Opinion issued October 28, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00953-CV

IN THE ESTATE OF MYRTLE DELL BROWN, DECEASED

On Appeal from the County Court at Law No. 3
Fort Bend County, Texas
Trial Court Case No. 18-CPR-032114

MEMORANDUM OPINION

Appellant, the Humane Society of the United States (the "Humane Society"), challenges the trial court's order, entered after a bench trial, denying an application to probate a copy of the October 1, 2009 will of Myrtle Dell Brown (the "October 2009 will"). In five issues, the Humane Society contends that the trial court erred in

denying the application to probate a copy of Brown's October 2009 will, declaring that Brown died intestate, and denying the Humane Society its right to a jury trial.

We affirm.

Background

Brown died on June 15, 2018 at ninety-three years old. Beverly June Eriks filed an Application for Probate of Copy of Will and Issuance of Letters Testamentary, alleging that Brown "left a valid written [w]ill . . . dated October 1, 2009, which was never revoked," the original October 2009 will "ha[d] not been located," the original October 2009 will was "believed to have been accidentally disposed of at some point during the guardianship of [Brown]," and Brown "would have been incapable of executing another [w]ill after[] [the October 2009 will] due to her becoming incapacitated." The application also alleged that Brown was never married and had no children, and the October 2009 will named the Humane Society "as the sole devisee." The October 2009 will named Eriks as the independent executor. Eriks attached a copy of the October 2009 will to her application.

The October 2009 will states that it revokes "all [w]ills and [c]odicils previously made by [Brown]," notes that Brown has no children, names Eriks as "[i]ndependent [e]xecutor," and states that Brown "gives all of the residue of [her] estate to [t]he Humane Society." The will is signed by Brown and two witnesses, Vickey Lee and Lesa Smith. It contains a self-proving affidavit.

Subsequently, Catherine Wylie, the attorney who had served as guardian ad litem for Brown and who was serving as the guardian of Brown's estate, filed an Application for Determination and Declaration of Heirship, asserting that she was appointed as the guardian ad litem for Brown on October 19, 2009 and had served as the guardian of the estate of Brown since February 8, 2010. According to Wylie, Brown died on June 15, 2018 and it was in the best interest of Brown's estate for the trial court "to determine who [were] the heirs and only the heirs of [Brown]." Brown was not married and did not have any children. Wylie identified Annabelle Louise Powell, Brown's cousin, as an heir of Brown's estate. And Wylie stated that a "determination of heirs" was necessary so that she could "distribute the guardianship estate to those entities entitled to receive."

The Humane Society then filed an Application for Probate of Will Not Produced in Court and for Letters Testamentary and Opposition to Application for Determination and Declaration of Heirship, alleging that Brown "left a valid self-proved, attested [w]ill dated October 1, 2009, which was never revoked," the original October 2009 will "ha[d] not been located," and it was believed that the original October 2009 "ha[d] been accidentally disposed of at some point during the guardianship of [Brown]." The application also alleged that the Humane Society was the "sole devisee" under the October 2009 will, the October 2009 will named Eriks as the independent executor, Brown "was never married and had no children,"

and Brown "owned personal property described generally as bank accounts and stock with an estate of probable value in excess of $50,000.[]" The Humane Society attached of a copy of the October 2009 will to its application.

The Humane Society also attached to its application a "Waiver of Citation and § 258.051 Affidavit" signed by Powell, Brown's cousin. It states that Powell was "given a copy of the Application for Probate of a copy of [her] cousin's [w]ill and a copy of the [w]ill that ha[d] been filed, and [she] ha[d] read both and underst[ood] them." And she "enter[ed] [her] appearance in said cause for all purposes, and waive[d] the issuance, service, and return of [c]itation upon [her]." And Powell stated:

> Had [Brown] died intestate, I would have been entitled to inherit from the [e]state, as I am the first cousin and sole surviving heir. I understand that I do not take assets under the [w]ill as . . . Brown[] named the Humane Society . . . to take everything in the [w]ill. I agree that the probate of a copy of the [w]ill may be taken up and considered by the Harris County Probate Court without further notice to me.

