

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
(SAINT CHRISTOPHER CIRCUIT)**

IN THE HIGH COURT OF JUSTICE

CLAIM NUMBER: SKBHCV2011/0369

BETWEEN

**LAUREN CUNDARI
JONI ANDREA CARISSE PETTIT**

Claimants

and

GERALD ANTHONY DWYER ASTAPHAN

Defendant

Appearances:

Mr. Leslie Haynes Q.C. with Mr. Sylvester Anthony and Mrs. Angelina-Gracy Sookoo-Bobb of Counsel for the Claimants

Mr. Glenford Hamilton with Mr. Jason Hamilton and Ms. Deidre Williams of Counsel for the Defendant

2020: February 17th; 18th; 19th; 20th;
2020: June 9th;

JUDGMENT

- [1] **Moise, J.:** Ms. Agnes Gwendoleyne Sahely (Ms. Sahely) died on 2nd September, 2010. She was a spinster and had no children. On 8th April, 2011 her nephew, Mr. Gerald Anthony Dwyer Astaphan (Mr. Astaphan), obtained a grant of probate in her estate. This was granted on the basis of a Last Will and Testament executed on 26th October, 2006. The Claimants seek orders from this Court revoking the grant of probate, pronouncing against the validity of the Last Will and Testament and appointing them as administrators in Ms. Sahely's estate. After reviewing the evidence and the submissions from Counsel at the end of the trial, I have decided that the Last Will and Testament should be declared invalid and the grant of probate

revoked. I have however declined the invitation to grant letters of Administration to the Claimants. These are the reasons for my decision.

The Facts

- [2] Ms. Sahely was one of 9 children born to George Sahely and his wife Ida (the Sahelys). During their lifetime the Sahelys invested in a number of businesses and appear to have enjoyed a measure of success. They founded George Sahely & Co. in Saint Kitts in 1915. Sometime thereafter they established George Sahely & Co. (Barbados), in Barbados. In the 1950s the St. Kitts company was incorporated under the provisions of the legislation then in force. Similarly the company in Barbados was incorporated in that country in 1952.
- [3] George Sahely died on 18th April, 1956. By the time of his death his three sons had died and there remained 6 daughters who survived him, along with his wife. He left a Last Will and Testament which he had executed in April of 1944. In that will he appointed his wife Ida and his daughters Josephine and Gena as joint executrices of his estate. He left the entirety of his estate to his wife and 6 daughters. As I understand it, Mr. Sahely's estate was never fully administered. His wife ran the business after his death along with her daughter Millie, until Millie's marriage to Robert Bradshaw in 1963. There was no objection to this arrangement from the other children who were themselves beneficiaries in the estate. At that time Ms. Sahely (Gwendoleyne) was residing in Barbados. After her sister Millie's marriage, she returned to Saint Kitts to assist her mother in running the family business.
- [4] On 5th April, 1973, Ida Sahely died. She left a Last Will and Testament in which she appointed two of her daughters, Ms. Sahely (Gwendoleyne) and Venetta as joint executrices of her estate. However, Venetta had migrated to Curacao in or about 1938. As such, Ms. Sahely was left to run the family business on her own after her mother's death. The evidence suggests that although probate was granted in December 1976, Ida's estate, as well as that of her husband, has never been fully administered. From 1973 Ms. Sahely ran the family business until she suffered a stroke and was involved in a car accident in March, 2006.

- [5] All of the witnesses described Ms. Sahely as a shrewd businesswoman who kept a firm grip on the affairs of the companies. Although she seemed to have maintained good relationships with her nieces and nephews, she is described as someone who spoke her mind and would not hesitate to swear during her conversations. It seems that she was somewhat colourful in her language and sometimes brash. She was an independent person. In 2004 when Ms. Sahely was hospitalized for some time as a result of a fractured hip, she ran the affairs of the company from her hospital bed. She loved dogs and kept them as pets throughout her lifetime. She was a committed member of the Anglican faith and loved to read.
- [6] In time, most of Ms. Sahely's siblings passed away; except for her sister Josephine. Josephine was married to Joseph Anthony Astaphan and had 11 children. The parties to these proceedings are all children of Josephine Astaphan. In fact the Defendant was a godson of Ms. Sahely. At the time of Ms. Sahely's death Josephine was her only surviving heir, if her estate had gone into intestacy. Ms. Sahely had however acquired a substantial personal estate in her own name and there emerged a view among some members of the family that she had unlawfully benefited from the family estate. The Defendant in particular was very fortified in that view. Ms. Sahely was however never formally challenged with that allegation; at least not insofar as the evidence has provided. Josephine passed away on 5th March, 2011. Therefore if Ms. Sahely's estate were to fall into intestacy, the heirs of Josephine would stand to benefit the most.
- [7] The circumstances surrounding the last four years of Ms. Sahely's life are rather tragic and give rise to the present dispute. Insofar as I may not have referred to certain specific facts presented in the evidence, I have done so merely to preserve Ms. Sahely's dignity. The facts raise some of the challenges faced by persons who suffer dementia in their old age. It is not the way anyone would naturally wish to be remembered, much less have crystalized in a published judgment.

The Accident and Hospitalization of Ms. Sahely

- [8] Ms. Sahely was involved in a car accident on 7th March, 2006, which was apparently caused as a result of a stroke she suffered while driving. She was hospitalized as a result of this

accident and never returned to her home or the businesses which she had managed for some 33 years. She spent the remaining four years in care facilities and died at “The Grange” nursing home on 2nd September, 2010. The medical records indicate that upon admission to the hospital on the day of the accident, Ms. Sahely appeared conscious but disoriented. She had a laceration to her left occipital area and no focal neurological signs. Over the first week of her hospitalization she had fluctuating levels of consciousness with periods of deep somnolence. She appeared to have decreased use of her left arm and favoured use of the right. A repeat CAT scan on 11th April, 2006 revealed a small left parietal subdural hematoma. She was described as having recovered subsequently in terms of her alertness over the next few weeks, with fluctuating periods of orientation. She remained in the hospital for approximately one month, at which point the medical doctor who attended to her recommended that she be moved into a care facility. In April 2006, Ms. Sahely was transferred to the Brimstone View Residential Care Home via ambulance. She remained at that institution until she was transferred to The Grange in April, 2009. She remained at The Grange until her passing.

[9] The family members who visited Ms. Sahely at the hospital described her as being in bad shape. The First Claimant, Mrs. Cundari, states that she arrived in Saint Kitts a few days after the accident. Her mother Josephine, who normally resided in Canada, was on island when the accident took place. Mrs. Cundari stated that she would visit the hospital on a daily basis with her mother. From what she observed, Ms. Sahely could not recognize her. This was despite the close relationship they had in the past. Ms. Sahely could not feed herself and was physically restrained to the bed. The hospital notes indicate that Ms. Sahely had been making attempts to get out of bed on her own. Given her condition, she was restrained in order to prevent this from happening. Mrs. Cundari indicates that Ms. Sahely appeared “*very weak and very confused.*” She did not know where she was or the cause of her being there. When prompted by various questions, she was unable to answer them correctly.

