

Opinion issued June 25, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00667-CV

IN RE L.C.R., A CHILD

On Appeal from the 312th District Court
Harris County, Texas
Trial Court Case No. 2016-51691

MEMORANDUM OPINION

Lindy Richardson and William Franklin Richardson, Jr. were divorced in Harris County in 2018. As was permitted in the divorce decree, Lindy¹ moved to McLennan County with the couple's child. Frank, who continued to live in Harris County, filed an enforcement action in his county of residence in 2019, more than

¹ Because the parties share the same last name, we will refer to them by their given names.

six months after Lindy and the child moved to McLennan County. Lindy filed a motion to transfer venue, citing a mandatory venue provision in the Family Code that requires transfer of enforcement actions to the county where the child has resided for six months or longer.² The trial court granted Lindy's motion and transferred the suit to McLennan County. The order acknowledges that transfer without a hearing was mandatory. But, two hours before ordering transfer, the trial court granted William the relief he was requesting and entered an order of enforcement that subjects Lindy to a period of confinement in jail if she does not meet the court's independently constructed conditions to suspend enforcement, including payment of \$3,000 to Frank.

In three issues, Lindy contends the trial court abused its discretion by refusing to perform its mandatory, ministerial duty to transfer the enforcement action and by proceeding to rule on the enforcement action when all prerequisites for mandatory venue transfer had been met.

We reverse and vacate the trial court's order of enforcement.

Background

When Lindy Richardson and Frank Richardson divorced in Harris County in April 2018, Lindy was granted the exclusive right to designate the primary residence of their child and permitted to designate a residence in McLennan

² TEX. FAM. CODE §§ 155.201, 155.204.

County. On the date the divorce decree was entered, Lindy had already moved to McLennan County. She lived with her mother until October of that year. In November, she moved into a rental property with the child and continued to live at that residence in McLennan County throughout this enforcement action.

In June 2019, Frank filed a petition for enforcement of possession or access. He filed the action in the Harris County court that had issued the divorce decree 14 months earlier. Lindy immediately filed a motion to transfer venue, citing Section 155.201 of the Family Code, which requires transfer to the county where the child has resided for six or more months.

In July, Frank filed a response and an affidavit, entitled “Affidavit Controverting Motion to Transfer.” Despite the affidavit’s name, the affidavit did not controvert any venue facts. It merely stated that Lindy had not given Frank information about the venue facts. That same day, Lindy filed a reply pleading with an affidavit specifically averring that she and the child had lived in McLennan County for more than six months. All parties appeared before the trial judge the following day—July 23, 2019—which was the date Frank had scheduled his enforcement action to be heard.

Lindy opened the hearing by informing the trial court that her venue motion was pending, that all requirements for transfer had been met, that transfer was mandatory without a hearing, and that she would not waive her right to mandatory

transfer of venue. Lindy requested the trial court grant the transfer of venue without ruling on the enforcement action. The trial court discussed Frank's position on the matter, which was that Frank was not ready to proceed with a venue hearing. Lindy reiterated her position that transfer was mandatory without a hearing, meaning that Frank's preparedness was irrelevant.

Lindy noted that Frank's "controverting" affidavit did not, in fact, controvert any venue facts and, thus, did not invoke the statutory provision for a venue hearing.³ She further noted that the deadline to challenge mandatory transfer had passed without Frank filing a qualifying controverting affidavit. And, as such, she argued, transfer was mandatory without a hearing, making the trial court's duty to order transfer, under Texas Supreme Court authority, a mandatory, ministerial duty.

The trial court indicated it would proceed on the enforcement issue without first addressing the venue issue. Lindy objected, moved for a continuance, and announced she was not ready to proceed on the enforcement matter because transfer was mandatory and immediately required.⁴ The trial court referred to the

³ TEX. FAM. CODE § 155.204(e).

⁴ Lindy further argued that she had a right to a jury trial on the enforcement action because it could result in more than 180 days in jail, citing Texas Supreme Court authority, and she demanded a jury trial. The trial court denied her request for a jury. The jury-trial ruling has not been appealed.

on-going discussions as “nonsense” and proceeded with the enforcement action over Lindy’s objections.