Along with its application, the Humane Society filed a jury demand "of any contested matter in th[e] cause."

At a bench trial on Eriks's application to probate a copy of the October 2009 will, Eriks testified that Brown died on June 15, 2018 in Sugar Land, Texas. Brown did not have any children. Eriks met Brown when Brown's caregivers called her to "come and help" because "[t]hey saw irregularities." Brown's caregivers "kept

hearing . . . Brown talk[] about wanting to get [Powell] off the will," so Eriks told the caregivers to find Brown a lawyer.

Eriks testified that she did not know whether Brown ever revoked the October 2009 will. Eriks had a copy of the October 2009 will. When asked if the "original [October 2009] will might have been accidentally disposed of," Eriks responded, "I have no firsthand knowledge." Eriks did not think that Brown had "any reason" to tear up or dispose of the original October 2009 will. Brown "tended to save every scrap of paper."

According to Eriks, Brown "had a history of hiding" and she "hid $5,000." Brown "may have . . . hid both original copies" of the October 2009 will because no one "had the original of . . . the October [2009 will]." But Eriks did not look anywhere for the original October 2009 will.

When asked if she knew why Brown would have chosen the Humane Society as the beneficiary in the October 2009 will, Eriks stated that Brown "was upset with [Powell] and said she stole while she was in rehab . . . and continued to steal." Brown "loved animals and she had a precious cat named Callie."

Lee testified that she and Smith are sisters and they were witnesses to the October 2009 will of Brown. On October 1, 2009, Lee believed that Brown was of sound mind, and John Yow, the attorney who handled the October 2009 will for Brown, would not have "had someone sign a will if they didn't have capacity." Lee

signed the October 2009 will and the self-proving affidavit. Lee stated that she recognized her signature and the signature of Brown on the self-proving affidavit. Lee also testified that she recognized her signature and the signature of Brown on another document, but the record is not clear as to what document was being shown to Lee then.

Smith, for her testimony, was only asked two questions: "You would agree you have the same answers?" and "You would agree that was the routine?" She responded, "Yes" and "Absolutely," respectively.

No exhibits were admitted into evidence at trial.

On September 10, 2019, the trial court denied Eriks's Application for Probate of Copy of Will and Issuance of Letters Testamentary related to the October 2009 will.

The Humane Society moved to reconsider the trial court's order denying Eriks's application to probate a copy of the October 2009 will and for new trial, asserting that "sufficient evidence was presented to support the [October 2009] [w]ill's probate." The Humane Society asserted that sufficient evidence was presented at trial to show the fact of Brown's death, the timely filing of the application for probate, proper jurisdiction and venue, citation served and returned in the manner and for the period required, execution of the October 2009 will with proper formalities, Brown's testamentary capacity when she executed the October

2009 will, the contents of the non-produced October 2009 will, the reason for the October 2009 will's non-production and non-revocation, and Eriks's entitlement to letters and non-disqualification.

The trial court held a hearing on the Humane Society's motion to reconsider and for new trial. At the hearing, Yow testified that he is an estate planning and probate attorney and he drafted the October 2009 will. The copy of the October 2009 will, which the trial court admitted into evidence,[1] was a true and correct copy of the October 2009 will, which was executed at his office. Two witnesses, Lee and Smith, witnessed the execution of the October 2009 will. Yow searched his office for the original October 2009 will, but he did not have it because it was his practice to give the original will to the testator. He did not keep original wills.

Yow also testified that he met Brown more than once; he recalled meeting Brown at her home and at her office. Brown requested that Yow work with her to