[10] According to Mrs. Cundari, Ms. Sahely’s speech was slurred and she could not appreciate the fact that she was in an accident. She could not carry out a full conversation and appeared to have lost her memory. She states that Ms. Sahely had traditionally been a very neat person and that she would not have accepted the condition under which she was at the time. She

could not take care of herself and was therefore not that person Mrs. Cundari had known before. She also states that Ms. Sahely was hallucinating, in that she imagined that there was a dog beneath her bed and that there were persons in the room who were in fact not there. Despite this, she never enquired about her own dogs or the family business. She would ask about her deceased parents and siblings who had long passed away. Mrs. Cundari left the island on 15th April, 2006 and it was her evidence that she had seen no visible signs of improvement in Ms. Sahely's condition.

- [11] Ms. Sahely's nephew, Karl Astaphan, also gave evidence about his visit to the hospital. He states that although he resides in the United States, he was in Saint Kitts in March 2006. He therefore visited his aunt during her stay at the hospital. He states that his mother Josephine specifically invited him to observe his aunt's condition as he, Karl, is a licensed medical practitioner. In light of this, the Court proceeds with some caution, as it must be noted that Mr. Astaphan was not called as an expert witness. In fact as a family member to Ms. Sahely he would certainly not have been in a position to give an impartial opinion, as he has rightfully recognised. However, insofar as his observations are concerned, the Court recognizes them as it has recognized those of any other family member who may have visited Ms. Sahely during her stay at the hospital and thereafter. Mr. Astaphan states that upon visiting Ms. Sahely she did not know who he was. He had only recently visited her in January of that very year. She did not know which country she was in. She spoke as if she was in Nevis at one point and then as if she was in Barbados at another. She did not seem to recognize that she was in Saint Kitts. She also spoke about her parents and her sisters Millie and Gloria as if they were alive. She kept uttering meaningless sentences.

Ms. Sahely's Stay at the Brimstone View Residential Care Home

- [12] Ms. Sahely was discharged from the hospital on 10th April, 2006. She was taken via ambulance to the Brimstone View Residential Care Home. The arrangements for her stay at that facility were made by her sister Josephine and Mrs. Cundari. During the course of the trial, the parties agreed to the tendering of a deposition of Ms. Karen Phipps, who was the owner and administrator of the Brimstone View Residential Care Home at the time of Ms. Sahely's admission and the duration of her stay there. Ms. Phipps described in some detail,

Ms. Sahely's condition at the time. She stated that Ms. Sahely spent a total of approximately 3 years at the institution. She came into the institution on a stretcher. Ms. Phipps indicated that a room had been allocated to Ms. Sahely. However, it became clear that Ms. Sahely would not remain on the bed. Despite her condition, she continually tried to get down. As a result, the bed was removed and the mattress was placed on the floor. Although this was not the ideal situation, Ms. Phipps felt that this was necessary for Ms. Sahely's own safety, rather than continually restraining her in the manner this was addressed at the hospital.

[13] It was Ms. Phipp's evidence that at first Ms. Sahely was unable to feed herself. Although she could have used her hands, Ms. Phipp's evidence was that "*she did not know what to do with them... she seemed to have lost her motor skills. She did not know how to take the bread off the plate and to put it in her mouth or use a spoon*". This lasted for about 6 months after which she started regaining her motor skills slowly. According to Ms. Phipps, in October, 2006 Ms. Sahely was still unable to feed herself as her motor skills had not yet improved to that extent. She was back on track after the first year of being admitted to the home. At that point she was fully able to feed herself.

[14] Ms. Phipps also testified that Ms. Sahely had mood swings. Some days her behavior was worse than others. She would say that she wanted to go to St. Kitts, not realizing that she was actually in Saint Kitts. Despite efforts to inform her of this she wouldn't have any of it and continued her insistence in wanting to go to Saint Kitts. She would use "*all the bad words that she was known for.*" Every day for many months Ms. Sahely used to call for her niece Isis, who she was particularly fond of. Three days after Ms. Sahely's admission to the facility, her sister Josephine was informed that Isis had in fact died. This information was conveyed to Ms. Sahely. However, Josephine took a decision that Ms. Sahely was not in a physical and mental condition to attend Isis' funeral service. Ms. Phipps indicated that Ms. Sahely was hurt when she was not allowed to attend.

[15] According to Ms. Phipps, after Ms. Sahely had gone back to her normal self she started reading and writing again. At first her writing was not legible. By Ms. Phipp's account "*the writing didn't really make sense, she just looked like she was learning again...*" This started about a year after her admission into the facility. Despite this, Ms. Phipps stated that Ms.

Sahely was never fully back to where she could converse with the staff. For the duration of her time at the facility she had mood swings which became worse when her family members visited. She seemed agitated after these visits and insisted that people were after her money. She would insist that the money belonged to her, Millie and Josey, who Ms. Phipps understood to mean Josephine. Ms. Sahely would throw things around the room, tear up the table mats and throw spoons about. She would also pull off the table cloth, despite there being food on it. Ms. Phipps indicated that Ms. Sahely would put herself in danger by even attempting to pull down the television and stereo and going into drawers to take things out of them. That was the level of her disruption whenever she was agitated.

[16] As it relates to visits from family members, Ms. Phipps stated that Josephine and Mrs. Cundari had initially visited frequently. These two resided in Canada and would eventually visit once every three weeks during their frequent visits to Saint Kitts. As it relates to the Defendant, Ms. Phipps indicated that he didn't visit as often but did so about once a month. He came alone a few times and at times with his son. On one occasion he was accompanied by a bald headed male individual in his 30s or 40s. She described this person as being a family member but could not recall the name. At some point she was instructed by the family to monitor visitors to Ms. Sahely. A log is also kept with information of this nature. During cross examination Ms. Phipps admitted that she worked mainly the nightshift and that when she did, she was not around during the course of the day. Despite this, and given the fact that she was the owner and manager of the institution, I am satisfied with the general truth of Ms. Phipp's evidence.

[17] Mrs. Cundari stated in her witness statement that Ms. Sahely's condition did not improve after her transfer to the Brimstone View Residential Care Home. She stated that Ms. Sahely was restrained to either a chair or her bed. That was somewhat contradictory to the evidence of Ms. Phipps who indicated that the head of the bed was in fact removed rather than restraining Ms. Sahely in this way. Mrs. Cundari went on to state that Ms. Sahely did not seem mentally present and could not hold a fluent conversation. After returning to Canada in April, 2006, Mrs. Cundari and her mother Josephine would frequently call the home. However, Ms. Sahely was never able to recognize who was speaking to her and could not carry on a conversation.

[18] Mrs. Cundari returned to Saint Kitts in August, 2006. During that time, as she puts it, she visited Ms. Sahely at the home on a daily basis. To her mind Ms. Sahely's condition had not improved. In fact, it seemed to have worsened. Ms. Sahely was handed a packet of biscuits. However, she threw the biscuits away and started eating the wrapper instead. Mrs. Cundari was of the view that Ms. Sahely appeared sedated. The family had received complaints from Ms. Phipps regarding Ms. Sahely's behaviour. She was combative and engaged in other behaviour which would be disruptive and disturbing.

