IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE ESTATE OF
GREGG I. MILBERG, DECEASED.

LENORE J. MILBERG,
Petitioner/Appellant,

v.

LEZA S. TELLAM, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF GREGG I. MILBERG,
Respondent/Appellee.

No. 2 CA-CV 2020-0014
Filed February 11, 2021

Appeal from the Superior Court in Pima County
No. PB20190283
The Honorable Kenneth Lee, Judge

AFFIRMED

Lenore J. Milberg, Beverly Hills, California
In Propria Persona

Leza S. Tellam, Winter Park, Florida
In Propria Persona

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this probate matter involving the estate of Gregg Milberg, his sister Lenore Milberg appeals from the trial court's grant of summary judgment to Leza Tellam, in which the court determined that Tellam was Gregg Milberg's daughter and thus his heir. On appeal, Lenore contends, among other things, that insufficient evidence supported the trial court's determination that Tellam is Milberg's daughter and that the court erroneously denied her and her sister Kena Milberg's requests for DNA testing to determine whether Milberg was Tellam's father. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Gregg Milberg died intestate in late 2018. In March 2019, Tellam applied in superior court to be informally appointed as personal representative of his estate, claiming to be his daughter and sole heir. After the application was granted, Lenore filed an objection in late April, claiming that she had reasons to believe that Tellam was not Milberg's biological daughter and had been formally adopted by Tellam's stepfather, and thus Lenore and her sister Kena Milberg were Milberg's heirs, and not Tellam.[1] In her petition, Lenore requested that the court order DNA testing to determine if Milberg was Tellam's father and schedule an evidentiary hearing on the matter. The court set a status and scheduling hearing for June.

¶3 Before the June hearing, Lenore filed for a preliminary injunction to enjoin Tellam from taking any action regarding the estate. The court granted Lenore's request for an accelerated hearing and set that matter to be heard at the June hearing. At that hearing, the court delayed the evidentiary hearing on the preliminary injunction until August 26 to give Lenore time to obtain DNA testing, and ordered Tellam not to distribute or encumber estate assets in the meantime.[2] In July, Tellam

[1]Kena Milberg later filed a similar petition.

[2] Only a portion of this hearing appears to be included in the transcript we have been provided; the remainder of the transcript appears to be a record of a later hearing. The discussion about DNA testing did not occur in the portion of the hearing that is part of our record. "A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal." *Kopacz v. Banner Health*, 245 Ariz. 97, n.4 (App. 2018) (quoting *Baker*

moved for summary judgment, contending that she had established that Milberg was her father via affidavits and a valid Florida birth certificate she had filed. She maintained that this fact had been countered only by "spurious and inaccurate accusations" that Milberg was not her father and that she had been adopted by her mother's current husband. Lenore, joined by Kena, objected to Tellam's claims to the estate, but took no action in court to obtain DNA testing to establish Tellam's paternity before the August hearing.

¶4 At the August 26 hearing on the preliminary injunction, the court denied the injunction, finding that the Milberg sisters had presented no evidence to support it. But the trial court granted the sisters additional time to "get [the] evidence" and complete the process of comparative DNA testing. Although the trial court declined to advise the sisters on particulars, it told the sisters that there were processes by which they could get evidence held by the medical examiner "released to an appropriate testing lab," and also "get a DNA sample from [Tellam]." The court granted them sixty days to complete those tasks, but advised them that they needed to comply with proper procedure to accomplish them. The court set a hearing on Tellam's motion for summary judgment for November, and it warned the sisters that if they did not complete testing, it would rule on the motion for summary judgment because the paternity issue "had been around since the beginning of the case" and they could have begun the process of obtaining DNA testing much earlier.

¶5 In late September, Lenore moved for DNA testing pursuant to A.R.S. § 25-807, requesting that the court order the Pima County Medical Examiner's office to produce Milberg's DNA sample and send it to a testing facility, order that Tellam submit a DNA sample by arranging an appointment with a lab via a phone number they provided, order that the lab send Tellam's sample to the DNA testing facility in Ohio for testing, and order that the lab return results to the court.

