



In re Estate of Shamoon

2005 | Cited 0 times | Court of Appeals of Texas | August 4, 2005

MEMORANDUM OPINION¹

Before Justices Rodriguez, Castillo and Garza

Appellee, Anthony Shamoon, filed an application to probate the will of his mother, Sadie Shamoon. Appellant Naseph "Sammy" Shamoon filed a will contest and appeals the trial court's order, following a jury trial, probating the will. By four issues, Sammy challenges the legal and factual sufficiency of the evidence and admission of evidence. We affirm.

I. BACKGROUND

A widow, Sadie, died of complications arising from chronic obstructive pulmonary disease. Survived by her sons Ellis, Sammy, and Anthony, Sadie named as executor and bequeathed the bulk of her estate to Anthony. The evidence reflects that Anthony managed Sadie's real property and, although he owned a home in the same city, stayed with her and took care of her. Anthony called numerous witnesses to testify about the events central to Sadie's execution of the will.²

II. ISSUES PRESENTED

Sammy brings the following issues on appeal:

Is the evidence legally sufficient (issue #1) and/or factually sufficient (issue #2) to support the jury's answer to question No. 1, that the will was executed with all requisite formalities to render it valid?

Is the evidence legally or factual sufficient to sustain the conclusion that Sadie either signed and/or proclaimed the document as her last will and testament where subscribing witnesses did not see her sign the will or hear her announce it as her will, and the only witness to the signing is incompetent to testify as a matter of law (issue #3)?

Did the trial court err in admitting the incompetent testimony of Anthony to establish Sadie's signing of the will (issue #4)?

III. SUFFICIENCY

By his first, second, and third issues, Sammy argues that the evidence is legally and factually



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insufficient to support the jury's answer to Question No. 1.³ Specifically, Sammy asserts that there is no evidence that the two witnesses "attested" the will. Anthony responds that the evidence is sufficient to prove the will was properly executed.

A. Legal Sufficiency Standard of Review

We address legal-sufficiency challenges as either "no-evidence" or "matter-of-law" issues. *Gooch v. Am. Sling Co.*, 902 S.W.2d 181, 183-84 (Tex. App.-Fort Worth 1995, no writ). We analyze the issue as a "no-evidence" challenge when the party complaining on appeal did not bear the burden of proof at trial. *Id.* Where the appellant did not bear the burden of proof on the issue, he must show that the record presents no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983).

In performing a legal-sufficiency review, we consider only the probative evidence and inferences that support the challenged finding, disregarding all evidence and inferences to the contrary. *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002). We overrule a legal-sufficiency challenge if the record reflects any evidence of probative force to support the finding. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997).

If more than a scintilla of evidence exists to support the finding, the legal-sufficiency challenge fails. *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). The evidence is no more than a scintilla and, in legal effect, is no evidence "[w]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence." *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Suspicion linked to other suspicion produces only more suspicion, not some evidence. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993). Similarly, an inference stacked only on other inferences is not legally sufficient evidence. *Pitzner*, 106 S.W.3d at 727. Conversely, more than a scintilla exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994).

When both legal and factual sufficiency challenges are raised on appeal, the court must first examine the legal sufficiency of the evidence. See *Glover v. Texas Gen. Indem. Co.*, 619 S.W.2d 400, 401 (Tex. 1981) (per curiam).

B. Factual Sufficiency Standard of Review

When reviewing a jury verdict to determine the factual sufficiency of the evidence, the party attacking a finding on which an adverse party bore the burden of proof must show that the record presents "insufficient evidence" to support the finding. *Gooch*, 902 S.W.2d at 184. We examine and consider all the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998). We set



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aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986), overruled on other grounds, *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000). If we reverse a trial court's judgment on factual-sufficiency grounds, we detail all of the evidence relevant to the issue and articulate why the finding is factually insufficient. *Maritime Overseas Corp.*, 971 S.W.2d at 407. We reverse and remand for a new trial when we sustain a factual-sufficiency point. *Glover*, 619 S.W.2d at 401.

C. Necessary Formalities and Solemnities

Sammy argues that the sworn testimony of the subscribing witnesses did not constitute an adequate "witness" to the execution of the will as required by the concept of "attestation," and there is insufficient evidence from other sources as to proper execution of the will. Thus, we must examine the record to determine whether some evidence exists to support the finding in issue, namely, that the two witnesses "attested" the instrument. See *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex.1992).

