Affirmed and Memorandum Opinion filed May 17, 2018.

In the

Fourteenth Court of Appeals

NO. 14-17-00077-CV

IN THE MATTER OF THE MARRIAGE OF CINDY GARZA FARMER AND JOHN CLINTON FARMER

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2015-15899

M E M O R A N D U M O P I N I O N

Cindy Garza Farmer appeals the trial court's final decree of divorce. Cindy contends that the divorce decree should be vacated because it departs from the terms of the mediated settlement agreement, Cindy's expert witness was excluded, and Cindy's motion for a continuance was denied. We affirm.

I. BACKGROUND

In March 2015, Cindy filed for divorce from John. John answered and filed

a counter-petition for divorce.[1] The parties moved for multiple continuances of the trial date. After granting several continuances, the trial court denied Cindy's final motion for continuance. Trial was set for September 19, 2016.

On the date of trial, the trial court reiterated the denial of the final motion for continuance. The trial court also heard and granted John's motion to exclude Cindy's expert Robert Adams. The parties subsequently entered into a Binding Mediated Settlement Agreement (MSA). *See* Tex. Fam. Code. Ann. § 6.602 (West 2017). That same day, the agreement was proved up before the court.

The MSA specifically provides:

> Pursuant to Sections 6.601, 6.602, and 153.0071 of the Texas Family Code, the undersigned parties to this Binding Mediated Settlement Agreement agree to compromise and settle the claims and controversies between them.
>
> . . .
>
> The parties agree and stipulate that this Binding Mediated Settlement Agreement provides a basic outline of their complete agreement; however, the parties understand and acknowledge that this Agreement may omit specific details or terms that must be included in an enforceable final order or decree. Consequently, the parties agree that whether this Binding Mediated Settlement Agreement specifically provides the necessary language to make the final order or decree enforceable, the parties intend that the drafting party shall insert all the details, appropriate dates, times, locations, and notice requirements necessary to make the final order or decree enforceable.
>
> If any dispute arises with regard to the interpretation or performance of this Agreement or any of its provisions, including the necessity, form and substance of documents, the parties agree to try to resolve the dispute by telephone conference or meeting with Jeffrey H. Uzick, the Mediator who facilitated this settlement. Any disputes regarding drafting shall be resolved whenever possible by reference to the Texas Family Law Practice Manual, unless the Family Code has been

[1] Both parties subsequently amended their pleadings.

> modified after the published date of the manual; in such event the Family Code shall take precedence. *In the event an agreement cannot be reached on drafting or intent, the mediator shall act as the arbiter of the issue and shall resolve the issue by telephone conference or meeting of the attorneys and mediator prior to the date of entry. Such decision of the mediator shall be final and binding*.

(emphasis added).

On October 26, 2016, the trial court entered a final decree of divorce. Cindy filed a motion for new trial, primarily complaining that the trial court improperly incorporated a "Property Division" into the divorce decree rather than the MSA. Cindy conceded that the property division was signed by Jeff Uzick; Cindy included in her motion the signature page of the property division showing that Uzick had signed the document as "Arbitrator." Cindy argued, however, that the property division took place before the "date of entry," and the MSA did not authorize Uzick to act as an arbitrator after the "date of entry."

At the September 19, 2016 prove-up hearing on the MSA, the trial court orally granted the parties' divorce and set an entry date of September 26, 2016:

> The Court: The Court hereby grants your divorce per the binding mediated settlement agreement and agreements of the parties as a final judgment. Your entry will be on September 26th, 2016.

As noted above, however, the final divorce decree (which incorporated the property division) was not actually entered until October 26, 2016.

According to John, the property division resulted from arbitration as provided by the MSA. John responded, "What Cindy is really complaining about is how the arbitrator resolved . . . drafting disputes in arbitration leading up to the entry of a Final Decree of divorce." John's response stated:

> Jeff Uzick, a well-respected mediator and arbitrator, resolved these

> drafting disputes in arbitration conducted pursuant to the MSA prior to the entry of a Final Decree.

John argued there were no grounds to vacate the arbitration award and that Cindy's failure to provide a record of the arbitration proceedings to the trial court prevented review of the arbitration award.

