the transferor's intention to make a gift, a loan, or trust. The transferee may rebut the presumption by evidence proving that consideration has been provided in return for the payment,<sup>123</sup> or the payment was made with an intention inconsistent with the presumed resulting trust,<sup>124</sup> or the transferor and transferee are spouses, civil union partners, or de facto partners.<sup>125</sup>

The presumption of advancement arises in respect of transfers by a parent to a child.<sup>126</sup> The presumption implies that the transferor intended to make a gift to the transferee, which is 'no more than a circumstance of evidence which may rebut the presumption of resulting trust'.<sup>127</sup> The transferor may rebut the presumption by evidence proving that he/she did not intend the transfer to be a gift.<sup>128</sup> The presumption does not apply to transfers between husband and wife,<sup>129</sup> to collateral relatives such as brothers/sisters<sup>130</sup> and nephews/nieces,<sup>131</sup> or to a grandchild unless the transferor is in loco parentis.<sup>132</sup>

There are disagreements as to whether the application of the presumption of advancement should be limited to transfers to a minor and/or dependent child only. The majority of the Supreme Court of Canada in *Pecore v Pecore*<sup>133</sup> held that the presumption does not apply to transfers to an adult child, whether or not dependent on the parent(s). New Zealand courts, however, have applied the presumption to transfers to adult children, whether dependent on the parent(s) or not, because dependency is not the only basis, but 'parental affection still underlies the rationale for the presumption'.<sup>134</sup>

New Zealand Law Commission notices the rise in family advances and disputes arising therefrom, but is satisfied with the status quo and thinks the presumption needs no change.<sup>135</sup> Rather, it considers a more appropriate response improving 'public awareness of the need to properly document legal and financial arrangements between family members'.<sup>136</sup> It does not discuss whether the presumption applies to adult children, or whether dependency is required, but simply states that '[t]he law presumes the advance is a gift unless the contrary can be proved' 'when parents give financial assistance to children and the nature of the transaction is ambiguous'.<sup>137</sup>

<sup>121</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 708, cited with approval by New Zealand Court of Appeal in *Crampton-Smith v Crampton-Smith* [2012] 1 NZLR 5 (CA) [35].

<sup>122</sup> *Cossey v Bach* [1992] 3 NZLR 612 (HC); *Stack v Dowden* [2007] 2 WLR 831 (HL).

<sup>123</sup> *Standing v Bowring* (1885) 31 Ch D 282; *Gough v Fraser* [1971] 1 NZLR 279 (CA) 283.

<sup>124</sup> W. Swadling, 'A New Role for Resulting Trust?' (1996) 16 *Legal Studies* 110,113.

<sup>125</sup> *Mamat v Mamat* [2018] NZHC 639.

<sup>126</sup> As the current New Zealand law stands.

<sup>127</sup> *Pettit v Pettit* [1970] AC 777(HL) 814.

<sup>128</sup> *Holster v Grafton* (2008) NZCPR 314 (HC) [18], [19].

<sup>129</sup> Property (Relationships) Act 1976 (NZ), s 4(3)(a).

<sup>130</sup> *Ibid* s 4(3)(b).

<sup>131</sup> *In re Muller* [1953] NZLR 879 (HC).

<sup>132</sup> *Re Vinogradoff* [1935] WN 68.

<sup>133</sup> [2007] SCC 17; *Brooks v Saylor and Madsen* [2007] SCC 18.

<sup>134</sup> *Woolf v Kaye* [2019] 3 NZLR 93. Devonshire argues that the presumption should be conditional on dependency (including financial dependency) alone: P. Devonshire, 'Resulting Trusts Arising from Voluntary Payments: Developments in New Zealand' (2019) 2 *New Zealand Law Review* 119, 130.

<sup>135</sup> New Zealand Law Commission, *Review of the Property (Relationships) Act 1976* (Law Com No 143, 2019) [22].

<sup>136</sup> *Ibid*.

<sup>137</sup> *Ibid*.

