Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00728-CV

IN THE INTEREST OF L.M.D., D.D., and T.D., Children

From the 57th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-CI-20628
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: August 12, 2020

AFFIRMED

Appellant G.D.[1] ("Father") appeals from an order, in which the trial court relinquished jurisdiction of the suit affecting the parent-child relationship. The trial court determined that jurisdiction lies with the State of New York as the more convenient forum. We affirm.

BACKGROUND

Father and appellee A.D. ("Mother") are the parents of the minor children, L.M.D., D.D., and T.D. In 2016, the trial court signed an agreed final decree of divorce, in which Mother was granted the exclusive right to designate the primary residence of the children within Bexar County, Texas.

[1] To protect the identity of the minor children, we use the parties' and children's initials. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

In February 2017, Mother filed a petition to modify the parent-child relationship, seeking to expand the geographic restriction to New York. Father filed a counter-petition, seeking equal rights and duties and equal periods of possession. In July 2017, the parties executed a Rule 11 agreement, agreeing to lift the residency restriction to allow Mother and the children to move to New York. *See* TEX. R. CIV. P. 11. Father was relieved of his child support obligations by the agreement, and the parties agreed that Father would split possession of the children if he moved to New York.

In August 2017, the parties and children moved to New York. According to Father, Mother did not comply with the terms of the Rule 11 agreement as to equal possession, and Father moved back to Texas. In September 2017, Father filed a "Revocation of Consent and Agreement of Rule 11." He also filed a motion to modify the trial court's possession order and to compel the return of the children to Bexar County. In October 2017, the trial court denied Father's motion.

The parties pursued discovery as the litigation continued. In May 2018, the trial court appointed a child-custody evaluator and ordered Father to pay for the entire cost of the home-study and psycho-social evaluation. The evaluator traveled to New York to meet with Mother and the children and filed an evaluation with the trial court afterward. The trial court set the case for a jury trial for November 2018, but the setting was continued.

In April 2019, Mother filed a "Motion to Change Venue." In her motion, Mother requested a "change of venue" because she and the children resided outside of Texas and because "Clinton County, New York, is the county most appropriate to serve the convenience of the resident parties and the witnesses and the interest of justice, and venue is proper in that county." Mother did not verify her motion or attach an affidavit in support. Father opposed the motion and did not file a controverting affidavit.

In June 2019, the trial court held a hearing on Mother's "Motion to Change Venue." Mother's counsel asserted that Mother and the children had lived in New York since 2017, and the children's teachers, doctors, and therapists were in New York. Counsel also stated that Mother earned approximately $19 per hour and was unable to pay for witnesses to travel to Texas. According to counsel, any witnesses residing in New York were outside of the trial court's subpoena range. Father's attorney did not contest the representations, but argued in opposition that Texas venue rules do not permit a transfer of venue to another state. *See* TEX. R. CIV. P. 86, 259. According to Father's counsel, the trial court held continuing exclusive jurisdiction under section 152.202 of the Texas Family Code and dismissal would prejudice Father, who had expended time and money to litigate the case in Texas. *See* TEX. FAM. CODE ANN. § 152.202. Mother's attorney replied that the substance of the motion was a request for the trial court to decline to exercise its jurisdiction. At the conclusion of the hearing, the trial court determined that the matter should be transferred to New York, where the children had resided for the last two years. Father's attorney requested attorney's fees, which the trial court denied without prejudice.

After the hearing, the trial court signed an "Order on [Mother's] Motion to Transfer Venue." The order states: "The Court . . . finds that all necessary prerequisites of the law have been legally satisfied and that the Court has jurisdiction of this case and of all the parties." The order further states:

> [T]he Court finds . . . that jurisdiction of this matter rests with the State of New York and that Texas relinquishes jurisdiction to the State of New York as the more convenient forum in accordance with [the] Texas Family Code. The Court ORDERS that jurisdiction of this case lies in New York State.

Father filed a motion for new trial, arguing the judgment was unsupported by factually sufficient evidence because the trial court did not hear testimony. The trial court denied Father's motion and stated in its denial order: "The Court finds that [Father] may have the right to seek

recover[y] for attorney['s fees] for any and all litigation that occurred in Texas in the venue in which [t]rial on the [m]erits is to occur." Father appeals.

DISCUSSION

Father argues the trial court abused its discretion when it signed the "Order on [Mother's] Motion to Transfer Venue."

In his first stated issue[2], Father argues the "transfer of venue" to New York violated the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA" or the "Act"). According to Father, the Act governs "interstate venue transfers," and, under a provision of the Act—section 152.202 of the Texas Family Code—the trial court held exclusive continuing jurisdiction.

