

**NO. XXX**

**IN THE  
SUPREME COURT**

**IN RE: XXX,**

**Relator**

**From the XXX Judicial District Court of  
XXX County, Texas**

**PETITION FOR WRIT OF HABEAS CORPUS**

**Jimmy L. Verner, Jr.  
Texas Bar No. 20549490  
Verner & Brumley, P.C.  
3131 TurtleCreek Blvd.  
Penthouse Suite  
XXX, Texas 75219  
214.526.5234  
214.526.0957.fax  
jverner@vernerbrumley.com  
www.vernerbrumley.com**

**Attorney for Relator,  
XXX**

**ORAL ARGUMENT REQUESTED**

**IN RE: XXX,**

**Relator**

**IDENTITY OF PARTIES & COUNSEL**

Relator:	XXX
Respondents:	XXX
Real Party in Interest:	XXX
The parties' child:	XXX
Appellate Counsel for Relator:	Jimmy L. Verner, Jr. Texas Bar No. 20549490 Verner & Brumley, P.C. 3131 TurtleCreek Blvd. Penthouse Suite XXX, Texas 75219 214.526.5234 214.526.0957.fax
Trial Counsel for Relator:	XXX
Prior Trial Counsel for Relator:	XXX
Trial Counsel for Real Party in Interest	XXX
Amicus Attorney:	XXX

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Issue 2: The trial court’s order holding Relator in contempt and for commitment is void because the motion for enforcement upon which it is based failed to comply with the mandatory pleading requirements set forth in Tex. Fam. Code § 157.002(c).

Issue 3: The trial court’s order holding Relator in contempt and for commitment is void because Relator was denied due process of law at the contempt hearing when the Real Party in Interest nonsuited his trial pleading such that Relator had no notice or inadequate notice of what contempt allegations the Real Party in Interest intended to pursue.

Issue 4: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violation found for May 19, 2005, in that there was no evidence that the Real Party in Interest had given two weeks’ notice of visitation as is required for visitation under the possession order.

Issue 5: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, 2002, and March 28, 2003, because the Real Party in Interest failed to plead, and there was no evidence, that Relator failed to deliver the child at a time that allowed reasonable

transportation to XXX, Texas, on the day the child was dismissed from school for Spring Break.

Issue 6: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violation found for March 28, 2003, because the Real Party in Interest failed to plead, and there was no evidence, that the child’s school was released for Spring Break on March 28, 2003, or that the Real Party in Interest gave Relator two weeks’ notice of visitation.

Issue 7: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violation found for October 7, 2005, in that the possession order on which it is based required Relator to surrender the child at the airport nearest the residence of the Real Party in Interest, and not in Relator’s county of residence, which was the violation found by the trial court.

Issue 8: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violation found for October 27, 2005, because no pleading supports that alleged violation.

Issue 9: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violation found for October 27, 2005, in that there was no evidence that the Real Party in Interest had given two weeks’ notice of visitation as is required for visitation under the possession order.

Issue 10: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, November 1 and December 6, 2002; and February 2, March 3, March 28 and May 16, 2003, because the possession order on which the order holding Relator in contempt and for commitment is based is insufficiently specific to be enforced by contempt.

Issue 11: The trial court’s order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, November 1 and December 6, 2002; and February 2, March 3, March 28 and May 16, 2003, because the the Real Party in Interest failed to plead, and there was no evidence, that the child’s transportation to XXX was unreasonable.

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## STATEMENT OF THE CASE

Relator is Ms. Relator. The Real Party in Interest is Mr. RPII. Ms. Relator and Mr. RPII are the parents of Child, now aged XX. Mr. RPII lives in XXX; Ms. Relator and the child live in [another state].

On February 7, 2007, the XXX Judicial District Court of XXX County, Texas, the Hon. XXX presiding, heard contempt proceedings brought by Mr. RPII against Ms. Relator. At the conclusion of the hearing, Judge XXX found Ms. Relator to be in contempt of court for violating provisions of a possession order, fined her \$150.00 per violation, awarded attorney's fees of \$2,000.00 and ordered Ms. Relator to return to court on February 26, 2007, for imposition of punishment.

On February 26, 2007, Ms. Relator appeared for imposition of punishment. No evidence was taken at that hearing. Judge XXX reiterated the contempt finding, the fines and the attorney's fees. In addition, Judge XXX sentenced Ms. Relator to sixty days in jail for the contempt violations. Judge XXX further ordered that the sentence be probated for four years but required "as a condition of probation that Ms. Relator be booked into and out of the XXX County Jail and her probation begin upon book out." (II RR 23/17-20). Judge XXX then signed the Order Holding Respondent in Contempt and for Commitment to County Jail. (Tab A). A XXX County Deputy District Clerk then signed the Attachment and Commitment in Contempt. (Tab B). Ms. Relator was booked into and out of the XXX County Jail.

Ms. Relator later filed a Motion for Recusal of Judge XXX. The Hon. XXX (Ret.) subsequently was appointed Visiting Judge to hear the case.



## **STATEMENT OF JURISDICTION**

This Court has jurisdiction to issue a writ of habeas corpus under Article 5, section 3 of the Texas Constitution and under Texas Government Code section 22.002(a), (e).

The Petition for Writ of Habeas Corpus was first filed in the XXX Court of Appeals at XXX, which denied the relief requested. See Tab I.

## ISSUES PRESENTED

Issue 1: The trial court's order holding Relator in contempt and for commitment is void because the motion for enforcement upon which it is based failed to comply with the mandatory pleading requirements set forth in Tex. Fam. Code § 157.002(a)(1).

