

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2017

CLAIM NO. SKBHCV2011/0369

BETWEEN:

LAUREN CUNDARI
JONI ANDREA CARISSE PETTIT

Claimants/Respondents

and

GERALD ANTHONY DWYER ASTAPHAN

Defendant/Applicant

Appearances:-

Mr. Sylvester Anthony and Ms. Angelina Gracy Sookoo instructed by Ms. Rénal Edwards for the Respondents;
Mr. Glenford Hamilton and Ms. Deidre Williams for the Applicant.

2017: April 12th

JUDGMENT

- [1] **WARD, J.:** This is a contested probate claim involving the estate of Agnes Gwendoleyn Sahely.
- [2] At the date of her death she was survived solely by her sister Josephine who died testate. The applicant/defendant is a sibling of the respondents and executor and sole beneficiary of the pretended will of Agnes. The respondents/claimants are Josephine's children and the intended administrators of her estate. The respondents, as intended administrators of Josephine's estate, seek to be appointed administrators of Agnes' estate.

- [3] The respondents brought the underlying substantive claim seeking, inter alia, the revocation of the grant of probate of a copy of a will dated 26th October, 2006 of which the applicant obtained a grant of probate on 8th April, 2011, and for a pronouncement against the validity of the said will on the basis that Agnes lacked the requisite testamentary capacity at the time of the execution of the will.
- [4] To assist in resolving this issue, the Court, by order dated 15th February, 2013, gave leave to issue a number of witness summons to medical personnel or institutions that had administered medical care to Agnes to produce medical records.
- [5] On the return date, 28th June, 2013, the medical documents were produced by witnesses who were examined on oath as to the provenance of these documents.
- [6] By Order dated 1st July, 2016, Carter J directed that Karen Phipps, Head Matron of Brimstone Elderly Home, attend for examination on oath and to produce all documents in her possession necessary for the examination.
- [7] By Order dated 1st July, 2016, Carter, J also granted leave to call Forensic Psychiatrist Dr. Stephen Raffle as an expert witness and to provide a report, based on the said medical notes and the deposition of Mrs. Karen Phipps, as to whether the deceased, Agnes Gwendolyn Sahely, was *non compos mentis* when she executed the pretended will dated October 26th 2006 and a Power of Attorney filed on November 17th 2006 in favour of the applicant.
- [8] Dr. Raffle duly complied and filed his report on 25th July, 2016.
- [9] The applicant now seeks to have Dr. Raffle's report struck out on the basis that Dr. Raffle never medically attended on Agnes; the facts upon which he relies to support his opinion are not within his personal knowledge, neither were they independently proven at the time of making his report; the report seeks to reintroduce the contents of medical reports which the applicant had previously succeeded in having struck out.

- [10] Further, it is said that in so far as the report speaks to the issue of undue influence, that subject is outside Dr. Raffle's sphere of competence and involves issues of law and fact which are to be determined by the Court.
- [11] In reply, the respondents submit that the documents and records upon which Dr. Raffle based his opinions were established under oath by medical personnel to be contemporaneous records of the medical and mental care and treatment of the deceased Agnes.
- [12] The respondents deny that Dr. Raffle has relied on witness statements that were previously struck out. The documents and notes relied on by Dr. Raffle to influence his opinion consisted of the medical records adduced in evidence under oath and the deposition of Mrs. Phipps. It was further submitted that at the time of their production and the deposing of the witness, the applicant made no objections to either the admissibility of the documents nor did they raise any objection on the basis that Dr. Raffle had not personally attended on the deceased.
- [13] Finally, it is said that Dr. Raffle is a qualified forensic psychologist and thus competent to opine on the issue of undue influence by identifying the medical and non-medical indicia of undue influence while acknowledging that the ultimate issue of whether undue influence was in fact exerted was a question for the trier of fact.

Issues

- [14] As the Court sees it, the issues for resolution are:
- I. Whether Dr. Raffle's report should be struck out on the basis that it is constructed on inadmissible hearsay and unproven facts; or, if not
 - II. Whether that part of the report, in so far as it relates to undue influence, should be struck out.

