TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00003-CV

Alice Lawson and Jeanie Dell Collins Carr, Appellants

v.

Ernest Boyd Collins and Ella Elizabeth Collins, Appellees

FROM TRAVIS COUNTY PROBATE COURT NO. 1
NO. C-1-PB-14-002129, HONORABLE GUY S. HERMAN, JUDGE PRESIDING

MEMORANDUM OPINION

In this consolidated appeal Alice Lawson (Alice) challenges the probate court's judgment confirming an arbitration award resolving her will contest, and Jeanie Dell Collins Carr (Jeanie) challenges the court's adverse summary judgment in her separate will contest.[1] *See* Tex. Est. Code § 32.001(c) (final order issued by probate court is appealable to court of appeals). As urged by Ernest Boyd Collins (Boyd) and Ella Elizabeth Collins (Elizabeth), we will affirm both the judgment confirming the arbitration award and the probate court's summary judgment order.

[1] The appellants and appellees, as well as other parties to and individuals with an interest in the underlying proceedings, are relatives and several of them share a common surname. To avoid confusion, we will refer to these individuals by their given names.

BACKGROUND

Ella Lee Myers Collins (Ella) and Talferd Gabriel Collins (Talferd Gabriel) were the parents of eleven children: Silas Turner Collins (Silas), Talferd Myers Collins (Talferd Myers), Alice, Boyd, Elizabeth, Phyllis Elaine Davis (Phyllis), Ronald Martin Collins (Ronald), Edwin Charles Collins (Edwin), Jeanie, Cecelia Jo James (Cecelia), and Lambert Elliot Collins (Lambert). When Talferd Gabriel died in 1997, his estate was transferred into a testamentary trust created by his 1997 will (the Collins Family Trust). Ella died in 2014 leaving a will dated May 14, 2012 (the 2012 Will), which named Boyd, Elizabeth, and Ronald as independent executors. Boyd and Elizabeth filed an application to admit the 2012 Will to probate. Ronald also filed a separate application for probate of the 2012 Will. Shortly thereafter, Alice filed a petition asserting that (1) the 2012 Will was not valid because Ella lacked legal or testamentary capacity to execute that will and (2) the 2012 Will was executed due to the fraud or undue influence of Boyd or Elizabeth. Alice also objected to the appointment of Boyd and Elizabeth as co-executors under the 2012 Will and later amended her petition to include a request to admit a "lost will" of Ella's to probate.[2]

In October 2015, Boyd, Elizabeth, Ronald, Silas, and Alice, at that time the only parties to the probate proceedings, participated in a mediation that resulted in a Rule 11 Mediated Settlement Agreement (the MSA). The MSA was signed by each participant in the mediation as well as the mediator and the attorneys representing Alice, Ronald, and Boyd and Elizabeth. The terms of the MSA provided that Alice would withdraw her contest to the probate of the 2012 Will and agree to the appointment of Boyd and Elizabeth as independent executors. The MSA also

[2] According to Alice and Jeanie, the lost will was a 1997 "mirror will" to Talferd Gabriel's.

provided for some modifications to the terms of the 2012 Will, including (1) deeding Ronald title to the "Homestead 'Gert' 29 acres," (2) the parties' agreement to waive any individual residuary interest greater than 1/10 and directing the executors to divide such residuary interest equally among Ella's ten surviving children, and (3) conveying Boyd's one-half undivided interest in a 30-acre parcel of land to the children of Talferd Myers, who had predeceased Ella. Additionally, Ronald agreed to decline to serve as a co-independent executor. The parties agreed that all other terms of the 2012 Will would be probated. The MSA also provided that Elizabeth would pay attorneys' fees of $10,000 to Ronald and attorneys' fees of $20,000 to Alice. In an addendum to the MSA, the parties agreed that Alice would receive "$50,000 as her cash distribution from the [Collins Family Trust] (in accordance with the terms of Talferd [Gabriel] Collins's will)" and that the trustees of the Collins Family Trust would wind up the trust and make final distributions no later than March 2016. The parties to the MSA consented to settlement documents (to be prepared after the mediation) that would include full releases of all claims and the nonsuit of Alice's claims.

