

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2016/0026

BETWEEN:

GERALD ANTHONY DWYER ASTAPHAN

Claimant

and

LAUREN CUNDARI

Defendant

Appearances:

Mr. Brian Barnes and Ms. Michelle Slack for the Claimant

Mr. Leslie Haynes Q.C., with him, Mr. Sylvester Anthony, Mrs. Angelina Gracy
Sookoo-Bobb and Ms. Renal Edwards for the Defendant

2019: October 7-12
October 12

ORAL JUDGMENT

- [1] **VENTOSE, J.:** The Claimant and Defendant are siblings. They are the son and daughter of Mrs. Josephine Astaphan, the matriarch of the Astaphan family. These proceedings relate to the challenge by the Claimant of the 2007 Will executed by Mrs. Astaphan. The question that essentially arises for determination is whether the 2007 Will should be declared void for the reasons as alleged by the Claimant in his statement of claim.
- [2] The Claimant filed a fixed date claim form on 29 January 2016 seeking a declaration that the will of Mrs. Josephine Astaphan dated 4 May 2007 (the “**2007 Will**”) is void and of no effect it being executed without the knowledge and

approval of Mrs. Astaphan; that the 2007 Will had been procured by undue influence and ought to be set aside; that Mrs. Astaphan was coerced and/or unduly influenced from revoking the 2007 Will; and that the will dated 4 March 2004 be confirmed as the last will of Mrs. Astaphan. The Defendant filed a defence and a counterclaim in which she claimed that Mrs. Astaphan was of sound mind and understanding when she made the 2007 Will and it was made of her own free will and volition and was not procured by undue influence of the Defendant; that Mrs. Astaphan was mentally and medically competent to make the 2007 Will; and that the 2007 Will was drafted by competent and independent counsel of reputable character and was executed in the absence of the Defendant and was executed on the independent wishes of Mrs. Astaphan. The Defendant also claimed that she never abused Mrs. Astaphan physically, mentally, emotionally or otherwise, and that Mrs. Astaphan was never under the exclusive control of the Defendant, and that the court should pronounce in favour of the validity of the 2007 Will.

The Evidence of the Claimant

- [3] It was the evidence of all the parties including the Claimant that Mrs. Astaphan was a strong-willed lady and that she was someone who would speak her mind. I have no doubt that if Mrs. Astaphan did not wish something to happen, she would ensure that it did not. She had resources at her disposal, so this was not an issue. I have no doubt that the Defendant did not exert any undue influence on Mrs. Astaphan. Mrs. Astaphan had the right to dispose of her assets as she wished. That she changed her will in 2007 is not of itself a reason to suggest that something was wrong with her decision. The fact that persons were left out of the 2007 Will is not a reason for thinking that something is wrong. The Claimant has provided no evidence to suggest that there is anything suspicious in the making by Mrs. Astaphan of the 2007 Will
- [4] The Claimant was cross-examined on the letters written by Mrs. Astaphan. He stated that he was not sure if it was her handwriting and that he is not certain that the letter was sent to him by Mrs. Astaphan. I accept that the letters were written by Mrs. Astaphan. The Claimant gave evidence about the call made by the

Defendant when Mrs. Astaphan was having lunch at his house. She was brought there by Mrs. Kelsick-Astaphan. The Claimant was granted leeway to add substantially to his evidence during cross-examination, much of which did not feature in his witness statement. In one example, when this was put to him, the Claimant merely replied that this was an oversight; but that it was the truth. The Claimant failed to answer questions directly often deflecting questions for most of his cross-examination, and mostly going off tangent on matters not relevant to the question asked. The Claimant was not able to identify any documents in trial bundle three (3) that Mrs. Astaphan signed without knowing what she was signing.

[5] I do not find that the Defendant exerted any undue influence over Mrs. Astaphan and her concerns in respect of Mrs. Astaphan signing any document or having the meeting with Mr. Vernon Viera seems in the circumstances understandable. I do not believe that Mrs. Astaphan was prevented by the Defendant from doing as she wished. In addition, the dispute in the family in relation to the estate of Ms. Gwendolayne Sahely I believe would perfectly explain why the Defendant would be concerned when she called from Paris to find out that Mrs. Astaphan was having lunch at the Claimant's house with Mrs. Astaphan-Kelsick, their sister. I do not believe that the words used were as expressed by the Defendant or that Mrs. Astaphan reacted in the manner as recounted by the Claimant.

[6] The Claimant accepted in cross-examination that there were no instances of actual physical abuse by the Defendant on Mrs. Astaphan in his witness statement. Yet he insists he has seen instances of physical abuse. I do not believe the Claimant is telling the truth. When asked by Counsel for the Defendant to point out instances of verbal abuse, the Claimant only pointed out one instance in 2009 when the Defendant called his house from Paris. I do not accept that the Defendant used those words to Mrs. Astaphan although she may have expressed her disappointment at Mrs. Astaphan being there. When asked to point out examples where the Defendant acted in a hostile and dismissive manner towards Mrs. Astaphan, the Claimant could only reply that it can be supplied in the evidence, failing to appreciate that his witness statement is his evidence in chief.

- [7] In addition, the Claimant accepted that the Defendant was not always around Mrs. Astaphan, for example, when the Defendant went to France in 2009 and asked Mrs. Astaphan-Kelsick to take care of Mrs. Astaphan while she (Mrs. Astaphan) was at the house of Mr. Damian Kelsick and his wife. The Claimant also accepted that the Defendant's increased presence in the life of Mrs. Astaphan coincided with the deterioration in the health of Mrs. Astaphan. When asked whether the Defendant influenced Mrs. Astaphan to leave 10% of her estate to the two sons of Mr. Damian Kelsick, he responded that the Defendant would have influenced her not to give them more. The Claimant insisted that those who were included in the 2004 will but left out of the 2007 Will was the result of the full and effective control the Defendant had over Mrs. Astaphan. I do not accept this.
- [8] The Claimant gave the names of employees who he said witnessed actual physical violence on Mrs. Astaphan by the Defendant but stated that they did not wish to be part of the claim. When informed by Counsel for the Defendant of the witness summons process, the Claimant replies that he did not summon them and respected their sense of discomfort. The Claimant responded in the same manner in respect of the health care professionals who he states witnessed the actual physical abuse. I do not believe that any employees or health care professionals witnessed any actual physical abuse or otherwise of Mrs. Astaphan by the Defendant. I also do not believe the Claimant witnessed any actual physical abuse. If he had done so, he would have included it in his witness statement or given specific examples while giving evidence at trial. The Claimant invented that allegation in my view. I agree with Counsel for the Defendant that the one example that the Claimant was able to point to as alleged verbal abuse was merely a raised voice. This is not uncommon in families where persons are strong willed and opinionated. It was not an indication of dominance and or control as the Claimant states.
- [9] What is striking is that the Claimant paints a picture that Mrs. Astaphan was subject to this verbal abuse from the Defendant. Moreover, he states that she was also subject to actual physical abuse. But when asked what action if any he took to