## 2. Application of the presumptions to Chinese familial transfers

It could be more problematic in applying these presumptions, developed in Western culture, to transfers between Chinese family members profoundly influenced by Chinese culture. First, the strong long-term orientation in Chinese culture may impact the application of the presumptions. For a Category (A) presumption of resulting trust, the transfer must be voluntary, that is, without consideration. The concept of reciprocity is broad in Chinese culture, so that many transfers may not be voluntary.<sup>138</sup> Chinese parents may transfer to a child now, expecting the child to look after them when they get old many years later.<sup>139</sup> If the expectation is perceived and accepted, the child's future care could amount to consideration, a price, for the transfer. The transfer could be argued not voluntary, but consideration of a long-term arrangement, so that the presumption of resulting trust may not apply.

The parents' expectation to keep a good relationship and to live with their children in the future may also affect the presumption of advancement. The entitlement to live with the children's family could be either the consideration for the transfer, which negates the 'gift' presumption, or a condition of the transfer which renders the transfer a conditional gift.<sup>140</sup> Even if the transfer was only for keeping a good *guanxi* with the child, *guanxi* carries the benefit of reciprocity or exchanges of favours,<sup>141</sup> hence could, arguably, be consideration in a broad sense.

Secondly, the high-power distance, with the patriarchy and male dominance, in Chinese culture, may be relevant in the application of the presumption of advancement. In the absence of manifested intention, a transfer from parents highly influenced by this cultural dimension to an adult son would more likely be a gift than such a transfer to a daughter, where all other things are equal. If the daughter transferee has a brother, the parent's transfer to her would less likely be a gift, unless it is a limited portion of the parents' wealth.<sup>142</sup>

## 3. Chinese culture and presumption of loan?

PRC courts have made contradicting judgments as to the nature of transfers from parents to their adult children without contemporaneous documentation. Searching through the official China Judgments Online database,<sup>143</sup> for judgments of the Intermediate People's Courts (IPC), High People's Court (HPC), and Supreme People's Court (SPC),<sup>144</sup> only IPC and HPC judgments were found. A bare majority of the judgments presumed the transfers to be gifts,<sup>145</sup> whereas others applied a 'loan presumption'.<sup>146</sup>

The 'gift presumption' judgments are mostly very brief, simply citing rule 22 of the SPC Judicial Interpretation on Application of the Marriage Law (2).<sup>147</sup> Rule 22 provides that where parents paid for purchasing the house of the child's couple, the transfer should be deemed a gift to *their own child* if that happened before the young couple's marriage, or a gift to *the young couple* if that happened after their marriage unless the parents clearly indicated

<sup>138</sup> It may be 'an act in exchange for an act or promise' from the transferee: *Dunlop v Selfridge* [1915] AC 847 (HL) 855.

<sup>139</sup> As Judge Walker noted in *Zhou v Yu* (n 3), New Zealand parents generally do not expect this.

<sup>140</sup> As discussed in *Zhou v Yu* (Ibid).

<sup>141</sup> K. Hwang, 'Face and Favor: The Chinese Power Game' (1987) 92(4) *American Journal of Sociology* 944.

<sup>142</sup> This means there is still sufficient money available to help the son in the future.

<sup>143</sup> SPC, China Judgments Online <<https://wenshu.court.gov.cn/>> accessed 1 September 2022.

<sup>144</sup> They are at equivalent levels to the High Court, Court of Appeal and Supreme Court in New Zealand, respectively.

<sup>145</sup> E.g., *Zhao v Zhou* (2021) Su 07 Minshen 104 (IPC); *Wang v Wang* (2021) Su 10 Minzhong 3958 (IPC); *Chen v Guo* (2021) Jingminshen 4660 (HPC); *Guo v Zhang* (2020) Minminshen 3609 (HPC); *Liu v Xie* (2020) Ganminshen 104 (HPC); *Sun v Wang* (2019) Suminzhai 181 (HPC); *Tang v Gong* (2019) Suminshen 3826 (HPC); *Zhou v Chen* (2019) Guiminshen 6172 (HPC); *Gao v Li* (2017) Chuanminshen 1179 (HPC).