The MSA also included the following:

> H. Any disputes as to the wording of settlement documents or performance hereof shall be submitted to the Mediator, Claude Ducloux, for binding arbitration.
>
> **Disputes Arising from This Agreement**. If any dispute arises with regard to the interpretation or performance of this Mediated Settlement Agreement or any of its provisions, including the necessity and form of closing documents, the parties agree to try to resolve the dispute by telephone conference with Claude Ducloux, the mediator who facilitated this settlement. If the parties are unable to agree, the parties agree that Claude Ducloux shall serve as the sole arbitrator of disputes regarding the interpretation or performance of this Mediated Settlement Agreement or any of its provisions. In addition, the parties agree that Claude Ducloux shall serve as the sole arbitrator of disputes concerning the form of the Release or pleading. The parties agree that, at the sole discretion of the arbitrator, the arbitration of disputes may be

> by written submissions without a hearing. The parties agree that the arbitration shall be binding arbitration.

Counsel for Boyd and Elizabeth and counsel for Alice then began exchanging drafts of the settlement documents contemplated by the MSA, which included the agreed upon terms and releases. According to Boyd and Elizabeth, after the attorneys had agreed to the form of the settlement documents, Alice expressed to Ella's heirs who were not parties to the probate proceedings that she did not intend to sign the proposed settlement documents and that Boyd and Elizabeth were unfit to serve as co-executors because of their alleged theft from Ella before her death. Also according to Boyd and Elizabeth, Alice encouraged her non-party siblings to file will contests and to oppose the appointment of Boyd and Elizabeth as co-executors of Ella's estate. Ronald's counsel did not respond to communications regarding the form of the settlement documents.

After Alice and Ronald refused to sign the settlement documents and Alice failed to withdraw her will contest, Boyd and Elizabeth filed a motion to enforce the MSA and to enter judgment in accordance with its terms. After a hearing, the court ordered the parties to the MSA to submit their disputes about the form of the settlement documents to Claude Ducloux for binding arbitration. On the day before the hearing, Jeanie had appeared in the probate proceedings and filed a pleading titled "Original Answer of Interested Person" in which she questioned the validity of the 2012 Will[3] and objected to the appointment of Boyd and Elizabeth as executors. At the hearing,

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[3] The pleading states that Jeanie:

> has reason to believe that the Decedent was not of sound mind or memory nor was the decedent capable of making a valid Will at the time by virtue of the fact that Decedent lacked the testamentary capacity and/or said Will was produced under

Jeanie also objected to enforcement of the MSA and stated that she should be allowed to participate in the arbitration. The court instructed Jeanie that she could file her own pleadings challenging the 2012 Will and the appointment of executors and making any other claims regarding Ella's estate, but that (1) her claims did not preclude other heirs from entering a settlement agreement and (2) because she was not a party to the MSA, she had no standing to participate in the arbitration proceeding.

The arbitration hearing was held on April 20, 2016, and after the hearing the arbitrator exchanged emails with counsel for the parties addressing their proposals and objections to specific language in the proposed settlement documents. The arbitrator signed an Arbitrator's Award on April 22, 2016. Exhibit A to the Award was the final form of the settlement documents contemplated by the MSA as determined by the arbitrator. The following week, Jeanie filed a pleading titled "Opposition to Probate of Will and to Issuance of Letters Testamentary" in which she again challenged the validity of the 2012 Will on the alternative grounds that (1) Ella lacked testamentary capacity to make that will, (2) the 2012 Will was executed as a result of undue influence exerted on Ella by Boyd and Elizabeth, or (3) the 2012 Will was a forgery. Jeanie also opposed the appointment of Boyd or Elizabeth as co-independent executors.

> undue influence, nor did decedent intend to revoke an earlier yet unproduced Will of 1997 which contained provisions that expressly mirrored the terms of the Last Will and Testament of Talferd Gabriel Collins, deceased, whose Will is subject of another proceeding before this Court, said proceeding being numbered 68585; however, Respondent [Jeanie] does not herein contest or challenge Decedent's 2012 Will at this time.