remedy this, he said he did not discuss this at all with the Defendant and that he took no actions whatsoever. It was not unreasonable in the circumstances for the Defendant to advise Mrs. Astaphan not to sign any document with the Claimant and Mrs. Astaphan-Kelsick present. It was put to the Claimant by Counsel for the Defendant that he took no steps in relation to the allegation of abuse because they were not true. I agree.

[10] The Claimant did not deny that the email dated 25 August 2008 was written by him recounting to his siblings and cousins the telephone conversation he had with Mrs. Astaphan. He stated that the impression he got was that Mrs. Astaphan was acting under the influence of the Defendant. I do not accept that evidence.

[11] Having heard the evidence of the Claimant, first, I am not satisfied that the Defendant was controlling, cruel and abusive to Mrs. Astaphan, or that Mrs. Astaphan was fearful of the Defendant. The Claimant provided no evidence of instances of actual physical and verbal abuse exerted on Mrs. Astaphan by the Defendant. The Claimant mentions names of employees, health care professionals and family members but none of them provided evidence to the court. The Claimant provided no first-hand experience of any of those matters. While Mrs. Astaphan was elderly and needed medical attention that was being provided in Canada, it would be shocking indeed if that alone would justify leaving her in the care of the Defendant who the Claimant stated in evidence was physically abusive to Mrs. Astaphan. This is a serious allegation. The Claimant has not provided any evidence of this to the court and I reject it completely. The Claimant's very general and bald statements in his witness statement were not corroborated by any substantial evidence or evidence at all that he could provide to the court to explain the allegations that he had made.

The Evidence of Lana Kelsick-McMaster

[12] Mrs. Kelsick-McMaster gave evidence that Mrs. Astaphan, when her oxygen tank began to alarm, told her not to call the Defendant because the Defendant would overreact. I accept this but for the reasons given by the Defendant who states that her overreaction was essentially for the welfare of Mrs. Astaphan. I do not believe

that Mrs. Astaphan made the comments attributed to her by Mrs. Kelsick-McMaster. The statement that Mrs. Astaphan checked to see if the Defendant, who was not in the car, could hear the conversation, is unlikely to be true. During cross-examination Mrs. Kelsick-McMaster stated that Mrs. Astaphan checked behind approximately three times to see if the Defendant was there. This evidence is puzzling because the Defendant was in another vehicle, either behind or in front. Why would Mrs. Astaphan look back to see if the Defendant was there? There was no suggestion by any of the parties, including the Claimant, that Mrs. Astaphan was of unsound mind. I believe this evidence to be contrived and I reject it.

- [13] When the oxygen tank started to alarm, Mrs. Kelsick-McMaster stated that Mrs. Astaphan said not to call the Defendant because the Defendant would overreact. In isolation, this may be significant but as explained by the Defendant that her overreaction related to her fear of the death of Mrs. Astaphan – it is a perfectly understandable and reasonable reaction. I see nothing inherently wrong with that statement. Mrs. Kelsick-McMaster's conclusion that Mrs. Astaphan was afraid of the Defendant because of that statement is unfounded. I also reject it as contrived.

The Evidence of Daisy Archibald

- [14] Ms. Archibald in her evidence could not give many concrete examples of the abusive, harsh, and disrespectful and intimidating manner in which she alleged the Defendant spoke to Mrs. Astaphan. She merely gave details of an incident concerning the bathing of Mrs. Astaphan and the alleged use by the Defendant of obscene language towards Mrs. Astaphan. It was only during cross-examination that Ms. Archibald mentioned that this incident took place on the day when a lawyer visited the home of Mr. Damian Kelsick and his wife. She gave evidence that when the lawyer left, the Defendant took Mrs. Astaphan to the living room where the expletives were allegedly used. Ms. Archibald accepted that it was the Defendant who attended to the administration of the medication to Mrs. Astaphan. Ms. Archibald did not impress me as a truthful witness, and I do not believe that the incident of which she gave evidence actually took place. She failed to provide clear examples of her bald statement that on several occasions she witnessed the

Defendant speak in a very harsh, abusive, disrespectful and intimidating manner to Mrs. Astaphan.

The Meeting with Emile Ferdinand QC

- [15] Mr. Ferdinand gave evidence that in 2010 he met with Mrs. Astaphan to discuss with her something at the home of her nephew, Mr. Damian Kelsick. They had a general discussion and one about her gift options. He stated that the Defendant came close to them (he and Mrs. Astaphan) so as to overhear the discussions. On asking Mrs. Astaphan if she was comfortable with this, Mrs. Astaphan replied "It's OK". I place no reliance on his evidence as it reveals nothing of significance in this case. No doubt if Mrs. Astaphan wanted privacy away from the Defendant, she would have arranged to meet Mr. Ferdinand at his office.
- [16] In cross-examination, Mr. Ferdinand stated that it was not correct for the Defendant to say that she was not in the area where he was speaking to Mrs. Astaphan. He stated that the Defendant was positioning herself close to hear the conversation with Mrs. Astaphan but that the place was open plan and he did not see this as sinister. Mr. Ferdinand also stated that he did not notice anything about Mrs. Astaphan when the Defendant was present. He stated he was not absolutely certain that Mrs. Astaphan continued the conversation with him as if the Defendant was not there. Counsel for the Defendant suggested to Mr. Ferdinand that if the Defendant was present and Mrs. Astaphan had stopped talking or had abruptly changed the topic that was something about which he would have made a mental note. He replied: "I think you are correct". When asked if the gift scenarios presented to him by Mrs. Astaphan were prompted by the Defendant, Mr. Ferdinand replied: "certainly not verbally". Mr. Ferdinand agreed that he did not notice the Defendant prompting Mrs. Astaphan in a non-verbal way. He concluded that Mrs. Astaphan had not communicated any gifts to him as this was not the purpose of the meeting.
- [17] The Claimant on cross-examination indicated that Mr. Ferdinand told him that Mrs. Astaphan wanted to meet him to change her 2007 Will. Mr. Ferdinand stated that