<sup>146</sup> E.g., *Jiang v Wang* (2022) Liaominshen 632 (HPC); *Duan v Li* (2020) Jingminzhong 380 (HPC); *Li v Liu* (2019) Jingminshen 2635; (2019) Jingminzhai 2635 (HPC); *Cao v Chen* (2019) Yue 01 Minzhong 10115 (IPC); *Liao v Chen* (2018) Yue 01 Minzhong 21765 (IPC).

<sup>147</sup> SPC fashi [2003] 19.

otherwise. These judgments generally also cite rule 2 of the SPC Provisions on Application of Law to Trials of Private Loan Cases,<sup>148</sup> which provides that the lender should provide the court with evidence proving the debt and the existence of a lending–borrowing relationship. Parents’ transfers to children are indifferently treated as with other ‘private loans’—loans not involving financial institutions. An ‘IOU’ or ‘loan agreement’ signed *only by the child, not by the spouse* is generally held inadmissible.

The ‘loan presumption’ judgments generally have more detailed discussions and reasoning. They decline rule 22 as proper authority for a ‘gift presumption’, because the purpose of the rule is to resolve whether the parents’ transfer was a gift *to their own child, or to their child and the daughter/son-in-law together*. Its application is subject to a prerequisite—the parents’ gifting intention is already manifested.<sup>149</sup> The Courts also generally held an ‘IOU’ or ‘loan agreement’ *signed only by the child* admissible, so that the burden of proof shifts to the party denying such evidence or arguing for gifting.<sup>150</sup> The transfers are presumed to be loans unless proved otherwise by evidence,<sup>151</sup> and both the child and his/her spouse are the debtors if the transferred money was used for the benefit of both.<sup>152</sup>

No guidelines or judgments of the Supreme Court are found to date, to resolve the obvious conflicts between these two divergent and irreconcilable lines of judgments. In the most recent HPC decision, made on 28 April 2022,<sup>153</sup> the applicant argued that the transfer from her husband’s parents was a gift, citing articles 1062 and 1063 of the newly enacted Civil Code<sup>154</sup> and rule 29 of the SPC Judicial Interpretation on the Marriage and Family Chapter of Civil Code (1).<sup>155</sup> The HPC held that these new provisions do not apply retrospectively, and the transfer should be presumed to be a loan. The Court commented that these new provisions ‘merely continue’ the previous rule 22,<sup>156</sup> for determining whether parents’ transfer was a gift *to their child alone* or *both their child and the son/daughter-in-law*, provided the transfer is proved a gift. This judicial opinion seems to be convincing because there are disputes as to the nature of parents’ transfers without separation or divorce involved,<sup>157</sup> in which circumstance, no application of rule 22 or the new rule 29 at all. This judgment was made having considered the effects of the newly enacted Civil Code and the most recent SPC Judicial Interpretation. Another HPC judgment mentioned the divergent ‘gift presumption’ judgments, made on materially similar facts, but refused to follow.<sup>158</sup>

The presumption of loan approach is consistent with the Chinese culture of *zhongyong* (keeping in the middle, balance; ‘doctrine of the mean’).<sup>159</sup> In *Li v Liu*,<sup>160</sup> the HPC stated that there was a need to *balance* the benefits of the parties involved. It would be too imbalanced if, in the absence of evidence, parents’ transfers were held to be gifts, or parents’ equity in the property of the children/young couples, which would give all benefits to one party while the other suffers all detriments.<sup>161</sup>

<sup>148</sup> SPC fashi [2015] 18, as amended by SPC fashi [2020] 6.

<sup>149</sup> E.g., *Duan v Li* (n 146).

<sup>150</sup> E.g., *Ibid*; *Jiang v Wang* (n 146); *Li v Liu* (n 146).

<sup>151</sup> *Ibid*; *Liao v Chen* (n 146); *Cao v Chen* (n 146).

<sup>152</sup> *Ibid*.

<sup>153</sup> *Jiang v Wang* (n 146).

<sup>154</sup> Enacted 28 May 2020, effective 1 January 2021.

<sup>155</sup> SPC fashi [2020] 22. Rule 19 provides that parents’ payment for purchasing the young couple’s property should be a gift *to their own child alone* unless expressly indicated otherwise.

