

[Cite as *Lisboa v. Lisboa*, 2009-Ohio-5228.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92321

JOSE C. LISBOA, JR.

PLAINTIFF-APPELLANT

vs.

KIMBERLY LISBOA, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-295186

BEFORE: Stewart, J., Cooney, A.J., and Rocco, J.

RELEASED: October 1, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Jose Lisboa (“Jose”), appeals the judgment of the trial court granting the post-decree motions of defendant-appellee, Kimberly Lisboa (“Kimberly”), and denying his motions for a continuance, to appear via internet conferencing, and to modify the terms of a visitation order. For the reasons stated below, we affirm.

{¶ 2} Jose and Kimberly were divorced in 2005. According to the parties’ separation agreement, Kimberly was granted custody and designated the residential parent of their then four-year-old daughter. Jose, who had been deported following a criminal conviction and was living in Brazil, was granted parenting time consisting of “written communications, telephonic communications, and internet audio and video communications, electronic mail communications and such other communications as provided or to be provided by internet access or telephonic access.” Jose was to provide the money for Kimberly to install a computer with internet audio and video capabilities so Jose could see and speak with his daughter online.

{¶ 3} In May 2006, Jose filed a motion to modify visitation alleging that he was being denied access to his daughter in violation of his parenting rights. Jose asserted that according to the court order, he was permitted a minimum of one half-hour to a maximum of one hour contact with his daughter five times weekly. He alleged that Kimberly purposefully interfered with that order to prevent him

from communicating with his daughter. He pointed out that Kimberly had yet to install the computer equipment and said she interfered with his telephone communications. Between May 2006 and March 2007, Jose filed additional motions including a motion to show cause and a motion for attorney fees related to the alleged denial of visitation rights.

{¶ 4} Between March 2007 and August 2008, Kimberly filed a number of post-decree motions in which she alleged that Jose's conduct toward her and their daughter violated the divorce decree and two previously granted civil protection orders. Kimberly sought a termination of telephone privileges and temporary and permanent restraining orders.

{¶ 5} An evidentiary hearing on the numerous motions commenced on November 2, 2007. Jose, who was prohibited from appearing in person, appeared through counsel. The guardian ad litem ("GAL") for the child testified on the issue of visitation and whether Kimberly was in compliance with the terms of the agreement. The GAL stated that Kimberly was unable to comply with the terms relating to computer access prior to the hearing because Jose had only recently submitted the funds for the equipment. However, she offered her opinion that Kimberly had not fully complied with the terms of the agreement relating to telephone calls. The GAL based her opinion on conversations with Jose and telephone records he provided to her.

{¶ 6} Kimberly disagreed and insisted that she had complied with the order. She informed the court that she had more than 43 hours of telephone recordings

from the two years and nine months since the divorce and that she had asked the GAL to review them. The trial court continued the hearing to allow time for the GAL to review the telephone evidence and to allow Kimberly time to comply with the court's order for the installation of the computer equipment.

{¶ 7} The court reconvened the hearing on September 8, 2008. Before the start of testimony, the trial court placed on the record the fact that earlier that morning Jose had filed a motion seeking a 90-day continuance of the hearing. The trial court stated it had denied the motion and notified Jose by telephone that his failure to appear at trial to proceed on the pending motions would result in the court dismissing those motions. Jose did not appear, and the hearing proceeded on Kimberly's motions.

{¶ 8} At the conclusion of the evidentiary hearing, the court dismissed Jose's motions and granted Kimberly's motions. The court found Jose to be in contempt for violations of the terms of the divorce decree, the two civil protection orders, and the October 16, 2007 restraining order. The court granted a restraining order preventing Jose from having any contact with Kimberly and her family, friends, or employees. Additionally, the court granted Kimberly's motion to terminate telephone privileges and ordered that Jose have no further contact with the child. The court indicated that its order was subject to modification upon proof that Jose purged his contempt and demonstrated to the court the ability to conform his conduct to the court's orders and was able to engage in communications that were appropriate for the minor child. Finally, the court

ordered Jose to pay \$3,089 in fees to the GAL and \$18,574 to Kimberly for attorney fees.

{¶ 9} Jose timely appealed assigning three errors for our review.

{¶ 10} “1. The trial court committed reversible error by modifying the shared parenting plan without determining that a must make [sic] a change has occurred in the circumstances of the child, the residential parent, or either of the parents subject to the shared parenting decree, and that the modification was necessary to serve the best interests of the child.”

{¶ 11} Jose argues that the trial court modified his parental rights without a finding of “changed circumstances.” His argument is based upon R.C. 3109.04, which governs the allocation of parental rights and responsibilities where a shared parenting plan is in place, and requires the trial court to find that a change of circumstances has occurred and that the modification would be in the best interest of the child. R.C. 3109.04(E)(1)(a). However, in the instant case, there is no shared parenting plan. By agreement of the parties, Kimberly was allocated parental rights and responsibilities regarding the parties’ minor daughter and was designated the sole legal custodian and residential parent. Jose was granted parenting time consisting of written, telephonic, or electronic communication. The statute applicable to orders granting parenting time where no shared parenting plan is in place is R.C. 3109.051. See *Braatz v. Braatz* (1999), 85 Ohio St.3d 40.