¶6 The trial court denied the motion, ruling that § 25-807 applied only in paternity actions brought under A.R.S. § 25-806. It concluded that

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v. Baker, 183 Ariz. 70, 73 (App. 1995)). As Lenore has failed to ensure that the record contains the complete transcript of the hearing, we assume the missing portion of the transcript "would support the court's findings and conclusions." *Id.* (quoting *Baker*, 183 Ariz. at 73). We thus accept as fact the trial court's characterizations of what occurred at the hearing, given in support of its summary judgment ruling.

§ 25-807(B) did not provide it with authority to compel DNA testing of Tellam in a probate matter. It further concluded that pursuant to A.R.S. § 25-803 Lenore had no standing to bring a paternity action. Finally, it stated that Lenore's request "d[id] not meet the requirements of the proper procedure applicable to this case."

¶7 On October 31, Kena filed a second motion for DNA testing, joined by Lenore, this time citing A.R.S. §§ 14-2114, 25-807(C), Rules 26 and 35, Ariz. R. Civ. P., and Rule 28, Ariz. R. Prob. P. She again requested that the court order Tellam to submit a DNA sample and the Pima County Medical Examiner's office to provide Milberg's DNA sample to the Ohio testing facility. Kena requested that the court place the Ohio facility "in charge of all arrangements for collection, comparative testing and delivery of those results back to" the judge.

¶8 At the November hearing on the summary judgment motion, the trial court denied the sisters' request for a continuance for additional time to get DNA testing, finding that the sisters "had ample opportunity to appropriately get the DNA testing" and the latest motion was "still procedurally defective." At the conclusion of the hearing, it granted summary judgment, finding that Tellam was Milberg's daughter based on the evidence Tellam had provided. It found that the sisters had presented no evidence controverting Tellam's claim that Milberg was her father.

¶9 In its signed minute entry, the trial court stated that there was no just reason for delay "as to the issue of intestacy and heirship" and that the order was a final order under Rule 54(b), Ariz. R. Civ. P. We have jurisdiction over Lenore's appeal of those issues under A.R.S. § 12-2101(A)(1).[3]

DNA Testing

¶10 Lenore contends that the trial court erred by denying the requests for "a DNA test to determine on a scientific basis the relationship of [Tellam] and the decedent, Gregg Milberg."[4] We review a trial court's

[3]We have no jurisdiction over Lenore's appeal over other issues, including several related to Tellam's administration of the estate and any raised in a non-appealable post-judgment order she has attempted to appeal.

[4]In many respects, Lenore's opening brief is not compliant with Rule 13(a), Ariz. R. Civ. App. P., including a general lack of "citations of legal authorities and appropriate references to the portions of the record on

denial of a motion for genetic testing for abuse of discretion. *See Antonsen v. Super. Ct.* (*Witt*), 186 Ariz. 1, 7-8 (App. 1996). "We defer to a trial court's factual findings unless they are clearly erroneous." *In re Ghostley*, 248 Ariz. 112, ¶ 21 (App. 2020). "But we review the court's legal conclusions de novo." *Id.* ¶ 8 (quoting *In re Estate of Zaritsky*, 198 Ariz. 599, ¶ 5 (App. 2000)).

¶11 For purposes of intestate succession, if a person's paternity is in dispute, "the court shall establish that relationship under title 25, chapter 6, article 1." A.R.S. § 14-2114(A). That article provides that the court, on its own motion or that of any party, "shall order the mother, her child or children and the alleged father to submit to genetic testing and shall direct that inherited characteristics to determine parentage, including blood and tissue type, be determined by appropriate testing procedures conducted by an accredited laboratory." § 25-807.

