

Reversed and Remanded and Opinion filed June 18, 2020.



In The

Fourteenth Court of Appeals

NO. 14-19-00056-CV

FRANCO GAMBOA, Appellant

V.

LIZETTE NOEMI ALECIO, Appellee

**On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2018-26302**

OPINION

Franco Gamboa is an indigent prison inmate. He resides at the French Robertson Unit in Abilene, some three hundred and sixty miles from the civil courthouse in Houston. Acting pro se, he petitioned for a divorce from his wife. He filed a “waiver of service” document that was signed by his wife and notarized.

The trial court notified Gamboa that his case was set for trial or dismissal on a date certain and stated, “Cases with no service shall result in dismissal for want of prosecution,” and, “Failure to appear shall result in dismissal.” Gamboa filed a

proposed final decree, and, concluding that he was not entitled to a bench warrant, he asked the trial court to allow him to appear by an attached affidavit.¹ The trial court dismissed the case due to lack of service on Gamboa's wife and his failure to appear at the dismissal hearing.

On appeal, Gamboa contends that the trial court erred by dismissing the petition for lack of service and failure to appear. We agree.

I. Legal Principles

A trial court's authority to dismiss for want of prosecution stems from two sources: (1) Rule 165a of the Texas Rules of Civil Procedure, and (2) the court's inherent power. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). First, a court may dismiss under Rule 165a if a party seeking affirmative relief fails to appear for trial. *Id.* (citing Tex. R. Civ. P. 165a(1)). Second, a court has inherent power under the common law to dismiss when a plaintiff fails to prosecute their case with due diligence. *Id.*

We review each type of dismissal for an abuse of discretion. *See Stromberg Carlson Leasing Corp. v. Cent. Welding Supply Co.*, 750 S.W.2d 862, 864 (Tex. App.—Houston [14th Dist.] 1988, no writ). A trial court abuses its discretion if it acts without reference to any guiding rules or principles or acts in an arbitrary or unreasonable manner. *Bjorkstam v. Woodward, Inc.*, No. 14-14-00927-CV, 2016

¹ Gamboa's proposed final decree and request to appear by affidavit are file-stamped *after* the date of the trial court's dismissal hearing but *before* the date of the trial court's dismissal order. He included a certificate of service stating that he mailed the documents to the clerk of the court and his wife on a date before the dismissal hearing. Thus, his proposed final decree and request to appear by affidavit were deemed filed before the dismissal hearing. *See Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) (under mailbox rule, prisoner's document deemed filed when certificate of service stated that documents were placed with outgoing prison mail).

WL 1072298, at *1 (Tex. App.—Houston [14th Dist.] Mar. 17, 2016, no pet.) (mem. op.).

II. Failure to Appear

“It is well-established that litigants cannot be denied access to the courts simply because they are inmates.” *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003). It is “fundamentally unfair” to order an incarcerated person to appear at a mandatory dismissal hearing, ignore his request to appear by affidavit, and then dismiss the case because he failed to appear. *See In re R.C.R.*, 230 S.W.3d 423, 427 (Tex. App.—Fort Worth 2007, no pet.); *see also Hutchinson v. Hutchinson*, 299 S.W.3d 840, 843 (Tex. App.—Dallas 2009, no pet.) (trial court abused its discretion by dismissing an indigent pro se inmate’s divorce case for want of prosecution when the inmate “moved for the effective alternative means of appearing by the affidavit filed with the trial court”; “By requiring appellant to appear at a hearing and denying his motion to appear by his filed affidavit, the trial court effectively closed the courthouse doors to appellant.”) *cf. Parker v. Parker*, No. 14-16-0098-CV, 2017 WL 924529, at *2 (Tex. App.—Houston [14th Dist.] Mar. 7, 2017, no pet.) (mem. op.) (noting that if a trial court denies a bench warrant to a pro se inmate, “then the trial court should allow the inmate to proceed by affidavit, deposition, telephone, or other effective means”).

Gamboa did not request a bench warrant, but he asked to appear by an affidavit attached to a proposed final decree of divorce.² In both his petition and the final decree, he included the phone number for the prison switchboard and

² He titled it an “affidavit” but did not include a jurat. He referred to the statute authorizing unsworn declarations. *See* Tex. Civ. Prac. & Rem. Code § 132.001. The purported affidavit bears the signatures of two witnesses, and appellant wrote that “two witnesses below attest to this being my signature.” The trial court did not strike the affidavit, and no one objected to the defects of form. *See Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 166 (Tex. 2018) (citing *Mansions in the Forest, L.P. v. Montgomery Cty.*, 365 S.W.3d 314, 318 (Tex. 2012)).

