

Citation: Leona Gonder v Diane Velder et al
2001 YKSC 513

Date: 20010314

Docket: 99-A0120
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

LEONA NATALIE GONDER

PLAINTIFF

AND:

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

DEFENDANTS

SUPREME COURT OF THE

MAR 14 2001

YUKON TERRITORY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HUTCHINSON

Counsel for the plaintiff:

G.R. Thompson

Counsel for Paula Conlon

D.B. Rush

Date and Place of Hearing:

Not applicable,
Written submissions

[1] On 17 March 2000 I released reasons for judgment in this action extending the time in which the plaintiff be permitted to commence proceedings under the *Dependants Relief Act*.

Since then counsel applied to resolve some matters that had not been disposed of in those reasons for judgment. The issues are as follows:

1. That the application to amend the statement of claim be granted;
2. That the amount that should be distributed to the defendant Paula Conlon be \$210,272 plus interest and not \$220,000 as shown in the reasons;
3. That the administration of the estate be suspended or stayed pending the outcome of this action;
4. That an additional condition be imposed on the plaintiff i.e. that the sum of \$37,125.00 paid from the estate to the plaintiff as wages or as a stipend be returned to the estate. This last issue was not argued in full on the original application as all the circumstances concerning this payment were not before me on the original application, but the written submissions covered this issue.

[2] When these issues were raised, I held telephone conferences with counsel in May 2000 and on 20 September 2000, I then received further affidavits and written submissions from both counsel. The main thrust of both submissions was directed to the third and fourth issues set out above. Consequently I am inclined to resolve issues 1 and 2 in the following manner unless counsel wish to make submissions, in

which case I will hear them by way of telephone conference call.

Issue Number 1

[3] Subject to the above, I allow the application to amend the statement of claim.

Issue Number 2

[4] Subject to the above, I agree that the affidavit material shows that the amount of the deceased, Anton Velder's shareholder's loan in Carcare (Yukon) Ltd. at the time of his death was \$210,272 and not \$220,000 as shown in the reasons. The amount to be released to the defendant Paula Conlon will be \$210,272 plus interest as ordered.

Issue Number 3

[5] Turning to a stay or suspension of the administration of the estate, I doubt that I have authority within this action to make such an order. If I had, I would not make such an order for the following reasons. By the order of Moreau J. made on 22 September 1999 the defendant Paula Conlon is now the executor of the estate of Anton Velder, deceased, and she, as executor, is authorized by the will to wind up the estate, sell the assets or continue to operate the businesses of the

deceased as she deems advisable. It would do a disservice to the beneficiaries to impose the restriction sought on the executor, so I deny that aspect of the application. The executor is constrained by law from distributing the assets until the plaintiff's claim is resolved, and I give no relief from that restraint except for the payment of costs and the distribution of the bequest to Paula Conlon of the shareholder's loan due to the deceased in Carcare (Yukon) Ltd.

Issue Number 4

[6] In the material before me on the original application were the following paragraphs in the affidavit of the plaintiff sworn the 25th of August 1999:

30. My monthly income is derived from a gross monthly wage of \$3,000.00 from Four Eleven Ventures Ltd. and a Canada Pension entitlement of \$419.00. I pay myself from my business which represents 60% of the gross revenue of the business. I have been receiving wages of \$1,500.00 per month for managing Tony's business affairs in accordance with the terms of his Will.
31. I will no longer receive the \$1,500.00 per month stipend as I do not wish to carry on as a manager of Tony's business or as an Executor under his Will. I found and continue to find that being an Executor of Tony's Will to be extremely stressful on me because of the adversarial nature of having his estate concluded.