<sup>156</sup> SPC fashi [2003] 19.

<sup>157</sup> E.g., *Liao v Chen* (n 146).

<sup>158</sup> *Li v Liu* (n 146).

<sup>159</sup> F. Xia, ‘A Comparative Study of Aristotle’s Doctrine of the Mean and Confucius’ Doctrine of Zhong Yong’ [2020] 7 *International Communication of Chinese Culture* 349.

<sup>160</sup> *Li v Liu* (n 146).

<sup>161</sup> *Ibid*.

All of these might suggest that the ‘loan presumption’ may take the lead in the future. The position, however, remains unsettled unless guidelines or decisions of the SPC are made.<sup>162</sup>

The presumption of loan approach taken by some PRC Courts significantly differs from what New Zealand courts do. It seems to be more in line with the majority of the Canadian Supreme Court in *Pecore v Pecore*,<sup>163</sup> in that children’s dependency on the parents ends when they become an adult, so that the presumption of gift should not apply.

It is conceivable that New Zealand courts generally apply New Zealand law in hearing cases brought to them,<sup>164</sup> whether the parties are Chinese or not. It is arguable, however, that many Chinese parents transfer money to their adult children living in New Zealand without any perception of New Zealand law or Western culture, but are still highly influenced by Chinese culture. While the presumption of resulting trust and presumption of advancement meet the legal theory nicety; the outcomes of the application of these ‘all or nothing’ presumptions developed in the common law jurisdictions in the Anglo-Saxon culture, however, seem to be less ‘balanced’ as compared to those Chinese Courts’ presumption of loan approach. A possible mitigation might be that Western judges should be more readily open to accept the relevant cultural norms as evidence rebutting the presumptions and limit the application of the doctrine of advancement to circumstances where the adult children’s dependency on their parents exists.<sup>165</sup>

## VI. A MODEL FOR CONSISTENCY AND JUSTICE

### 1. Risks of one-size-fits-all approach

The previous parts have shown that in determining the nature of Chinese familial transfers, adequate and proper understanding of Chinese culture and its effects on the parties involved is highly relevant. Dealing with Chinese culture in a one-size-fits-all approach, however, tends to increase the risks of stereotype and bias, which undermines justice in individual cases.<sup>166</sup>

Chinese culture has changed over time and keeps changing with the changing society. Its geographical and ethnical variations should also be properly perceived. Mainland China is a large territory and the history and developments in different regions could be significantly different.<sup>167</sup> There are 56 ethnicities in China so that ‘Chinese culture’ could refer to the dominant culture of the Han ethnicity, or a culture that mixed up with the culture of other ethnicities in China.

Chinese people are also a vague concept. It may refer to Chinese living in Mainland China, Chinese living in Hong Kong, Macao, Taiwan, Singapore or overseas Chinese community, or even an NBC (New Zealand Born Chinese), each with different exposures to different aspects of Chinese culture.<sup>168</sup>

Cultural perception and experience is personal. The aspects and extent of Chinese culture influence on an individual ‘Chinese’ could be different, which could only be properly assessed in the context of the individual’s particular circumstances.

It is necessary, therefore, to take into account all the relevant factors in assessing whether, and to what extent, and how, the individuals involved in the particular familial transaction

<sup>162</sup> There is no stare decisis in PRC, but SPC’s decisions are highly persuasive.

<sup>163</sup> *Pecore v Pecore* (n 133).

<sup>164</sup> Unless another law is the applicable law.

<sup>165</sup> As submitted in Devonshire (n 134).

<sup>166</sup> *Huang v Chen* [2022] NZHC 1888 [172].

<sup>167</sup> E.g., modern cities of Beijing, Shanghai, Guangzhou, Shenzhen versus rural under-developed areas in Western China.

<sup>168</sup> E.g., my New-Zealand-born daughter thinks Chinese culture means some fun extracurricular activities, whereas my 80-year-old mother-in-law who recently moved from Mainland China thinks Chinese culture means her living with her children’s family something ‘natural’.

have been influenced by which aspects of Chinese culture. Ideally, there should be a way of balancing the 'legal tidiness' and 'cultural nicety'.

