Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-14-00564-CV

IN THE ESTATE OF Wade R. **BEDELL**, Jr., Deceased

From the Probate Court No. 2, Bexar County, Texas
Trial Court No. 2013-PC-0636
Honorable Tom Rickhoff, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: February 3, 2016

AFFIRMED

Wade R. Bedell, Jr. died on February 14, 2013. On February 20, 2013, his daughter, Robyn Zalewa, filed an application to probate a will Wade signed on June 17, 2003, and the 2003 will was admitted to probate by an order entered on March 4, 2013. On April 4, 2013, Deborah Bedell, Wade's wife on the date of his death, filed an application to probate a will dated July 7, 2005 and a contest to the 2003 will alleging the 2003 will was revoked by the 2005 will. After a bench trial, the probate court signed a judgment denying Deborah's will contest and application. Deborah appeals challenging various findings of fact and conclusions of law made by the probate court. Because we hold the evidence is sufficient to support the trial court's finding that Deborah failed

to prove that the 2005 will was executed with proper formalities, we affirm the probate court's judgment.[1]

BURDEN OF PROOF

In her contest and application, Deborah alleged the 2005 will revoked the 2003 will which was previously admitted to probate. "In a proceeding such as this, where the suit seeks to set aside, on the ground of revocation, a will previously admitted to probate, the burden of proof is upon the party attacking the will, rather than the proponent, as is the case when the will is contested on the original application to probate." *Lisby v. Richardson's Estate*, 623 S.W.2d 448, 449 (Tex. App.—Texarkana 1981, no writ); *see also Halamicek v. Halamicek*, 542 S.W.2d 246, 248 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *Baptist Found. of Tex. v. Buchanan*, 291 S.W.2d 464, 472 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.). In Texas, the statutory method of revoking a will is exclusive. *Morris v. Morris*, 642 S.W.2d 448, 449-50 (Tex. 1982); *In re Estate of Teal*, 135 S.W.3d 87, 93 (Tex. App.—Corpus Christi 2002, no pet.). Section 253.003 of the Texas Estates Code provides, "A written will … may not be revoked, except by subsequent will, codicil, or declaration in writing that is executed with like formalities, or by the testator destroying or canceling the same, or causing it to be destroyed or canceled in the testator's presence." TEX. ESTATES CODE ANN. § 253.003 (West 2014).[2] Therefore, "[a] party who seeks revocation by a subsequent will or declaration in writing must prove the subsequent instrument was executed with the same formalities that are required to probate a will." *Harkins v. Crews*, 907 S.W.2d 51, 58

[1] Because we base on our holding on this single issue, we do not address Deborah's challenges to the probate court's other findings of fact and conclusions of law. *See* TEX. R. APP. P. 47.1 (stating opinions should address only those issues necessary to the court's disposition).

[2] Although Deborah cites the Probate Code because the will and the probate proceedings pre-date the codification of the Estates Code, the Estates Code sections at issue are not substantively different than the predecessor sections in the Probate Code. Therefore, we cite to the Estates Code. *See In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 571 n.8 (Tex. 2015) (citing Estates Code because codification did not affect court's analysis).

(Tex. App.—San Antonio 1995, writ denied). One of those required formalities is that the will be attested by two or more credible witnesses. TEX. ESTATES CODE ANN. § 251.051.

STANDARD OF REVIEW

Deborah challenges the probate court's finding that she failed to prove that the 2005 will was attested by two or more credible witnesses. A probate court's findings are reviewable for legal and factual sufficiency by the same standards applied in reviewing evidence supporting a jury's answer. *Kirkland v. Schaff*, 391 S.W.3d 649, 655 (Tex. App.—Dallas 2013, no pet.); *Norman v. Finley*, No. 04-01-00394-CV, 2002 WL 341585, at *1 (Tex. App.—San Antonio Mar. 6, 2002, no pet.) (mem. op., not designated for publication).

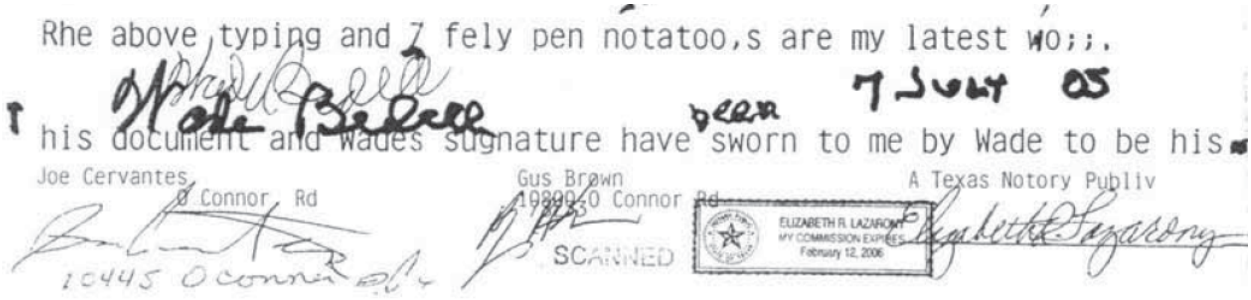
When the party with the burden of proof attacks the legal sufficiency of the evidence to support an adverse finding, the party "must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue." *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In reviewing such a challenge, we "must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary." *Id*. "If there is no evidence to support the finding, [we must] then examine the entire record to determine if the contrary proposition is established as a matter of law." *Id*. The legal sufficiency challenge will only be sustained "if the contrary proposition is conclusively established." *Id*.