Frank testified. His testimony included statements about going to Waco—in McLennan County—repeatedly to discuss visitation issues and to visit the child at the Waco school where she was enrolled. In other words, Frank’s own testimony confirmed the venue facts requiring mandatory transfer to McLennan County. At the conclusion of the hearing, the trial court noted that there had been a “lack of candidness” about venue and that another court would likely take over the matter in the future.

After the hearing, Lindy filed a motion for entry of an order transferring the matter to McLennan County under the mandatory venue-transfer provision of the Family Code. Lindy cited to various court opinions in support of her position that the trial court had no discretion to rule on the enforcement action because all requirements had been met for mandatory transfer; and further, delaying a ruling on a mandatory transfer motion to first rule on an enforcement action is an abuse of discretion.⁵

The next month, the trial court signed two orders on the same day, noting on the orders that they were signed two hours apart. At 11:25 a.m., the trial court

⁵ See *In re T.J.L.*, 97 S.W.3d 257, 259 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Fitzgerald v. Fitzgerald*, No. 14-12-00086-CV, 2013 WL 269040, at *2–3 (Tex. App.—Houston [14th Dist.] Jan. 24, 2013, no pet.) (mem. op.).

signed an order of enforcement by contempt and suspension of commitment against Lindy, finding that she had violated the terms of the divorce decree's provisions on access to the child on four occasions. The trial court ordered "that punishment for each separate violation is assessed a punishment [of] confinement in the county jail of *Harris* County, Texas, for a period of 30 days." (Emphasis added.) It further ordered that the commitment be suspended and Lindy be placed on community supervision for 12 months so long as Lindy meets certain court-designated conditions, including that Lindy pay Frank \$3,000, that Lindy not violate any of Frank's possession rights, and that Lindy permit Frank an additional 10 days' access that summer. The order required Lindy to reappear before the trial court in *Harris* County in October 2019 "to determine if she has materially complied with the terms of this order." (Emphasis added.)

Two hours later, the trial court entered an order transferring the suit to McLennan County. Because the trial court's findings detailed in the transfer order are central to our analysis, we include them here:

1. The child had resided in McLennan County, Texas, for 6 or more months before Frank filed his enforcement petition;
2. Frank did not file a qualifying controverting affidavit;
3. Transfer is mandatory under Family Code section 155.204(c); and
4. Transfer is mandatory without further hearing.

The trial court ordered that Lindy’s venue motion be “granted immediately” and ordered transfer of the suit to McLennan County.

The order did not include a finding on what, if anything, had transpired during the two hours between entries of the orders, and no party suggests anything relevant did occur. By all accounts, the court’s orders were based on matters that occurred before and during the July 23 hearing, where Lindy argued Frank’s affidavit did not qualify as a countervailing affidavit, Frank confirmed through his testimony that the child lived in McLennan County, and Lindy argued immediate transfer was mandatory without a hearing.

Lindy appeals, arguing the trial court abused its discretion in multiple regards in its handling of the enforcement matter and its rulings.

Mandatory Venue Transfer

In three issues, Lindy contends the trial court abused its discretion by failing to order a transfer to McLennan County before ruling on the enforcement suit, given that all requirements for mandatory venue transfer were met before the trial court ruled on the enforcement action.

A. Standard of review

The applicable standard of review is abuse of discretion. *See In re T.J.L.*, 97 S.W.3d 257, 265 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Silverman v. Johnson*, 317 S.W.3d 846, 849 (Tex. App.—Austin 2010, no pet.). “A trial court

abuses its discretion when it acts arbitrarily or unreasonably, without reference to guiding rules or principles.” *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011).