## 2. A model as analytical tool

Partially based on the 3D matrix<sup>169</sup> I developed for a seminar for judges of the Senior Courts of New Zealand,<sup>170</sup> this article proposes the function below as an analytical tool:

$$f(N) = \frac{C + 1/V}{1 - e(S/A)} \pm O$$

The meanings and relations of the variables are:

N—Nature of the transaction, the dependent variable to be ascertained, which is to be inferred from an overall assessment of all the relevant factors (independent variables) in the particular case. A greater value of  $f(N)$  suggests a greater likelihood of the transfer in issue being a gift.

C—Closeness of relation between the parties. A greater value is given to a parent–child relationship over husband–wife, uncle–aunt, nephew–niece, and other relative relationships. N and C have a positive correlation. The closer the relationship (greater value of C) the more likely the transfer being a gift (greater value of N).

V—Commercial value of the transaction, including the relative value (transferred as a portion of the transferor's wealth) and the absolute market value. N and V have a negative correlation. The greater the value involved, the lesser the N, pointing against the gift argument, and the stronger evidence is required to prove the alleged gifting intention. If the transferor is in debt to a third party, this fact may be strong evidence pointing to the transfer being a loan.<sup>171</sup>

$e$ —Effect of the original culture on the individual, an independent variable in relation to N, but a dependent variable depending on the S (stickiness to the traditional culture) and A (assimilation into the mainstream Western society).  $e$  and S are in positive correlation, whereas  $e$  and A are in negative correlation. The greater the Stickiness (S), or the lesser the Assimilation (A), the greater the culture effect ( $e$ ) on the individual. Where  $e$  tends to zero, the denominator of the fraction will tend to be 1 and the matter could be determined as if the parties were substantially similar to non-Chinese parties in the Western common law jurisdiction, as what they would have intended in the circumstance.

S—Stickiness to traditional Chinese culture—to what extent the individual sticks to traditional Chinese culture. Indicators include his or her personal views as to Chinese culture, having a traditional family such as living with old Chinese parents, having a Chinese wife/husband who are traditional, celebrating Chinese festivals, practicing Chinese customs, arts or Chinese *kongfu*, playing traditional musical instruments, and keeping close connections with relatives, friends in China or the Chinese communities.

A—Assimilation/integration into mainstream Western society. A greater assimilation value suggests that the individual has adopted the Western culture norms, hence a lesser value of  $e$  (Chinese cultural effect on the individual), which results in a greater N, pointing in favour of a stronger presumption of gift/advancement.

<sup>169</sup> Chen (n 1) appendix 2.

<sup>170</sup> Senior Courts Update Faculty Programme, 'Cross Cultural Communication in the Courtroom', (Institute of Judicial Studies, 2019).

<sup>171</sup> E.g., *Li v Liu* (n 146).

O—Other facts, including where the Chinese individuals came from, his/her age, how many children the transferor has, whether the transferee is the sole child,<sup>172</sup> and the gender of the transferee and other children where there are more than one.<sup>173</sup> Type or course of the transfer, marriage status of the transferee, gender, time lapsed, education, understanding of law, history of the relationship, and pre and post transfer conducts, location and time of living,<sup>174</sup> and the source of the money<sup>175</sup> may also be relevant.

### 3. Illustrations of application

Assuming the same thing happened—Chinese parents transferred money to their daughter without written records on the nature of the transfer. If the transfer was made by old parents, soon after the birth of a grandchild, especially where the grandchild is the first grandson, it would more likely be a gift, due to the closeness of the relationship (C), the circumstance that the transfer was made, and the influence of the patriarchy culture (O).