"When a party attacks the factual sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co.*, 46 S.W.3d at 242. We "must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id*.

In conducting a sufficiency review, the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); *In re Estate of Henry*, 250 S.W.3d 518, 523 (Tex. App.—Dallas 2008, no pet.). When there is conflicting evidence, the resolution of such conflicts is within the province of the trier of fact. *City of Keller*, 168 S.W.3d at 820; *see also Norman*, 2002 WL 341585, at *1 (noting findings of probate court generally regarded as conclusive when conflicting evidence is presented).

EVIDENCE PRESENTED AT TRIAL

With regard to the witnessing of the 2005 will, the 2005 will contains the following signatures:



Gus Brown is Deborah's brother. Brown testified he, Joe Cervantes, and a notary were present when Wade signed the 2005 will. Brown identified his signature on the will and testified he saw Cervantes, who was a neighbor, and the notary sign the will.

Cervantes testified he had never seen the 2005 will and did not recall signing the will. Based on the size of the 2005 will,[3] Cervantes testified he would have recalled signing the document. Cervantes also testified no one asked him to serve as a witness to the will, and he would

[3] Brown testified the will had been enlarged at a copy store to enable Wade to read it because Wade had difficulty with his eyesight.

have recalled such a request if it was made. Finally, Cervantes testified he would have recalled witnessing Wade's will if he had done so.

Although Brown testified Deborah was present when the will was executed, Deborah testified she was not present. Prior to trial, Deborah's attorney informed the court that the notary was the secretary of an attorney. Deborah's attorney contacted the attorney but was told the notary was in "very ill health." Therefore, Deborah's attorney did not call the notary as a witness.

ANALYSIS

In this case, the probate court was the sole judge of the credibility of the witnesses. *City of Keller*, 168 S.W.3d at 819; *In re Estate of Henry*, 250 S.W.3d at 523. Since the probate court found Deborah failed to prove that the 2005 will was attested by two or more credible witnesses, the probate court chose to believe Cervantes's testimony that he did not sign or witness the 2005 will.

In her brief, Deborah argues even if the probate court believed Cervantes was not a witness, the notary could serve as the second witness. A notary may be considered to be a witness to a will. *See Brown v. Traylor*, 210 S.W.3d 648, 671-72 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *In re Estate of Teal*, 135 S.W.3d at 91-92; *Saathoff v. Saathoff*, 101 S.W.2d 910, 912 (Tex. Civ. App.—San Antonio 1937, writ ref'd). In this case, however, Gus was the only witness who testified the notary was present when Wade signed the will because Cervantes and Deborah both testified they were not present and the notary did not testify. Because the probate court was the sole judge of the credibility of the witnesses, we defer to its evaluation of the credibility of Gus's testimony regarding the notary's presence as a witness. *See City of Keller*, 168 S.W.3d at 819; *In re Estate of Henry*, 250 S.W.3d at 523. Holding the notary was not proven to be a witness in this case is consistent with existing precedent because in the cited cases, the notary testified to his or her presence and his or her actions during the execution of the will. *See Brown*, 210 S.W.3d at

671-72 (notary testified she was witness to the will); *In re Estate of Teal*, 135 S.W.3d at 91 (notary testified she asked testator questions about will and confirmed he was familiar with its contents and that the will reflected his desired disposition of his estate); *Saathoff*, 101 S.W.2d at 911 (notary testified to his presence and actions in executing the will). In this case, no evidence was introduced to show the purpose for the notary's signature. *See Mossler v. Johnson*, 565 S.W.2d 952, 957 (Tex. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) ("When doubt exists concerning the purpose of the witnesses' signatures, the testimony of the attesting witnesses may serve to explain the reason for their signatures.").

Having reviewed the record as a whole and deferring to the probate court's evaluation of the credibility of the witnesses, we hold the evidence is legally and factually sufficient to support the probate court's finding that Deborah failed to prove that the 2005 will was attested by two or more credible witnesses. Accordingly, because Deborah failed to prove the 2005 will was executed with proper formalities, Deborah failed to establish the 2003 will was revoked by the 2005 will. *See* TEX. ESTATES CODE ANN. § 253.003.

CONCLUSION

The probate court's judgment is affirmed.

Rebeca C. Martinez, Justice