he did not tell anyone that Mrs. Astaphan wanted to change her 2007 Will under any circumstances.

The Meeting with Vernon Veira

[18] Both the Claimant and Mrs. Astaphan-Kelsick recount the story in relation to the meeting with Mr. Veira. While the Defendant was in France on another occasion Mrs. Astaphan told the Claimant that she had a legal matter to attend to and he recommended Mr. Veira, an Attorney-at-Law, and Mrs. Astaphan-Kelsick contacted Mr. Veira. Mr. Veira visited Ms. Astaphan at the J. Astaphan Store on Church Street. He states that Mrs. Astaphan gave Mr. Veira instructions, but he was not aware of what they were. The Claimant gives evidence that while the meeting was taking place, the Defendant called and, after being informed that Mr. Veira was present, told Mrs. Astaphan not to sign any document without the Defendant being present and without the Defendant's permission. The Claimant on being informed of this, went to the J. Astaphan store and spoke to Mrs. Astaphan who, he said, told him that the Defendant prevented her from discussing the matter with Mr. Veira.

[19] I do not accept the way in which the Claimant and Mrs. Astaphan-Kelsick have recounted what happened. I accept the evidence of the Defendant that she expressed concern in all the circumstances because it was the Claimant and Mrs. Astaphan-Kelsick with Mrs. Astaphan and an Attorney-at-Law present. In light of her history with the Claimant and Mrs. Astaphan-Kelsick, it seems to me natural that her sense of protection of Mrs. Astaphan would be heightened. I accept that the Defendant advised Mrs. Astaphan not to sign any documents unless she informed Mr. Damian Kelsick of what she was doing, and that Mrs. Astaphan exercised her own judgement and free will to follow that advice. This is not evidence of any control by the Defendant over Mrs. Astaphan as the Claimant states.

The Evidence of Karen Astaphan-Kelsick

- [20] Mrs. Astaphan-Kelsick gave evidence at trial in general terms about the change in Mrs. Astaphan's behavior and that the Claimant was demanding of Mrs. Astaphan. Mrs. Astaphan was an elderly lady with some health issues. It is understandable that as the years went by, she could not travel alone and was using a wheelchair a lot of the time. The evidence of Mrs. Astaphan-Kelsick was full of unsupported allegations which I do not believe. It may well be true that Mrs. Astaphan started to cry because she had to return to Canada, but she is from St. Kitts and Nevis and was living in Canada far away from the place of her birth. I do not believe the evidence of Mrs. Astaphan-Kelsick.
- [21] During cross-examination, Mrs. Astaphan-Kelsick indicated that she merely told Mrs. Astaphan that she could come live with her but that there was no one else with whom Mrs. Astaphan could live in Canada. She accepted that the Defendant was the default position and that there were other family members living in Canada around that time. Mrs. Astaphan-Kelsick in cross-examination stated that the Defendant had no children and did not work, and therefore had more time to look after Mrs. Astaphan, and that the other members of the family had their jobs; and that the Defendant was the obvious person to take care of Mrs. Astaphan. Mrs. Astaphan-Kelsick accepted that she was already in St. Kitts to work in the store when she was asked by the Defendant to look after Mrs. Astaphan when the Defendant went to Paris. When she took care of Mrs. Astaphan that week, Mrs. Astaphan-Kelsick slept in the same room as Mrs. Astaphan who slept in a recliner. Mrs. Astaphan was fearful of her mortality and needed company at nights. Mrs. Astaphan-Kelsick accepted that the Defendant gave her instructions concerning the medication for Mrs. Astaphan while she (the Defendant) was in Paris.
- [22] When asked why she did not do more in light of what she believed of the treatment of Mrs. Astaphan by the Defendant, Mrs. Astaphan-Kelsick replied that she tried to convince the Defendant to let Mrs. Astaphan stay in St. Kitts and that in retrospect the family should have done more. I do not believe the evidence of Mrs. Astaphan-Kelsick that the Defendant treated Mrs. Astaphan in any improper manner. I also

do not accept that any of the words allegedly spoken by Mrs. Astaphan to Mrs. Astaphan-Kelsick were those of Mrs. Astaphan. I believe it was invented by Mrs. Astaphan-Kelsick together with the Claimant for the purpose of these proceedings. It is no strange coincidence that Mrs. Astaphan-Kelsick believed that the letters, which she accepts were in Mrs. Astaphan's handwriting, read like they were being dictated and that Mrs. Astaphan would not express herself in that manner. This is remarkably similar to the response given by the Claimant. I do not accept it.