[19] Mrs. Andrea Pettit, the Second Claimant, also gave evidence regarding Ms. Sahely's condition during her stay at the home. She too is a child of Josephine and is therefore a niece of Ms. Sahely. Although she resides in the United States, she travelled to Saint Kitts in August of 2006. During this time she visited Ms. Sahely along with her mother. Upon arrival at the hospital, she claimed to have been shocked to see what had happened to her aunt. Ms. Sahely didn't seem able to conduct a cogent conversation and her behavior was not normal. Mrs. Pettit stated that she had taken some treats to the hospital with her and noticed that Ms. Sahely would throw away the treats but attempt to eat the wrapper instead. Ms. Sahely kept saying that she was in Barbados and that she wanted to return to Saint Kitts. She kept referring to her parents and one of her siblings as if they were still alive. That was the extent of Mrs. Pettit's interactions with Ms. Sahely.

[20] Mrs. Cundari again returned to the island in November, 2006 and, along with other family members, visited Ms. Sahely. Although she observed some physical improvement, Ms. Sahely appeared to be the same mentally. During one of these visits however, the family was informed by Mr. Astaphan (the Defendant) that Ms. Sahely had executed a power of attorney in his favour. He stated that he was contacted by Ms. Sahely who requested that he take care of her affairs. This seemed to have alarmed certain members of the family, as they were of the view that Ms. Sahely did not have the mental capacity to execute such a document. Those who gave evidence on behalf of the Claimants all claimed that Ms. Sahely was never particularly fond of Mr. Astaphan in the first place. Although she was his godmother, they didn't have a particularly close relationship.

[21] Despite his mention of the power of attorney to the family in November, 2006, what the Defendant did not then mention was that a Last Will and Testament was also drawn up with him as the sole executor and main beneficiary in Ms. Sahely's estate. Although it was not mentioned in the Defendant's witness statement, nor was he cross examined on it, the documents disclosed a copy of Mr. Astaphan's Last Will and Testament allegedly executed on 2nd November, 2006 in which he mentioned the dispositions made in Ms. Sahely's will.

[22] The Court also heard evidence from Mr. Jason Kelsick. He is a grandson to Josephine and therefore a nephew of the Claimants and the Defendant. Mr. Kelsick states that he had visited the Brimstone View Residential Care Home in September, 2006. He states that he did so at Mr. Astaphan's invitation. He states that he had a very good relationship with Mr. Astaphan and it was not unusual for him to be asked to accompany Mr. Astaphan during his visits with Ms. Sahely. Mr. Kelsick is bald headed and fits the description of the family member whom Ms. Phipps indicated in her evidence also visited the home along with Mr. Astaphan. On his first visit to the home, Mr. Kelsick immediately realized that Ms. Sahely was not the person that he had known her to be. She did not recognize him, even after his prompting. According to Mr. Kelsick she seemed unaware of her circumstances, surroundings and what had brought her to that place. Like most persons who visited Ms. Sahely, Mr. Kelsick indicated that she spoke as if she was in Barbados and kept indicating that she wanted to return to Saint Kitts. She could not remember her sisters and appeared totally spaced out. She also seemed paranoid and kept indicating that persons were out to steal her money and she was very concerned about that.

[23] During these visits, Mr. Kelsick formed the view that Mr. Astaphan would dominate the conversations he had with Ms. Sahely. It seemed to him that an attempt was being made to manipulate her. He never observed Ms. Sahely ask Mr. Astaphan to do anything for her. According to Mr. Kelsick, she certainly did not ask that Mr. Astaphan conduct any business for her whilst he was present. In fact, he states that Ms. Sahely kept asking for her nephew Tommy, who is himself an attorney who resides in Anguilla. Anytime Tommy's name was brought up, Mr. Astaphan would change the subject. After one of his visits to the home with Mr. Astaphan in September, 2006, Mr. Kelsick states that Mr. Astaphan confided in him that

Ms. Sahely had executed a power of attorney in his name and that he was going to get her to sign a will. According to Mr. Kelsick, he enquired as to whether Ms. Sahely would ever do such a thing. In response, Mr. Astaphan indicated that Ms. Sahely would sign anything because she was not aware of what was going on. Mr. Kelsick was of the firm view that based on his interactions with Ms. Sahely, she had never trusted Mr. Astaphan prior to her accident and did not particularly like him. This was a sentiment also expressed by the Claimants in their own evidence. The Defendant never denied that allegation and the Claimants' witnesses were not challenged on it during cross examination. It therefore stands uncontroverted.

[24] Mr. Kelsick went on in his evidence to state that Mr. Astaphan had intimated to him that he was concerned that if Ms. Sahely died with the existing will she had in place, Isis Bradshaw would have inherited too much. I do observe however that by that time Isis had in fact died. Mr. Kelsick stated that Mr. Astaphan wanted to make sure he was in control of Mr. Sahely's estate and that he would divide it in a reasonable manner as he saw fit. When Mr. Kelsick made a further enquiry as to whether Ms. Sahely would ever agree to such a thing, Mr. Astaphan responded that she wouldn't know the difference. According to Mr. Kelsick, Mr. Astaphan asked that he not relay this information to Josephine.

[25] In cross examination Mr. Kelsick admitted to regularly riding his bicycle near the home in which Ms. Sahely was resident. The evidence from the Defendant was that Ms. Sahely had recognized him riding near the home with his bicycle. The inference which counsel for the Defendant wished for the Court to draw was that Ms. Sahely was perfectly capable of recognizing Mr. Kelsick from the balcony of the institution. However, taking the evidence as a whole, I am not of the view that this assertion undermines the evidence of Mr. Kelsick in any substantial way.

The Last Will and Testament of Ms. Sahely

[26] It was from Mr. Kelsick that Mrs. Cundari and the rest of the family learned that Ms. Sahely had executed a Last Will and Testament in October, 2006. This document appointed Mr. Astaphan as the sole executor of Ms. Sahely's estate. He was also the sole beneficiary and

that if he died prior to Ms. Sahely, his son was named as the sole beneficiary. Mr. Astaphan's son was a minor at the time. According to Mrs. Cundari, the members of the family were not only upset, but deeply skeptical about the authenticity of this document, given everyone's views on Ms. Sahely's condition. It seemed clear to a number of members of the family that Ms. Sahely was not mentally capable of executing such a document. This skepticism was also rooted in certain facts which, according to Mrs. Cundari, proved that there was an improper motive on Mr. Astaphan's part in his desire to take control of Ms. Sahely's assets.