Although Boyd, Elizabeth, and Jeanie had exchanged written discovery requests, including request for disclosures, beginning in March 2016, by June of that year Jeanie had not designated any testifying experts and had produced no documents to support her claim that the 2012 Will was not valid. Boyd and Elizabeth then filed a no-evidence motion for partial summary judgment on Jeanie's will-contest claims. In July, Jeanie filed a motion seeking to release the original 2012 Will to a forensic handwriting expert, identified as Dale Stobaugh, but did not set that motion for hearing. The court held a hearing on Boyd and Elizabeth's no-evidence summary judgment motion in November 2016, after which it sustained objections to certain evidence proffered by Jeanie and granted summary judgment against her as to her will-contest claims. The court also denied Jeanie's request to have the 2012 Will examined by a forensic handwriting expert. Jeanie then voluntarily non-suited the remainder of her claims in the probate proceeding and filed a notice of appeal from the order granting summary judgment.

Beginning in July 2016, Alice opposed confirmation of the Award and entry of judgment in accordance with its terms. She filed numerous pleadings seeking to vacate or set aside both the MSA and the Award. Despite not having been a party to the MSA or to the arbitration, Jeanie also filed pleadings asserting that the Award should be vacated or set aside. After granting summary judgment on Jeanie's will-contest claims, the court held a bench trial to address Boyd and Elizabeth's motions for confirmation of the Award and to address Alice's motions seeking to vacate or set aside the Award and the MSA. After conducting a hearing, the court signed an order confirming the Award and ordering that it be enforced according to its terms. The court also rendered judgment dismissing Alice's claims. Alice then filed a notice of appeal.

DISCUSSION

Alice's Appeal[4]

Alice's appellate arguments are directed at challenging the trial court's order confirming the arbitration award that determined the form of the settlement documents contemplated by the MSA reached by Boyd, Elizabeth, Alice, Ronald, and Silas after participating in a mediation with Ducloux serving as the mediator. We review a trial court's decision to confirm or vacate an arbitration award under a de novo standard of review. *D.R. Horton-Tex., Ltd. v. Bernhard*, 423 S.W.3d 532, 534 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Texas law favors arbitration and thus review of arbitration awards is very narrow. *See Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016); *Southwinds Express Constr., LLC v. D.H. Griffin of Tex., Inc.*, 513 S.W.3d 66, 70 (Tex. App.—Houston [14th Dist.] 2016, no pet.). We afford the award great deference, indulging reasonable presumptions in its favor and none against it. *CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002). The Texas General Arbitration Act (TAA) requires the trial court to confirm the award "[u]nless grounds are offered for vacating, modifying, or correcting [the] award under Section 171.088 or 171.091." Tex. Civ. Prac. & Rem. Code § 171.087.[5] Under the TAA a party may avoid

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[4] Alice's brief does not, in many respects, comply with the Texas Rules of Appellate Procedure, which require, among other things, that a brief contain clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. *See* Tex. R. App. P. 38.1. We will, however, endeavor to address the complaints contained in Alice's brief that are supported by legal argument and will consider the evidence and authorities that she has identified to the Court. It is not our duty to, nor will we, review the record, research the law, or consider legal arguments that are not included in Alice's brief. *See Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.) ("It would be inappropriate for this Court to attempt to re-draft and articulate what we believe Valadez may have intended to raise as error on appeal.").

[5] No party contends that the Federal Arbitration Act applies, and we therefore apply the Texas General Arbitration Act to this dispute.

confirmation of the arbitrator's award "only by demonstrating a ground expressly listed in section 171.088." *Hoskins*, 497 S.W.3d at 495. The TAA "leaves no room for courts to expand on those grounds" in vacating an arbitration award. *Id.* at 494. A party seeking to vacate an arbitration award may not invoke extra-statutory or common law reasons for vacatur. *Id.* at 495. The common law allows a court to set aside an arbitration award only if the decision "is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment." *Riha v. Smulcer*, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Arbitration awards are entitled to great deference by the courts "lest disappointed litigants seek to overturn every unfavorable arbitration award in court." *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.—Dallas 2004, pet. denied).

In what we take to be her first appellate issue,[6] Alice asserts that she presented the trial court with evidence "raising substantive issues as to the propriety of both the original mediation and/or the subsequent arbitration . . . which contained issues of duress and/or coercion by Ducloux and [Alice's then-counsel Scott Morrison]." She contends that the trial court "elected not to admit the Lawson affidavit which appears to be error." We understand Alice to complain that the trial court erroneously excluded evidence that would have demonstrated that Alice was coerced into signing the MSA. Even assuming that could constitute a ground for vacating the arbitration award,[7]

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[6] Alice's brief presents her complaints in a series of numbered paragraphs that we will treat as her appellate issues.

