NUMBER 13-20-00234-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN RE B.E. AND G.E.

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Tijerina[1]

By petition for writ of mandamus, relators B.E. and G.E. contend that the trial court abused its discretion by (1) requiring relators to set a hearing on their motion to transfer venue, and (2) failing to grant relators' motion to transfer venue when the real parties in interest failed to file a controverting affidavit as required by the Texas Family Code. *See* TEX. FAM. CODE ANN. § 155.201. The underlying suit affecting the parent-child relationship

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[1] *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so," but "[w]hen granting relief, the court must hand down an opinion as in any other case"); *id.* R. 47.4 (distinguishing opinions and memorandum opinions).

concerns the termination of parental rights.[2] We conditionally grant the petition for writ of mandamus.

I. Background

Minor child C.G.'s maternal grandmother, A.M., was appointed as C.G.'s sole managing conservator in an April 26, 2018 temporary order in trial court cause number 2018-FAM-0460-H in the 347th District Court of Nueces County, Texas. At that time, A.M. signed an authorization allowing C.G. to live with the relators, as non-parent caregivers, and C.G. has subsequently lived with the relators in Williamson County, Texas, since April 26, 2018. A.M. is also grandmother to relator G.E.[3]

On September 17, 2019, the relators filed an "Original Petition to Terminate the Parent-Child Relationship and Suit Affecting the Parent-Child Relationship" against C.G.'s biological mother, C.D., and father, A.G., in that same cause. The relators sought to terminate mother and father's parent-child relationship and requested appointment as C.G.'s managing conservators. That same day, the relators filed a motion to transfer venue from Nueces County to Williamson County on grounds that C.G. had resided in Williamson County with the relators for more than six months. *See id.* § 155.201(b).

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[2] This original proceeding arises from trial court cause number 2018-FAM-0460-H in the 347th District Court of Nueces County, Texas, and the respondent is the Honorable Missy Medary. *See id.* R. 52.2. To protect the identity of the minor child, we use initials to refer to the child, parents, and family members. *See id.* R. 9.8(b)(2).

[3] Relators assert that A.M. agrees with their motion to transfer venue and does not oppose the relief they seek in this original proceeding, and they support these assertions with her signed declaration. This document was not presented to the trial court, and therefore, we do not consider it here. With limited exceptions, the appellate court reviews the actions of the trial court based on the record before the court at the time it made its ruling. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding); *Sabine OffShore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (orig. proceeding); *Hudson v. Aceves*, 516 S.W.3d 529, 539–40 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.) (combined appeal & orig. proceeding); *In re Taylor*, 113 S.W.3d 385, 392 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding).

On or about January 8, 2020, mother and father filed separate pro se answers to relator's petition. On January 28, 2020, M.F., who is C.G.'s paternal grandmother, filed a pro se petition in intervention asking for custody of C.G.

On January 15, 2020, counsel for the relators e-mailed the court coordinator of the 347th District Court and asked if they could submit a proposed order transferring venue to Williamson County because the real parties had filed answers to the relators' petition but had not filed controverting affidavits to their motion to transfer venue within the statutory deadline. *See id.* § 155.204(d). The court coordinator advised the relators that the trial court "requires a hearing" on the motion to transfer venue and provided the relators with several dates for the proposed hearing.

On February 5, 2020, the trial court held a hearing on the relators' motion to transfer venue. Relators were represented by counsel. Based on the transcript of the hearing, C.D. and M.F. appeared pro se.[4] At the inception of the hearing, the trial court instructed the parties to confer. Upon proceeding with the hearing, the real parties confirmed that they were aware that the relators' motion to transfer venue was set to be heard that day. At the request of C.D. and M.F., the trial court deferred ruling on the relators' motion to transfer venue and reset the venue hearing in order to allow the real parties time to obtain counsel.

The record indicates that the venue hearing was reset for March 16, 2020; however, that setting was ultimately cancelled due to the pandemic. On March 25, 2020,

[4] The transcript of the hearing identifies one of the speakers as father A.G. However, that speaker stated that he had driven to the hearing from Williamson County, that the child had been residing with him since April, and that he was "ready to go" on the issue of venue, thus, based on the text of the transcript, the speaking party may have instead been B.E. rather than A.G. We need not further address this anomaly because the resolution of this issue is not necessary to the disposition of this original proceeding. *See* TEX. R. APP. P. 47.4.

the relators asked the court coordinator if the trial court would allow the hearing to be held by videoconference, teleconference, or written submission. That same day, the court coordinator advised relators that "[a]t this time, the Court does not have the equipment." On March 27, 2020, the relators inquired whether the trial court would allow the motion to transfer venue to be heard by written submission, and the coordinator responded that the trial court "require[ed] a hearing" on the motion to transfer.