[7] The three executors named in the will of the deceased were the plaintiff, Leona Gonder; Diane Velder, his former wife; and Duane Brandvold. The plaintiff swore and filed an affidavit on 11 October 2000 concerning this application: in it she said:

6. In further response to paragraph 5(f) of Mr. Thalheimer's November Affidavit, wherein he deposes that I paid myself \$45,105 in "management fees", authorized \$37,754 to Duane Brandvold and \$31,943 to Diane Velder, I state as follows:

- (a) I paid myself \$1,500.00 per month for care and management of the corporations and properties as set out in paragraph 5(b), above, including a prorated amount of \$1,125.00 for October, 1997, for a total of \$37,125.00, and I do not know where Mr. Thalheimer has obtained the figure of \$45,105;
- (b) I was involved in authorizing \$1,500.00 per month to Mr. Brandvold for care and management of the corporations and properties as set out in paragraph 5(b), above, including a prorated amount of \$1,125.00 for October, 1997, for a total of \$37,125.00, not the total referenced by Mr. Thalheimer;
- (c) Mr. Brandvold and I commenced working immediately upon Tony's death in October, 1997, but did not pay ourselves any wages whatsoever until April 6, 1998, when we issues cheques; .

[8] The executors also authorized a payment to Diane Velder (one of the executors) of \$2,000 per month from the revenues of Carcare (Yukon) Ltd. until that company was reorganized in October 1998. The plaintiff's justification for that payment

was that the deceased Anton Velder had paid Diane Velder that sum since 1988, and when Carcare (Yukon) Ltd. was reorganized Diane Velder no longer had an interest in that company so the payments ceased.

[9] The propriety of this conduct is beyond the scope of the application I am dealing with in this action under the *Dependants Relief Act*. However, it does have a bearing on the terms that I propose to impose on the plaintiff before she may pursue her claim in this action.

[10] In an affidavit the plaintiff swore and filed in the probate action on 10 September 1999 the plaintiff said that

We (the executors) have not been awarded any compensation for our services as personal representatives by this or any other court.

[11] A claim had been advanced by the former executors for remuneration of \$70,000 prior to the order of Moreau J. Moreau J. ordered that the present executor, Paula Conlon, post an irrevocable letter of credit in that sum to secure the claims of Leona Gonder, Diane Velder and Duane Brandvold as executors.

[12] Counsel for the plaintiff submitted on this application that the terms of the will authorized the payments made to the

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plaintiff and Brandvold of \$1,500.00; that they were active as employees; and that the terms of the will permitted the executors to become employees in any business owned and operated by the deceased. That issue will also be canvassed in the probate proceedings when the former executor's accounts are passed and their remuneration is set. However it appears that these payments are in addition to the executor's remuneration; they appear, from the material, to be in the nature of services normally performed and carried out by executors and so are the services for which the executor can properly claim remuneration of up to 5% of the estate. As their executor's remuneration is now protected, I am of the opinion that those payments should be returned to the estate by the plaintiff. I do not make that order against Diane Velder or Duane Brandvold in this action as neither has been separately represented here and they are not claiming relief in this action that could lead to my imposing terms on them. They must have notice that those payments made to them are questioned, and they should have an opportunity to answer those allegations. I have no doubt that issue will be considered in the probate proceedings, but it is inappropriate to do so in this action.

[13] However, with respect to the plaintiff, she is seeking relief in this action, and I have already imposed terms on her ability to pursue her claim for that relief. Had the facts I set out above been before me when the matter was first argued, I would have imposed additional conditions on her right to pursue her claim in this action.

[14] In the submissions of both counsel many authorities were cited which should properly be considered in the probate proceedings and not in this action. For that reason I have not dealt with them, and have limited myself to those issues that I consider to be relevant to this action.

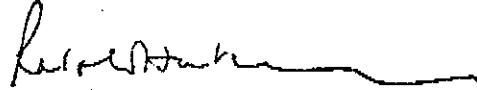
[15] For the above reasons I impose the following additional conditions:

1. Leona Gonder will pay to the executor the sum of \$37,125.00 to be held by the executor in trust until the final distribution of the estate;
2. That sum together with the sum of \$30,000 by way of security for costs ordered to be paid into court pursuant to my order of 17 March 2000 will be paid into court on or before 1 June 2001. If those sums are not paid into court by that date this action will stand as dismissed.

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3. The plaintiff will pay the executor her special costs thrown away by this application forthwith after taxation.



MR. JUSTICE R.M.J. HUTCHINSON