The Hearsay Argument

- [15] The applicant contends that at common law, the opinion of an expert must be based on facts that are independently proved. It was further submitted that Section 55 of the **Evidence Act, 2011** codifies the common law position.
- [16] Accordingly, the makers of the documents relied upon by Dr. Raffle in compiling his report ought to have been called to give evidence, or, at the least, given witness statements. Because of this failure, the factual basis underpinning his report has not been independently proved.
- [17] Additionally, the Applicant submits that the provisions of Section 163 of the **Evidence Act** have not been complied with. In particular, it is said that Dr. Raffle's report contains no declaration by him, or any other person, declaring that the facts set out therein are true to the best of his knowledge and belief.

Discussion and Analysis

- [18] The documents relied on by Dr. Raffle are listed in his report. They consist of the following:
- (i) Medical Records from JNF Hospital;
 - (ii) Notes and records from the Grange Health Care Facility;
 - (iii) Medical Records from Dr. B. Sahely;
 - (iv) Report of Dr. Sharon Halliday ;
 - (v) Ambulance call report;
 - (vi) Caribbean CT Scan Centre;
 - (vii) Records of Dr. M. F. Laws;
 - (viii) Massage Therapist Notes;
 - (ix) Notes of Law Offices of Sylvester Anthony of the deposition of Karen Phipps.

[19] The question therefore is whether these documents constitute inadmissible hearsay.

[20] **R v Abadom (1983) 1 AER p. 364**, the Court of Appeal of England had to determine whether statistics compiled by the Home Office Central Research Establishment which the expert had consulted in arriving at his conclusion was hearsay evidence. In ruling that the evidence was admissible Kerr LJ. said at p. 368:

"First where an expert relies on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion that fact must be proved by admissible evidence."

[21] While it is accepted that an expert's report must be based on admissible evidence, or matters within his personal knowledge, subject to these limitations, it is settled that the evidence of experts is not subject to the rules against hearsay in the same way as that of witnesses of fact. Once the primary facts on which their opinion is based is proved by admissible evidence, they are entitled to draw on the works of others in arriving at their conclusions: **Abadom**.

[22] In this regard, the first observation to be made is that the documents relied on by Dr. Raffle represent the contemporaneous notes or work product generated during the relevant period of hospitalization covered by the Court Order. They are documents forming part of the medical record of the testatrix Agnes. They were produced pursuant to a Court order dated 15th February 2013 which, although striking out the witness statements of a number of medical doctors, ordered them to produce these medical records.

[23] Likewise, with specific reference to the medical records of the testatrix held at the JNF hospital, Ramdhani, J, in a ruling dated 23rd December, 2013 opined:

*"[I]t is reasonable to believe that these documents are relevant and their production would assist in the fair disposal of this matter."*¹

¹ SKBHCV2011/0369, para. 40

[24] Section 55 of the **Evidence Act, 2011** makes admissible statements contained in a document where the maker of the statement had personal knowledge of the matters dealt with by the statement or where the document is or forms part of a record purporting to be a continuous record, and the maker of the statement made the statement (where the matters dealt with in the statement are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be presumed to have had, personal knowledge of those matters and the maker of the statement is called as a witness in the proceedings.

[25] As the Court of Appeal explained in *East Caribbean Flour Mills v Ormiston Ken Boyea, CV. App. No. 12 of 2006*:

*"We note, however, that section 55 applies not to a deposition taken pursuant to the Civil Procedure Rules 2000 ("CPR"), but to a statement of a person made in a document, i.e., to a typical hearsay statement contained in a document. Such a document is rendered admissible by the section only if the maker has personal knowledge of the matters dealt with in the statement, where the document forms part of a record made in the performance of a duty to record the information in question, and where the maker of the statement is called as a witness in the proceedings."*²

[26] In my view, the documents relied upon by Dr. Raffle represent statements made in a document within the meaning of Section 55 and constitute a record in the sense contemplated within the **Evidence Act**.