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[1] The trial court also admitted into evidence, among other things, a copy of its September 10, 2019 order denying Eriks's Application for Probate of Copy of Will and Issuance of Letters Testamentary related to the October 2009 will, a copy of Eriks's Application for Probate of Copy of Will and Issuance of Letters Testamentary related to the October 2009 will, a copy of the Humane Society's Application for Probate of Will Not Produced in Court and for Letters Testamentary, a copy of the transcript from the bench trial, a copy of Powell's "Waiver of Citation and § 258.051 Affidavit," a copy of an "Affidavit Waiving Citation for Probate of a Copy of a Lost Will or Codicil or Probate of a Lost Will or Codicil without a Copy" signed by Joyce Jean Brehmer, a copy of a "Sworn Statement Recognizing Decedent's Handwriting or Signature" signed by Lee, a copy of a "Sworn Statement Recognizing Decedent's Handwriting or Signature" signed by Smith, and a copy of "Testimony for Self Proven Willis" signed by Eriks.

draft the October 2009 will. He spoke with Brown alone to make sure he understood how she desired to dispose of her estate and he "got[] the information to write into the [October 2009] will" from Brown. Yow would not have let Brown execute the October 2009 will if he believed that she lacked capacity.

On November 15, 2019, the trial court denied the Humane Society's motion to reconsider the trial court's order denying Eriks's application to probate a copy of the October 2009 will and for new trial. The trial court entered the following findings of fact:

> 1. . . . Brown . . . died on June 15, 2018, in Fort Bend County, Texas at the age of [n]inety-three (93).
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> 2. . . . . [P]rior to her death[,] she was under a guardianship whereby . . . Wylie was appointed on October 19, 2009, to serve as [g]uardian [a]d litem and the guardianship was established on February 8, 2010, and continued until her death . . . .
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> 3. [Brown] had copies of two (2) different [w]ills, one dated August 5, 2009, and another dated less than two months after[,] the October 1, 2009 [w]ill. After a diligent search of the home and safe deposit box, during the guardianship, neither original [w]ill was located. The only [w]ill produced to the Court was a copy dated October 1, 2009. The hearing, the subject of this cause, was on the [a]pplication to [p]robate a copy of the October 1, 2009 [w]ill . . . filed by . . . Ericks [sic], the named executor in the October 1, 2009 [w]ill.
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> 4. [Brown] was not married and had no children. [Brown] did have other family members to varying degrees of consanguinity.
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> 5. The August 5, 2009 [w]ill left all assets of her [e]state to her cousin, . . . Powell.

6. The October 1, 2009 [w]ill left all assets of [Brown] to the Humane Society . . . .

7. On October 15, 2009, after [Brown] fell and was hospitalized, Attorney C. David Easterling sent an Information Letter for Initiation of Guardianship Proceeding for . . . Brown to this Court giving some brief history of [Brown] and suggesting that there was a need for guardianship due to possible financial exploitation of caregivers and the change of previously executed estate planning documents and concerns about . . . Eriks, a stranger to . . . Brown, becoming her agent to handle business and medical decisions on her behalf. . . .

8. On October 19, 2009, this Court appointed . . . Wylie to serve as the [g]uardian [a]d [l]item in a guardianship proceeding styled "In the Guardianship of Myrtle Dell Brown, an Incapacitated Person" with Cause Number 09-CPR-022328. . . .

9. The named [e]xecutor had no contact[] with [Brown] after the guardianship was established on February 8, 2010, until the date of death in June of 2019 [sic].

10. Brown's [e]state is currently valued at approximately $750,000.

11. On August 23, 2018, an Application for Probate of Copy of Will and Issuance of Letters Testamentary was filed by . . . Eriks, the named executor in the October 1, 2009 purported [w]ill.

12. On September 3, 2019, . . . Eriks filed a Brief Concerning Testamentary Capacity and Lost Wills.

13. On December 3, 2018, . . . Wylie, continuing to serve as [g]uardian of the [e]state of . . . Brown, . . . filed an Application for Determination and Declaration of Heirship and requested appointment of an [a]ttorney [a]d [l]item.

14. On December 6, 2018, . . . Eriks filed a Motion for Reconsideration and Objection to the Court's Requirement of an Heirship.

15. On December 14, 2018, an Application for Probate of Will Not Produced in Court and for Letters Testamentary and Opposition to Application for Determination and Declaration of Heirship was filed by the Humane Society . . . .

16. A hearing was held and testimony heard and considered on September 9, 2019[] for the Application for Probate of Will Not Produced in Court and for Letters Testamentary and Opposition to Application for Determination and Declaration of Heirship [sic].