Sammy argues that, because the will is not self-proved, the evidence implicates the formalities and solemnities required by the probate code as follows: (1) section 59(a), that the will be attested by two or more credible witnesses who subscribe their names to the will in their own handwriting in the presence of the testator, see TEX. PROB. CODE ANN. § 59(a) (Vernon 2003);⁴ (2) section 84(b), that an attested will which is not self-proved may be proved up by the sworn testimony of one or more of the subscribing witnesses in open court, see TEX. PROB. CODE ANN. § 84(b) (Vernon Supp. 2004-05);⁵ and (3) section 88(b)(2), that the testator execute the will with the formalities and solemnities and under the circumstances required by law to make it a valid will, see TEX. PROB. CODE ANN. § 88(b)(2) (Vernon 2003).⁶

A. The Law

The probate code provides, subject to certain exceptions not in issue here, that to be properly executed, a will must be signed by the testator and two subscribing witnesses, the latter being required to sign in the testator's presence. TEX. PROB. CODE ANN. § 59; see *Jones v. Whiteley*, 533 S.W.2d 881, 883 (Tex. App.-Fort Worth 1976, writ ref'd n.r.e.). While there is no requirement that the testator actually sign in the presence of the subscribing witnesses, it is mandatory that the witnesses sign in the presence of the testator. *Id.* The proponent of an attested written will which is not self-proved may establish its proper execution by the sworn testimony or affidavit of at least one of the subscribing witnesses thereto, taken in open court, assuming at least one such witness is available. TEX. PROB. CODE ANN. § 84(b); *Jones*, 533 S.W.2d at 883. "However, it has been held that the provision relating to proof of the will in court 'only furnishes a guide under the conditions stated in the statute, and using the word 'may' is a recognition of other methods of proof and of other conditions under which that statute is not applicable.'" *Whiteley*, 533 S.W.2d at 883 (citing *Massey v. Allen*, 248 S.W. 1067, 1069 (Tex. Comm'n App. 1923, op. adopted)); see also *Estate of Teal*, 135 S.W.3d



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87, 90-91 (Tex. App.-Corpus Christi 2002, no pet.) ("there is no requirement that the testator sign the instrument in the presence of the witnesses."). Similarly, section 88 of the probate code requires certain facts to be proved to the satisfaction of the court, showing, among other things, that the testator executed the will with the formality and solemnity required by the law to make it a valid will. See *Estate of Teal*, 135 S.W.3d at 90-91. No method is designated in this article for the making of such proof; rather the articles only require that it be done "to the satisfaction of the court." *Whiteley*, 533 S.W.2d at 883.

If, from defect of memory, subscribing witnesses are unable to testify to the facts bearing on the due execution of a will, "this ought not to be permitted to defeat the will, if other evidence, admissible under the ordinary rules of law to establish facts, is introduced sufficient to satisfy the court 'that the testator executed the will with the formalities and solemnities and under the circumstances required by law to make a valid will.'" *Whiteley*, 533 S.W.2d at 883 (citing *Hopf v. State*, 10 S.W. 589, 592 (1888)).

B. The Record

The title of the instrument admitted in evidence is "Last Will and Testament of Sadie Shamoon." The instrument consists of three pages. It identifies Sadie's three sons, Ellis, Sammy, and Anthony. It bears a signature of "Sadie Shamoon" on each of the three pages above a line with the typewritten name "Sadie Shamoon." On the third page, the instrument has a handwritten date of June 15, 1999. The third page also includes two lines underneath the designation "Witnesses." The signatures affixed on the lines legibly show "Gloria Morrison" and "Elizabeth D. Moon."

Sammy testified that the signature on the instrument was Sadie's signature. Sadie's long-time friend, Victoria Brown, also testified that the signature on the will was Sadie's signature. Sadie's financial accountant, Richard Guldin, testified that Sadie told him that she had a will and that the will was "in order." Charles Cartwright, an attorney, testified that Sadie's son Ellis retained him to prepare a draft of a will for discussion purposes. He identified the instrument bearing Sadie's and the witnesses' signatures, admitted in evidence, as the instrument he drafted. Cartwright testified that Sadie was not his client. He mailed the instrument to her "to stimulate conversation and somebody looking into doing a proper will for her."