[27] It was Mr. Astaphan's view that Ms. Sahely had stolen from the heirs of her parents. He was of the view that her estate should compensate her victims for this theft and that such should have been done even prior to her death. In fact, the evidence suggests, and Mr. Astaphan does not deny, that he was of the view that the power of attorney executed in his favour empowered him to compensate the alleged victims of Ms. Sahely's impropriety. By way of emails exchanged between members of the family, Mr. Astaphan has acceded to stating as follows:

- (a) Gwenny (Ms. Sahely, as she was affectionately referred to within the family) was in full control of the business and did not consult with the other shareholders and directors;*
- (b) All accounting was done on the instructions of Gwenny and in the case of the Barbados company the same person in Barbados who did the accounts also did the audits;*
- (c) Over the years Gwenny made loans from the Barbados company to herself, Milly's medical bills...*
- (d) In one instant, substantial funds were authorized by Gwenny for payment of Milly's medical bills...*
- (e) There is no evidence that any moneys were repaid.*
- (f) Over the years, 1991, 1992, 1993, 1998 and 1999 director's fees in the Barbados company appear to have accrued and or paid to Gwenny only...*

- (g) *She failed to keep the St. Kitts company up to date and she caused all of its shares to be placed in her name, again without the knowledge and approval of the other shareholders and directors;*
- (h) *She assumed control of the estate of George Sahely when she was not the executrix. She made loans therefrom and from the estate of Ida Sahely, improperly and unauthorised, to herself, Milly and Isis...*

The persons who are aggrieved by the wrongdoings are persons who stand to benefit from Gwenn's estate anyway! In the scenario painted here, there is nobody else!

So if they are satisfied that she has committed wrongdoings, and they are willing to make arrangements to rectify same, then what or who is there to stop them?"

[28] In his email Mr. Astaphan went on to state as follows:

"By the wills, Gwenny's assets go to Josie (Mommy) if the former predeceases the latter.

... I propose that, instead of waiting to see how these events unfold, a distribution of these assets of Gwenny be distributed. And I have proposed a formula based on the wills and based on the premise that Gwenny, Milly and Isis misconducted themselves with regard to assets of Georgina, Venetta and Josie.

... the focus of the formula therefore... show Gwenny with ownership of well over \$12,000,000.00."

[29] Mr. Astaphan clearly expressed the view that not only was Ms. Sahely guilty of impropriety but that he was prepared to use the power of attorney that he had been granted to redistribute her assets even prior to her death. Yet, there is no evidence that he had ever spoken with Ms. Sahely about his intentions while she was alive. He goes on to state the following:

"... is Gwenny herself inclined to do so? Not as far as I am aware, and not as far as I am concerned. And I say that humbly as the person appointed to act on her behalf.

Indeed, if the person who is alleged to have acted wrongfully acknowledged such wrongdoing, then any questions of acquiescence, laches ... become irrelevant ... such person opens the door for a remedy to be made available to the aggrieved. And I am hereby formally acknowledging that there was mismanagement and wrongdoing on Gwenny's part and that I am willing and committed to a remedy. Accordingly I reiterate my proposal.

Under an intestacy, Gwenny's estate, passes to Josie, if the former predeceased the latter. If the reverse occurs, the estate of Gwenny is shared equally among the estates of Georgina, Venetta and Josie.

I would support it on Gwenny's behalf."

[30] The evidence suggests to me that there was no point during Mrs. Sahely's life when she was ever confronted with such allegations of wrongdoing. To my mind, these allegations rise to the level of misfeasance, dishonesty and outright misappropriation of the companies' funds. Yet no action was ever taken against Ms. Sahely for any of these. This is further compounded by the fact that Mr. Astaphan at that time had no legal interest whatsoever in Ms. Sahely's affairs, except as her own trustee on the basis of the power of attorney allegedly executed in his favour and later by virtue of becoming her Court appointed guardian. He was the son of Josephine who was herself a direct heir of the Sahely's. She was still alive and not in agreement with the course of action being proposed. In addition to that, it is more than merely inappropriate to level such significant allegations against someone who seemed to not be in a position to defend herself at the time.

[31] I note that these emails written by Mr. Astaphan were in June, 2009. That would have been subsequent to the date of the Last Will and Testament allegedly executed in October, 2006. Yet he speaks of a previous will and dispositions made therein with no reference to the fact that by then he had become the sole beneficiary of Ms. Sahely's estate by virtue of that testament. As will be addressed later in this judgment, Mr. Astaphan was adamant that Ms. Sahely had the testamentary capacity to draft a will and a power of attorney, yet he did not see it fit to share his own views with her regarding the allegations of impropriety. He denies that she did not know what she was doing when she signed these documents. He testified that

she was lucid and well capable of reading and understanding the document. Yet he thought it proper, with no consultation with her whatsoever, to agree that she was guilty of significant mismanagement and impropriety and distribute her assets without her consent.

[32] In March, of 2007, Mr. Astaphan was engaged in a conversation with his mother Josephine. Unbeknownst to him, the conversation was being recorded. He does not deny the authenticity of the statements attributed to him. In that conversation he stated that *"you ain't going ever find out how much money Gwenny and them thief."* He indicated that he had sought a legal opinion on the question of whether Ms. Sahely's assets could have been legally redistributed prior to her death. However, even before obtaining that opinion he expressed the view that he was able to do the redistribution in his capacity as her legal guardian. During that conversation Josephine confronted Mr. Astaphan about the Last Will and Testament executed in October, 2006. His reply was *"no. I don't have no will."* He went on to say *"I can't find it. I don't know where it is..."* When it came to a discussion regarding Ms. Sahely, Mr. Astaphan stated *"at this stage here, I went to see Gwenny the Saturday. She said, 'who you be?' I said, Dwyer. She Say, 'Me ain't know you.'" He also went on to state that "... I don't see we can take what Auntie Gwenny said now, because the fact is, she and Millie and Isis stole and they stole form everybody."* It was Mrs. Cundari's evidence that after the family had consistently chastised Mr. Astaphan he indicated that he had destroyed the will after confessing that it would not stand up in Court.

The Defence's Evidence

[33] For his part, Mr. Astaphan swore to a witness statement on 31st August, 2013. It was his evidence that on a visit to Ms. Sahely in October, 2006 she expressed fear and concern to him that certain persons were trying to cheat her off of her property and that she wanted him to assist her and protect her from them. According to Mr. Astaphan, Ms. Sahely indicated that she wanted to execute a power of attorney in his favour so that he could handle her affairs on her behalf. She also indicated that she wanted to vest her estate in him as her beneficiary under her Last Will and Testament. When he enquired as to the rest of the family, Ms. Sahely indicated that she trusted him to distribute the assets to whomever he thought deserved it.