B. Applicable law

When a trial court enters a divorce decree, the trial court acquires continuing, exclusive jurisdiction over the children of the divorce. *See* TEX. FAM. CODE §§ 155.001(a), 155.002. A party may move for transfer to another county under Sections 155.201 and 155.204 under certain circumstances discussed in Section 155.201. *Id.* §§ 155.201, 155.204. One of those circumstances is when a party files in the court with continuing jurisdiction a motion to enforce a prior order but the child has resided in another county for six months or longer. *Id.* § 155.201(b). Transfer is required under that circumstance because the State has adopted a policy that “the county of the child’s residence is in the best position to determine the ‘best interests’ of the child.” *In re Cooper*, 320 S.W.3d 905, 911 (Tex. App.—Texarkana 2010, no pet.); *see In re Compton*, 185 S.W.3d 526, 530 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

If a motion to enforce an order is filed in the court with continuing, exclusive jurisdiction and a party timely moves for transfer under Section 155.204, the party is entitled to transfer of the suit to the other county if the child has resided in the other county for six months or longer, and the party is entitled to have the transfer be completed “within the time required by Section 155.204.” *Id.*

§ 155.201(b). To be timely, a motion to transfer by a petitioner or movant is due at the time the initial pleadings are filed, while a motion to transfer by another party is due on or before the first Monday after the 20th day after the date of service of citation or notice of suit or before the commencement of the hearing, whichever is sooner. *Id.* § 155.204(b).

A party wishing to contest transfer must file “a controverting affidavit denying that grounds for the transfer exist,” which must be filed 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). Merely labeling an affidavit as a “controverting affidavit” is insufficient; an affidavit that fails to deny venue facts is not a controverting affidavit under Section 155.204(d). *See In re Burling*, No. 05-16-00529-CV, 2016 WL 3438075, at *2 (Tex. App.—Dallas June 21, 2016, no pet.) (orig. proceeding) (“When, as here, a controverting affidavit is filed, but the affidavit fails to deny that grounds for transfer exist the allegations in the motion to transfer are effectively uncontroverted.”); *see also In re Whitworth*, No. 05-19-00677-CV, 2019 WL 2710747, at *1 (Tex. App.—Dallas June 28, 2019, orig. proceeding); *In re Alvarez*, No. 05-16-00753-CV, 2016 WL 4275032, at *2 (Tex. App.—Dallas Aug. 15, 2016, orig. proceeding).

If a qualifying controverting affidavit is timely filed, each party is entitled to notice not less than 10 days before the hearing date on the transfer motion. *Id.*

§ 155.204(e). If, on the other hand, no qualifying 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).

If transferred, the transferee court becomes the court of continuing, exclusive jurisdiction, and all proceedings continue as if brought there originally. *Id.* § 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).

This is not the first case in which a trial court has been inclined to rule on the merits of an enforcement action when a mandatory-venue-transfer motion is pending and no qualifying controverting affidavit has been filed. This Court and others have held that, in that circumstance, 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. *See In re R.M.B.*, No. 01-09-00710-CV, 2010 WL 2788290, at *2 (Tex. App.—Houston [1st Dist.] July 15, 2010, no pet.) (mem. op.) (stating that, “if a motion to transfer is not timely controverted, then the

trial court has a mandatory, ministerial duty to promptly, without a hearing, transfer a proceeding to the county where the child at issue has resided for more than six months”); *In re Kramer*, 9 S.W.3d 449, 451 (Tex. App.—San Antonio 1999, orig. proceeding) (“The trial court had a mandatory duty to transfer the case to Harris County *promptly without a hearing* as soon as the statutory requirements were met.”).

This Court has further held that a trial court must order transfer once the elements for mandatory transfer are met, even if there is an enforcement action pending. *Fitzgerald v. Fitzgerald*, No. 14-12-00086-CV, 2013 WL 269040, at *3 (Tex. App.—Houston [14th Dist.] Jan. 24, 2013, no pet.) (mem. op.). Acting on the pending enforcement action before ordering mandatory transfer is an abuse of discretion. *Id.* at *3 (“We conclude that the trial court abused its discretion by dismissing Andrea’s motion for enforcement of possession and access when her motion to transfer was pending; on these facts, the trial court had a statutory, ministerial duty to transfer venue and thus lacked discretion to make further rulings in the case.”); *see Silverman*, 317 S.W.3d at 850; *see also In re R.M.B.*, 2010 WL 2788290, at *3 (holding that trial court had mandatory ministerial duty to transfer case in absence of controverting affidavit, reversing judgment, and remanding for limited purpose of transferring case); *In re T.J.L.*, 97 S.W.3d at 265, 268 (concluding that trial court was required to transfer all proceedings pertaining to

child when appellee did not controvert appellant's motion to transfer, reversing orders as to child, and remanding with instructions to transfer).