17. On September 10, 2019, the Court issued an Order Denying Application and Copy of Will to Probate.

. . . .

19. On November 4, 2019, this Court heard the Motion to Reconsider and for New Trial filed by the Humane Society . . . and affirmed the visiting [j]udge's Order Denying Will to Probate by denying the Motion to Reconsider and for New Trial.

The trial court entered the following conclusions of law:

The Court must now determine whether . . . Eriks has proven her case as to why [the] original [October 2009] [w]ill has [not] been produced and whether . . . Brown ever revoked the October 1, 2009 [w]ill, as the original was never produced.

When an original [w]ill cannot be located and was last seen in the testator's possession, a presumption arises that the testator destroyed the [w]ill with the intent of revoking it. . . . The proponent must overcome this presumption by a preponderance of the evidence.

On November 4, 2019, testimony given by [a]ttorney . . . Yow, who drafted the [October 2009] [w]ill, was that it is his practice to give the [o]riginal [w]ill to the [t]estator. Testimony further revealed that he had twice visited with [Brown], once at his office and a second time probably at her home. As evidenced by the copy of the prepared [w]ill of . . . Brown by [a]ttorney . . . Yow, the county in which . . . Brown resided was incorrectly stated; the identification of family members

was incomplete; further, the [w]ill failed to name a successor for the appointed executor, . . . Eriks. The last person who had the original [October 2009] [w]ill in their possession was [Brown].

There was not sufficient evidence as to the cause of non[-]production of the October 1, 2009 [w]ill. Under the Texas Estates Code 256.156(b), the cause of the non[-]production of a will not produced in court must be proved, which must be sufficient to satisfy the court that the will cannot by any reasonable diligence be produced and that the will was never revoked.

1. There was not sufficient proof to show non-revocation of the October 1, 2009 [w]ill, particularly since the [w]ill executed immediately prior to this [w]ill was revoked within two months of creation. An original [w]ill's absence creates a rebuttable presumption of revocation; but that presumption could have been overcome by proof and circumstances contrary to the presumption, however none was presented.

According to testimony from the caretaker, . . . Eriks, and her staff, [Brown] was known to be unforgiving. Those . . . reasons were laid out as to why the first [August 2009] [w]ill was revoked, namely a distrust between [Brown] and her cousin, . . . Powell.

At the time of the filing for [g]uardianship, [Brown] had developed similar accusations of theft and misdealing by . . . Eriks and her staff stating to the [g]uardian [a]d [l]item, . . . Wylie, they had stolen from her home. [Brown] further stated she . . . did not want them appointed as her guardian of her person and/or estate. It is quite possible that [Brown] voluntarily destroyed her own original [w]ill dated October 1, 2009. No evidence was given or produced to contradict such a possibility.

2. The named executor under the copy of the [w]ill had no familial tie to [Brown], and at the time of her appointment as the [a]gent for . . . Brown, according to Attorney C. David Easterling, "she and [Brown] [were] complete strangers, with no history that would warrant the high level of concern she professes for [Brown's] welfare." The suspicious nature of the actions drew the possibility and conclusion that [the October 2009] [w]ill was not done in good faith.

> The Humane Society attempted to quell doubts of the suspicions by filing an unsworn Waiver and Renunciation of Right to Letters Testamentary of . . . Eriks on November 4, 2019. The Waiver requested an appointment of an Independent Administrator with Will Annexed. However, no such [a]pplication is on file for the Court to consider.
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> . . . .
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> An [o]rder denying Application and Copy of Will to Probate was issued on September 10, 2019.
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> The Humane Society is the sole devisee under the copy of the purported [w]ill dated October l, 2009. The October 1, 2009[] [c]opy of [w]ill was not admitted to probate. The Humane Society has no legal standing in this case. The Court has determined that [Brown] died intestate.
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> Testimony was heard on the Motion to Reconsider and for New Trial filed by the Humane Society . . . on November 4, 2019, and revisited the Court's file. This Court affirmed the visiting [j]udge's Order Denying Will to Probate by denying the Motion to Reconsider and for New Trial as no proof given to overcome the presumption that the [w]ill was not voluntarily destroyed by [Brown].
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> At this time an administration of the estate is warranted and necessary to handle the monies from the closed guardianship. It is this Court's duty to protect the heirs at law and those suffering legal disability.
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> (Emphasis omitted.)

