

Gonder v. Gonder, 2001 YKCA 4

Date: 20010601
Docket: C.A. No. 09-YU457
Registry: Whitehorse

IN THE COURT OF APPEAL FOR THE YUKON TERRITORY

BETWEEN:

LEONA NATALIE GONDER

PLAINTIFF
(APPELLANT)

AND:

LEONA GONDER, DIANE VELDER and DUANE BRANDVOLD,
EXECUTORS OF THE ESTATE OF ANTON PETER HEINRICH VELDER,
DECEASED and PAULA CONLON

DEFENDANTS
(RESPONDENTS)

Glen Thompson

Counsel for the Plaintiff

David B. Rush

Counsel for the Defendants

**REASONS FOR JUDGMENT
OF MADAM JUSTICE RYAN**

[1] The appellant, Leona Gonder, applies for an order staying the execution of the order of Mr. Justice Hutchinson pronounced March 14, 2001 pending a hearing of the appeal of this matter. On May 31, 2001 I dismissed the application and advised counsel that I would release my reasons in writing. These are my reasons.

[2] The appellant applied before Hutchinson J. under section 14(2) of the *Dependants Relief Act*, R.S.Y. 1986, c. 44 to

extend the time within which to make an application for a greater portion of the estate of Anton Velder. In Chambers Hutchinson J. made an order permitting the appellant to do so on certain conditions. The appellant has appealed that order on the basis that Hutchinson J. lacked the jurisdiction to impose two of the conditions.

[3] The conditions which are the subject matter of the appeal can only be understood in the context of the facts as presented to Hutchinson J.

[4] The appellant lived with Anton Velder from 1989 until Mr. Velder's death on October 6, 1997. The couple never married but lived together as husband and wife. The appellant was 58 years of age at the time of the application. When she began to live with Mr. Velder she gave up her employment as an accounting clerk with Yukon Housing Corporation. Mr. Velder was a businessman with substantial assets, and he provided for the couple's daily needs.

[5] Mr. Velder had been married before; his daughter from that marriage is the respondent Paula Conlon.

[6] Ms. Conlon was, at the time of the application, 38 years of age and the mother of 5 children. Mr. Velder had not seen Ms. Conlon from the time she was 2 years of age until he re-

established contact with her in 1994. Mr. Velder had not provided child support for his daughter after the separation from his wife. His support was limited to some money he sent to his daughter for her wedding in 1982 and money he sent at Christmas thereafter.

[7] Mr. Velder made a will on November 15, 1996. In it he made two bequests of \$50,000 each to his two brothers; he left his shares in Four Eleven Ventures Ltd., the proceeds of his RRSP and a Sony movie camera to Ms. Gonder. He made specific bequests to Paula Conlon of money owed to him as shareholder's loans by Four Eleven Ventures Ltd. and Carcare (Yukon) Ltd. He left the residue of his estate to Paula Conlon. He appointed Ms. Gonder, his ex-wife Diane Velder, and Duane Brandvold as executors.

[8] Probate of the estate was granted by an order of Kerans J. on August 12, 1998. The Chambers Judge found that the plaintiff was aware of her right to make a claim before probate was granted and did nothing to pursue her claim until some ten months after the grant was made. Pursuant to s. 14(2) of the Act the question for the Chambers Judge was whether the court considered it just to allow the application to be made past the limitation period.

[9] The Chambers Judge concluded that the length of time the appellant lived with Mr. Velder, her financial dependence on him, the percentage of the estate left to her (by the calculation of the Chambers Judge, 15%), the fact that the majority of the estate was undistributed, and the fact that she was the only person who came within the definition of a "dependant" under the statute who could advance a claim, led him to conclude that it would be just and equitable to allow the application. The Chambers Judge, however, was mindful of the submissions of the respondent who argued that the appellant as both plaintiff and executor was in a conflict of interest and had shown bias as executor in her own favour. The respondent argued that had the appellant disclosed her intention at an earlier date to proceed with claims to vary the will, she would have been unable to act as Executor and would have received no benefit therefrom. The Chambers Judge made the order extending the time on the condition that, *inter alia*, the appellant renounce her appointment as executor and waive any executors fees, and, if paid executors fees she should return them to the estate. He also ordered that the respondent Ms. Conlon recover from the appellant her special costs for the hearing of the application.

[10] After delivering his written reasons for judgment the Chambers Judge conducted two telephone conferences and received written submissions on a number of items left unresolved by the first reasons for judgment. In particular the Chambers Judge was asked to impose an additional condition, that is, that the sum of \$37,125.00 paid to Ms. Gonder from the estate be returned to the estate.

[11] The imposition of the additional condition was raised by the respondent as the result of an allegation that the appellant had improperly paid herself the sum of money in question as executor's fees in payment for managing certain rental properties held by the estate. The appellant did not dispute the amount of money involved, but alleged that the money was paid to her outside her capacity as executor. The appellant argued that she earned this sum of money as a property manager in accordance with an agreement in place between Mr. Velder and herself prior to his death. The Chambers Judge held that he could not dispose of these issues as they were matters to properly be dealt with in probate. The Chambers Judge ordered that the \$37,125.00 be paid to the executor of the estate in trust until the final distribution of the estate.

[12] The appellant's appeal to this court is limited to the portion of the order requiring that she pay \$37,125.00 in trust to the executor and the order to pay special costs. The appellant says that if, as the Chambers Judge recognized, the appropriate forum in which to determine whether the sum in question was paid as wages or executors fees was in the probate proceedings, it follows that the Chambers Judge had no jurisdiction to order the appellant to pay \$37,125.00 to the estate in trust. As to the order to pay special costs, the appellant says that the Chambers Judge made no findings of reprehensible conduct to justify such an order.

[13] At the very least it can be said that the order made by the Chambers Judge, is not the norm. I have been directed to no cases in which an extension of a limitation period under the *Act* in question has been extended on conditions, let alone the terms ordered in this case. That is not to say that it is wrong, it is to say that it is unique.

[14] In order to obtain a stay of execution pending the hearing of the appeal, the onus is on the appellant to show:

1. That there is some merit to the appeal in the sense that there is a serious question to be determined.

2. That irreparable harm would be occasioned to the applicant if the stay was refused, and,
3. On balance, the inconvenience to the applicant if the stay were refused would be greater than the inconvenience to the respondent if the stay was granted.

[15] I am persuaded that there is a serious question to be tried.

[16] The appellant must fail however, because she has not established that there would be irreparable harm if the stay were not granted.

[17] The appellant's material filed on this application attempted to show that the appellant's financial position was such that the orders imposed upon her were so burdensome that it would inhibit her ability to carry on with the lawsuit. I did not, however, understand her to say that it would inhibit her ability to pursue this appeal.

[18] The appellant had refused to reveal anything about her financial situation to the Chambers Judge. The material filed on this application did not paint a clear picture of the appellant's financial conditional. At best, it demonstrated that she did not have "ready access" to the funds required,

and that payment of the funds may make it difficult to meet other obligations.

[19] It may be that on appeal, this Court will set aside the conditions as an impediment to the pursuit of this lawsuit. Right now I cannot say that they are an impediment to the pursuit of this appeal. Irreparable harm has not been demonstrated. For that reason the application is dismissed.

"Ryan J.A."