This original proceeding ensued on June 5, 2020. By one issue, the relators assert that the trial court abused its discretion by requiring the relators to set a hearing on their motion to transfer venue and by failing to grant the motion to transfer when the real parties in interest failed to file a controverting affidavit.

By order issued on June 11, 2020, this Court requested that the real parties in interest, M.F., C.D., A.G., and A.M., or any others whose interest would be directly affected by the relief sought, file a response to the petition for writ of mandamus on or before the expiration of ten days. *See* TEX. R. APP. P. 52.2, 52.4, 52.8. The real parties did not file a response to the petition for writ of mandamus. On June 26, 2020, the Clerk of the Court advised the real parties (1) that this Court had issued an order requesting the real parties to respond to the petition for writ of mandamus on or before June 22, 2020, and (2) the Court had not received their response. The Clerk requested that the real parties respond to this Court's order dated June 11, 2020, within five days. The real parties have neither filed a response to the petition for writ of mandamus nor have they responded to the Court's notice.

II. Mandamus

Mandamus is an "extraordinary" remedy. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding); *see In re Team Rocket, L.P.*, 256 S.W.3d 257, 259 (Tex. 2008) (orig. proceeding). In order to obtain mandamus relief, the relator must show that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *see In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 462 (Tex. 2008) (orig. proceeding).

Mandamus is available to compel the mandatory transfer of venue in a suit affecting the parent-child relationship because a trial court that improperly refuses its ministerial duty to transfer has abused its discretion. *See Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding); *Cassidy v. Fuller*, 568 S.W.2d 845, 847 (Tex. 1978) (orig. proceeding); *In re Venegas*, 595 S.W.3d 341, 344 (Tex. App.—Eastland 2020, orig. proceeding); *In re Yancey*, 550 S.W.3d 671, 674 (Tex. App.—Tyler 2017, orig. proceeding); *In re Thompson*, 434 S.W.3d 624, 628 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding); *In re Lawson*, 357 S.W.3d 134, 135–36 (Tex. App.—San Antonio 2011, orig. proceeding). In such cases, remedy by direct appeal is inadequate because parents and children who have a right to mandatory venue "should not be forced to go through a trial that is for naught" and because "[j]ustice demands a speedy resolution of child custody and child support issues." *Proffer*, 734 S.W.2d at 673; *see In re Lawson*, 357 S.W.3d at 136; *see also* Tex. Fam. Code Ann. § 155.204(h) (providing that an order transferring or refusing to transfer venue "is not subject to interlocutory appeal").

III. Mandatory Venue

The relators asserted that the "principal residence of the child is in Williamson County, Texas, and has been in that county during the six-month period preceding the commencement of this suit," and thus requested transfer of the case from Nueces County to Williamson County. *See* TEX. FAM. CODE ANN. § 155.201(b). "The plain language of Section 155.201(b) demonstrates the legislature's desire that matters affecting the parent-child relationship be heard in the county of the child's residence." *In re Yancey*, 550 S.W.3d at 675; *see Cassidy*, 568 S.W.2d at 847 (explaining that it is easier to prove the current circumstances affecting children in their county of residence). Section 155.201(b) provides that, if a suit to modify or a motion to enforce an order is filed in the court having continuing, exclusive jurisdiction of a suit and a party files a timely motion to transfer, the court "shall, within the time required by Section 155.204, transfer the proceeding to another county in this state if the child has resided in the other county for six months or longer." *Id.* § 155.201(b); *see In re Venegas*, 595 S.W.3d at 344.