[7] Allegations of fraud in the inducement of the underlying contract are matters for the arbitrator to decide, whereas fraud concerning the inducement of an arbitration clause in a contract must be decided by the trial court. *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.—Houston 1996, no writ) (citing *New Process Steel Corp. v. Titan Indus. Corp.*, 555 F. Supp. 1018, 1022 (S.D. Tex. 1983)).

the reporter's record from the hearing on the motion to confirm the arbitration award indicates that counsel for Alice did not offer any affidavit into evidence nor did Alice make an offer of proof. Consequently, Alice failed to preserve a claim that the trial court erred in excluding evidence. *See* Tex. R. Evid. 103(a)(2). Alice did, however, attach an affidavit to her opposition to the motion to enforce the arbitration award and although it is not clear from the brief, we will assume that this is the affidavit to which Alice refers. Unless specifically permitted by statute or rule, affidavits do not constitute evidence in contested cases. *Ortega v. Cach, LLC*, 396 S.W.3d 622, 630 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Stephens v. City of Reno*, 342 S.W.3d 249, 253 (Tex. App.—Texarkana 2011, no pet.) ("[A]bsent authority to the contrary, affidavits are not, as a general rule, admissible in a trial as independent evidence to establish facts material to the issues being tried."). Alice has not identified any authority to support the admissibility of her affidavit. *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 908 n.5 (Tex. 2004) ("The proponent of hearsay has the burden of showing that the testimony fits within an exception to the general rule prohibiting the admission of hearsay evidence."). The trial court would not have erred in refusing to admit "the Lawson affidavit" even had it been offered into evidence. Alice's first issue is overruled.

In what we will treat as Alice's second appellate issue, she contends that her counsel "presented a medical report questioning the competency of [Alice] at the time of the mediation and the later alleged arbitration" and that the trial court "reviewed the medical report and then elected not to admit said report on the basis of hearsay." According to Alice, "such action(s) would appear to be error by the Trial Court in that the medical report could show the Court the incompetence of [Alice] making her participation in the referenced proceedings void." The only mention of any medical report made at the hearing on the motion to confirm the arbitration award is as follows:

Counsel: We have a medical report here.

The Court: A medical report, sir, is not going to get in here without having the person who created the report to be here and testify as to what it is and be subject to cross-examination. [] I don't see any witnesses in this courtroom that can testify. You have a medical record, but there's going to be an objection to hearsay. It is not going to come in. How are we going to get the evidence in?

No further reference to any medical report was made at the hearing, and there was no offer of proof that would inform the trial court or this Court of the substance of the medical report. Alice has not preserved her claim that the trial court would have erred in excluding the medical report. Moreover, a record of a diagnosis is excluded by the rule against hearsay unless certain qualifying conditions are shown "by the testimony of the custodian or other qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10)."[8] Because Alice did not attempt to elicit that testimony from a qualified witness, the trial court would not have erred in excluding the report had counsel attempted to offer it into evidence. We overrule Alice's second issue.

In her third and fifth issues, Alice contends that the arbitration award is not "final, appropriate, and/or binding" because she has to date refused to sign the settlement documents as drafted by the arbitrator. She asserts that for this reason the trial court erred in confirming the Award and ordering that it be enforced according to its terms. An arbitration award, like a court order, is final and effective once it is signed by the arbitrator. The purpose of the arbitration was to finalize the form of the settlement documents, which the arbitrator did. Attached as Exhibit A to the Award

[8] These conditions include that the record was made at or near the time by someone with knowledge, the record was kept in the course of a regularly conducted business activity, and making the record was a regular practice of that activity. *See* Tex. R. Evid. 803(6) (records of regularly conducted activity exception to rule against hearsay).

is the arbitrator's final draft of the "Settlement Agreement and Release of Claims," the form of which he determined "embraces and is consistent with the intent" of the parties to the MSA. The Award orders the parties to sign the Settlement Agreement and Release of Claims as drafted by the arbitrator and attached as an exhibit to the Award. The trial court confirmed the arbitration award and ordered "that the award shall be enforced according to its terms." The Award is binding, and Alice's failure to sign the settlement documents as drafted by the arbitrator does not disturb the finality of the Award or its binding effect on the parties to the arbitration. Instead, Alice's failure to sign the Settlement Agreement and Release of Claims constitutes a violation of the trial court's clear order that she do so. We overrule Alice's third and fifth issues.[9]