wrote that the law library supervisor could make arrangements for Gamboa to attend hearings by phone. Although he did not ask for a bench warrant to personally appear, his other filings were satisfactory to prevent dismissal for want of prosecution. *See Gray v. Gray*, No. 09-14-00332-CV, 2015 WL 1535684, at *5 (Tex. App.—Beaumont Apr. 2, 2015, no pet.) (mem. op.) (trial court abused its discretion by dismissing an indigent pro se inmate’s divorce case for want of prosecution when the inmate asked to appear by affidavit or telephone; “We find no authority indicating an inmate’s decision not to specifically request a bench warrant to allow for a personal appearance waives the inmate’s right of access to the court, especially when the record contains documentation that the inmate made a good faith request prior to the hearing to appear by other means.”); *Parnell v. Parnell*, No. 02-09-00270-CV, 2010 WL 2331411, at *3–4 (Tex. App.—Fort Worth June 10, 2010, no pet.) (mem. op.) (trial court abused its discretion by dismissing a pro se inmate’s divorce case for want of prosecution when the inmate asked to appear by unsworn declaration and did not specifically request a bench warrant); *Nabelek v. Aldrich*, No. 14-04-00886-CV, 2006 WL 8451661, at *4–5 (Tex. App.—Houston [14th Dist.] June 22, 2006, no pet.) (mem. op.) (trial court abused its discretion by dismissing a pro se inmate’s case for want of prosecution when the court required the inmate’s presence at the dismissal hearing and did not act on the inmate’s motion to appear by telephone; by doing so, the court “essentially closed the court’s doors to him”).

By requesting to appear by affidavit and filing a final decree, Gamboa made a good faith effort to appear by means other than requesting a bench warrant. *See Gray*, 2015 WL 1535684, at *5. By not acting on Gamboa’s request to appear by affidavit, or otherwise providing Gamboa a means to appear, and then dismissing Gamboa’s divorce case for failure to appear, the trial court essentially closed the

court's doors to him. *See Hutchinson*, 299 S.W.3d at 843; *Nabelek*, 2006 WL 8451661, at *4–5.

The trial court abused its discretion to dismiss the case for appellant's failure to appear at the hearing.

III. Lack of Service

A dismissal based on lack of service is grounded in the court's inherent power to dismiss. *See Stone v. Cunningham*, No. 05-06-01151-CV, 2007 WL 1206677, at *1–2 (Tex. App.—Dallas Apr. 25, 2007, pet. denied) (mem. op.) (analyzing dismissal for failure to serve as one based on inherent power); *Brown v. Bush*, No. 02-03-00272-CV, 2004 WL 816319, at *1–2 (Tex. App.—Fort Worth Apr. 15, 2004, pet. denied) (mem. op.) (same). When a court relies on its inherent power to dismiss, the central issue is whether the plaintiff exercised reasonable diligence. *See MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997). A plaintiff must use reasonable diligence to advance the case on the docket and move it to trial, and a plaintiff's duty to exercise diligence extends to service of process when the plaintiff instructs the clerk to not issue service of process. *See Allen v. Rushing*, 129 S.W.3d 226, 230–31 (Tex. App.—Texarkana 2004, no pet.). When reviewing the trial court's ruling, we look at the entire history of the case and perform a fact intensive, case-by-case determination. *Bjorkstam*, 2016 WL 1072298, at *1.

In his petition, appellant did not check a box requesting the court to send a process server to give a copy of the petition to his wife; he checked a box next to the request, "Do not send a process server to give a copy of this petition to my spouse. I believe my spouse may sign a Waiver of Service."³ Along with his

³ The petition appears to be a pre-printed form. The language regarding service of process is similar to the language approved by the Supreme Court of Texas for uncontested

petition, he filed a “waiver of service” document that is signed by his wife and notarized; it contains her address and states that she received a copy of the petition.⁴ The waiver substantially complies with the Family Code provision for waiver of service. *See* Tex. Fam. Code. § 6.4035 (requiring that a waiver acknowledge receipt of a copy of the petition, contain the mailing address of the party who executed the waiver, be signed, and be sworn before a notary public who is not an attorney in the suit).