Standard of Review

We review a trial court's ruling on a probate application for an abuse of discretion. *In re Estate of Setser*, No. 01-15-00855-CV, 2017 WL 444452, at *2 (Tex. App.—Houston [1st Dist.] Feb. 2, 2017, no pet.) (mem. op.); *Stoll v.*

Henderson, 285 S.W.3d 99, 106 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner without reference to guiding rules and principles. *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004); *Woods v. Kenner*, 501 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.). It likewise abuses its discretion if it incorrectly construes or applies the law, because a trial court has no discretion to misconstrue or misapply the law. *In re Estate of Setser*, 2017 WL 444452, at *2. The mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate court in a similar circumstance does not establish that an abuse of discretion has occurred. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985).

Under the abuse-of-discretion standard, legal and factual sufficiency of the evidence are not independent grounds for asserting error, but they are relevant factors in assessing whether the trial court abused its discretion. *Dunn v. Dunn*, 177 S.W.3d 393, 396 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). We give the trial court's fact findings the same weight as a jury's verdict. *Thompson v. Smith*, 483 S.W.3d 87, 93 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

When a party attacks the legal sufficiency of an adverse finding on an issue on which it had the burden of proof, the party must show on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co.*

v. Francis, 46 S.W.3d 237, 241 (Tex. 2001). When we consider a legal-sufficiency challenge, we "must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary." *Id.* Only if there is no evidence to support the finding will we examine the entire record to determine whether the contrary proposition is established as a matter of law. *Dow Chem.*, 46 S.W.3d at 241. We must uphold the fact finder's verdict if more than a scintilla of evidence supports the judgment. *W & T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 898 (Tex. 2020). We will sustain a challenge to the legal sufficiency of the evidence only if (1) there is a complete lack of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) there is no more than a scintilla of evidence offered to prove a vital fact, or (4) the opposite of the vital fact is conclusively established. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 903 (Tex. 2004).

When a party attacks the factual sufficiency of an adverse finding on an issue on which it had the burden of proof, the party must show that the adverse finding is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Dow Chem.*, 46 S.W.3d at 242.

We are mindful that the trial court, as the fact finder in a bench trial, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005);

McKeehan v. Wilmington Sav. Fund Soc'y, FSB, 554 S.W.3d 692, 698 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Thus, the trial court may choose to believe one witness and disbelieve another. *McKeehan*, 554 S.W.3d at 698; *see also City of Keller*, 168 S.W.3d at 819. It is the fact finder's role to resolve conflicts in the evidence, and we may not substitute our judgment for that of the fact finder. *See McKeehan*, 554 S.W.3d at 698.

Non-Production

In its first issue, the Humane Society argues that the trial court erred in denying Eriks's application to probate a copy of Brown's October 2009 will because the evidence is conclusive and overwhelming that a diligent search was made for the lost will.

A copy of a will may be probated when the original will cannot be found. *See* TEX. EST. CODE ANN. § 256.156; *In re Estate of Catlin*, 311 S.W.3d 697, 699–700 (Tex. App.—Amarillo 2010, pet. denied); *see also In re Estate of Standefer*, 530 S.W.3d 160, 167 (Tex. App.—Eastland 2015, no pet.) (Texas Estates Code "[s]ection 256.156 applies when the original will cannot be produced in court"); *Garton v. Rockett*, 190 S.W.3d 139, 145 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (noting "[a] party seeking to probate a copy of a will, rather than the original, must proceed under section [256.156 of the Texas Estates Code]"). A party seeking to probate a copy of a will, rather than the original, must prove the will "in the same