In her fourth issue, Alice complains that Jeanie was not permitted to participate in the arbitration proceedings and that, as a consequence, the trial court should have vacated the arbitration award. As an initial matter, Alice does not have standing to bring a claim that Jeanie's rights were somehow violated. Moreover, Jeanie was not a party to the MSA containing the agreement to arbitrate any disputes regarding the form of the settlement documents. Alice provides no authority for her claim that a non-party to an arbitration agreement has a right to participate in an arbitration conducted pursuant to that agreement. She has also failed to provide any authority demonstrating that Jeanie had a right to intervene in the arbitration proceeding. Alice also argues in this issue that the arbitrator was not impartial because, according to her, he did not take into consideration any

[9] In her brief, Alice states that counsel for Boyd and Elizabeth "apparently admitted" that the Award "required signatures by all parties to be binding." This argument mischaracterizes counsel's testimony, which was unequivocal that the Award ordered the parties to sign the settlement documents prepared by the arbitrator. Counsel did not agree that the award was not final and binding and, in fact, filed the motion to confirm the award.

versions of the settlement documents that were proposed by attorneys other than counsel for Boyd and Elizabeth. The record does not support this assertion and, in fact, the only exhibit admitted into evidence at the hearing on the motion to confirm the Award contains emails exchanged between the arbitrator and all counsel that participated in the arbitration soliciting their input on the form of the settlement documents. Attorneys for Boyd and Elizabeth, Alice and Jeanie, and Ronald each provided their substantive comments to the arbitrator's draft. As provided in the MSA, the parties agreed that the arbitrator alone would resolve any disputes concerning the form of the settlement documents, which he could do without written submissions or a hearing. We overrule Alice's fourth issue.

In her sixth issue, Alice merely states that she "believes it was error by the Court to enforce the Arbitration award." This issue includes no legal argument to support the contention and presents nothing additional for this Court's review.

Alice makes two additional arguments in her brief which we will also address. First, Alice appears to assert that she was not required to participate in the arbitration because she did not sign the MSA. This statement is contradicted by the record, which includes the MSA bearing Alice's signature. While Alice has thus far refused to sign the settlement documents as finalized by the arbitrator, she did sign the MSA and agreed to submit disputes about the form of the final settlement documents to binding arbitration. Second, Alice argues that it is "highly likely" that Texas Family Code section 153.0071 applies "since this is a family matter and/or family dispute." Section 153.0071 requires that a mediated settlement agreement reached after an agreed arbitration in a suit affecting the parent-child relationship is binding on the parties if, among other requirements, "it provides, in a prominently displayed statement that is in bold-faced type or capitalized or underlined, that the

agreement is not subject to revocation." Tex. Fam. Code § 153.0071(d)(1). Alice argues that since the Award does not comply with the requirements of section 153.0071, it is void. The underlying proceedings are a probate proceeding, not a suit affecting the parent-child relationship. Texas Family Code section 153.0071 has no application to this case.

Having considered and overruled the issues raised in Alice's brief, we affirm the trial court's order confirming the Award and ordering that it be enforced according to its terms, including the requirement that Alice sign the Settlement Agreement and Release of Claims attached as Exhibit A to the Award.

Jeanie's Appeal

Jeanie appeals from the trial court's order granting Boyd and Elizabeth's no-evidence motion for summary judgment on her will-contest claims.[10] Before the hearing on the motion for summary judgment, Jeanie voluntarily withdrew any claims that Ella lacked testamentary capacity to execute the 2012 Will. Thus, the issue before the trial court was whether Jeanie had presented the court with more than a scintilla of admissible evidence to raise a genuine issue of material fact regarding (1) whether the 2012 Will was a forgery or had been altered from its original form and (2) whether Boyd and Elizabeth caused Ella to execute the 2012 Will through the exercise of undue influence. *See Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003) (no-evidence summary judgment motion defeated if respondent brings forth more than scintilla of probative evidence to raise genuine issue of material fact).

