



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

**NO. 02-17-00218-CV**

IN RE L.M.

RELATOR

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ORIGINAL PROCEEDING  
TRIAL COURT NO. CV16-0106

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**MEMORANDUM OPINION<sup>1</sup>**

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Relator L.M. (Mother) seeks a writ of habeas corpus setting aside the trial court's April 11, 2017 "Order of Enforcement by Contempt and Suspension of Commitment (Possession or Access)" claiming the order is void because it severs one contemptuous act into separate acts and assesses punishment for each allegedly separate act. Because, as pointed out by Real Party in Interest

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<sup>1</sup>See Tex. R. App. P. 47.4.

J.B.N. (Father), Mother is not currently restrained of her liberty, we construe Mother's petition for writ of habeas corpus as a petition for writ of mandamus.<sup>2</sup>

The trial court signed May 20, 2016, temporary orders in Mother and Father's suit affecting the parent-child relationship. The temporary orders included the following provision:

IT IS ORDERED that [Father] shall have electronic communication with the child to supplement his periods of possession as follows:

- a. [Father] shall have telephonic and/or facetime and/or skype access on 7:00 p.m. to 8:00 p.m. of each week with [Child]. [Mother] shall make the child available for each phone call.
- b. Telephone calls and other communication shall not be monitored by the other parent unless either believes in good faith that a child is having a problem, in which case

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<sup>2</sup>See *In re Daniel*, 396 S.W.3d 545, 546 (Tex. Crim. App. 2013) (orig. proceeding) (treating petition for writ of habeas corpus as a petition for writ of mandamus); *In re Rivas-Luna*, No. 08-16-00312-CV, 2017 WL 2351347, at \*2 (Tex. App.—El Paso May 31, 2017, orig. proceeding) (citing *Ex parte Hughey*, 932 S.W.2d 308, 310–11 (Tex. App.—Tyler 1996, orig. proceeding) and *Ex parte Sealy*, 870 S.W.2d 663, 665–66 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding)) (explaining that suspended contempt orders which only require contemnor to pay attorney's fees and otherwise comply with trial court's orders do not constitute a sufficient restraint on liberty to allow the contemnor to challenge the contempt order by habeas corpus and construing writ as one seeking mandamus); *In re Spates*, No. 14-14-00603-CV, 2014 WL 4262197, at \*2 (Tex. App.—Houston [14th Dist.] Aug. 28, 2014, orig. proceeding) (mem. op.) (construing habeas petition as mandamus petition where the relator filed habeas petition prior to commencement of confinement to jail); *In re Honermann-Garinger*, No. 02-10-00361-CV, 2010 WL 4644464, at \*4 (Tex. App.—Fort Worth Nov. 17, 2010, orig. proceeding) (mem. op.) (“[W]e construe her petition for writ of habeas corpus as a petition for writ of mandamus.”); *In re Easton*, 203 S.W.3d 438, 441 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (construing application for writ of habeas corpus as a mandamus petition where relator's liberty was not restrained).

the parent shall advise the other parent that the call or other communication is being monitored.

Father later moved to enforce the temporary orders complaining, among other things, that Mother had monitored an October 6, 2016 phone call between himself and Child without a good-faith belief that Child was having a problem and after failing to advise him that the call was being monitored. After a hearing, the trial court signed a March 13, 2017 “Order of Enforcement by Contempt and Suspension of Commitment (Possession or Access)” holding Mother in contempt for ten separate violations of the temporary orders, two of which concerned Mother’s monitoring of the October 6, 2016 phone call. The court assessed punishment at one day of confinement for the first violation—which did not include the monitoring of the phone call—and ten days’ confinement for each of the nine remaining violations—which included the monitoring of the phone call. In the order, the trial court suspended and probated for twelve months the commitment for violations two through ten. Mother served a single day in jail in March 2017 relating to the first violation.