manner as provided" for an attested written will or holographic will. *See* TEX. EST. CODE ANN. § 256.156(a); *see also Woods*, 501 S.W.3d at 196–97; *see generally* TEX. EST. CODE ANN. §§ 256.151 ("General Proof Requirements"), 256.152 ("Additional Proof Required for Probate of Will"), 256.153 ("Proof of Execution of Attested Will"). The "same amount and character of testimony is required to prove the will not produced in court as is required to prove a will produced in court." TEX. EST. CODE ANN. § 256.156(a); *see also Woods*, 501 S.W.3d at 196–97. The proponent must also prove "the cause of the non[-]production" of the original will in a manner "sufficient to satisfy the court that the will cannot by any reasonable diligence be produced."[2] TEX. EST. CODE ANN. § 256.156(b)(1); *see also Woods*, 501 S.W.3d at 197. The proponent of the will satisfies this burden by showing by a preponderance of the evidence that the original will could not be located after a reasonably diligent search. *In re Estate of Burrell*, No. 09-14-00345-CV, 2016 WL 5400260, at *3 (Tex. App.—Beaumont Sept. 22, 2016, no pet.) (mem. op.). The proponent need not establish how the original will was lost. *In re Estate of Burrell*, 2016 WL 5400260, at *3; *see also In re Estate of Catlin*, 311 S.W.3d at 701.

[2] Additionally, "the contents of the will must be substantially proved by the testimony of a credible witness who has read either the original or a copy of the will, has heard the will read, or can identify a copy of the will." TEX. EST. CODE ANN. § 256.156(b)(2); *see also Woods v. Kenner*, 501 S.W.3d 185, 197 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

Here, the trial court found that there was "not sufficient evidence as to the cause of non[-]production of the October 1, 2009 [w]ill." *See* TEX. EST. CODE ANN. § 256.156(b)(1); *see also Woods*, 501 S.W.3d at 197. At trial on her application to probate a copy of the October 2009 will, Eriks testified that she did not know whether Brown ever revoked the October 2009 will and she had "no firsthand knowledge" that the original October 2009 will had been accidentally disposed of. Eriks also testified that she did not think that Brown had "any reason" to tear up or dispose of the original October 2009 will, Brown "tended to save every scrap of paper," and Brown "had a history of hiding." Significantly though, as to non-production of the original October 2009 will, Eriks testified that she *did not search* anywhere for Brown's original October 2009 will. *Cf. In re Estate of Standefer*, 530 S.W.3d at 167–68 (testimony at trial was that diligent search for original will made; decedent's lockbox, where important papers normally kept, was searched as well as office of decedent's bookkeeper); *In re Estate of Catlin*, 311 S.W.3d at 700–01 (testimony at trial was that proponent went through decedent's office at house, "the banks," and "checked for safety deposit boxes" but could not locate original will (internal quotations omitted)); *In re Estate of Capps*, 154 S.W.3d 242, 244–45 (Tex. App.—Texarkana 2005, no pet.) (testimony at trial was that original will had not been located despite thorough search of house and search of metal box that typically contained decedent's important papers).

The Humane Society, in its briefing, points to the statements made during trial by Wylie, the attorney who served as Brown's guardian ad litem and the guardian of Brown's estate, to assert that "all the evidence demonstrate[d] that the [original October 2009] will could not be found after a diligent search."[3] (Emphasis omitted.) Wylie made the following comments to the trial court at trial:

> I served as . . . Brown's guardian for a number of years, for almost ten years.
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> . . . .
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> When I came in I searched for a will and found what we found and I found nothing else. I looked in safe deposit boxes. We cleared the whole house, so if there was an original it was not in her home or in the safe deposit box. I don't know where the original could have gone.