However, the waiver document is dated about a month before appellant filed the petition for divorce. It has long been the law in Texas that waiver of service of process may not be made prior to the initiation of the suit. *See, e.g., McAnelly v. Ward*, 12 S.W. 206, 206–07 (Tex. 1888). Indeed, the Family Code states that a party may waive service of process “after the suit is filed” with an acknowledgement of “receipt of a copy of the *filed* petition.” Tex. Fam. Code § 6.4035(a) (emphasis added). The general statute provides, “In an instrument executed before suit is brought, a person may not accept service and waive process, enter an appearance in open court, or confess a judgment.” Tex. Civ. Prac. & Rem. Code § 30.001. Without proper service, a valid waiver, or the party’s general appearance, the trial court lacks personal jurisdiction over the party. *See In re M.D.M.*, 579 S.W.3d 744, 758–59 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *see also Deen v. Kirk*, 508 S.W.2d 70, 71 (Tex. 1974) (orig. proceeding) (“It is clear then that the waiver executed by relator prior to institution of the divorce suit in Wichita County did not subject her to the jurisdiction of the court.”).

divorces involving no minor children or real property. *See* Tex. Sup. Ct., *Order Approving Revised Uniform Forms—Divorce Set One*, Misc. Docket No. 13-9085 (June 17, 2013).

⁴ In addition to waiving service, she expressed her desire for a divorce: “I would also state for the record. I want a divorce.”

Thus, the document appellant filed was inoperative to demonstrate his wife's waiver of service because it was executed before the divorce proceeding was initiated.⁵ This fact alone, however, does not end the inquiry into whether appellant exercised reasonable diligence in prosecuting the case. Evidence of a plaintiff's attempt to effect service is just one of many factors a court should consider in reviewing the trial court's dismissal. *Allen*, 129 S.W.3d at 231; *see also Bjorkstam*, 2016 WL 1072298, at *1. We consider the entire history of the case. *See Bjorkstam*, 2016 WL 1072298, at *1.

Gamboa petitioned for divorce in April 2018 and enclosed notarized statements from himself and his wife attesting to their common law marriage, the purported waiver of service, an affidavit of indigency and declaration of inability to pay, an affidavit of previous filings, and an affidavit of exhaustion of remedies. He provided a telephone number and instructions for arranging his attendance at hearings by telephone. When the trial court notified Gamboa of the trial setting in August 2018, he filed a proposed final decree of divorce and asked to appear by affidavit. He wrote in the decree that his wife appeared by waiver, which had previously been filed with the court.

This case is similar to *In re Marriage of Buster*, 115 S.W.3d 141 (Tex. App.—Texarkana 2003, no pet.). Buster petitioned for divorce as a pro se indigent inmate. *Id.* at 142–43. He never served his wife or obtained a waiver of service from her because he could not ascertain her whereabouts. *Id.* at 142. He asked the court to appoint an attorney so he could complete service on the wife. *Id.* at 145. He also filed a motion for writ of habeas corpus ad testificandum, i.e., a bench warrant, to be brought to the trial. *Id.* at 143. He asked to proceed by affidavit or

⁵ We render no opinion on whether the waiver was also deficient because Gamboa, rather than his wife, filed the waiver. *See* Tex. Fam. Code § 6.0435(a) (noting that a party may waive service “by filing with the clerk of the court” the requisite waiver).

other alternative means if he could not be personally present. *Id.* at 145. However, sixteen months after the petition was filed, the trial court dismissed the case for want of prosecution. *Id.* at 142.

The court of appeals reversed the trial court's dismissal for want of prosecution, reasoning that Buster "did everything he could reasonably do to diligently prosecute his case." *Id.* at 144–45. The court reasoned that although pro se litigants are held to the same standards as attorneys, "the level of reasonable diligence for prison inmates is somewhat lower than that for litigants who are free and represented by counsel." *Id.* at 144. The court noted that inmates cannot personally appear unless the court orders prison officials to allow it, and a pro se inmate's ability to participate in activities designed to bring his case to trial is "seriously limited." *Id.* The trial court did not act on any of Buster's requests, including to appear personally or by other means, and the court of appeals reasoned that there was "a complete breakdown in communication between the trial court and Buster." *Id.* at 145. Because of his status as an indigent inmate, "he could not reasonably remedy the situation." *Id.*

Here, Gamboa was operating under the mistaken belief that the pre-suit waiver of service was valid and that no further service of process was required. He continues to hold this belief on appeal. Although the trial court notified Gamboa that cases without service would result in dismissal, the court did not inform Gamboa that the waiver was invalid. Thus, there was a "breakdown in communication" between the court and Gamboa regarding the necessity for service. *See id.* Further, Gamboa took reasonable steps to prosecute his case by filing a proposed final decree of divorce with a request to appear by affidavit; and he provided instructions to make himself available by telephone. The record shows that Gamboa attempted to advance the divorce with reasonable diligence.

Under these circumstances, the trial court abused its discretion by dismissing the divorce case for want of prosecution. *See id.* at 144–45.

IV. Conclusion

The trial court’s order of dismissal is reversed, and the case is remanded for further proceedings.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.