The Evidence of Janice Morton

- [23] Ms. Morton gave evidence that she noticed that, especially during the last five to six years of her life, Mrs. Astaphan was under the influence and control of the Claimant in any decision she would take in relation to the company affairs. However, she admitted that during the last five to six years of the life of Mrs. Astaphan she was no longer working at George Sahely & Company Limited. She then stated that it was during the last five to six years of working at George Sahely & Company Limited. Ms. Morton gave no evidence of any undue influence. She mentioned that at a staff meeting, the Defendant did all the talking and that Mrs. Astaphan said nothing. I do not believe any of the evidence of Ms. Morton.
- [24] During Cross-examination, Ms. Morton accepted that she did not interact frequently with Mrs. Astaphan when she (Mrs. Astaphan) visited St. Kitts. She testified that she signed the witness statement at the office of the Claimant and not at the office of the Attorney-at-Law on record for the Claimant. Ms. Morton also gave evidence that she spoke to the Claimant on that day at his office. Ms. Morton accepted that Mrs. Astaphan was under the control of the Defendant because Mrs. Astaphan said nothing when the Defendant gave orders at the store. She provided evidence that she followed those instructions but did not obey them when the Defendant gave her an instruction in the absence of Mrs. Astaphan. She also stated during the trial that at one point in the store the Defendant told Mrs. Astaphan to shut up when Mrs. Astaphan asked her how sales in the store were. This evidence is so strange that I do not accept it. In the circumstances, I do not

see any rational basis for the Defendant to have made that statement. This evidence is rejected, as is all the evidence of Ms. Morton.

The Evidence of the Defendant

- [25] The Defendant gave evidence that she travelled between St. Kitts and Canada regularly. At times she travelled with Mrs. Astaphan, sometimes thrice a year. The Defendant was a forthright witness who answered questions directly and with ease. I accept her evidence that she treated Mrs. Astaphan with love and affection. I also agree that she was the primary care giver to Mrs. Astaphan, and this plainly explains why she would have a greater involvement in the affairs of Mrs. Astaphan. The Defendant was the one with whom Mrs. Astaphan lived, and since 2006 after the death of her son, Mrs. Astaphan, who feared her mortality, needed someone around her most if not all of the time especially at nights. It was accepted that Mrs. Astaphan did not sleep in her own bed but on a recliner chair. I accept the Defendant's evidence that she was never controlling, coercive, cruel or in any way abusive to Mrs. Astaphan.
- [26] It is clear based on the evidence presented in court that each member of the Astaphan family is independent minded; so too both the Claimant and Defendant. No doubt they inherited this from their mother, Mrs. Astaphan. I accept that Mrs. Astaphan was capable of making her own decisions relating to her finances or otherwise. The evidence of the Defendant was able to withstand the cross-examination by Counsel for the Claimant. She remained consistent with her answers and I believe her evidence and that she is a witness to the truth. The Defendant answered directly and fully to all questions posed to her and provided reasonable and what I believe to be truthful answers.
- [27] I accept that the Defendant had good reason to request Mrs. Astaphan-Kelsick to be with Mrs. Astaphan while she was in France in light of her concerns relating to the administration of medication to Mrs. Astaphan while she was at the home of Mr. Damian Kelsick and his wife. I also accept that the emails (pages 42-45 of trial bundle three) written by the Defendant were done with the knowledge of and on behalf of Mrs. Astaphan or that the emails were sent with the consent and

knowledge of Mrs. Astaphan. I do not accept that any of the letters written by Mrs. Astaphan were written by her on the instructions of, or the control or undue influence of, the Defendant. While these letters might reflect the position of the Defendant, I accept unreservedly that they were the views and words of only Mrs. Astaphan. I do not accept that the Defendant was using Mrs. Astaphan to wage war against the Claimant. The evidence shows that Mrs. Astaphan was capable of putting her views as she wished to anyone, as is clear in the letters she wrote and the telephone conversation she had with the Claimant which is recorded in the email from the Claimant to family members and cousins on 25 August 2008. I accept the Claimant's evidence that it was Mr. Damian Kelsick who arranged for Mrs. Astaphan to visit Mr. Anthony Gonsalves Q.C.

[28] I do not accept that the Defendant went on a tirade on the telephone with Mrs. Astaphan in 2009. She stated in cross-examination that she was angry and had a raised voice and expressed her concern that Mrs. Astaphan was at the Claimant's house and again on the other occasion when she telephoned and Mr. Viera was also there. She stated it caused her concern because she had reason to not trust the Claimant and Mrs. Astaphan-Kelsick and that her anger was directed at them only. I accept that evidence. I also accept that the Defendant told Mrs. Astaphan not to sign any document unless she spoke first with Mr. Damian Kelsick. I do not accept that by advising Mrs. Astaphan in this way, the Defendant was exercising any form of control over Mrs. Astaphan. I do not accept that Mrs. Astaphan was fearful of the Defendant. I do not accept that the Defendant dictated any of the letters written by Mrs. Astaphan. Even if the Claimant may not have received the letters, which I doubt, it does not undermine the fact that they were letters written by Mrs. Astaphan to him.

[29] I do not accept that the Defendant dictated what documents Mrs. Astaphan could or could not sign. I accept her evidence that she offered her advice and Mrs. Astaphan exercising her own independent will and judgement followed that advice. I do not accept that the Defendant physically or verbally abused Mrs. Astaphan. I do not accept that the 2006, 2008 or 2010 reports by Dr. Sirman were prepared in

anticipation of these proceedings in which Mrs. Cundari is the Defendant. I do not accept that the Defendant used swear words to Mrs. Astaphan.

- [30] As I mentioned above, the Defendant impressed me as a witness to the truth. She answered questions forthrightly without hesitation. I believe her evidence that she did not control Mrs. Astaphan, exercise any undue influence over her or subdued Mrs. Astaphan to act in accordance with her wishes.

The Evidence of Anthony Gonsalves QC

- [31] Mr. Gonsalves gave evidence that, on the request of Mr. Damian Kelsick, he met Mrs. Astaphan in May 2007. She visited his office and was in the conference room alone and she gave him directions as to who should be the executors, and the portion that each beneficiary should receive. The 2007 Will was signed in the presence of Mr. Gonsalves and Ms. Parry. Mr. Gonsalves gave evidence that her demeanor on the day seemed fine and there was nothing to suggest to him that she was preparing the 2007 Will under pressure or duress or was being influenced by any person. I accept this evidence in full.

The Evidence of Sonya Parry

- [32] Ms. Parry gave evidence that she witnessed the execution of the 2007 Will and only Mrs. Astaphan and Mr. Gonsalves were in the room. She gave evidence that Mrs. Astaphan was jovial and that there was nothing in her demeanor to indicate that she had any discomfort or that she was suffering from any defect of any kind which would prohibit her from having testamentary capacity to sign the will. I accept this evidence in full.