If the transferee's daughter is the only child, the transfer would more likely be a gift. If she has a brother, and the V (absolute and relative value of the transfer as a portion of parents' wealth) is highly substantial (especially if more than half of the parents' wealth was transferred when the daughter needed help with the deposit to buy a house), the transfer would more likely be a loan. The existence of a younger brother, and the context of the daughter's needing help with a deposit to buy her home, as with their genders, are the other factors (O). Parents highly influenced by traditional Chinese culture generally leave more property to a male child.<sup>176</sup>

If the parents are experienced property investors who have successfully accumulated wealth via property investments, and if the daughter is buying an investment property, the likelihood of the transfer being an equity/investment would increase.<sup>177</sup> The parents' occupation, experience, and daughter's circumstance are the 'O' factors. However, if the transfer value (V) is a small amount relative to the parents' wealth, a gift could still be possible.

If the same amount was transferred to a nephew, the likelihood of it being a gift decreases. The closeness of the relationship (C) is not decisive but an important and weighty factor. What if the nephew told the uncle and aunt that he needed help with his wedding expenditure? This other factor (O, eg, the cause or context of the transfer) increases the likelihood of a gift, especially where the absolute and relative value of transfer (V) is limited.

## VII. CONCLUSION

Culture influences people in their dealings with others, in particular with those in close relationships. Influenced by Chinese culture, most transfers between Chinese family members lack contemporaneous documentation and testimonies in the courtroom are divergent as to what was agreed and what happened. These increase the difficulty in determining whether the transfer was a gift, a loan, or an equity investment.

<sup>172</sup> A transfer from wealthy parents to their only child in New Zealand is more likely to be a gift. E.g., *Zhou v Yu* (n 3).

<sup>173</sup> This is so if the parents are still highly influenced by the traditional 'male dominance' culture.

<sup>174</sup> A 40-year-old who grew up in the modern city of Shenzhen after the 'Reform and Open-up' policy, educated in UK, now a senior manager in a multinational corporate, presumably would be less influenced by traditional Chinese culture, in contrast to his or her parents grew up in a West China village 60 years ago.

<sup>175</sup> If the parents borrowed a substantial part of the money from others, the transfer to their children would more likely be a loan. E.g., *Li v Liu* (n 146) and *Zhang v Li* (n 3).

<sup>176</sup> Y. Li, 'A Sociology Analysis of My Sister' (Thepaper.CN, 8 April 2021).

<sup>177</sup> However, if the transfer were for the child to buy a family home, it would be extremely unlikely to be the parent's equity investment in the child's home, unless proved by clear evidence. This is the same with New Zealand parents' transfers.

Where some relevant documents are available, the cultural background should be part of the matrix of facts admissible in the interpretation of the documents, and the relevant established clear cultural norms could arguably be implied into the transaction. Understanding Chinese culture would also help the (Western) judges in assessing the credibility of the parties and other witnesses. While common law courts apply the presumption of advancement and presumption of resulting trust developed in Western culture, some Chinese courts have applied the presumption of loan in cases with materially similar facts, recognizing the influence of Chinese culture, which might provide Western judges with a different perspective for reference.

An analytical model is proposed, aiming to help Western judges and lawyers assess properly the effects of Chinese culture on Chinese parties involved in particular circumstances, and to mitigate the possible stereotype and bias resulting from treating Chinese culture in a one-size-fits-all approach in decoding the nature of Chinese familial transfers. It is still a common-sense approach taking into account all relevant factors.

Chinese cultural norms alleged must be proved by expert witnesses before they could be admitted in a proceeding. It is insufficient merely asking the Court to 'Google' on the internet,<sup>178</sup> or citing an article on Chinese culture. Expert witnesses' opinions based on the facts of each case are required, which should go beyond general descriptions of relevant cultural norms, but also explain whether and to what extent and how the individuals involved in the particular case were influenced by which aspects of the culture and why.

There seem to be some common issues arising from court proceedings involving Asian litigants in Western courtrooms. The discussions in this article including the proposed matrix may also to a large extent be applicable to other Asian litigants provided that they share the common cultural values and practices relevant in the particular case.<sup>179</sup>

<sup>178</sup> *Tian v Zhang* (n 3) 56; *Zhou v Yu* (n 3) [400], [411].

<sup>179</sup> Japanese, Korean, and other Asians share many common aspects of Chinese culture. Lin (n 24) and Watson (n 111).