[27] It has not been suggested that the information contained therein was not supplied by persons who may reasonably be expected to have personal knowledge of the matters contained therein.

[28] Further, Section 55 (3) gives the Court a discretion to permit such documents/statements to be admissible as evidence where the maker of the statement is available but not called as a witness provided that a certified true copy of the document is produced.

² HCVAP2012/002, para. 11

- [29] Section 55 in effect makes provision for hearsay evidence to be admissible in certain circumstances while Part 32.7 (2) of **CPR 2000** makes expert evidence subject to the hearsay rule.
- [30] It seems to me that in ordering the production of the medical records of the testatrix Agnes for the specific purpose of informing Dr. Raffle's expert report the court was clearly exercising its discretion to treat these statements/documents as admissible evidence pursuant to Section 55 of the **Evidence Act**.
- [31] I accept the evidence and submissions of Counsel for the respondent that these documents were produced by order of the Court by witnesses who on oath confirmed their authenticity and contemporaneity. No objection was taken to their admissibility on the basis that they were not independently proved.
- [32] The Court before whom they were produced was well aware of the nature of the documents and nonetheless ordered that Dr. Raffle produce a report based on them.
- [33] I am satisfied that in so far as these documents are concerned, Dr. Raffle's report is based on admissible evidence.

The Section 163 Argument

- [34] In so far as the applicant submits that Dr. Raffle's report is inadmissible because it does not comply with the requirements of Section 163 of the **Evidence Act**, I accept the submissions of Counsel for the respondents that the expert report was produced pursuant to the Rule 32 **CPR 2000** regime and not Section 163 of the **Evidence Act**.
- [35] In examining the relationship between these two regimes the Court of Appeal in **Keithlyn Bergan v Sheryl Evans**³ stated at paragraphs 19-20:

"Section 163 of the Evidence Act, 2011 is a separate regime for the tendering into evidence of certain types of expert reports, including those of a registered medical practitioner.³ Part 32, on the other hand, applies to any kind of expert evidence which a party may be seeking to admit for the

³ SKBHCVAP2014/0021 delivered on 13th October, 2016

purpose of assisting the court. Thus, Part 32 is wider in scope than section 163. Most importantly however, as stated by the learned judge at paragraph 24, none of the provisions contained in section 163 offend the rules of procedure contained in CPR relating to expert evidence. In fact, the two regimes complement each other.

As pointed out by the learned judge at paragraph 22 of his judgment, section 163 is substantive law while CPR is subsidiary legislation. Additionally, as stated above, section 163 begins with the words 'Notwithstanding any enactment or law' and was therefore not intended to be subject to any other provision of substantive legislation, far less to subsidiary legislation. Accordingly, section 163 of the Evidence Act, 2011 is a standalone provision and a party seeking to admit a medical report into evidence therefore has the option of tendering the report pursuant to section 163 or pursuant to Part 32 of CPR."

- [36] Dr. Raffle's report was plainly generated pursuant to applications made **under Rule 32. Rule 32.4** requires, inter alia, that an expert witness must state the facts or assumptions upon which his or her opinion is based. Dr. Raffle's report does so. It is also compliant with Rule 32.14 which governs the contents of an expert's report.
- [37] For the reasons discussed at paragraphs 26-33 above, I am also of the view that his report was based on medical records which the Court deemed admissible and relevant for the purpose of resolving the issue whether the testatrix was *compos mentis*.
- [38] Similarly, the deposition of Karen Phipps, on which Dr. Raffle also relied, was taken pursuant to Rule 33.7 **CPR 2000**. The applicant participated in those proceedings in which the deponent was examined about the physical and mental condition of the deceased while she was in her care during the material time.
- [39] By virtue of Rule 33.14 this deposition may be given in evidence at the trial unless the Court orders otherwise. The Court before whom it was taken was fully cognizant that it would form part of the material on which Dr. Raffle's report would be based.