The Evidence of Shermel Jeffers

- [33] Ms. Jeffers gave evidence that she never saw the Defendant strike Mrs. Astaphan in the store or elsewhere and that she never saw Mrs. Astaphan act as if she was afraid of the Defendant. Her observation was that their relationship was one of love in the way the Defendant took care of Mrs. Astaphan and the way in which

Mrs. Astaphan reacted to the caretaking by the Defendant. Nothing in cross-examination undermined the evidence of Ms. Jeffers. I accept her evidence in full.

The Evidence of Sarah Nisbett-Delany

- [34] Mrs. Nisbett-Delany gave evidence that she never saw the Defendant strike or abuse Mrs. Astaphan. She gave evidence that she never personally witnessed the Defendant anger striking Mrs. Astaphan. Mrs. Nisbett-Delany has been working at J. Astaphan Store since 1980, approximately 40 years. During cross-examination she stated that during those approximately 40 years, she only once saw the Defendant hold the hair of Mrs. Astaphan. Mrs. Nisbett-Delany did not provide any details of the manner in which the Defendant held Mrs. Astaphan's hair or the purpose for which her hair was held. There was no indication when this happened during the 40 years. Did it happen when the Defendant was 22 or 23 years old in 1980 or did it happen in the year Mrs. Astaphan died? The court is unable to make a determination on this and this was not expanded upon during her cross-examination. I, therefore, attach no significance to it. She gave evidence that the Defendant never used swear words in front of Mrs. Astaphan and that the Defendant spoke hard but sometimes people do that. I accept her evidence in full.

The Issue of Testamentary Capacity

- [35] At trial during cross-examination, the Claimant insisted on more than one occasion that his claim against the Defendant was not in relation to testamentary capacity but solely that of undue influence. The Claimant did not accept under cross examination that his witness statement did not deal with the testamentary capacity of Mrs. Astaphan. He insisted that it was not included in his witness statement. The Claimant stated that documents were put in front of Mrs. Astaphan to accept as her own not knowing what she was asked to sign or approve. However, the Claimant could not point to anything in his witness statement to substantiate his claim that Mrs. Astaphan did not have knowledge of what she signed. The Claimant then asserted that the matter of mental capacity is not part of his case and is not part of his argument. In his view, his case was about undue influence.

He reiterated that undue influence is at the center of his case. The Claimant stated that he attached no weight to the 2006, 2008 and 2010 reports of Dr. Sirman.

[36] In his claim, the Claimant stated that the 2007 Will was executed without the knowledge and approval of Mrs. Astaphan. In the particulars of this, the Claimant avers that Mrs. Astaphan was of an extreme age, and of poor health during the execution of the 2007 Will, and that, at the time, Mrs. Astaphan was physically unwell and dependent on the Defendant.

[37] The Defendant had filed an application to call Dr. Sirman as an expert witness and this was opposed by the Claimant. The Claimant opposed the application on the basis that the application was irrelevant as his claim was not based on testamentary capacity. The court in its judgment interpreted the claim as suggesting that Mrs. Astaphan did not have a sound and disposing mind when she made the 2007 Will. The Claimant did not appeal that finding of the court based on the pleadings. Based on the finding of the court that the Claimant's claim can be interpreted, and the court interpreted it, as having the meaning that Mrs. Astaphan lacked testamentary capacity, it was incumbent on the Claimant to amend his statement of case clearly to ensure that there was one meaning and that that meaning was the one that the Claimant supports. The Claimant failed to do so, which meant it was necessary for the Defendant to lead evidence at trial to show that Mrs. Astaphan did have the testamentary capacity to execute the 2007 Will.

[38] The 2006 assessment of Dr. Sirman, after having conducted various tests on Mrs. Astaphan relating to her psychiatric state, found that she did not suffer from any formal psychiatric disorder, and found her to be mentally competent to administrate her own estate, make all kinds of financial decisions, as well as showing testamentary capacity. He continued that she was able to make up her will and instruct legal authorities as to the dispersion of her money and property. The 2008 assessment showed that Mrs. Astaphan demonstrated exceptional competence in relation to testamentary capacity. In the 2010 assessment, Dr. Sirman was informed by Mrs. Astaphan of the names of the beneficiaries as her own children and she informed him that she will be leaving more to the daughter

who had been taking care of her for years, and that this was her wish and she was in no way being pressured to do so.

[39] Counsel for the Claimant, although conceding that the Claimant's case was not about testamentary capacity, still cross-examined Dr. Sirman. Nothing in the cross-examination undermined the findings in Dr. Sirman's expert report. The expert report confirmed the independent nature of the three evaluations and that the Defendant played no part in recommending Mrs. Astaphan to undertake them, and also played no part in the actual assessment except to confirm to Dr. Sirman matters which Mrs. Astaphan would have indicated to him in her confidential examination, which, in fact, is part of the assessment itself.

[40] Dr. Sirman gave evidence that he was asked to do the reports by Dr. Greenwald, the family physician. This is indicated on the report. Dr. Sirman testified that by family physician he means the doctor to whom the patient goes for all kinds of reasons. I also accept the evidence of Dr. Sirman that the standard examination of Mrs. Astaphan was conducted in private and was confidential. There was nothing that arose during cross-examination to doubt the accuracy of the 2006, 2008 or 2010 assessments of Mrs. Astaphan by Dr. Sirman, which I accept in full.

The Video and Transcript Evidence

[41] The court admitted the video and transcript into evidence notwithstanding the manner in which the video was obtained by the Claimant. It is of highly probative value. It was recorded sometime in January or February 2010, approximately a year before Mrs. Astaphan died. It confirmed that the Claimant states clearly, he has no problem with the Defendant, which he stated twice. He states he has worked with her and that he learnt a lot from her. This in my view contradicts the Claimant's evidence that the Defendant verbally and physically abused Mrs. Astaphan and that the Defendant exercised undue influence over Mrs. Astaphan.