In *Fitzgerald*, both an enforcement action and a motion to transfer were filed, but no controverting affidavit was filed. *Id.* at *3. Transfer was mandatory. *Id.*; see *In re T.J.L.*, 97 S.W.3d at 265. After the deadline for mandatory transfer had passed, the trial court issued an order that took two actions. The first part of the order sua sponte considered the motion for enforcement and dismissed it as frivolous. *Fitzgerald*, 2013 WL 269040, at *1. The second part of the order found that no qualifying controverting affidavit had been filed and granted the motion to transfer. *Id.* As stated, both rulings were made in the same order, but with the dismissal preceding the transfer. *Id.* This Court held that the trial court abused its discretion by acting on the pending motion for enforcement when all elements for mandatory transfer had already been met. *Id.* at *3. Under those circumstances, “the trial court had a statutory, ministerial duty to transfer venue and thus lacked discretion to make further rulings in the case.” *Id.* We reversed the portion of the order dismissing the motion to enforce. *Id.* at *4. Recognizing that the trial court granted transfer in the second part of the order and that it no longer had authority to set aside its own order of dismissal, this Court vacated the portion of the trial court's order that dismissed the enforcement action and affirmed the remaining portion of the order that granted transfer. *Id.*

C. Trial court abused its discretion

Both parties agree that, under the statutory deadlines, Frank was required to file a controverting affidavit by July 22 to avoid automatic transfer without a hearing. Frank argues he met that deadline, and a hearing was required, because he filed his “Affidavit Controverting Motion to Transfer.” But, as stated above, we look beyond the title of the document to determine whether the affidavit denies venue facts and, in doing so, qualifies as a controverting affidavit. *In re Burling*, 2016 WL 3438075, at *2.

The only portion of Frank’s filing that related to venue facts stated as follows:

Since the date that my Petition for Enforcement was filed in this Court on June 12, 2019, Lindy Richardson has not provided me or my counsel with any evidence regarding the child’s primary residence for the past six months.

Frank’s affidavit did not deny Lindy’s venue facts. He did not aver that the child lived in Harris County, where he filed the enforcement action. Nor did he aver that the child resided somewhere other than where Lindy claimed. Frank’s statement of lack of receipt of supporting evidence fails to meet the requirements of a controverting affidavit. *See id.* Therefore, under Section 155.204(c), transfer without a hearing was required by the 21st day after the final date of the period allowed for the filing of a controverting affidavit. TEX. FAM. CODE § 155.204(c). The 21st date after the controverting affidavit was due was August 12.

Between the date Frank's controverting affidavit was due (July 22) and the deadline for the trial court to transfer without a hearing (August 12), the trial court held a hearing on Frank's enforcement action, over Lindy's objection. At the July 23 hearing, Frank's testimony confirmed the child lived in McLennan County as Lindy had pleaded. He spoke of going to Waco in McLennan County to visit the child at the Waco school where she was enrolled. Thus, as of August 12, not only was there no qualifying affidavit filed, Lindy's venue facts had actually been confirmed by Frank's testimony.

Under these circumstances, the trial court's duty to order transfer without a hearing was mandatory and ministerial. *Fitzgerald*, 2013 WL 269040, at *3. The trial court ultimately acknowledged in its transfer order that no qualifying controverting affidavit had been filed and transfer without a hearing was mandated by statute. Yet, before transferring the suit, the trial court acted on the pending enforcement action. In doing so, the trial court acted contrary to established statutory requirements and precedent and, thus, abused its discretion. *Id.*

We reverse and vacate the trial court's enforcement order. That order found Lindy in contempt, sentenced her to jail, suspended her jail sentence, and placed her on community supervision for one year. Under the order's terms, Lindy's sentence would be fully suspended so long as she met the court's enumerated conditions. Those conditions included payment of \$3,000 to Frank. Because the

trial court's enforcement order is vacated, all findings, rulings, and mandates in the order are void.

Conclusion

We reverse and vacate the trial court's enforcement order. The order transferring venue to McLennan County stands.

Sarah Beth Landau
Justice

Panel consists of Justices Keyes, Kelly, and Landau.