Significantly, Wylie was not called as a witness at trial, not sworn in as a witness, and not subject to cross-examination. *Cf. Hines v. Tex. Dep't of Family & Protective Servs.*, No. 01-08-00045-CV, 2009 WL 4441353, at *4 (Tex. App.—Houston [1st Dist.] Dec. 3, 2009, no pet.) (mem. op.); *see also Hoover v. Hooker*, No. 05-00-00268-CV, 2002 WL 1462210, at *4 (Tex. App.—Dallas July 9, 2002,

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[3] To the extent that the Humane Society directs this Court to Wylie's statements made at a previous status conference, months before trial, we do not consider them. *Cf. Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("In order for testimony from a prior hearing or trial to be considered in a subsequent proceeding, the transcript of that testimony must be properly authenticated and entered into evidence."); *see also In re J.J.F.R.*, No. 04-15-00751-CV, 2016 WL 3944823, at *3 (Tex. App.—San Antonio July 20, 2016, no pet.) (mem. op.). We consider only the evidence admitted at trial on Eriks's application to probate a copy of the October 2009 will.

no pet.) (not designated for publication) (attorney did not testify at hearing where he "was not sworn as a witness" and "was not subject to cross-examination, a crucial aspect of testifying"). She did not offer her comments during trial in response to questioning.

An attorney's unsworn statements are not evidence. *See Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (holding unsworn statements of attorneys are not normally evidence); *Ardmore, Inc. v. Rex Grp., Inc.*, 377 S.W.3d 45, 62 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *see also In re J.T.G.*, No. 14-10-00972-CV, 2012 WL 171012, at *15 (Tex. App.—Houston [14th Dist.] Jan. 19, 2012, pet. denied) (mem. op.) (comment by attorney in response to trial court's question "was not sworn testimony by a witness"); *In re J.N.F.*, 116 S.W.3d 426, 436 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (guardian ad litem's unsworn statement to trial court "that another postponement would cause emotional harm to the children" was not evidence); *In re N.R.C.*, 94 S.W.3d 799, 808 n.5 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (attorney ad litem's assertions did not constitute evidence). Wylie's statements to the trial court, when she had not been called as a witness to testify, were not evidence establishing that the original October 2009 will could not be located after a reasonably diligent search. *See Hines*, 2009 WL 4441353, at *4; *Cauble v. Key*, 256 S.W. 654, 655 (Tex. App.—Austin 1923, no writ) ("'Testimony' has been defined as a statement made by a witness under oath

in a legal proceeding."); *see also In re Guardianship of A.E.*, 552 S.W.3d 873, 881 n.5 (Tex. App.—Fort Worth 2018, no pet.) ("The common law has long recognized that testimony in the context of a legal proceeding is fundamentally defined as a statement made by a witness under oath. Moreover, the administration of the oath by a competent officer is a fundamental and essential requirement to give testimony its binding force, and the Texas Constitution clearly implies that such a prerequisite to the giving of evidence." (internal quotations and citations omitted)). Instead, the only evidence admitted at trial as to whether the original October 2009 will could not be located after a reasonably diligent search was Eriks's testimony, and she testified that she *did not search* for Brown's original October 2009 will.[4] *Cf. In re Estate of Berry*, No. 12-19-00077-CV, 2019 WL 7373843, at *7 (Tex. App.—Tyler Dec. 13, 2019, no pet.) (mem. op.) (witness testified she looked for original will and could not find it).

We conclude that the Humane Society, on appeal, has failed to show that the evidence establishes, as a matter of law, that the original October 2009 will could not be located after a reasonably diligent search. *See* TEX. EST. CODE ANN.

[4] To the extent that the Humane Society refers this Court to Yow's testimony at the hearing on its motion to reconsider and for new trial, we note that Yow testified that he drafted the October 2009 will, but he would have given the original October 2009 will to Brown. He did not keep original wills. *See In re Estate of Wright*, No. 09-18-00227-CV, 2020 WL 1173701, at *4 (Tex. App.—Beaumont Mar. 12, 2020, no pet.) (mem. op.) (trial court, as fact finder, may choose which testimony to believe).