[42] The Claimant also gives Mrs. Astaphan advice as follows: "And then you can leave the property to whoever you want. It is yours. Who ain't get that is their damn business. You don't owe your children anything., maybe Lauren you owe

something, because Lauren has taken care of you. And I would hope that whatever you are doing in terms of your will or asset, Lauren gets a significant, you could give her all. It is yours. Nobody can begrudge Lauren for that". This statement is significant because, first, the Claimant recognized correctly that Mrs. Astaphan can give her property to whomsoever she wishes. Second, that Mrs. Astaphan owes the Defendant something because the Defendant has taken care of her. Third, the manner in which the Defendant has taken care of Mrs. Astaphan is over and above that of anyone else in the family. Fourth, he advises Mrs. Astaphan specifically that she can give the Defendant a significant share in light of what the Defendant has done for her. Fifth, he goes further by stating that Mrs. Astaphan can give all her assets to the Defendant. Sixth, that no one can begrudge the Defendant if she receives either a significant share or all of the assets in Mrs. Astaphan will because of what the Defendant has done for Mrs. Astaphan is significantly over and above that of all the other members of the family. The Claimant cannot seriously argue in light of these statements that the Defendant undue influenced Mrs. Astaphan in making the 2007 Will. The Defendant merely replies that she does not want anything.

- [43] The Claimant returns to this theme again and says to Mrs. Astaphan: "You have life. Take what is yours and enjoy it. You do not have to account to anybody. Either who you want to give whoever you want to give everything you have it is Lauren or Lauren and this or Lauren that. It is yours, damn well yours. Okay. Damian has been there for you. It is yours. Everybody big let them go and work." The Claimant is making it clear to Mrs. Astaphan that: (1) she does not have to account to anyone; (2) she can give her assets to anyone she wishes; (3) she can give all of her assets to the Defendant; or (4) she can share her assets between the Defendant and anyone else; (5) Mr. Damian Kelsick has been there for her and presumably should be left something; and (6) by implication she does not need to leave anything to most if not all family members because they are big and can go and work.

- [44] The Claimant continues, yet again, informing Mrs. Astaphan that “Your father and them give you something. Your father and mother give you thing, and you work for things, okay. What else you must do for us. You send us school. What else must do for us? You have helped me a lot of time in my politics. Helped me with money. You helped me. I can’t expect you to give me anything. You gave me everything. I can’t vex if you give Lauren everything you have. Never be vex. God will punish me for that”. The Defendant replies that she does not want everything to which the Claimant replied “or whatever. You understand what I am telling you. It is yours. And who is going to be vex for that, that is the devil in them. Let them roast in hell.” In these further statements, the Claimant is indicating to Mrs. Astaphan that: (1) she has done all that she can do for her children; (2) she has assisted him with money; (3) **he does not expect her to give him anything**; (4) she has already given him everything; (5) he cannot be angry if she gave the Defendant all her assets (which he repeats twice); and (6) God will punish him if he was ever to be angry.
- [45] The Claimant continues by questioning Mrs. Astaphan and making sure she understands clearly what he is saying repeating that: (1) her assets are hers; (2) who would be angry if she gave the Defendant everything; (3) if anyone was vex, it was the devil in them making them angry; and (4) they should roast in hell if they were angry if she gave the Defendant everything she owns. The words, although they needed no explanation, show clearly that the Claimant was indicating to Mrs. Astaphan that no one should be angry if she exercised one of her options in her will to leave everything she owns to the Defendant.
- [46] During cross-examination, the Claimant insisted that during the January or February 2010 meeting, Mrs. Astaphan was under the influence of the Defendant. This is not borne out by viewing the recording. When questioned about his statement to Mrs. Astaphan that she can do whatever she wants with her property or assets, the Claimant responded that a testator could give away her assets in the absence of undue influence. The Claimant disagreed with Counsel for the Defendant who put it to him that he gave Mrs. Astaphan specific advice as to how

to bequeath her property. The Claimant stated that he was not vex that the Defendant got an increased share. The Claimant accepted that he did not mention that Mrs. Astaphan was under the influence of the Defendant at the meeting because he felt he did not have to.

The Letters from Mrs. Astaphan to the Claimant

- [47] The Defendant tendered in evidence letters from Mrs. Astaphan to various persons including the Claimant. The Claimant did not wish to state that it was Mrs. Astaphan's handwriting but this was confirmed by Mrs. Astaphan Kelsick, although both she and the Claimant gave evidence that the tone of the letter did not suggest that it was from Mrs. Astaphan. I accept that the letters were actually written by Mrs. Astaphan, and not dictated to her by the Defendant as Mrs. Astaphan-Kelsick suggested. It seems clear that when Mrs. Astaphan was writing in an official capacity, she wrote her signature and when she wrote to her children, or the Claimant in particular, she did not append her signature to the letter. I have no doubt about the authenticity of the letters which was not challenged by the Claimant.
- [48] The Claimant avoided speaking to the substance of the letters written to him by Mrs. Astaphan but focused on the language and structure which he claimed he had never seen before in communication to him from Mrs. Astaphan. However, it was clear that Mrs. Astaphan spoke to the Claimant in very direct terms, as he reported in his email to his siblings and cousins dated 25 August 2008. There, the Claimant reported on a telephone conversation he had with Mrs. Astaphan where she instructed him to yield up the Power of Attorney that he had for Ms. Sahely. He noted that he felt a tension and anger in her voice and when he mentioned that to her, she responded by saying that if she had called to cuss him, she would have done so from the start. The Claimant continued stating that Mrs. Astaphan said that he no longer has any power, so nobody is afraid of him. He continued that Mrs. Astaphan informed him that she wants him to yield up the Power of Attorney and if he did not, she would take him to court. This conversation clearly shows that Mrs. Astaphan was capable of using strong language and was an independent

and strong-willed person. When confronted with this letter, the Claimant merely states that Mrs. Astaphan was under the influence of the Defendant. I do not believe this. It would be an odd thing indeed if anyone could show such anger and tension on behalf of someone else directing them to do so. The Claimant then conceded that Mrs. Astaphan signed some of the letters, but that if she did so, she did so under the influence of the Defendant. I reject this evidence.