The two witnesses who signed the instrument, Elizabeth Moon and Gloria Morrison, testified at trial. Moon testified that she worked as a volunteer at the information desk at Bay Area Medical Center. She had witnessed wills four or five times over the several years she volunteered at the hospital. Her impression was that hospital employees were not allowed to witness wills. Consequently, volunteers were called upon to do so. Moon identified Sadie's last will and testament and the signatures on the instrument as her own and those of Sadie and Morrison. Moon testified she did not remember whether Anthony or one of the admitting clerks asked Morrison and her to witness Sadie's will. Moon indicated she would not have signed the will as a witness to the instrument if Sadie had not already signed it or if Sadie was not conscious. She explained that, as



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long as a person was not unconscious, babbling, or under duress, she assumed the person was of sound mind. Moon recalled that, at the time, Sadie was sitting at a desk with Moon and Morrison behind her. Moon reached over Sadie to sign the instrument.

Moon further testified that she did not ask Sadie to confirm Sadie's signature on the instrument, and she guessed the affixed signature was Sadie's signature. Moon did not ask Sadie or Anthony or anyone else about Sadie's mental state or capacity. Moon did not see Sadie sign the will but recalled that Sadie was "bent over" the desk. Moon did not speak with Sadie at the time. Finally, Moon testified that the handwritten date on the instrument, June 15, 1999, was not correct. The actual date of her signing was June 16, 1999.

Gloria Morrison, also a hospital volunteer, did not recall who summoned Moon and her to witness the will. She heard Anthony asking or telling Sadie to sign the will. She described Anthony's statement to Sadie as a "simple request." A couple of minutes passed between Anthony's statement and the time Morrison and Moon signed the instrument. Morrison identified her signature and Moon's signature on the will. She did not recall seeing Moon or Sadie sign the instrument nor the order of the three in signing it. Morrison also did not recall speaking with Sadie. Morrison admitted she did not read the instrument line by line. However, Morrison testified she would not have signed the instrument until Sadie signed it. She believed Sadie witnessed their signing the instrument because Moon and Morrison stood next to Sadie to sign. Morrison testified she would not have signed the instrument had she seen something indicating that Sadie was incompetent. She testified that the date of signing was June 16, 1999, because that was the only day of the week she worked with Moon.

C. Sufficiency Analysis

Viewed in the light most favorable to the challenged finding, the evidence establishes that a draft of a will for Sadie was prepared for her at the request of her son, Ellis. The attorney-drafter of the instrument identified the instrument admitted in evidence as the draft of a will he prepared and forwarded to Sadie. Sammy and Sadie's friend identified the signature of the testator on the instrument as Sadie's signature. The same instrument bears the signature of two witnesses. The two subscribing witnesses to the instrument, Moon and Morrison, testified at trial. They testified that they subscribed their names to Sadie's will in their own handwriting and in the presence of Sadie, the testator. See TEX. PROB. CODE ANN. § 59(a) (Vernon 2003) & § 84(b) (Vernon Supp. 2004-05).

Section 88(b)(2) of the probate code requires certain facts to be proved to the satisfaction of the court, showing, among other things not germane to this appeal, that the testatrix executed the will with the formality and solemnity required by the law to make it a valid will. TEX. PROB. CODE ANN. § 88(b)(2) (Vernon 2003). We conclude that the evidence is not so weak as to do no more than create a mere surmise or suspicion that the instrument Sadie executed was in fact her will, and that the subscribing witnesses duly attested to it in Sadie's presence. Thus, we conclude that evidence of the



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complained-of necessary formalities and solemnities required to make the instrument a valid will is more than a scintilla. Accordingly, we conclude the evidence is legally sufficient. See *Kindred*, 650 S.W.2d at 63.

Viewing all the evidence in the record, we cannot conclude that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Ellis requested an attorney to draft a will for Sadie. The attorney complied and forwarded the instrument to Sadie. Sadie signed the instrument, titled "Last Will and Testament of Sadie Shamoon." Two witnesses affixed their signatures to the instrument. Sadie told her financial consultant she had a will and that it was in order. On this record, we conclude that the evidence is factually sufficient to sustain the jury's finding that Sadie executed her will with the necessary formalities and solemnities to make it a valid will. See *Maritime Overseas Corp.*, 971 S.W.2d at 406-07.