¶12 When paternity is contested, requests for testing to determine it are governed by Rule 35(a), Ariz. R. Civ. P. *Pettit v. Pettit*, 218 Ariz. 529, ¶ 10 (App. 2008); *see* Ariz. R. Prob. P. 28(a)(1) (Rules 26 through 37, Ariz. R. Civ. P., generally apply in contested probate proceedings). Rule 35(a)(2) allows a court to "order a party whose physical or mental condition is in controversy to submit to a physical or mental examination," or "order a party to produce for examination a person who is in the party's custody or under the party's legal control." Rule 35(a)(2) requires that "[a]n order under Rule 35(a)(1) . . . specify the time, place, manner, conditions, and scope of the examination" and "the person or persons who will perform the examination."

¶13 Because a court needs the information listed in Rule 35(a)(2) to issue an appropriate DNA testing order, it follows that a party must

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which the appellant relies." Ariz. R. Civ. App. P. 13(a)(7)(A). Although such defects are "appropriate ground[s] for this court to find an appellant's argument waived," we have exercised our discretion and overlooked them to the extent we address the merits of her claims. *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, n.2 (App. 2011). Arguments scattered throughout the opening brief that we have not individually addressed—for example, her unsupported contention that the trial court's denial of DNA testing constituted "a violation of [her and her sister's] rights to irrefutable evidence"—we have deemed waived. *See Sholes v. Fernando*, 228 Ariz. 455, n.5 (App. 2011) (waiving arguments that were "unsupported with citation to authority or the record"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2 (App. 2007) (same).

provide that information in its motion. Lenore does not explain how her September motion complied with this requirement. Indeed, this motion set no time or place for the sample to be collected from Tellam, or who would collect it, leaving it to Tellam to arrange these particulars. *Cf. Martin v. Super. Ct.*, 104 Ariz. 268, 270 (1969) (suggesting that Rule 35 motion nominate person or entity to perform examination for court's consideration and approval). Nor did it specify how Tellam's DNA would be collected.

¶14 Furthermore, the September motion did not explain, nor does Lenore explain here, how the trial court had authority to order the medical examiner—a non-party not mentioned in § 25-807—to "submit DNA of the decedent" as she requested. Similarly, Rule 35(a)(1) only allows a court to order examination of "a *party*" or "a person who is in the *party's* custody or under the *party's* legal control." (Emphasis added.) Lenore cited no authority, here or in her motion, suggesting that the court had power under Rule 35(a)(1) to compel the non-party medical examiner to act. Finally, even if the medical examiner were a party within the meaning of Rule 35, the rule states that an order may be entered only "on notice to all parties," Ariz. R. Civ. P. 35(a)(2)(A), and there is no indication that Lenore provided the medical examiner notice of the motion. Lenore has thus failed to establish that the September motion complied with proper procedures allowing for the court to grant the requested relief.[5]

¶15 As Lenore acknowledges, the trial court granted her and her sister sixty days on August 26 to obtain any necessary DNA samples from Tellam and the medical examiner and complete DNA testing. That time had elapsed by the time Kena's motion for DNA testing was filed on October 31. While Lenore contends that they needed only ten more days when the court denied this motion, by then the deadline had passed by more than two weeks. Lenore does not cite, nor are we aware of, any authority establishing that the court was required to grant a continuance in these circumstances. In sum, Lenore first challenged Tellam's status as Milberg's heir in April when she and Kena first appeared in this action, and the court gave them sufficient time and several opportunities to have the DNA samples submitted and testing completed. This alone constitutes an

[5]Although the trial court erred in concluding that § 25-807 did not apply to Lenore's request, that error is of no consequence given that Lenore has not established that the court erred in its denial of her motion on procedural grounds. *See Solimeno v. Yonan*, 224 Ariz. 74, ¶ 33 (App. 2010) (appellate court may affirm trial court on any basis supported by the record).

appropriate basis to uphold the trial court's denial of Kena's motion. *See Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287-88 (App. 1997) (absent abuse of discretion, appellate court affirms trial court's decision whether to grant continuance for additional discovery); *Solimeno v. Yonan*, 224 Ariz. 74, ¶ 33 (App. 2010) (appellate court may affirm trial court on any basis supported by the record); *see also Higgins v. Higgins*, 194 Ariz. 266, ¶ 12 (App. 1999) (pro se party held to same standards as attorney).