[49] Mrs. Astaphan's letter to the Claimant dated 5 September 2008 is instructive. She writes the Claimant admonishing him that she is thoroughly disgusted with the foolish things being written. The barbs and accusations being hurled at the Defendant who has done only good and kind things for her (Mrs. Astaphan) as the matriarch of the family. This statement reveals, first, Mrs. Astaphan, again, is expressing her mind freely. Second, she is not pleased, to say the least, with the things being written. Third, she is also not pleased with the accusations being levelled at the Defendant who she states has only done good and kind things for her.

[50] Mrs. Astaphan continues that the Claimant keeps attacking the Defendant and asked: what in God's name has she done to you, and that the Defendant defended his child when Mrs. Astaphan-Kelsick accused him of going to the back of the store; and that the Defendant looked after her when it was very difficult. What is worthy of note is that Mrs. Astaphan is, first admonishing the Claimant for attacking the Defendant. Second, supporting the Defendant against those attacks. Third, reminding the Claimant that the Defendant has looked after her when it was difficult. Mrs. Astaphan continues that, first, she is not foolish even though the Claimant may think that she is; second, she is in her perfect senses; and, third, for the Claimant's information, the Defendant cannot control her. These statements, in my opinion, show a person who is strong willed and who makes it absolutely clear that she cannot be controlled by anyone including the Defendant. Mrs. Astaphan concludes that the Claimant continues to abuse the Defendant and that both are her children and that no one is better than the other.

[51] These letters in my view show that Mrs. Astaphan came to the defence of the Defendant from attacks on her by the Claimant and other persons in the family. This cannot be the actions of someone who was under any undue influence. Moreover, her letters reveal the depth of the animosity that the Claimant has towards the Defendant. Importantly, Mrs. Astaphan recognizes that the Defendant has only done good and has looked after her when it was difficult. Mrs. Astaphan is making specific reference to the manner in which she was cared for and treated by the Defendant and that reference is positive and seems grateful. She makes no reference to actual physical or verbal abuse, or any cruel or abusive behavior by the Defendant. I do not accept that the Defendant was verbally or physically abusive to Mrs. Astaphan. I do not find that the Defendant was controlling cruel or abusive to Mrs. Astaphan or that Mrs. Astaphan was fearful of the Defendant. I do not accept there was any apparent fear by Mrs. Astaphan of the Defendant.

[52] It is more likely than not that these allegations were invented by the Claimant with the assistance of his sister, Mrs. Astaphan-Kelsick, because they were both not included in the 2007 Will. The allegations seem concocted to prevent the persons who stood to benefit under the 2007 Will from receiving their inheritance in accordance with the wishes of Mrs. Astaphan. The Claimant reminded Mrs. Astaphan that she can give away her property to anyone, even all to the Defendant and no one should be vexed. What is clear is that the Claimant and Mrs. Astaphan-Kelsick became angry or vex because they were excluded from among the beneficiaries of the 2007 Will and invented the allegations, the subject of the claim.

The Other Documentary Evidence

[53] Counsel for the Claimant objected to the questioning of the Claimant in respect of the dispute surrounding the Will of Ms. Sahely. I allowed it. However, much of the documentation found in Trial Bundle 3 relates specifically to that dispute but was nonetheless included in the documents in evidence before the court. I make it clear that I have made no findings of fact in relation to any issue concerning the estate of Ms. Sahely. Also, I have not addressed any issue concerning whether

the Claimant had any motive for making this claim for it may require me to make pronouncements or findings on a matter that is set for trial in February 2020. In any event, a finding on his motive was not necessary for me to determine whether the Claimant had proven his case on the balance of probabilities. Moreover, while these documents provide context within which all the issues in this matter have taken place, this case is narrower in that it focusses on Mrs. Astaphan, whether she executed the 2007 Will under the undue influence of the Defendant; and whether the 2007 Will was executed without any knowledge and approval of Mrs. Astaphan. To answer these, I do not need to make, and have not made, any findings in relation to any issues or matters or otherwise concerning the estate of Ms. Sahely. In particular, the many emails although providing context to the wider dispute in the family were not material to the two issues that the court had to consider. I have not relied on them for the purpose of this decision.

The Execution of the 2007 Will

- [54] The evidence is clear that Mrs. Astaphan received advice from independent counsel when she executed the 2007 Will. The uncontroverted evidence of Mr. Gonsalves was that Mrs. Astaphan gave him directions as to who should be the executors, and the portion that each beneficiary should receive. He also stated that the demeanor of Mrs. Astaphan on the day seemed fine and there was nothing to suggest to him that she was preparing the 2007 Will under pressure or duress or was being influenced by any person. Ms. Parry gave evidence that she witnessed the execution of the 2007 Will and only Mrs. Astaphan and Mr. Gonsalves were in the room. She also gave evidence that Mrs. Astaphan was jovial and that there was nothing in her demeanor to indicate that she had any discomfort or that she was suffering from any defect of any kind which would prohibit her from having testamentary capacity to sign the will. I have no doubt that based on the evidence before the court and the evidence that I have already accepted above, there is nothing to show that Mrs. Astaphan was unduly influenced to execute the 2007 Will. That she received independent legal advice was not disputed by the Claimant.