Accordingly, we overrule Sammy's first, second, and third issues.

IV. ADMISSION OF EVIDENCE

By his fourth issue, Sammy argues that the trial court abused its discretion in admitting Anthony's testimony regarding Sadie's execution of the will. He further argues that the error probably caused the rendition of an improper jury verdict and judgment.

At trial, Sammy did not object to Anthony's testimony. In his motion for new trial, Sammy asserted that Anthony was not a competent witness and his testimony should not be considered in evaluating the sufficiency of the evidence to support the jury's verdict. However, Sammy did not secure a ruling from the trial court. The motion was overruled by operation of law.

As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection or motion and that the trial court ruled on the request, objection, or motion. TEX. R. APP. P. 33.1(a)(1), 33.1(a)(2)(A). This Sammy did not do so. We conclude that he has not preserved error.

Even assuming that Sammy preserved error, we conclude that he has not shown the complained-of harm. To reverse a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error was calculated to cause and probably did cause "the rendition of an improper judgment." TEX. R. APP. P. 44.1; *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Sammy has not shown how Anthony's testimony caused "the rendition of an improper judgment." See TEX. R. APP. P. 44.1. Significantly, in our sufficiency review, we excluded Anthony's testimony. Sammy has not shown how the result of the trial would have been different if Anthony had not testified. Accordingly, even if we were to conclude that the trial court abused its discretion in admitting the complained-of testimony and evidence, Sammy has not shown that the error was calculated to cause or probably did cause "the



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rendition of an improper judgment." TEX. R. APP. P.44.1; see *Ed Rachal Found. v. D'Unger*, 117 S.W.3d 348, 368 (Tex. App.-Corpus Christi 2003, pet. filed) (citing *Malone*, 972 S.W.2d at 43).

Accordingly, we overrule Sammy's fourth issue presented.

IV. Conclusion

Having overruled the four issues presented, we affirm.

1. See Tex. R. App. P. 47.2, 47.4.

2. A will proponent has the burden of proof in the initial probate proceeding. *In re Estate of Flores*, 76 S.W.3d 624, 629 (Tex. App.-Corpus Christi 2002, no pet.).

3. Question number one reads in its entirety as follows: Do you find from a preponderance of the evidence that Sadie Shamoon executed the Purported Will dated June 15, 1999, with all the formalities to make it a lawful and valid will? INSTRUCTION: You are instructed that the formalities required by law to make a will are as follows: 1. The will must be in writing; and 2. The testator is 18 years of age or older; and 3. The testator must sign the will in person, or the will must be signed by another person for the testator in his or her presence and by his direction; and 4. The will must be attested by two or more credible witnesses above the age of 14 years who subscribe their names to the will in their own handwriting in the presence of the testator. With the respect to formality (4) above, you are instructed that a witness is in the presence of the testator if the testator is able to see the witness sign the will from the testator's actual position at the time, or from a slightly altered position if the testator has the power readily to alter her position without assistance. Answer "We do" or "We do not" ANSWER: We do

4. Section 59 states in relevant part: (a) Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses above the age of fourteen years who shall subscribe their names thereto in their own handwriting in the presence of the testator. . . . Tex. Prob. Code Ann. § 59(a) (Vernon 2003).

5. Section 84 states in relevant part: (b) Attested Written Will. If not self-proved as provided in this Code, an attested written will produced in court may be proved: (1) By the sworn testimony or affidavit of one or more of the subscribing witnesses thereto, taken in open court. Tex. Prob. Code Ann. § 84(b) (Vernon Supp. 2004-05).

6. Section 88(b)(2) states in relevant part: (b) Additional Proof for Probate of Will. To obtain probate of a will, the applicant must also prove to the satisfaction of the court: (2) If the will is not self-proved as provided by this Code, that the testator executed the will with formalities and solemnities and under the circumstances required by law to make a valid will[.] Tex. Prob. Code Ann. _ 88(b)(2) (Vernon 2003).