¶16 Lenore complains that the motions "were denied with no reference as to what the proper procedure should have been." But Lenore fails to cite authority requiring the trial court to supply such advice. Nor does the record indicate that she requested the trial court to make specific findings of fact about the proper procedure or otherwise objected to the rulings. Thus, any claimed deficiencies in the rulings are waived. *See Sholes v. Fernando*, 228 Ariz. 455, n.5 (App. 2011) (unsupported arguments waived); *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (issue over trial court's failure to make findings waived by party's failure to request them or otherwise object); *In re $15,379 U.S. Currency*, 241 Ariz. 462, ¶ 27 (App. 2016) (issue waived for failure to include record citations demonstrating that issue was raised below). In short, Lenore has failed to show that the court abused its discretion in denying the motions for genetic testing.

Summary Judgment

¶17 Lenore contends that insufficient evidence supported the trial court's determination that Tellam is the decedent's daughter. A trial court "shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56. To avoid summary judgment, "[t]he party opposing a motion for summary judgment must show that evidence is available that would justify a trial." *Nelson v. Nelson*, 164 Ariz. 135, 137 (App. 1990). We review a grant of summary judgment de novo, "viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13 (App. 2005).

¶18 As an initial matter, Lenore repeatedly refers to unspecified defects in the format of Tellam's summary judgment motion, complaining that the court overlooked the deficiencies of Tellam's actions while penalizing her and her sister for deficiencies in theirs. However, Lenore does not meaningfully argue how Tellam's summary judgment motion was deficient, nor cite relevant supporting authorities. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (argument for each issue must include "supporting

reasons for each contention, . . . with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"). Moreover, she fails to point to where she preserved error for appeal by challenging Tellam's motion on this basis in the trial court. *See* Ariz. R. Civ. App. P. 13(a)(7)(B) (for each contention, party must refer to place in record where issue raised and ruled upon). Any claim of error relating to the form of Tellam's motion is therefore waived. *See Trantor*, 179 Ariz. at 300 (appellate court generally does not consider issues raised for first time on appeal); *$15,379 U.S. Currency*, 241 Ariz. 462, ¶ 27; *Sholes*, 228 Ariz. 455, n.5.

¶19 Tellam supported her summary judgment motion with documents showing that Milberg was her father and she had not been adopted, including her birth certificate showing Milberg as her father. Although Lenore denies that Tellam provided her birth certificate—stating that "the only document placed into the record was an amended name change document"—the document, entitled "Amended Certification of Birth," is a birth certificate on its face.[6] Lenore offers no meaningful argument that such a birth certificate, along with affidavits—including one from Tellam's mother stating that Milberg was Tellam's father and another from her stepfather stating that he had not adopted her—cannot support a finding that Tellam was Milberg's heir.

¶20 Nor does Lenore point to any controverting affidavits or other documentation that showed Tellam's father was someone else. At any rate, Lenore's bare allegations that Tellam's mother had been involved with other men who could have been Tellam's father were insufficient to create a material issue of fact. *See Florez v. Sargeant*, 185 Ariz. 521, 526 (1996) (unsupported, self-serving assertions insufficient to avoid summary judgment). In sum, the record supports the trial court's grant of summary judgment.

Disposition

¶21 For the foregoing reasons, we affirm the trial court's denial of Lenore's motions for genetic testing and its grant of summary judgment in favor of Tellam declaring her to be Gregg Milberg's sole heir. Under A.R.S. § 12-341, Tellam is entitled to her costs on appeal upon compliance with

[6]The birth certificate, which Lenore mischaracterizes as a "name change order," merely contains a notation that Tellam legally changed her name by such an order.

Rule 21, Ariz. R. Civ. App. P. To the extent Lenore has requested attorney fees on appeal, they are denied.