A motion to transfer venue by a petitioner or movant is timely "if it is made at the time the initial pleadings are filed." TEX. FAM. CODE ANN. § 155.204(b). A party who contests the transfer must file "a controverting affidavit denying that grounds for the transfer exist" on or before "the first Monday after the 20th day after the date of notice of a motion to transfer is served." *Id.* § 155.204(d). If a qualifying controverting affidavit is timely filed, each party is entitled to notice not less than ten days before the hearing date on the transfer motion. *Id.* § 155.204(e). At the hearing, "[o]nly evidence pertaining to the transfer may be taken." *Id*. § 155.204(f). If, on the other hand, no controverting affidavit is filed within the period allowed for its filing, "the proceeding shall, not later than the 21st

day after the final date of the period allowed for the filing of a controverting affidavit, be transferred without a hearing to the proper court." *Id*. § 155.204(c). This provision is mandatory. *Proffer*, 734 S.W.2d at 673; *In re Venegas*, 595 S.W.3d at 344; *In re Yancey*, 550 S.W.3d at 674; *Silverman v. Johnson*, 317 S.W.3d 846, 849 (Tex. App.—Austin 2010, no pet.).

If transferred, the transferee court becomes the court of continuing, exclusive jurisdiction, and all proceedings continue as if brought there originally. TEX. FAM. CODE ANN. § 155.206(a). The transferee court acquires the power to enforce previous orders entered by the transferor court, including disobedience of the transferring court's order that occurred before or after the transfer. *Id.* § 155.206(c). "After the transfer, the transferring court does not retain jurisdiction of the child who is subject of the suit, nor does it have jurisdiction to enforce its order for a violation occurring before or after the transfer of jurisdiction." *Id.* § 155.206(d).

IV. ANALYSIS

By one issue, the relators contend that the trial court abused its discretion by requiring a hearing on the motion to transfer venue and refusing to transfer venue in the absence of a controverting affidavit. The relators assert that it is "undisputed" that C.G. has resided in Williamson County for longer than the statutory six-month requirement for transfer and that "no party has filed a controverting affidavit." They thus assert that the trial court's failure to transfer the case constitutes an abuse of discretion.

Here, the record indicates that the trial court has continuing, exclusive jurisdiction over the case. *See id.* § 155.001(a). The mandamus record shows that the relators filed the motion to transfer venue on the same day that they filed their petition. *See id.*

§ 155.204(b). The record also shows that C.G. had lived in Williamson County for more than six months when the relators filed their petition and motion to transfer venue. *See id*. § 155.201(b). The record further indicates that the real parties had notice of the motion to transfer venue. *See id*. § 155.204(d). Accordingly, the requirements of § 155.201(b) have been satisfied. The real parties in interest did not file a controverting affidavit, timely or otherwise. "When the statutorily required grounds for mandatory venue transfer under the Family Code exist, the trial court has a mandatory, ministerial duty to transfer the case to the county where the child has resided for more than six months." *In re Venegas*, 595 S.W.3d at 344. Therefore, the trial court was statutorily required to transfer the case to Williamson County without holding a hearing. *See* TEX. FAM. CODE ANN. §§ 155.201(b), .204(c); *In re Venegas*, 595 S.W.3d at 346; *In re Yancey*, 550 S.W.3d at 675–76; *In re Lawson*, 357 S.W.3d at 136; *In re Leyva*, 333 S.W.3d 315, 318 (Tex. App.—San Antonio 2010, orig. proceeding); *see also In re L.C.R.*, No. 01-19-00667-CV, 2020 WL 3456595, at *4 (Tex. App.—Houston [1st Dist.] June 25, 2020, no pet. h.) (mem. op.) (holding that a trial court has a statutory, ministerial duty to promptly transfer the suit without a hearing once all requirements of the mandatory-venue-transfer statute are met). In so ruling, we recognize that, in deferring ruling, the trial court was attempting to allow the real parties in interest the opportunity to retain counsel. However, we have found no authority that would permit the trial court to exercise discretion to act outside the parameters of the statutory deadline under the facts presented in this case. *See In re Venegas*, 595 S.W.3d at 346; *In re Kramer*, 9 S.W.3d 449, 451 (Tex. App.—San Antonio 1999, orig. proceeding).

IV. Conclusion

We have carefully considered the petition for writ of mandamus, the record, and the applicable law. We conclude that the relators have met their burden to obtain relief. Accordingly, we conditionally grant the petition for writ of mandamus and direct the trial court to transfer the suit to Williamson County. The writ will issue only if the trial court fails to promptly comply.

JAIME TIJERINA,
Justice

Delivered and filed the
22nd day of July, 2020.