According to Mr. Astaphan, Ms. Sahely expressly stated *“you deal with it and you deal with them.”*

[34] Mr. Astaphan's evidence was that at Ms. Sahely's request, he engaged the services of Mr. Glenford Hamilton, attorney at law, to prepare the power of attorney and the Last Will and Testament. This was despite the fact that Mr. Hamilton had never acted on behalf of Ms. Sahely before. In fact, Mr. Hamilton was Mr. Astaphan's personal attorney. In the witness box Mr. Astaphan stated that he had provided a list of names of attorneys to Ms. Sahely and that it was she who requested Mr. Hamilton's services. On 26th October, 2006, Mr. Hamilton accompanied Mr. Astaphan to the home where Ms. Sahely was resident. Also present was Mrs. Karen Astaphan-Kelsick. Mrs. Kelsick is Mr. Astaphan's sister and is also affectionately known to the family as Tressy. She is Jason Kelsick's mother and a niece of Ms. Sahely. According to Mr. Astaphan, Mr. Hamilton brought 2 draft duplicates of both the power of attorney and the Last Will and Testament. Ms. Sahely carefully read both documents. She engaged in discussions and asked questions before expressing her satisfaction. She highlighted some typographical errors which needed to be changed. The parties returned, apparently on the same day, with the corrected documents which Ms. Sahely signed after taking her time to read through. Mrs. Kelsick and Mr. Hamilton also signed.

[35] Mr. Astaphan was of the view that Ms. Sahely was alert, attentive and showed no signs of mental defects. In his witness statement he states that he visited her weekly during her stay at the Brimstone View Residential Care Home, as well as The Grange. During these visits they spoke of politics, family and her business affairs. I note that there was no mention of him speaking to her of the allegations of misappropriation which he so freely leveled at her when speaking to other members of the family. I also note that he spoke of having these conversations during her stay at both nursing homes. This was despite him admitting to his mother in March 2007 that Ms. Sahely did not even recognize who he was on one of his visits. This evidence also runs contrary to that of most other witnesses who had interacted with Ms. Sahely during that period. She seemed unable to communicate coherently with other persons at intervals during this time.

[36] Mrs. Kelsick (Tressy) also gave evidence during the course of the trial. She filed a witness statement on 31st January, 2013. As it relates to the execution of the power of attorney and the Last Will and Testament in favour of the Defendant, Mrs. Kelsick states that she was present when Ms. Sahely gave instructions to Mr. Astaphan. She states that in October, 2006, Ms. Sahely told Mr. Astaphan that she needed him to protect her against persons, who at the time were seeking to cheat her off of her property. She states that she was present during that conversation and that Ms. Sahely wanted to ensure that persons who were trying to cheat her off of her estate should not benefit from her assets while she was alive or even after her death. She therefore wanted Mr. Astaphan to take care of her affairs. According to Mrs. Kelsick, Ms. Sahely appeared to be aware of what she was saying, and she communicated in an intelligible and deliberate manner.

[37] Mrs. Kelsick went on to indicate that on 26th October, 2006 she along with Mr. Astaphan and attorney at law, Mr. Hamilton, called on the Brimstone View Residential Care Home. Mr. Hamilton had a draft power of attorney and a draft will in his possession. Ms. Sahely read both documents carefully, partially out loud and partially in silence. She asked questions, made comments and pointed out a few typographical errors on both of them. Mr. Hamilton agreed to have the errors corrected and return at a later date to execute the documents. In fact, the parties returned on the same day and the documents were executed. Ms. Sahely read them and was satisfied with them. Mr. Hamilton and Mrs. Kelsick also signed. Mrs. Kelsick also indicated that Ms. Sahely admonished Mr. Astaphan not to rob her as others were trying to do and asked him how much he would charge to take care of her.

[38] If this evidence is to be accepted, it would be very unfortunate that Mr. Astaphan did not inform Ms. Sahely that of the persons most concerned with accusing her of impropriety and redistributing her assets, he was chief among them. In addition, it must be observed that although Mr. Hamilton was the executing attorney for both the power of attorney and the Last Will and Testament, he did not attend these proceedings to give evidence regarding the circumstances under which he took his instructions and witnessed the execution of either of these documents. Despite Mr. Astaphan's attempt to state the contrary in the witness box, it does not appear to me that Ms. Sahely ever gave instructions directly to the Mr. Hamilton, or that he ever communicated with her in the absence of anyone else. The instructions appear to

have come directly from Mr. Astaphan and there seem to have been no request by Mr. Hamilton to verify Ms. Sahely's medical and mental condition prior to executing those documents.

The Aftermath of the Will's Execution

[39] After the remaining members of the family became aware of the Last Will and Testament, the relationship between Mr. Astaphan, his mother and some of his siblings became strained. Mrs. Cundari's evidence was that her mother became concerned with protecting Ms. Sahely's assets from Mr. Astaphan. Given that Josephine is now deceased, the Court will proceed with caution regarding the evidence as it relates to her own actions during this time. However, insofar as much of that evidence is not contested by the Defendant, the facts outlined in Mrs. Cundari's evidence assists in placing certain issues into context.

[40] Mrs. Cundari states that she and her mother prepared two letters for Ms. Sahely to sign on 8th May, 2007. These letters requested the closure of her bank accounts in the United Kingdom and a transfer of the funds to an account in Saint Kitts. One of these letters was addressed to HSBC and the other to Helicon. Mrs. Cundari's evidence was that Ms. Sahely signed the letters even without reading or questioning them. I do note however, that the evidence suggests that it was Mrs. Kelsick who took the letters to Ms. Sahely at her mother's request. Mrs. Kelsick insisted that Ms. Sahely was lucid. I understand that Mrs. Cundari's name was placed on one of the accounts but was subsequently removed as the confusion within the family deepened. Mrs. Cundari accepted that the letters were not a reflection of Ms. Sahely's wishes but that her mother was merely trying to protect Ms. Sahely's assets. She accepts that Ms. Sahely was not in a position to have signed those letters on her own volition.

[41] In March, 2007 Josephine Astaphan and Mrs. Cundari engaged Ms. Sahely in a conversation. This interaction was recorded and the Court is in receipt of the recording as well as a transcript of the conversation. Ms. Sahely was confronted by her sister about someone being in charge of her affairs. Her response was *"I am going to take away my signature from him. Josie, he has too much work. He is what you call it National ... thing for the government..."* During the course of the conversation a document was handed to Ms. Sahely. Ms. Sahely

denied ever agreeing to the terms contained therein. She states *"he get s**t though. I don't like number one ... because I going scratch number one."* She goes on to say *"everything I have he want? He can go and f**k himself. I could tell you that."* When asked whether she had agreed to these terms Ms. Sahely said *"no, I did not. I certainly ain't agree to that. This must be my stocks, man."* She denied that it was her signature on the document and stated *"I am nothing to do with that... he could go and tell the man what he put it wrong."*

[42] During the conversation Josephine asked Ms. Sahely whether she remembered the terms of the will that she signed. She said that she did not but that if she saw it she would remember. When it was put to her that everything went to "him" she responded by stating *"no, no. I never would will that to him because he asked me first and I tell him I am not doing it."* Mrs. Cundari then asked *"he asked you to leave everything to him for him to distribute it?"* Ms. Sahely's response was *"no, what he did ask me was he want to educate the son he has with the ... girl."* When it was put to her that everything she owned would go to "him" she indicated that this must have been included afterwards. Although Mr. Astaphan's name is not specifically mentioned, I take it that the claimant's case is that this refers to the Defendant. In the end Ms. Sahely denied ever disposing all of her assets to him.