Under R.C. 3109.051, a trial court is permitted to modify visitation rights if it determines that the modification is in the child’s best interest. In making this

determination, the court is required to consider the factors laid out in R.C. 3109.051(D).

{¶ 12} An appellate court reviews a trial court's decision with respect to visitation with deference and will reverse only if the trial court abused its discretion.

King v. King (1992), 78 Ohio App.3d 599. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 13} Applying the relevant factors to the facts of this case, we believe that the trial court properly determined that a visitation modification was in the best interest of the child. The trial court's findings state that Jose "engaged in a vendetta and reign of terror against the Defendant [Kimberly] that is unparalleled in the Court's experience. This court finds that this vendetta has been waged by the Plaintiff against his own daughter, and the family and friends, and employees of the Defendant." Additionally the court found that Jose's "outrageous actions" violated the terms of the divorce decree, the civil protection orders, and the court's prior orders entered to protect the interests of the child.

{¶ 14} Our review of the evidence supports the trial court's findings. The record contains Kimberly's and the GAL's testimony relating to Jose's attempts to alienate the child from her mother. The record also contains copies of legal actions filed by Jose against Kimberly, her mother, and her attorney in state and federal court and disturbing letters in which Jose refers to Kimberly's mother and

friends by profane and derogatory names. The GAL testified that she reviewed taped conversations between Jose and the child during which Jose belittled Kimberly and manipulated the child in an attempt to make her “feel bad about herself and about her Mom.” She further testified that Jose tried to get her to take the child to Toronto to see him and when she refused, “his tone and demeanor changed completely. * * * I became everything that Kim was: dumb, stupid, manipulative, conspiring with the world to take his daughter against his will * * *.”

{¶ 15} The GAL testified that Jose accused her of stealing money from him and sent her e-mails that were “scary” and “threatening.” She said Jose admitted hiring private investigators to watch Kimberly and their daughter. She said that based upon some of Jose’s comments, she suspected that he was having her watched as well. In response to questioning by the court, she stated she did not believe Jose could “keep to kid topics and not to other inappropriate subjects,” or that he could abide by the court’s earlier “gag” order and not speak ill of Kimberly or her family in front of their daughter. In her opinion, continued internet or telephone contact with Jose, at that time, would be detrimental to the child.

{¶ 16} Accordingly, we cannot say that the trial court abused its discretion in deciding that it was in the best interest of the child to terminate contact with Jose until he can demonstrate, “that he has purged his contempt, is able to conform his conduct to this court’s orders and is able to engage in communications that do not involve Defendant or her family, friends and employees and are age appropriate and content appropriate for the minor child.”

{¶ 17} The first assignment of error is overruled.

{¶ 18} “II. The trial court committed reversible error by denying Lisboa’s request to participate in the divorce proceedings via the internet.”

{¶ 19} It is well-settled that a trial judge possesses inherent power to regulate court proceedings. *Berghoff v. Davey Tree Expert Co., Inc.*, Cuyahoga App. No. 91475, 2009-Ohio-610, ¶28, citing, *State ex rel. Butler v. Demis* (1981), 66 Ohio St.2d 123, 128-129. “A ruling or order by the court affecting the conduct of trial will not be reversed unless the complaining party demonstrates a prejudicial abuse of discretion.” *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757, 771-772.

{¶ 20} The record reflects that at the start of trial in November 2007, Jose was represented by counsel. In May 2008, Jose’s counsel was granted leave to withdraw and Jose elected to proceed pro se in the action. At all times relevant to this appeal, Jose was under a deportation order and was prohibited from entering the United States.¹ Jose subsequently filed, pro se, a motion seeking to appear at trial via the internet at his own expense. The trial court denied Jose’s motions, stating:

{¶ 21} “Based upon the lack of accessibility to the requested technology and upon review of Plaintiff’s Motion, the Court finds that the motion is not well taken

¹ In *State v. Lisboa*, Cuyahoga App. No. 89282, 2008-Ohio-571, this court vacated Jose’s guilty plea and sentence in the criminal conviction that led to his deportation. However, the deportation order refusing Jose entry into the United States remains in effect.

and is hereby denied. Based upon the Ohio Rules of Civil Procedure or upon obtaining representation, Plaintiff can present his case without use of the internet.”

{¶ 22} Jose argues that by denying his motion to appear via the internet, the trial court denied him his constitutional right to defend himself in the civil action. He emphasizes that he had offered to pay the costs of providing the internet technology necessary to allow him to appear at trial through an internet video connection, and therefore, the court was unreasonable in refusing his request. We disagree.