- [40] The option remains open to the applicant to have the witness attend at trial for cross-examination.
- [41] Accordingly, I do not accept the applicant's submissions that Dr. Raffle's report was required to contain the Section 163 declaration or that it should be struck for non-compliance therewith.
- [42] In so far as it is said that Dr. Raffle's report is inadmissible because he did not personally attend or examine the testatrix, there is no merit in this submission. An expert witness need not have conducted any tests or examination himself but is permitted to give his opinion on facts proved in court. The fact that he has not himself done so goes to the weight to be attached to his report; not to its admissibility.

Undue influence

- [43] The applicant submits that, based on the Court order, Dr. Raffle's remit was confined to providing an opinion on whether the testatrix was *compos mentis*. It was no part of his mandate to trespass into the realm of undue influence.
- [44] The respondents counter that from its very pleadings it was always clear that the enquiry into the issue whether the testatrix was *compos mentis* necessarily included the issue of undue influence and that both issues were within the professional competence of Dr. Raffle.
- [45] The first question for resolution is whether the Court asked Dr. Raffle to opine on this issue or whether this is implicit in the order.
- [46] In determining this question I have had regard to the pleadings, the application to call an expert witness and the order granting leave to do so.

The pleadings

[47] At paragraphs 5 and 6 of the statement of claim⁴ the respondents raise directly the issues of testamentary capacity and undue influence as being at the heart of the underlying substantive claim.

[48] The applicant in its defence and counterclaim asserts that the testatrix was *compos mentis* at the time she executed the will and further denies that the will was obtained by undue influence.

The Application to call expert witness

[49] The application dated 2nd June, 2016 sought leave for Dr. Raffle *“to produce an expert report to the Court as to whether the deceased, Agnes Gwendolyn Sahely was non compos mentis when she executed the pretended will dated October 26th 2006 and a Power of Attorney filed on November 17th 2006 in favour of the Defendant/Respondent.”*

[50] The grounds on which this application was based was said to be that *“the expert evidence on whether the deceased Agnes Gwendolyn Sahely was non compos mentis and possessed the testamentary capacity to execute a will on October 26th 2006 and a Power of Attorney executed in favour of the Defendant/Respondent and filed in this Court on November 17th 2006 is reasonably required and will greatly assist the Court in resolving the dispute between the parties.”*

The Court Order

[51] The Court Order states:

“1. The claimants are permitted to call Forensic Psychiatrist, Dr. Stephen M. Raffle, M.D. of 35 Wolfe Grade, Kentfield, California, in the United States of America as an expert witness and to provide expert evidence.

2. Stephen M. Raffle is permitted to produce an expert report to the Court pursuant Rule s32.12 and 32.14 of the Civil Procedure Rules 2000 as amended, as to whether the deceased, Agnes Gwendolyn Sahely, was compos mentis when she executed the will dated October 26th 2000 and a Power of Attorney filed on 17th November, 2006.”

⁴ Statement of Claim filed 9th December, 2011

- [52] Having regard to the foregoing, I am satisfied that the issue of undue influence is inextricably linked to the issues raised in the pleadings.
- [53] The purpose for appointing an expert was to assist the Court in resolving these central issues. I can discern no reason why the Court would deny itself the assistance of expert evidence on one of the important issues between the parties, provided that the opinion is properly confined to matters which genuinely call for expert assistance.
- [54] Accordingly, I hold that the issue of undue influence was the subject of proper enquiry and opinion by Dr. Raffle. For him to opine on this issue is not to trespass on the province of the tribunal of fact.
- [55] As the learned authors of **Phipson on Evidence, 18th Edition, Paragraph 33-12** recognize:

"There is considerable difficulty in identifying and what is not an "ultimate issue", but in many cases an expert's opinion is valueless, even unintelligible, if he is prohibited from expressing his view the trier of fact will be called upon to decide the same question"

- [56] An expert is now permitted to give his opinion on what has been traditionally called the ultimate issue provided that the tribunal of fact bears in mind that it is not bound by the expert's opinion but that the issue is one which it must decide.