"The UCCJEA governs jurisdiction over child custody issues between Texas and other states." *Lesem v. Mouradian*, 445 S.W.3d 366, 372 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The Act "was designed, in large part, to clarify and to unify the standards for courts' continuing and modification jurisdiction in interstate child-custody matters." *In re Forlenza*, 140 S.W.3d 373, 374 (Tex. 2004) (orig. proceeding). The Act comprises Chapter 152 of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 152.101. Section 152.201(a) of the Family Code provides that a Texas court can make an initial child-custody determination in certain circumstances. *See id.* § 152.201(a). Here, the parties agree the trial court made an initial determination regarding the children when the trial court issued the agreed final decree of divorce in 2016. The divorce decree awarded Mother the exclusive right to designate the primary residence of the children within Bexar County.

After this initial determination, pursuant to the UCCJEA, the trial court retained "exclusive continuing jurisdiction" over child-custody determinations until such time as:

[2] Father asserts three issues in his brief in the statement-of-issues section. We address all three issues as well as various other issues Father raises in the argument section of his brief.

> (1) a court of this state determines that neither the child[ren], nor the child[ren] and one parent, nor the child[ren] and a person acting as a parent, have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child[ren]'s care, protection, training, and personal relationships; or
>
> (2) a court of this state or a court of another state determines that the child[ren], the child[ren]'s parents, and any person acting as a parent do not presently reside in this state.

TEX. FAM. CODE ANN. § 152.202(a).

Father argues the circumstances stated in section 152.202(a)(1) and (2) were never satisfied, and, therefore, the trial court never lost exclusive continuing jurisdiction. We take no position on the matter because it is not dispositive.

The UCCJEA provides, in addition to section 152.202, a second means by which a trial court with exclusive continuing jurisdiction can relinquish jurisdiction. Section 152.207 provides that a court of exclusive continuing jurisdiction "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." TEX. FAM. CODE ANN. § 152.207(a). Mother argues the trial court declined to exercise jurisdiction in favor of a New York court under section 152.207. We agree.

Although Mother styled her motion as a "Motion to Change Venue," it was in substance a motion requesting that the trial court decline to exercise jurisdiction under section 152.207. In her motion, Mother acknowledged the trial court had "continuing, exclusive jurisdiction of this suit or of the children the subject of this suit." Mother requested a "change of venue" because "Clinton County, New York, is the county most appropriate to serve the convenience of the resident parties and the witnesses and the interest of justice, and venue is proper in that county." "[W]e look to the substance of a motion to determine the relief sought, not merely to its title." *Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999); *see also PNP Petroleum I, LP v. Taylor*,

438 S.W.3d 723, 731 (Tex. App.—San Antonio 2014, pet. denied) (holding a trial court abused its discretion by refusing to consider evidence incorporated into an improperly labeled motion); *Hous. Lighting & Power Co. v. Klein Indep. Sch. Dist.*, 739 S.W.2d 508, 514 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (explaining the substance of a pleading is determined by the effect it would have on the proceeding if granted). Although incorrectly described as a venue matter, the substance of Mother's motion concerned relinquishment of the trial court's jurisdiction in favor of a more convenient forum in another state, which is a matter controlled by section 152.207.[3]

Father asserts several challenges that have bearing on the trial court's determination, under section 152.207, that it was an inconvenient forum. We review the trial court's determination on the matter for an abuse of discretion. *See Barabarawi v. Rayyan*, 406 S.W.3d 767, 774 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Section 152.207(b) provides:

> Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child[ren];
>
> (2) the length of time the child[ren] ha[ve] resided outside this state;
>
> (3) the distance between the court in this state and the court in the state that would assume jurisdiction;

[3] Father correctly notes that the venue provisions in the Texas Rules of Civil Procedure concern only intrastate venue transfers. *See* TEX. R. CIV. P. 86–89; 255–260; *Skinner v. Skinner*, No. 01-12-00515-CV, 2013 WL 6729837, at *5 (Tex. App.—Houston [1st Dist.] Dec. 19, 2013, no pet.) (mem. op.). Mother's use of the phrase "motion to change venue" underscores Mother's mislabeling of her motion because she sought a change from a Texas forum to a New York forum. The trial court and the parties understood that Mother's request concerned whether a Texas court or a New York court would determine child-custody matters. Under these circumstances, Mother's misuse of the phrase "motion to transfer venue" does not require that we apply venue rules that Mother cannot satisfy, as Father would have. *See Skinner*, 2013 WL 6729837, at *5 (holding a party's challenge to personal jurisdiction, through a process improperly labeled as a "change in venue," did not waive the party's right to challenge personal jurisdiction, as would be the case if the party, in fact, challenged venue).

> (4) the relative financial circumstances of the parties;
>
> (5) any agreement of the parties as to which state should assume jurisdiction;
>
> (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child[ren];
>
> (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

TEX. FAM. CODE ANN. § 152.207(b).

