

Affirmed and Memorandum Opinion filed March 7, 2017.



**In The
Fourteenth Court of Appeals**

NO. 14-16-00098-CV

ERIC PARKER, Appellant

V.

BRIGETTE PARKER, Appellee

**On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2015-34264**

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

Appellant Eric Parker challenges the trial court's dismissal of his divorce suit. The trial court dismissed the suit for want of prosecution when appellant, an inmate, failed to announce ready for trial. Appellant contends that the trial court effectively denied him access to the legal system. Because the trial court permitted appellant to appear by telephone but he failed to do so, we affirm.

BACKGROUND

Appellant filed for divorce from his wife, Brigitte Parker,¹ in June 2015. Appellant was incarcerated and proceeding *pro se* during the pendency of both the underlying suit and this appeal.

Along with his original petition for divorce, appellant filed a “Motion for Bench Warrant or in the Alternative, Motion to Proceed by Conference Call, Affidavit, or any other Effective Means.” In his motion, appellant requested a bench warrant allowing him to personally appear for trial. In the event the trial court denied his request for a bench warrant, appellant requested that the trial court “allow him to proceed by conference call, affidavit, or other effective means[.]”

The trial court set the case for trial or dismissal on December 11, 2015, and provided notice to appellant. The trial court determined that appellant’s personal appearance was not necessary and issued an order in October 2015 denying appellant’s request for a bench warrant but allowing appellant to participate in the proceedings by telephonic conference.

The trial court dismissed appellant’s case for want of prosecution on December 11, 2015. The order of dismissal states that the case was dismissed because there was no announcement by attorneys or parties and because there had been no service of process on Brigitte.²

¹ Appellant’s wife’s first name is spelled by appellant as “Bridgdette,” “Brigitte,” and “Brigett” in various pleadings. We use the spelling as it appears in the trial court’s order of dismissal.

² The record reflects that appellant served Brigitte by publication — specifically, by posting the required statutory notice of suit on the courthouse door. *See* Tex. Fam. Code Ann. § 6.409(a), (b), (d) (Vernon 2006). The record does not reflect why the trial court determined this service of process to be insufficient, but it is possible that the trial court believed appellant did not demonstrate diligence in attempting to locate Brigitte before serving her by publication. *See In re E.R.*, 385 S.W.3d 552, 560 (Tex. 2012) (“[W]hen a defendant’s identity is known, service by publication is generally inadequate.”); *Curley v. Curley*, No. 08-12-00257-CV, 2014

Appellant appeals the dismissal.

ANALYSIS

Trial courts have inherent power to dismiss cases for want of prosecution, and express authority to do so under Texas Rule of Civil Procedure 165a. *See* Tex. R. Civ. P. 165a; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 850 (Tex. 2004). A trial court may dismiss under Rule 165a on “failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice.” Tex. R. Civ. P. 165a. Likewise, the trial court has inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his case with due diligence. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). We review a dismissal for want of prosecution for an abuse of discretion. *In re Marriage of Bolton*, 256 S.W.3d 832, 833 (Tex. App.—Dallas 2008, no pet.).

An inmate may not be denied access to the courts, but also has no absolute right to appear in person in every court proceeding. *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003); *Risley v. Alvarez*, No. 14-10-00015-CV, 2011 WL 397948, at *6 (Tex. App.—Houston [14th Dist.] Feb. 8, 2011, pet. denied) (mem. op.). If the trial court determines that the inmate’s personal appearance is not warranted, then the trial court should allow the inmate to proceed by affidavit, deposition, telephone, or other effective means. *In re R.C.R.*, 230 S.W.3d 423, 426 (Tex. App.—Fort Worth 2007, no pet.); *Boulden v. Boulden*, 133 S.W.3d 884, 886-87 (Tex. App.—Dallas 2004, no pet.).

WL 3867798, at *2-3 (Tex. App.—El Paso Aug. 6, 2014, no pet.) (holding service by publication in divorce suit was insufficient where appellant did not demonstrate diligence in attempting to locate respondent). Brigitte did not appear for the trial below and did not file a brief in this appeal.

Appellant does not challenge the trial court's denial of his request for a bench warrant.³ Instead, appellant contends that access by teleconference was insufficient and violated his due process rights because appellant does not have independent access to a telephone and is “wholly depend[ent] on the trial court's coordinator and [the prison's] law library supervisor to coordinate a trial court telephone conference.”

In his motion requesting a bench warrant, appellant specifically requested that the trial court “allow him to proceed by conference call, affidavit, or other effective means, should it not issue a bench warrant.” After considering whether appellant's personal appearance was necessary in the courtroom and determining that it was not, the trial court granted appellant's alternative request that he be allowed to participate by telephonic conference.

The responsibility to ensure that court-granted telephonic participation in a hearing occurs is on the inmate who requested the right to participate in the hearing. *Misigaro v. Bassowou*, No. 02-10-00473-CV, 2012 WL 171110, at *1 (Tex. App.—Fort Worth Jan. 19, 2012, no pet.) (mem. op.); *see also In re D.L.S.*, No. 02-10-00366-CV, 2011 WL 2989830, at *3 (Tex. App.—Fort Worth July 21, 2011, no pet.) (mem. op.) (reasoning that, after trial court granted telephonic participation in hearing regarding the termination of inmate's parental rights, responsibility of setting up telephonic conference fell to inmate). Here, appellant got what he requested — the ability to participate telephonically — and there is no evidence in the record suggesting that he was in any way prevented from telephonically appearing for his trial. Accordingly, we conclude that appellant's due process rights were not violated and that the trial court did not abuse its

³ The trial court considered a number of factors in its order denying appellant's request for a bench warrant. *See In re Z.L.T.*, 124 S.W.3d at 165-66 (identifying factors trial courts should consider when deciding whether to grant an inmate's request for a bench warrant).

discretion in dismissing appellant's case for want of prosecution upon appellant's failure to appear telephonically and announce ready for trial. *See Misigaro*, 2012 WL 171110, at *2 ("Given that it was Misigaro's responsibility to set up the telephone conference once the trial court had granted him the right to participate in the hearing through these means and he failed to do so, we cannot conclude that he was effectively barred from presenting his case by the trial court's actions."); *In re D.L.S.*, 2011 WL 2989830, at *3 ("[W]e hold that Father's due process and equal protection rights were not violated by the denial of his motion for bench warrant and that his due process rights were not violated by the trial judge's alleged failure to set up the requested telephone conference, which was Father's responsibility.").

CONCLUSION

Having concluded that the trial court did not abuse its discretion by dismissing appellant's case, we affirm the trial court's order of dismissal.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Wise.