The Expert Report

- [57] In purporting to treat with the issue of undue influence Dr. Raffle identifies those matters that he considers to be medical and non-medical indicia of undue influence.

[58] Medical indicia refer to certain medical states or conditions that predispose a person to be unduly influenced. These are identified at page 20 of Dr. Raffle's report⁵ and are unobjectionable.

[59] However, in purporting to identify non-medical indicia of undue influence of undue influence Dr. Raffle opines:

"Another indication of undue influence exists when the person who is performing the undue influence isolates the affected person from others. In the medical records I reviewed, there is a one-page undated entry from Joseph N. France General Hospital stating, "Mrs. Sahely is requesting to not allow the following persons below to visit her: Luigi Saide astaphan aka Lauren Alexander, Giovina Astaphan Cundari, Karen Kelsick. Isolation from family members is an indicia of undue influence.

Mrs. Sahely was dependent on Dwyer Astaphan for her medical care and physical care. Dependency on another for essential care is an indicia of undue influence.

Dwyer Astaphan and his son maintained the ongoing relationship with repeated visits. Repeated contact fosters dependency which is an indicia of undue influence.

An earlier will (in 2004) drawn before the motor vehicle accident in question, indicated Mrs. Sahely wished to distribute her estate differently than the subsequent will; therefore, her pre-dementia/traumatic brain injury intentions are known and are at variance with her stated intentions post dementia/traumatic brain injury. Her relationships with her other family members was unchanged during the subsequent two year interval. This is an indicia of undue influence.

On 26th, October 2006, Dwyer Astaphan entered in to a fiduciary relationship with Agnes Gwendoleyne Sahely, whereby she conferred to him her power of attorney. Thereafter, he utilized this power to reinforce his special relationship with her, and by so doing, created additional confidence and trust, which would have caused Mrs. Sahely to become increasingly dependent on him. He also used the power of attorney to exclude contact with certain family members. The record is unclear about why certain family members were not allowed to visit, Mrs. Sahely (in 2010). As noted above, when family members are barred from visiting a testator, this is an indicia undue influence is occurring.

Non-Medical indicia of undue influence are:

⁵ Psychiatric Independent Medical Evaluation filed 25th July 2016

- a) *Dwyer Astaphan retained his attorney to draw a new will and then accompanied Mrs. Sahely to the signing of the 26 October, 2006 will.*
- b) *The will signing is witnessed by an interested family member and the attorney.*
- c) *The "Golden Rule" was not followed whereas an independent medical exam of Mrs. Sahely was not performed at the time the 26 October, 2006 will was executed.*
- d) *Dwyer Astaphan was the major beneficiary of the 26 October, 2006, will.*
- e) *Mrs. Sahely could not read with meaning according to Mrs. Phipps in the deposition notes.*
- f) *Mrs. Sahely could not carry on or maintain a logical, sustained train of thought according to the Mrs. Phipps, as described in the deposition notes.*
- g) *Mr. Hamilton was not Mrs. Sahely's attorney.*
- h) *Dwyer Astaphan had a fiduciary relationship with Mrs. Sahely on 26 October, 2006, the same day the new will made him the sole beneficiary.*
- i) *No other relative (besides the witness) was informed about the new will on 26 October, 2006 before or immediately after it was signed." ⁶*

[60] I am satisfied, and it is patently clear, that the matters identified as constituting non-medical indicia do not fall within the scope of matters for which expert evidence is necessary. Expert opinion evidence may only be received on a subject calling for expertise which a lay person could not be expected to sufficiently possess to understand the evidence in the case. In my view, the tribunal of fact can form its own opinion on whether these matters are indicative of undue influence.

[61] Accordingly, those parts of the report are struck out.

[62] **ORDER**

1. Pages 21-22 of Dr. Raffle's report are struck out.
2. Paragraph 3 of the Conclusion to Dr. Raffle's report is struck out.

⁶ Psychiatric Independent Medical Evaluation filed 25th July 2016, pages 21 to 22.

3. Each party to bear its own costs.

Trevor M. Ward QC
High Court Judge