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[10] After the trial court granted summary judgment on the will-contest claims, Jeanie filed a notice of nonsuit of her remaining unadjudicated claims, which included her objection to the appointment of Boyd and Elizabeth as co-executors of Ella's estate.

In her first issue,[11] Jeanie argues that the trial court erred in excluding portions of the affidavit of Ella's daughter Phyllis, which Jeanie contends raised genuine issues of material fact about the validity of Ella's will. We review a trial court's decision to exclude or admit summary judgment evidence for an abuse of discretion. *See Blake v. Dorado*, 211 S.W.3d 429, 431-32 (Tex. App.—El Paso 2006, no pet.). An abuse of discretion exists only when the court's decision is made without reference to any guiding rules and principles or is arbitrary or unreasonable. *Eslon Thermoplastics v. Dynamic Sys., Inc.*, 49 S.W.3d 891, 901 (Tex. App.—Austin 2001, no pet.). We must uphold the trial court's ruling if there is any legitimate basis in the record to support it. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). We will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused rendition of an improper judgment. *See* Tex. R. App. P. 44.1; *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723 (Tex. 2003).

In her brief, Jeanie asserts that Phyllis's affidavit was admissible in its entirety as opinion testimony. *See* Tex. R. Evid. 701 (lay witness testimony in form of opinion is admissible if rationally based on witness's perception and helpful to clearly understanding witness's testimony or determining fact in issue). While lay witness opinion testimony may be admitted under certain circumstances, Jeanie does not provide argument or authority demonstrating that it would have been an abuse of discretion for the trial court to conclude that Phyllis's opinions as set forth in her

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[11] Jeanie's brief includes five separate arguments designated A, B, D, E, and F. We will treat each of these arguments as a separate appellate issue. Other portions of Jeanie's brief, including her statement of the issues presented and her prayer for relief, include challenges to the trial court's rulings that are not supported by any argument or authorities and therefore present nothing for this Court to review. *See* Tex. R. App. P. 38.1.

affidavit were not helpful to understand a witness's testimony or to determine a fact in issue as required by rule 701. Jeanie's brief also fails to address the other bases advanced by Boyd and Elizabeth for excluding portions of Phyllis's affidavit. Boyd and Elizabeth filed thorough and detailed written objections to the portions of Phyllis's affidavit they sought to exclude. These objections included that (1) Phyllis lacked personal knowledge of Ella's or Boyd and Elizabeth's conduct for several months before and after execution of the 2012 Will, (2) a number of the statements were hearsay for which Jeanie identified no exception, (3) some of the statements violated both the hearsay and the "best evidence" rule by referring to documents not attached to the affidavit, *see Gorrell v. Texas Utils. Elec. Co*, 915 S.W.2d 55, 60 (Tex. App.—Fort Worth 1995, writ denied) (failure to attach sworn or certified copies of documents referred to in affidavit constitutes defect in substance of affidavit), and (4) the affidavit contained opinions and conclusions that were unsupported by facts, *see Ryland Grp. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (unsupported conclusory statements are not credible and are not susceptible of being readily controverted). Jeanie has failed to present any legal authority that indicates the trial court abused its discretion or acted without reference to guiding rules or principles when considering and ruling on each of Boyd and Elizabeth's objections to Phyllis's affidavit. To the contrary, the record reflects that the court heard each objection, provided Jeanie's counsel an opportunity to respond, and made rulings that were within its discretion.[12] Jeanie's first issue is overruled.

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[12] Jeanie also claims that the affidavit is excepted from the hearsay rule under Texas Rule of Evidence 804. *See* Tex. R. Evid. 804 (exceptions to rule against hearsay when declarant unavailable as witness). There was no evidence provided to either the trial court or to this Court that Phyllis met any of the criteria for being considered "unavailable" under rule 804. *See id.* R. 804(a).

