



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00312-CV

IN THE INTEREST OF W.G., A
CHILD

FROM THE 325TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 325-376268-04

MEMORANDUM OPINION¹

Appellant W.G. (Father) seeks to vacate an order holding him in contempt. We treat this appeal as a petition for writ of mandamus, sustain Father's conceded third issue, and vacate the contempt order.

On July 21, 2016, the trial court signed an order that, among other things, (i) held Father in both criminal and civil contempt for failing to comply with a December 30, 2013 order obligating him to pay Appellee S.P. (Mother) attorney's

¹See Tex. R. App. P. 47.4.

fees in the amount of \$10,000, (ii) stated that Father had paid Mother the \$10,000 in attorney's fees before the hearing on Mother's contempt motion, and (iii) found that Father was "still in arrears in the amount of \$769.00" regarding the attorney's fees owed Mother (the 2016 Contempt Order).² As Father observes, and as the record demonstrates, the \$769 figure represents unpaid interest that the trial court found had accrued on the attorney's-fees award before Father paid Mother. The record also demonstrates that no reporter's record was made at the May 12, 2016 hearing on Mother's motion to hold Father in contempt for not paying the fees.³

In three issues, Father argues that we should vacate the 2016 Contempt Order because (1) the underlying 2013 order did not require him to pay interest on the attorney's fees, (2) Mother did not plead that Father failed to pay interest on the attorney's fees, and (3) there is no evidence to support the trial court's contempt findings. In light of his direct challenges to the 2016 Contempt Order, Father also requests that we treat this appeal as a petition for writ of mandamus.

Mother did not respond to Father's first two issues, but she concedes that the 2016 Contempt Order should be set aside because no reporter's record was

²The 2016 Contempt Order is titled, "Order on Motion for Enforcement of Child Support Order and on Motion to Revoke Suspension of Commitment." It also suspended Father's commitment conditioned on certain terms.

³The hearing was before an associate judge, but the district judge later signed the 2016 Contempt Order. The statement in the 2016 Contempt Order that a reporter's record was made is erroneous.

made of the contempt hearing. She contends, however, that instead of vacating the 2016 Contempt Order, we should reverse and remand it for a new trial.

“Decisions in contempt proceedings cannot be reviewed on appeal because contempt orders are not appealable, even when appealed along with a judgment that is appealable.” *In re Office of Attorney Gen. of Tex.*, 215 S.W.3d 913, 915 (Tex. App.—Fort Worth 2007, orig. proceeding) (quoting *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.—Fort Worth 2001, pet. denied) (op. on reh’g)). Instead, a “contempt judgment may be attacked by a petition for writ of habeas corpus (if the contemnor is confined) or a petition for writ of mandamus (if no confinement is involved).” *Id.* at 916.

Because Father directs each of his arguments at only the 2016 Contempt Order, we lack jurisdiction over this cause insofar as it proceeds as an ordinary appeal. See *id.* at 915–16. Nevertheless, in certain circumstances, we may treat an appeal as a petition for writ of mandamus. See *CMH Homes v. Perez*, 340 S.W.3d 444, 454 (Tex. 2011); *Icon Benefit Adm’rs II, L.P. v. Mullin*, 405 S.W.3d 257, 263 (Tex. App.—Dallas 2013, orig. proceeding [mand. denied]). The party seeking appellate review must specifically request that its appeal be treated as a mandamus petition to invoke this court’s original jurisdiction. *In re Estate of Aguilar*, 435 S.W.3d 831, 833 (Tex. App.—San Antonio 2014, no pet.). Father so requests, and he confirmed that he has not been confined or threatened with imminent confinement, so to avoid unnecessarily wasting precious time and judicial resources, we will treat this appeal as a petition for writ of mandamus.

As alluded to above, mandamus is available to challenge an order of contempt not involving confinement. *In re Reece*, 341 S.W.3d 360, 370 (Tex. 2011). The burden is on the petitioner to show that the order underlying the contempt order or the contempt order itself is void. *Snodgrass v. Snodgrass*, 332 S.W.3d 653, 663 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Father argues in his third issue that the 2016 Contempt Order should be vacated because no evidence supports the trial court's contempt findings, as no reporter's record was made at the contempt hearing. The family code requires that "a record of the hearing in a motion for enforcement shall be made by a court reporter or as provided by Chapter 201," unless the parties agree to an order or the motion does not request incarceration and the parties waive the requirement of a record at the time of the hearing. Tex. Fam. Code Ann. § 157.161(a), (b) (West 2014). No reporter's record was made of the contempt hearing, nor does the record indicate that either of the subsection 157.161(b) exceptions apply. Further, while section 201.009 requires a court reporter when an associate judge presides over a jury trial or a final termination hearing, see *id.* § 201.009(a) (West 2014), the trial court's contempt findings must be supported by evidence, see *In re Long*, 984 S.W.2d 623, 626–27 (Tex. 1999) (orig. proceeding), but no reporter's record was made of the contempt hearing. Mother concedes that the 2016 Contempt Order should be set aside because it fails to comply with section 157.161. We sustain Father's third issue. See *In re Carlton*, No. 09-07-00241-CV, 2007 WL 1793765, at *1 (Tex. App.—Beaumont June 21, 2007, orig.

proceeding) (mem. op.); see also *In re Sheridan*, No. 03-14-00589-CV, 2014 WL 6140078, at *2 (Tex. App.—Austin Nov. 14, 2014, orig. proceeding) (mem. op.). We need not address Father’s first two issues. See Tex. R. App. P. 47.1.

Mother asks us to reverse and to remand this cause for a new trial, but because we are treating this appeal as a petition for writ of mandamus, we may only either grant or deny Father’s requested relief. See Tex. R. App. P. 52.8(a), (c).

Father has no adequate remedy by appeal because the 2016 Contempt Order is not appealable. See *Office of Attorney Gen. of Tex.*, 215 S.W.3d at 916. Having sustained Father’s third issue, we conditionally grant a writ of mandamus and order the trial court to vacate its 2016 Contempt Order. The writ will issue only if the trial court fails to comply.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MEIER, KERR, and PITTMAN, JJ.

DELIVERED: August 24, 2017