Father argues the trial court did not afford him an opportunity to present any type of evidence as to why New York was an inconvenient forum. He argues:

> [T]he trial court abused its discretion when it granted the motion to transfer venue as the motion did not follow proper procedure. Especially in light of the fact that the requisite affidavits were not attached to the motion, and no evidentiary hearing was condcucted [sic].

We hold that Father has waived his complaint on this matter by not timely raising it at the trial court's hearing.

Section 152.207(b) requires that a trial court "shall allow the parties to submit information . . . ." *Id.* At least one of our sister courts has determined that "section 152.207 does not require the trial court to hold an evidentiary hearing before it makes a determination that Texas is an inconvenient forum." *Lesem*, 445 S.W.3d at 376; *see also In re K.T.P.*, No. 05-17-00922-CV, 2018 WL 6716934, at *3 (Tex. App.—Dallas Dec. 21, 2018, no pet.) (mem. op.) ("Numerous cases have concluded it is not necessary for the trial court to conduct an evidentiary hearing under section 152.207."). We have upheld an inconvenient forum determination, despite no evidentiary hearing, when the information before the trial court "included some of the factors enumerated under section 152.207(b)" and the appellant "ha[d] not shown that he was not allowed to submit relevant information for the trial court's determination." *In re M.Y.C.*, No. 04-06-00895-CV, 2007

WL 2935482, at *2 (Tex. App.—San Antonio Oct. 10, 2007, no pet.) (mem. op.). Here, it is arguable that the parties' attorneys adduced competent evidence at the hearing through their unsworn oral statements. *See id.* (determining unsworn attorney representations at a section 152.207 hearing established facts relevant to the trial court's consideration of inconvenient forum).

In any event, we need not determine the merits of Father's complaint about a perceived failure by the trial court to afford him an opportunity to present evidence because Father did not preserve his complaint for appellate review. To present a complaint for appellate review, a party must: (1) present to the trial court "a timely request, objection, or motion;" (2) state the specific grounds therefore; and (3) obtain a ruling. TEX. R. APP. P. 33.1. "An objection is considered timely when it is asserted at the earliest opportunity." *In re K.T.P.*, 2018 WL 6716934, at *3. An objection raised for "the first time in a motion for new trial does not satisfy the contemporaneous objection rule if the complaint could have been urged earlier." *Id.*; *see also In re D.W.*, No. 04-05-00927-CV, 2006 WL 2263907, at *1 (Tex. App.—San Antonio Aug. 9, 2006, no pet.) (mem. op.) (holding an appellant waived her objection to the absence of a purportedly indispensible party at trial because the appellant did not object until her motion for new trial). Here, Father waived his objection that the trial court did not afford him an opportunity to present evidence because he did not timely raise the objection at the hearing or before. *See* TEX. R. APP. P. 33.1; *K.T.P.*, 2018 WL 6716934, at *3 (holding an appellant waived his complaint that no competent evidence was offered at a hearing to support the trial court's section 152.207 determination because the appellant fully participated in the hearing on the matter, failed to object at the hearing, and first objected in his motion for new trial).

Father also complains that the trial court's order prejudiced Father because he "expended significant time, resources, and money having litigated the case in Texas for a two year period." Among other things, Father paid for a home-study and psycho-social evaluation. However, Father

does not explain how the purported prejudice is relevant to the factors a trial court may consider under section 152.207(b). *See* TEX. FAM. CODE ANN. § 152.207(b). Moreover, the trial court left open the possibility that Father could recoup attorney's fees related to his Texas expenses in a New York case. We reject Father's argument that the trial court abused its discretion by ignoring any potential prejudice to Father. *See id.*; *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 293–94 (Tex. 2016) (orig. proceeding) ("A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without regard to guiding legal principles." (quotations omitted)).

In a second stated issue, Father argues that Mother "consented to Texas continuing to exercise its jurisdiction until final resolution of the modification" because Mother filed a motion to modify the initial child-custody determination and litigated the matter in Texas. However, section 152.207 specifically provides that Mother, as a party, can raise the issue of inconvenient forum. *See* TEX. FAM. CODE ANN. § 152.207(a).

We overrule Father's first and second issues and related arguments that the trial court abused its discretion when it declined to exercise jurisdiction over the child-custody determination involved in this suit.

In a third issue, Father argues the trial court abused its discretion by transferring the child-support proceedings involved in this lawsuit to New York in violation of the Uniform Interstate Family Support Act ("UIFSA"). *See id.* §§ 159.001–159.901. Father did not raise this complaint to the trial court, and we hold it is waived. *See* TEX. R. APP. P. 33.1. We overrule Father's third issue.

CONCLUSION

We affirm the trial court's judgment.

Rebeca C. Martinez, Justice