Conclusion

- [55] While the Defendant has provided evidence of the motive the Claimant might have had to bring the proceedings, and although I heard evidence on it, it is not necessary for me to make any findings on this matter since in my view the Claimant has not provided sufficient evidence in all the circumstances on the balance of probabilities to justify the grant to him of the various orders that he seeks. The Claimant has failed to prove his case, and I wish to add that the evidence led by the Claimant falls woefully short in convincing me at all that there was any doubt concerning the validity of the 2007 Will.
- [56] Based on the evidence presented at trial, I find that, first, Mrs. Astaphan was of sound mind and understanding when she made the 2007 Will. Second, the 2007 Will was made of her own free will and volition. Third, the 2007 Will was not procured by any undue influence of the Defendant. Fourth, that Mrs. Astaphan was mentally and medically competent to make the 2007 Will. Fifth, the 2007 Will was drafted by competent and independent counsel of reputable character. Sixth, the 2007 Will was executed in the absence of the Defendant. Seventh, the 2007 Will was executed on the independent wishes of Mrs. Astaphan. Eighth, the Defendant never abused Mrs. Astaphan physically, mentally, emotionally or otherwise. Ninth, the 2007 Will was executed with the knowledge and approval of Mrs. Astaphan. Tenth, Mrs. Astaphan was not prevented from revoking the 2007 Will because of coercion or undue influence of the Defendant. Eleventh, Mrs. Astaphan was never under the control of the Defendant. The Claimant has failed to provide any evidence to substantiate the allegations made in his claim form and statement of claim and in his evidence at trial.
- [57] The Claimant has provided no evidence to the court to show that Mrs. Astaphan executed the 2007 Will without knowledge and approval. The evidence presented in court particularly the evidence of Dr. Sirman rejects this notion completely. I have found above that the Defendant did not exercise any form of coercion on Mrs. Astaphan when she executed the 2007 Will. As stated above, the examples given by the Claimant of undue influence were firstly not examples of undue

influence as I have found above, and secondly, they did not relate to the making of the 2007 Will because both examples came after the execution of the 2007 Will. They are not relevant evidence because they do not amount to undue influence as I have earlier found. The Claimant has not discharged the burden of proof by showing that the Defendant exercised any power over Mrs. Astaphan and that by means of that power, the 2007 Will was executed. There was no evidence of coercion exercised by the Defendant on Mrs. Astaphan in the execution of the 2007 Will. There is no evidence that Mrs. Astaphan, if she could speak, would have said “this is not my wish, but I must do it”. I find that the 2007 Will reflects the very clear wishes of Mrs. Astaphan and the court must give effect to them.

[58] In addition, the Claimant in his statement of claim states on at least six (6) different occasions that Mrs. Astaphan expressed the wish for her assets to be distributed to all her children including her grandchildren, Mr. Damian Kelsick and Mr. Jason Kelsick, on her death. However, the Claimant does not provide any evidence of those express wishes of Mrs. Astaphan. No evidence is provided of this in his witness statement or in his evidence in chief at trial; the Claimant merely repeats these bald assertions without any supporting evidence. Mrs. Astaphan Kelsick, the daughter of Mrs. Astaphan, also provided no evidence of any of those express wishes of Mrs. Astaphan. The Claimant has not, therefore, provided any evidence on which to base his claim that the 2007 Will does not accord with the express wishes of Mrs. Astaphan. Those statements having not been proven are rejected.

[59] The Claimant also states in the statement of claim that the 2007 Will is a marked departure from the 2004 Will. The Claimant has also not provided any evidence that Mrs. Astaphan wished to distribute her estate equally among all her children. The Defendant gave evidence, which I accept, that Mrs. Astaphan did not discuss or speak about her estate. This would explain why the Claimant only found out about the 2004, 2007 and 2010 Wills after the death of Mrs. Astaphan as he stated in evidence.

[60] No evidence was adduced by the Claimant that Mrs. Astaphan’s age was at issue, and the evidence of Dr. Sirman to which I have earlier referred contradicts this.

There is also no evidence before this court that her ill health prevented her from understanding what she was doing or going about her day to day life. I do not believe that Mrs. Astaphan's dependency on the Defendant is an issue. I agree with Counsel for the Defendant that this was a natural part of life and the Claimant and Mrs. Astaphan-Kelsick gave evidence that the Defendant was the primary caretaker of Mrs. Astaphan.

[61] The law on undue influence is clear and is not in dispute. In **Edwards v Edwards & Ors** [2007] EWHC 1119 (Ch) (03 May 2007), Lewison J. summarized the principles as follows:

47. There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:

i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;

ii) Whether undue influence has procured the execution of a will is therefore a question of fact;

iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.

v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;

vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be

induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;

vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;

viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;

ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent.

[62] The decision of **Mac Leish v Marryshow** (HCVAP 2010/0012 dated 14 May 2012) does not apply since there was a live issue concerning whether the testatrix was of sound mind. In this case, the Claimant stated that his case was not about mental capacity and no evidence was led by the Claimant relating to this issue. I have already addressed this issue above. The decision of **Murray v Duebery** (1996) 52 WIR 147 does not apply since it relates to transactions entered into between parties where undue influence is alleged, which is not the case here.

[63] The cases cited by Counsel for the Claimant and Counsel the Defendant make it clear that undue influence is coercion, and this is pressure that overpowers the volition without convincing the testators judgment. Any pressure that causes the testator to succumb for the sake of a quiet life, if carried out to an extent that it bears over the testator's free judgment, discretion or wishes, is enough to amount to coercion. Based on the evidence presented at trial, I find that the Claimant has not provided any evidence that the Defendant coerced Mrs. Astaphan or that the Defendant exerted any pressure over Mrs. Astaphan at all far less to the extent that it was overbearing on Mrs. Astaphan's judgment, discretion or wishes. As I

stated above, the examples provided by the Claimant not only do they not relate to the execution of the 2007 Will, they are not, in themselves, examples of undue influence. I doubt very much that Mrs. Astaphan would say this is not my wish, but I must do it.

[64] I also wish to make it clear that these findings are based on the evidence presented to the court by the Parties separate and apart from the video evidence and transcript evidence of the Defendant. However, when the video evidence and the transcripts are added, they corroborate most potently the issues relevant to determining this case and undermine completely the Claimant's case against the Defendant. Their relevance has already been explained above.

[65] The Defendant has, therefore, satisfied me that she is entitled to the orders that she seeks on her counter claim.

Disposition

[66] In light of the findings above, I make the following orders

- (1) The claim is dismissed, and judgment is entered in favour of the Defendant and will of Josephine Augusta Astaphan dated 4 May 2007 is pronounced in solemn form.
- (2) The parties shall file submissions on costs within 14 days of today's date.

Eddy D. Ventose
High Court Judge

By the Court

Registrar