The trial court later withdrew its March 13, 2017 “Order of Enforcement by Contempt and Suspension of Commitment (Possession or Access)” and signed an April 11, 2017 “Order of Enforcement by Contempt and Suspension of Commitment (Possession or Access)” that Mother now complains of. In that order, the trial court found Mother in contempt for two violations of the temporary orders, both relating to her monitoring of the October 6, 2016 phone call:

Violation 1. On October 6, 2016 [Mother] monitored a telephone call between [Father] and [Child] without a good faith belief that the child was having a problem.

Violation 2. On October 6, 2016 [Mother] monitored a phone call between [Father] and [Child] and failed to advise [Father] that the call or other communication was being monitored.

The trial court assessed Mother's contempt punishment at one day's confinement for the first violation and ten days' confinement for the second. The order stated that Mother's sentence relating to the first violation "shall be served instanter." The trial court suspended and probated the commitment for the second violation for twelve months on the condition that Mother comply with further orders of the court and pay Father's attorney's fees of \$1,250.

To be entitled to mandamus relief, a relator must establish that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).

A court signing a contempt order "cannot divide one contemptuous act into separate acts and assess punishment for each allegedly separate act." *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (op. on reh'g) (orig. proceeding); see *Ex parte Genecov*, 186 S.W.2d 225, 226 (Tex. 1945) (orig. proceeding) ("Neither could it reasonably be contended that the trial court could divide one contemptuous act into thirty separate acts and assess the maximum punishment

provided by statute for each.”). Indeed, “a single act of contempt, once it has been punished, cannot be repunished with ever larger fines or jail terms.” *Ex parte Hudson*, 917 S.W.2d 24, 26 (Tex. 1996) (orig. proceeding).

Here, the temporary orders forbade Mother from monitoring any telephone call between Father and Child. The no-monitoring provision contained an exception, providing that Mother could monitor a call if she believed in good faith that Child was having a problem and if Mother advised Father that the call was being monitored. The trial court’s April 11, 2017 “Order of Enforcement by Contempt and Suspension of Commitment (Possession or Access),” held Mother in contempt for monitoring an October 6, 2016 phone call between Father and Child. But the trial court severed the one contemptuous act—monitoring the October 6, 2016 phone call between Father and Child—into separate two acts (Mother’s alleged lack of good-faith belief that Child was having a problem and Mother’s failure to inform Father of the monitoring) and assessed punishment for both of these allegedly separate acts. Because the trial court divided the single contemptuous act prohibited by the trial court’s order into two separate acts, the trial court clearly abused its discretion.<sup>3</sup> See *Long*, 984 S.W.2d at 625; *Hudson*,

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<sup>3</sup>Citing *In re Hall*, 433 S.W.3d 203, 207 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding), Father asks that if we hold Mother’s monitoring of the October 6, 2016 phone call to be a single contemptuous act, we simply strike the offending portion of the contempt order rather than setting aside the entire order. Unlike the facts in *In re Hall*, where the trial court imposed separate contempt punishments for separate contemptuous actions, the trial court here imposed two separate contempt punishments for the same contemptuous act—monitoring the October 6, 2016 phone call. *In re Hall* is therefore inapplicable.

917 S.W.2d at 26; *Genecov*, 186 S.W.2d at 226. We also hold that Mother does not have an adequate remedy by appeal because contempt orders are not appealable. See *In re Braden*, 483 S.W.3d 659, 662 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding); *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.—Fort Worth 2001, pet. denied) (op. on reh’g).

Having determined that the trial court clearly abused its discretion and that Mother has no adequate remedy by appeal to rectify the erroneous contempt order, we hold that Mother is entitled to mandamus relief; we therefore conditionally grant a writ of mandamus and direct the trial court to set aside its April 11, 2017 “Order of Enforcement by Contempt and Suspension of Commitment (Possession or Access).”<sup>4</sup> We are confident that the trial court will promptly comply, and the writ will issue only if the trial court does not.

/s/ Sue Walker  
SUE WALKER  
JUSTICE

PANEL: WALKER, KERR, and PITTMAN, JJ.

DELIVERED: August 7, 2017

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<sup>4</sup>Because Mother is entitled to mandamus relief on this ground, we need not address her other challenges to the April 11, 2017 contempt order. See Tex. R. App. P. 47.1.