§ 256.156(b)(1); *see also In re Estate of Burrell*, 2016 WL 5400260, at *3. And the Humane Society, on appeal, has failed to show that the trial court's finding that there was "not sufficient evidence as to the cause of non[-]production of the October 1, 2009 [w]ill" is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See* TEX. EST. CODE ANN. § 256.156(b)(1). Thus, we hold that the evidence is legally and factually sufficient to support the trial court's finding on non-production, and the trial court did not err in denying the application to probate a copy of Brown's October 2009 will.[5]

We overrule the Humane Society's first issue.[6]

Jury Demand

In its fifth issue, the Humane Society argues that the trial court erred in denying its right to a jury trial on Eriks's application to probate a copy of the October 2009 will because the Texas Estates Code states that "[i]n a contested probate or

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[5] We note that in its briefing, the Humane Society, refers to Eriks's and its applications to probate a copy of Brown's October 2009 will as "unopposed." (Emphasis omitted.) Yet, the Humane Society still recognizes that "[a]ll the requirements under the Texas Estates Code" must be met before the trial court may grant an application to probate a copy of a will. *Cf. Ayala v. Mackie*, 158 S.W.3d 568, 572 n.1 (Tex. App.—San Antonio 2005, pet. denied) ("We disagree with appellants' assertion that an unopposed application must be granted."); *see also Garton v. Rockett*, 190 S.W.3d 139, 145 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (noting "[a] party seeking to probate a copy of a will, rather than the original, must proceed under section [256.156 of the Texas Estates Code]").

[6] Due to our disposition of the Humane Society's first issue, we need not address its second, third, and fourth issues. *See* TEX. R. APP. P. 47.1.

mental illness proceeding in a probate court, a party is entitled to a jury trial as in other civil actions." *See* TEX. EST. CODE ANN. § 55.002.

The Humane Society has not preserved its complaint for appellate review. *See* TEX. R. APP. P. 33.1; *In re Ruff Mgmt. Tr.*, No. 05-19-01505-CV, 2020 WL 7065829, at *5 (Tex. App.—Dallas Dec. 3, 2020, no pet.) (mem. op.). The right to a jury trial "is inviolate and one of the greatest rights guaranteed by our Texas and United States Constitutions." *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707 728–29 (Tex. App.—Dallas 2012, no pet.); *see also In re Ruff Mgmt. Tr.*, 2020 WL 7065829, at *5. But the right is not self-executing, and even after the right is properly invoked, a party must act affirmatively to preserve its complaint about the right's denial. *See In re Ruff Mgmt. Tr.*, 2020 WL 7065829, at *5; *Sunwest Reliance Acquisitions Grp., Inc. v. Provident Nat'l Assurance Co.*, 875 S.W.2d 385, 387 (Tex. App.—Dallas 1993, no writ). In other words, a party's right to try its case before a jury can be waived. *See In re D.R.*, 177 S.W.3d 574, 580 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) ("[A] perfected right to a jury trial in a civil case may be waived by a party's failure to act when the trial court proceeds with a bench trial.").

Notably, a party waives the right to trial by jury if it participates in a bench trial without objection. *See Lofton v. Dyer*, No. 01-07-00184-CV, 2008 WL 2058219, at *1 (Tex. App.—Houston [1st Dist.] May 15, 2008, pet. denied) (mem. op.); *Alam v. Wilshire & Scott, P.C.*, No. 01-06-00604-CV, 2007 WL 2011048, at

*3 (Tex. App.—Houston [1st Dist.] July 12, 2007, no pet.) (mem. op.); *see also In re Ruff Mgmt.*, 2020 WL 7065829, at *5 (to preserve error, party who has properly perfected its jury trial right must either object on record if trial court proceeds without jury or otherwise affirmatively indicate that it intends to stand on its perfected jury trial right); *In re D.R.*, 177 S.W.3d at 580 (holding parties waived their objection to bench trial by failing to object or otherwise indicate they possessed "perfected" right to jury trial until charge conference).

Here, the Humane Society participated in the bench trial without objecting or otherwise indicating that it planned to stand on its jury demand. *See In re D.R.*, 177 S.W.3d at 580; *see also Alam*, 2007 WL 2011048, at *3. Thus, we hold that its complaint that the trial court erred in denying its right to a jury trial on Eriks's application to probate a copy of the October 2009 will was not preserved for our review.

Conclusion

We affirm the order of the trial court.

Julie Countiss
Justice

Panel consists of Justices Goodman, Landau and Countiss.