In her second issue, Jeanie argues that the trial court erred in refusing to admit the testimony of Curt Baggett, offered as testimony of a handwriting expert. After hearing extensive argument and evidence challenging Baggett's qualifications to testify as an expert, the trial court refused to admit his testimony on the alternative ground that he was not timely designated as a testifying expert. *See* Tex. R. Civ. P. 193.6; 194.2(f). On appeal, Jeanie argues that her failure to disclose Baggett as an expert witness should not have served as the basis for excluding him from testifying at a "preliminary hearing not on the merits." To support this argument, Jeanie relies on *Monsanto Co. v. Davis*, 25 S.W.3d 773, 785 (Tex. App.—Waco 2000, pet. dism'd w.o.j.), in which the court of appeals held that rule 193.6 does not apply to a class certification hearing, and *In re Toyota Motor Corp.*, 191 S.W.3d 498, 501 (Tex. App.—Waco 2006, orig. proceeding), in which the same court held that the trial court could consider the testimony of an undisclosed expert psychiatrist when deciding whether to permit the deposition of two child automobile accident victims on the issue of whether they were properly restrained in the vehicle. In both cases the court of appeals held that rule 193.6 does not exclude testimony of an undisclosed expert in preliminary hearings not addressing the merits of the case. In the present case, the hearing was on Boyd and Elizabeth's no-evidence motion for summary judgment, plainly a hearing testing the merits of Jeanie's claim that the 2012 Will was invalid. We overrule Jeanie's second issue.[13]

In her third issue, Jeanie states that the trial court did not apply the appropriate standard of review when it granted Boyd and Elizabeth's no-evidence motion for summary judgment

[13] We also observe that it would not have been an abuse of the trial court's discretion to exclude Baggett's testimony on the ground that Baggett failed to provide any reliable basis for his conclusory opinions regarding Ella's signature. Moreover, Boyd and Elizabeth presented compelling evidence challenging both Baggett's qualifications as a handwriting expert and his credibility.

and that the court's "decision should have been based on the record and not additional testimony." This issue does not include any clear or concise argument supporting Jeanie's contention that she presented admissible evidence to raise a genuine issue of material fact regarding an essential element of her claim that the 2012 Will was a forgery or the result of undue influence exercised by Boyd and Elizabeth such that granting the no-evidence motion for summary judgment would have been improper. *See* Tex. R. App. P. 38.1(i). Because the issue presents nothing for our review, we need not address it.

In her fourth issue, Jeanie argues that the trial court erred in granting the no-evidence motion for summary judgment before passage of an adequate time for discovery to be conducted. When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *See Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 561 (Tex. App.—Dallas 2003, pet. denied). Jeanie filed neither. Instead, in an amended response to the motion for summary judgment and motion to freeze assets, counsel for Jeanie represented to the trial court that she had sufficient evidence to raise a genuine issue of material fact with regard to her forgery claim. By the time of the November 2016 hearing on the no-evidence motion for summary judgment, Jeanie and Boyd and Elizabeth had been engaged in discovery for seven months, Jeanie had a pending motion seeking to release the original 2012 Will to a forensic handwriting expert that she had not attempted to set for hearing for four months, and Jeanie had represented to the trial court that she had sufficient evidence to defeat the no-evidence motion for summary judgment. We overrule Jeanie's fourth issue.

In her fifth issue, Jeanie contends that it was error for the trial court to conduct a hearing on the no-evidence motion for summary judgment because, according to her, the arbitration to resolve disputes about the form of the settlement documents to memorialize the MSA stayed the trial court proceedings. In support of this argument, Jeanie refers to the TAA, which requires that the court stay a proceeding that involves an issue subject to arbitration if it makes an order for arbitration. *See* Tex. Civ. Prac. & Rem. Code § 171.025(a). The issue subject to arbitration in the underlying proceedings was the form of the settlement documents contemplated by the MSA, not Jeanie's will contest. Section 171.025 provides that "the stay applies only to the issue subject to arbitration if that issue is severable from the remainder of the proceeding." *Id.* Jeanie's claim that the 2012 Will was a forgery or the result of Boyd and Elizabeth's undue influence on Ella is severable from the other parties' dispute about the form of the settlement documents. The trial court was not required to stay litigation of Jeanie's will contest pending arbitration of the separate dispute about the form of the settlement documents. Moreover, that arbitration was completed in April 2016, three days before Jeanie had even filed her original petition challenging the 2012 Will. Jeanie's fifth issue is overruled.

Having overruled each of Jeanie's issues, we affirm the trial court's order granting Boyd and Elizabeth's motion for summary judgment.

CONCLUSION

For the reasons stated in this opinion, we affirm the trial court's order confirming the Arbitration Award and ordering it enforced in accordance with its terms. We also affirm the trial court's summary judgment order.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: September 20, 2017