In reply, Cindy argued that the property division did not constitute an arbitration award because it did not meet certain requirements of the Texas Civil Practice and Remedies Code for an arbitration award, including service of the award.

John filed a further response, incorporating an email from Uzick to the parties' lawyers, which stated "The attached Decree and property division contains my arbitration ruling on all disputed issues presented to me for ruling." John further asserted that Cindy had waived her complaint regarding service.

Cindy's motion for new trial was overruled by operation of law. Cindy appealed.

II. ANALYSIS

In her first issue, Cindy contends that the divorce decree should be vacated because it departs from the terms of the MSA. According to Cindy, the MSA, rather than the property division, should have been incorporated into the decree. Cindy attached the divorce decree and the property division to her notice of appeal and to her opening brief in an appendix.[2] She did not include the divorce decree or the property division in the appellate record. We cannot not consider documents attached to a notice of appeal or appellate brief that are not part of the appellate record. *See In re C.C.E.*, 530 S.W.3d 314, 317, n.1 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Jones v. Warren*, No. 02–12–00154–CV, 2013 WL 4679731,

[2] John included excerpts from these documents in his appellate brief.

at *2 (Tex. App.—Fort Worth Aug. 29, 2013, no pet.) (mem. op.) (citing *Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.*, 178 S.W.3d 198, 210 (Tex. App.—Houston [14th Dist.] 2005, no pet.)). Even if these documents were included in the record, the record does not show that the trial court erred.

John contends, as he did before the trial court, that the final decree and property division properly incorporated Uzick's arbitration rulings. John points to *Saldana v. Saldana*, where the appellant argued that the arbitrator's award improperly modified terms of the MSA, but the First Court of Appeals held the trial court did not err by incorporating terms of the arbitrator's award into the final decree of divorce. 2013 WL 1928800, at *4–5 (Tex. App.—Houston [1st Dist.] May 9, 2013, pet. denied) (mem. op.).

Cindy's opening appellate brief makes no mention of arbitration or any ruling by Uzick as arbitrator, and she does not reply to John's appellate arguments regarding arbitration. Before the trial court, Cindy argued the property division was not an arbitration award but conceded that the property division was signed by Uzick as "Arbitrator." We cannot conclude the trial court abused its discretion when the trial court reasonably may have concluded that the discrepancies between the final decree and the MSA were the product of arbitration, which was provided for by the MSA.

Moreover, a party seeking to vacate an arbitrator's award bears the burden to present a complete record establishing the basis for relief. *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see also Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 101 (Tex. 2011) ("A court must have a sufficient record of the arbitral proceeding . . . ."). Although Cindy challenges the inclusion of the property division in the decree, she did not provide this court (or the trial court) with a sufficient record of the proceedings leading up

to the property division. As Cindy stated in her motion for new trial, "There is nothing in this record to show how [the property division] came to fruition." Even assuming the property division was not the result of arbitration proceedings, in this case, the absence of any evidence showing how the property division "came to fruition" precludes this court from finding error. On this record, Cindy has not established the divorce decree should be vacated. We overrule Cindy's first issue.

In Cindy's second and third issues, she argues the trial court should not have excluded her expert and should not have denied her motion for continuance. John responds that these issues are moot because the parties settled.

"Appellate courts are prohibited from deciding moot controversies." *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). A case is moot if there is no longer a "justiciable controversy between the parties." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012). There is no justiciable controversy if our action on the merits would not affect the parties' rights. *Id.*

There is no dispute that the parties initially settled their claims and controversies under the MSA. Because the court addressed Cindy's motion for continuance and expert argument before the parties entered the MSA, these issues became moot once the parties entered the MSA. Although Cindy denies any connection between the property division and the MSA, Cindy does not contend that the MSA was invalid or without effect. Rather, Cindy argues the MSA controls. Consequently, no action we could take would invalidate the parties' settlement. Even if we vacated the decree and property division (which we do not), the MSA would control. *See Milner v. Milner*, 361 S.W.3d 615, 623 (Tex. 2012) (refusing to set aside MSA; instead, remanding for resolution of ambiguity in MSA). We cannot decide these moot controversies.

We overrule Cindy's second and third issues.

III. CONCLUSION

Having overruled all of Cindy's issues, we affirm the trial court's final divorce decree, including the attached property division.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Jamison, and Brown.