[43] During the latter part of 2007 attempts were being made at reconciliation within the family. It was Mrs. Cundari's evidence that Mr. Astaphan had confessed to destroying the will which was executed in October, 2006. His relationship with his mother began to improve. He however maintained that the "victims" of Ms. Sahely's impropriety should be compensated. Although Ms. Sahely's physical condition began to improve, Mrs. Cundari insists that her mental status was not much improved. In March, 2009 Mr. Astaphan applied for and obtained an order from the Court appointing him as Ms. Sahely's legal guardian, given that she had been declared to be mentally incompetent by that time. Josephine was much more comfortable at this time, given that there was a measure of Court supervision over Mr. Astaphan's actions regarding Ms. Sahely's property. In April, 2009, Ms. Sahely was transferred from the Brimstone View Residential Care Home to The Grange.

[44] In a report presented into evidence, Ms. Sahely was said to be lucid and coherent upon her transfer to the Grange. She was oriented of time, her name and date of birth. The report

indicated that she underwent a period of intense physiotherapy at Mr. Astaphan's instructions. Her physical condition however did not improve. She was described in the report as being mentally sharp at first but this deteriorated over time and signs of dementia were more marked. She died on 2nd September, 2010. A few months later, her sister Josephine took ill and she too died on 5th March, 2011. Josephine left a Last Will and Testament which was read on 18th March, 2011. In that testament she left no inheritance for Mr. Astaphan. Mrs. Cundari states that he was seriously aggrieved by this. Despite his previous insistence that he had destroyed the Last Will and Testament of Ms. Sahely dated 26th October, 2006, by way of email dated 26th April, 2011 Mr. Astaphan informed members of the family that 18 days prior, on 8th April, 2011, he was appointed executor in the estate of Ms. Sahely. He had now become the sole executor and sole beneficiary of Ms. Sahely's estate.

The Medical Evidence

[45] In December, 2006, at the instance of Mr. Glenford Hamilton, Dr. Bichara Sahely, accompanied Mr. Astaphan to the Brimstone View Residential Care Home in order to conduct an assessment of Ms. Sahely's mental condition. He did not prepare a report until 13th April, 2008. In that report he states that during that visit he found Ms. Sahely to be alert, attentive and oriented in person, but not in time or place. Her language skills were generally intact in that she demonstrated fluent speech and her comprehension of simple questions were adequate. Her responses to the questions were appropriate. Ms. Sahely's long term memory was intact but she demonstrated deficiencies in recalling recent events. She showed no signs of hallucination. Dr. Sahely indicated that although there were signs of early-stage dementia, on that particular morning Ms. Sahely demonstrated sufficient ability to make reasonable judgments.

[46] However, Dr. Sahely's report was heavily criticized by Dr. Stephen Raffle, who was called upon to give evidence as an expert in this matter. In Dr. Raffle's opinion, Dr. Sahely presented no notes of his observations on that day, despite the fact that his letter was dated almost a year and a half later. Dr. Raffle also noted that Dr. Sahely made no enquiries of the staff and other persons who looked after Ms. Sahely regarding her behavior. He relied on no medical

records of Ms. Sahely. On that basis Dr. Raffle opines that Dr. Sahely's assessment was *"impressionistic and provide no quantitative data upon which he based his opinion, nor do records exist in his file contemporaneous with his visit which are accepted medical practice."*

[47] However, Dr. Sahely had in fact examined Ms. Sahely prior to December, 2006. This had not initially been brought to Dr. Raffles' attention. Dr. Shaley's notes from that medical examination in September, 2006 indicate that she was brought into his office by Mrs. Cundari for a checkup. He did a physical as well as a mental status examination. He stated that she was alert, oriented in person but not in place and time. Assessment of her language fluency, comprehension, repetition, naming and writing was confirmed. However although her immediate memory was present, her recent memory was deemed to be poor with no long term memory. The records indicated zero attention and poor concentration. There was no comment on hallucinations or delusions. The notes on the record indicate that something was mentioned of a power of attorney being given to her sister Josephine, but that she had not made up her mind. She was diagnosed as suffering from early dementia. During cross examination however, Dr. Sahely accepted that he did not perform a full minimum mental examination test on Ms. Sahely because the results of his mental status examination had already revealed that she would have failed that test. In the end in his letter dated 15th January, 2013, Dr. Sahely noted that he was not in a position to determine whether Ms. Sahely was *non compos mentis* in October of 2006.

[48] In December, 2007 Ms. Sahely was taken to a consultation with Dr. Sharon Halliday in order to have her psychiatric condition evaluated. The Court is not in receipt of a report form that visit. However, on 6th April, 2008 Dr. Halliday prepared a report in which she states that a minimum mental examination test was conducted after which Ms. Sahely was deemed mentally incompetent. Dr. Halliday indicated that her assessment of Ms. Sahely took place over a number of visits, totaling at least four hours.

[49] As I have indicated, the Court heard evidence from Dr. Stephen Raffle who is a qualified forensic and clinical psychiatrist. He is certified by the American Board of Psychiatry and Neurology and specializes in both psychiatry and forensic psychiatry. Dr. Raffle has practiced medicine in this capacity for 47 years and offered medical opinions and testimony in over 5000

cases in the United States. He was deemed an expert in these proceedings. His task was to assess the various medical reports and witness testimony of Ms. Sahely's condition from the date of the accident in order to assist by offering an opinion on her likely mental capacity at the time of the execution of the Last Will and Testament. His opinion was that Ms. Sahely was not mentally competent to execute a new will on 26th October, 2006. He came to that conclusion for the following reasons:

- (a) Ms. Sahely suffered from dementia, which was manifested by disorientation, confusion, poor short term memory, impulsivity, disinhibition and other defects, all of which made her susceptible to another person's wishes. The presence of dementia, confusion and disorientation are indicia of undue influence;
- (b) Ms. Sahely is described by Ms. Phipps as having a paranoid delusion;
- (c) Ms. Sahely repeatedly misidentified a dead relative as being alive and a non-blood relative to be her sister. As such, she did not know who her heirs were.

[50] In assessing the medical evidence available to him, Dr. Raffle noted that there exist clearly demonstrated short-term memory problems at the time of her September, 2006 examination, as well as disorientation to place and time, a loss of recent memory, poor concentration, possible absent attention and a diagnosis of dementia. This medical report was approximately 6 months after the accident. This evidence indicates that Ms. Sahely was having persistent disorientation and confusion. According to Dr. Raffle, this indicated that there was a non-resolved traumatic brain injury. Six months after her injury there appears to be little, if any, meaningful improvement. This lack of improvement is further highlighted in the report of Dr. Sharon Halliday. In addition, the report from Ms. Phipps provides first hand observations of Ms. Sahely's behavior during that time. As regards the report received from The Grange, Dr. Raffle was of the opinion that this does not reflect a medical or clinical evaluation. She was certainly more amenable to taking instructions and was less agitated. However, the report also clearly indicates that someone else was making decisions for her. This is because by that time she was determined to have been mentally incompetent and Mr. Astaphan was appointed as her legal guardian. Her condition however worsened over time. Over all Dr. Raffle was of the

view that Ms. Sahely was *non compos mentis* in October, 2006 when the Last Will and Testament was executed.