{¶ 23} The Rules of Civil Procedure allow for the use of video deposition testimony when a party or witness is unable to appear for trial. Civ.R. 32(A). The rules also allow the trial court to conduct a trial exclusively through prerecorded videotaped testimony. See Civ.R. 40; *Arrington v. Daimler Chrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257. However, the rules make no provision for a party residing in a foreign country to appear at trial and represent himself via live internet connection. Accordingly, it was within the trial court’s discretion whether to permit Jose to appear in such manner.

{¶ 24} Jose cites to an unreported federal case in which the court permitted a plaintiff, imprisoned in a federal prison, to participate in a civil trial via videoconferencing. *Bustillo v. Hilliard* (C.A. 7, 2001), 7th Circuit No. 00-2110, unreported. However, in that case the video link was established between two United States government facilities – a federal district court and a federal prison. There were appropriate controls established at both ends of the connection.

{¶ 25} The trial court in the instant case is faced with an entirely different situation. Here, Jose is asking the court to conduct an evidentiary hearing through an internet hook-up between the court and an unspecified location in a foreign country. The record demonstrates that before denying Jose's motion, the trial court contacted the court administrator to discuss the feasibility of Jose's request and was informed that the court had no facilities for conducting such a hearing. Jose argues that he offered to pay for a local company to install the equipment necessary to establish a live video link via the internet. However, his motion is devoid of details such as the name of the company, the type of equipment to be installed in the courtroom, the time frame involved, and the circumstances surrounding the end of the connection located outside of the country. Thus, Jose's motion raises a number of questions relating to logistics and court control. Accordingly, even in light of Jose's offer to bear the expense of providing the internet technology, we find it was not unreasonable for the court to deny Jose's motion. In reaching this decision, we do not mean to imply that a trial court may never permit the use of internet technology during trial, only that under the facts of this case the court was within its authority to deny such use.

{¶ 26} We are also not persuaded by Jose's argument that because he was denied an appearance via the internet, he was denied meaningful access to the court. While Jose was prohibited from personally appearing at the hearing due to the deportation order, he was not denied access to the court or an opportunity to present his case. Jose certainly had the option to obtain new counsel to represent

him at the hearing. Alternatively, he could avail himself of one or more of the means of presenting evidence provided under the Rules of Civil Procedure. Accordingly, we find that the trial court committed no error by denying Jose's request.

{¶ 27} The second assignment of error is overruled.

{¶ 28} "III. The trial court committed reversible error by denying plaintiff's request for a continuance based upon sufficient reasons for the request."

{¶ 29} Jose asserts that he needed additional time to "get another attorney and to present valuable information about a possible conspiracy between his ex-wife and the guardian ad litem to deprive him of his visitation privileges." He further asserts that his absence from the hearing was unavoidable and that his removal from the United States was not voluntary. He argues that the trial court's decision unreasonably denied him the opportunity to be present at the hearing and to offer testimony and evidence. We disagree.

{¶ 30} The decision to grant or deny a continuance rests in the sound discretion of the trial court. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9; *State v. Unger* (1981), 67 Ohio St.2d 65, 67. "An appellate court will not interfere with the exercise of this discretion unless the action of the court is plainly erroneous and constitutes a clear abuse of discretion." *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 538.

{¶ 31} "The basis for a continuance of an action rests upon the right of a party to have a reasonable opportunity to be present at the trial of his cause upon

the merits, but without unnecessary delay. * * * Unreasonable delays cannot be tolerated and continuances must be justified by the circumstances of the case.” *State ex rel. Buck*, 140 Ohio St. at 538.

{¶ 32} The Ohio Supreme Court enumerated the factors sufficient to justify the granting of a continuance as follows:

{¶ 33} “To constitute a sufficient ground for a continuance because of the absence of a party it must appear that the absence is unavoidable, and not voluntary; that his presence at the trial is necessary; that the application is made in good faith; and that he probably will be able to attend court at some reasonable future time.” *Id.* at paragraph two of the syllabus.

{¶ 34} Applying these factors to the circumstances of this case, we cannot conclude that the trial court abused its discretion when it denied Jose’s motion for a 90-day continuance filed the morning of the hearing. There is nothing in the record to demonstrate that Jose’s motion was made in good faith, his presence at trial was necessary, or that he would be able to attend court in the future. Four months prior to the hearing, when the trial court granted Jose’s counsel’s motion to withdraw, the trial court warned Jose that, “[n]o continuance of trial date will be granted due to granting this motion.” Six weeks prior to the hearing, when it denied his motion to appear via the internet, the trial court again reminded Jose of his need to secure counsel or to use alternative methods of presenting evidence. Nonetheless, Jose chose to proceed pro se rather than obtain new counsel. We find no evidence in the record to indicate that Jose would have been able to attend

court. Jose states in his motion that his permission to re-enter the United States was revoked. Accordingly, the trial court's decision to deny a continuance was not an abuse of discretion.

{¶ 35} The third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas – Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, A.J., and
KENNETH A. ROCCO, J., CONCUR