The Law and its Application

[51] The starting point in cases such as the present is to accept and appreciate that an individual is perfectly entitled to make arrangements for the disposal of her property after her death in any manner in which she thinks appropriate. Such dispositions may sometimes seem unfair and entirely reprehensible to some. But that would not be enough to invalidate a Last Will and Testament executed in circumstances where the deceased had full testamentary capacity. In the case of ***Anne Marie MacLeish et al v Avison Marryshow***¹ Edwards JA quite helpfully highlighted a number of principles which the Court must consider before determining whether a Last Will and Testament should be deemed invalid on account of a lack of testamentary capacity. Although her Ladyship was in the minority in terms of the outcome of that case, the judges in the majority were in agreement with her exposition of the facts and the applicable law. The first three principles outlined in that judgment are as follows:

- (i) The Court should be satisfied that at the material time of making the 1995 Will the testatrix had a sound and disposing mind, memory and understanding, understood the nature of her act and its effects, the extent of the property of which she was disposing, and understood and appreciated the claims to which she ought to give effect. The testatrix must also have the capacity to comprehend the extent of her property and the nature of the claims of others whom by her will she is excluding from all participation in that property.***

- (ii) The mere capacity to communicate her testamentary wishes is not sufficient to discharge the burden of proof. There may be “testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A “disposing mind and memory” is***

¹ GDAHCVAP2010/012

one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions and the like...”

(iii) The principle emerging from the cases Pendock Barry Barry v James Butlin, W. Scott Fulton et al v Charles Batty Andrew et al and Wintle v Nye is that wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testatrix, the Court ought not to pronounce in favour of it unless the suspicion is removed. This principle is not confined to the single case in which a Will is prepared by or on the instructions of the person taking a large benefit under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the Will to remove such suspicion of the Court; and prove affirmatively that the testator knew and approved of the contents of the document. It is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the Will.

[52] In cases such as the present, there is a general difficulty in reconciling the dispute between the parties as there is no medical evidence of Ms. Sahely's mental condition at the time of the making of the will. Although the Court is entitled to rely on medical evidence before and after the execution, it is important to proceed with some measure of caution, as the Court ought not to be too quick to invalidate a will duly executed by a testator. Ultimately it is the testator's wishes which must matter most. The challenge is in determining whether what is contained in the will can be said to be a reflection of those wishes. That however depends on whether it can be said that the testator had the testamentary capacity to make the will in the first place. In the case of **Zorbas v Sidiropoulous (No 2)**², the following was highlighted regarding reliance on medical evidence in a bid to determine the issue of testamentary capacity:

² [2009] NSWCA 197

"Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording), of a detailed conversation with the deceased at the time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of such a conversation."

[53] Therefore the Court is to balance the medical evidence presented by the parties alongside the evidence of those who would have interacted with Ms. Sahely around the time of the execution of the will, in order to determine whether she was *non compos mentis*. Testamentary capacity is not merely a matter of medical science but a question of fact as to whether the testator ***"understood the nature of her act and its effects, the extent of the property of which she was disposing, and understood and appreciated the claims to which she ought to give effect."*** It is well established that even persons suffering from ailments such as dementia may, at moments of lucidity, be perfectly capable of executing a Last Will and Testament. However, if there are circumstances which give rise to a ***"well-grounded suspicion that it does not express the mind of the testatrix, the Court ought not to pronounce in favour of it unless the suspicion is removed."*** Once this well-grounded suspicion has been established, the burden of proving testamentary capacity shifts to those who would wish to argue in its favour.

[54] In the circumstances of the present case I am satisfied that there are facts which give rise to a well-grounded suspicion that the Last Will and Testament executed on 26th October, 2006 does not express the mind of Ms. Sahely. I say so for the following reasons:

- (a) The execution of the will took place in circumstances where Ms. Sahely had suffered a stroke and was involved in an accident which resulted in significant brain trauma. Six months later in September, 2006 she was diagnosed with dementia and displayed certain

signs of memory loss and poor concentration. With the exception of Mr. Astaphan and his sister Tressy, everyone who had visited Ms. Sahely with any measure of frequency, including Ms. Phipps, who was the manager of the elderly home where she resided, expressed significant doubt about the mental capacity of Ms. Sahely.

- (b) I also express significant doubt as to whether the dispositions in the will are even reflective of the very instructions Mr. Astaphan claimed to have been given by Ms. Sahely. When one examines what he said, even under cross examination, it seems that the instructions were for him to be placed as trustee over the assets to distribute to other members of the family. In the end the will made him the sole beneficiary. To further compound the issue, if Mr. Astaphan had pre-deceased Ms. Sahely, his son, who was a minor at the time, would have become her sole beneficiary. Yet at no point in the evidence did Mr. Astaphan or Mrs. Kelsick ever indicate that this was an express intention of Ms. Sahely. There is no evidence that Ms. Sahely ever mentioned Mr. Astaphan's son as a person she desired to benefit under her will. In fact, she seemed rather scathing in her taped conversation with Josephine about any of her property going to the benefit of Mr. Astaphan's son.
- (c) Further, and very importantly, the evidence clearly suggested that Mr. Astaphan had set about with the clear objective of dispossessing Ms. Sahely of her assets even before she was deceased. Whatever the accuracy of the allegation that Ms. Sahely had misappropriated company assets, it would be not only wrong in law, but wrong in ethics and morals, for her to be dispossessed of her property in this way without so much as a confrontation and an opportunity for her to defend herself. Mr. Astaphan is an attorney at law and ought to have known better. He claims to have been able to have had conversations with her regarding family and politics. She was lucid enough to read the documents and ask questions herself, but not enough to be honest with about his deep suspicions of her alleged impropriety.
- (d) I am of the view that the circumstances of this case are such that the golden rule of testamentary capacity ought to have been observed. As Edwards JA noted ***"[t]he Law imposes a heavy burden on a solicitor confronted with circumstances where an***

aged or seriously ill testatrix, or a testatrix with failing memory is giving him instructions, to prepare a will, or change the previous disposition in an existing will, or to make sweeping change from an earlier will.” Her Ladyship went on to note that ***“in the case of a testator who is elderly and/or seriously ill and/or at the point of death, the making of a will by such a testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings.”***

(e) The evidence presented in this case suggests, on balance, that although Mr. Hamilton was the executing attorney, he had never taken his instructions directly from Ms. Sahely. At no point did he meet with her in private, neither did he seem to have enquired at all about her medical and mental status prior to the execution of this will. In fact he seemed to have taken his instructions entirely from Mr. Astaphan who was his personal client. I do not accept that a list of lawyers was given to Ms. Sahely as Mr. Astaphan has stated. In addition to that, the evidence presented by Mr. Astaphan and Mrs. Kelsick indicates that the content of the will was never explained to Ms. Sahely. It would appear that she was left to read the document herself and make her own enquiries. When one considers the evidence of Ms. Phipps, who indicates that Ms. Sahely was hardly able to read and write legibly until after a year at the home, it is particularly troubling that she was left to read this document on her own rather than have it explained to her.

[55] Taking these facts into consideration, I am of the view that there is sufficient and well-grounded suspicion that the Last Will and Testament executed on 26th October, 2006 does not express the mind of Ms. Sahely. The document also completely ignores her sister Josephine, who she had specifically mentioned during her visit with Dr. Sahely and also at the Brimstone View Residential Care Home when she was agitated over persons wanting to get after those assets. At one point she seemed to have mentioned Josephine's inheritance. She also had a previous will, though not fully executed, which highlighted a number of persons whom she wished to benefit. These all raise significant suspicion in my mind about the authenticity of this document as a true reflection of Ms. Sahely's desires. The question is whether the Defendant

has presented sufficient evidence to disabuse the Court's mind of this suspicion. I am not of the view that he has.

[56] At the trial Mr. Astaphan confirmed his deep rooted view that Ms. Sahely had stolen assets from the family estates for her own purposes. He remained steadfast in the view that there was nothing wrong with his actions and desires to redistribute her assets even prior to her death. He did not see this as being in conflict with the trust and confidence Ms. Sahely had allegedly reposed in him. To my mind, Mr. Astaphan's demeanor in the witness box, though calm, did little to prove his own case. I also do not accept the evidence of Mrs. Kelsick when it comes to the circumstances under which the instructions were given to Mr. Astaphan. There were clear discussions taking place within the family as to what was to be done with Ms. Sahely's estate from the moment she was admitted into the home. I take Mr. Astaphan's point that he was not the only one who held that view, but that fact does not avail him much. To my mind, if persons were so concerned with Ms. Sahely's actions then they ought to have done something about it earlier. It would have been wrong to have waited until this lady was admitted to a home under these conditions to have leveled such significant allegations against her. In my view, these two witnesses for the Defence were the only persons who had interacted with Ms. Sahely who described her as being able to engage on such issues in this way. I do not accept this evidence as being truthful.

[57] I find it more than odd that Mr. Astaphan would have been perfectly comfortable in engaging Ms. Sahely in conversations which led to him being placed in charge of her affairs and yet not think it appropriate to express his own reservations to her and his intention to redistribute those very assets. If she was lucid enough to execute a will and power of attorney, then she certainly ought to have been lucid enough for him to have been honest with her about his views in relation to her propriety and honesty. It seems rather convenient that of all the family members visiting this institution to see Ms. Sahely, it was Mr. Astaphan, who was himself most concerned about the distribution of her assets, who was called upon to become the sole executor and beneficiary of her Last Will and Testament. He went as far as referring to this lady as a thief in emails and did little during the course of his evidence to satisfy the Court that the circumstances of his relationship with Ms. Sahely was such that this level of confidence

would have been naturally placed in him. Although the Court was in receipt of an unexecuted will allegedly drafted by Ms. Sahely in which Mr. Astaphan was one of three executors mentioned, this does little to alter the Court's views on the events which transpired after her accident. At the very least she may have been prepared to have Mr. Astaphan act as one of three executors and gave clear instructions on the disposition of her assets which are substantively different from what was contained in the will of 26th October, 2006. In the final analysis Mr. Astaphan became the sole executor and beneficiary in her estate in circumstances which are more than merely suspicious.

[58] Although Jason Kelsick's evidence may have had its contradictions, I accept him as being a generally truthful witness. He had a good relationship with Mr. Astaphan and Mrs. Kelsick is his mother. Yet this did not prevent him from expressing deep concern for what he had witnessed during his visit to Ms. Sahely with Mr. Astaphan. His observations of Ms. Sahely were consistent with the other witnesses and Ms. Phipps. I believe Mr. Kelsick where he states that Mr. Astaphan confided in him that Ms. Sahely would have executed a Last Will and Testament in his favour as she wouldn't know the difference. Mr. Kelsick's evidence also suggested that Mr. Astaphan had asked him to keep the ideas he expressed hidden from Josephine. I believe that, as the evidence suggests to me that Mr. Astaphan went through some trouble himself to keep certain key facts away from the knowledge of the rest of the family. He stated that he had destroyed the will and didn't know where it was. Yet within a matter of months he was able to obtain a grant of probate, even if only by presenting a copy of the will to the registry. By that time it seems he had also allegedly executed a Last Will and Testament himself which outlined what he thought needed to be done with the assets of Ms. Sahely in the event of his death. I find the actions of Mr. Astaphan in this case to be particularly troubling. His intentions seemed certainly contrary to Ms. Sahely's best interests.

[59] I accept the conclusions of Dr. Raffle. I do take into consideration that his evidence cannot state with any certainty what Ms. Sahely's mental condition was on the actual date of the execution of the Last Will and Testament. However, the medical evidence before and after the execution of the will clearly indicates that Ms. Sahely suffered from significant brain trauma. Six months later there were still signs of neurological deficiencies. At the very least a studious

attorney, if called upon to execute a Last Will and Testament in these circumstances, ought to have engaged the services of a medical practitioner to ascertain Ms. Sahely's condition on the date of the execution of these documents. It is not that failure to observe the golden rule is necessarily fatal to the pronouncement of a will's validity, but when put together with the other evidence in this case, I am of the firm view that it weighs very heavily against such a pronouncement.

Conclusion

[60] I therefore find in favour of the Claimants and pronounce against the validity of the Last Will and Testament executed on 26th October, 2006. I note that the Claimants had also hinged their case on undue influence. Given the views expressed on the will's validity I am not of the view that it is necessary to determine this aspect of the case. However, as it relates to the Grant of Letters of Administration. I am of the view that this is an administrative process which ought to be conducted by the registrar upon application by anyone who is so entitled. The process involves the filing of various documents and affidavits which are not now before me and it would be inappropriate to decide on the Claimants' right to make such an application at this stage. I am therefore not inclined to do so. This is however without prejudice to the Claimants' right, if they so desire, to apply to the Registrar for the Grant of Letters of Administration.

[61] In the circumstances I make the following orders and declarations:

- (a) The Last Will and Testament of Ms. Agnes Gwendoleyne Sahely dated 26th October, 2006 is deemed invalid for lack of testamentary capacity;
- (b) The Probate granted in the Estate of the late Agnes Gwendoleyne Sahely on 8th April, 2011 is hereby revoked;
- (c) The Claimant is entitled to prescribed costs to be calculated in accordance with the order of the Court dated 6th February, 2020;

- (d) The fees of the expert Dr. Stephen Raffle is to be separately assessed in accordance with the provisions of Rule 65.12 of the CPR in keeping with order dated 6th February, 2020. The Claimants are at liberty to apply for an assessment of these fees if the parties are unable to agree on the figure within a period of 21 days;
- (e) The Parties are to file Submissions on whether the costs of this Claim should be borne by the Defendant or by the Estate of the Ms. Agnes Gwendolayne Sahely within 14 days from today's date.

Ermin Moise
High Court Judge

By the Court

Registrar