Issue 2: The trial court's order holding Relator in contempt and for commitment is void because the motion for enforcement upon which it is based failed to comply with the mandatory pleading requirements set forth in Tex. Fam. Code § 157.002(c).

Issue 3: The trial court's order holding Relator in contempt and for commitment is void because Relator was denied due process of law at the contempt hearing when the Real Party in Interest nonsuited his trial pleading such that Relator had no notice or inadequate notice of what contempt allegations the Real Party in Interest intended to pursue.

Issue 4: The trial court's order holding Relator in contempt and for commitment is void with respect to the violations found for May 19, 2005, in that there was no evidence that the Real Party in Interest had given two weeks' notice of visitation as is required for visitation under the possession order.

Issue 5: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for March 28, 2002, and March 28, 2003, because the Real Party in Interest failed to plead, and there was no evidence, that Relator failed to deliver the child at a time that allowed reasonable transportation to XXX, Texas, on the day the child was dismissed from school for Spring Break.

Issue 6: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for March 28, 2003, because the Real Party in Interest failed to plead, and there was no evidence, that the child's school was released for Spring Break on March 28, 2003, or that the Real Party in Interest gave Relator two weeks' notice of visitation.

Issue 7: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for October 7, 2005, in that the possession order on which it is based required Relator to surrender the child at

the airport nearest the residence of the Real Party in Interest, and not in Relator's county of residence, which was the violation found by the trial court.

Issue 8: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for October 27, 2005, because no pleading supports that alleged violation.

Issue 9: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for October 27, 2005, in that there was no evidence that the Real Party in Interest had given two weeks' notice of visitation as is required for visitation under the possession order.

Issue 10: The trial court's order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, November 1 and December 6, 2002; and February 2, March 3, March 28 and May 16, 2003, because the possession order on which the order holding Relator in contempt and for commitment is based is insufficiently specific to be enforced by contempt.

Issue 11: The trial court's order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, November 1 and December 6, 2002; and February 2, March 3, March 28 and May 16, 2003, because the the Real Party in Interest failed to plead, and there was no evidence, that the child's transportation to XXX was unreasonable.

## STATEMENT OF FACTS

On September 2, 2005, Mr. RPII filed a First Amended Motion to Enforce and for Contempt against Ms. Relator. (Tab D). On October 28, 2005, Mr. RPII filed a First Supplement to First Amended Motion to Enforce and for Contempt against Ms. Relator. (Tab E). On November 1, 2005, Mr. RPII filed a Second Supplement to First Amended Motion to Enforce and Motion for Contempt against Ms. Relator. (Tab F). These pleadings sought a judgment of contempt against Ms. Relator for alleged violations of the visitation provisions of an Order on Motion to Modify in Suit Affecting Parent Child Relationship, signed by the trial court on June 12, 2001. (Tab C).

On February 7, 2007, Ms. Relator traveled from [another state], where she and the parties' child live, to XXX, where the trial court heard Mr. RPII's motion for contempt. At the conclusion of the hearing, the trial court found Ms. Relator in contempt, as follows:

The Court finds specifically that Ms. Relator has violated the court's order for visitation specifically for periods of possession of May 19th, 2005, October 7th, 2005 and October 27th, 2005 and failure to comply with the Court's order on November 1st 2002, December 6th, 2002 and February 7th, 2003, March 7th, 2003, March 28th, 2003 and April 18th, 2003 and May 16th, 2003 and March 28th, 2002.

(RR 107/12-19). The trial court fined Ms. Relator \$150.00 for each of these violations, assessed attorney's fees of \$2,000.00 and ordered Ms. Relator to return to court on February 26, 2007, for imposition of punishment. (RR 108/1-6).

On February 26, 2007, Ms. Relator appeared for imposition of punishment. No evidence was taken at that hearing. Judge XXX reiterated the contempt finding, the fines and the attorney's fees. In addition, Judge XXX sentenced Ms. Relator to sixty

days in jail for the contempt violations. Judge XXX further ordered that the sentence be probated for four years but required “as a condition of probation that Ms. Relator be booked into and out of the XXX County Jail and her probation begin upon book out.” (II RR 23/17-20). *See* Tex. Fam. Code § 157.165 (“Probation of Contempt Order”). Judge XXX then signed the Order Holding Respondent in Contempt and for Commitment to County Jail. (Tab A).

The Order Holding Respondent in Contempt and for Commitment to County Jail reiterates the violations announced by Judge XXX from the bench on February 7, 2007, except that the violation for April 18, 2003, was dropped. Although the Order Holding Respondent in Contempt and for Commitment to County Jail assesses a punishment of \$150.00 and sixty days in jail for each separate violation of the Order on Motion to Modify in Suit Affecting the Parent Child Relationship (Tab A, at 4-5), the Order Holding Respondent in Contempt and for Commitment to County Jail commits Ms. Relator to jail for one, sixty-day term, such that the several sixty-day sentences are to be served concurrently. (Tab A, at 5).

After Judge XXX signed the Order Holding Respondent in Contempt and for Commitment to County Jail, a XXX County Deputy District Clerk then signed the Attachment and Commitment in Contempt. (Tab B). Ms. Relator was booked into and out of the XXX County Jail. Ms. Relator has now begun her four years of probation.

## ARGUMENT

### Standard of Review

A writ of habeas corpus lies to order the release of a relator when the trial court's order holding Relator in contempt and for commitment is void, either because it was beyond the power of the court or because it deprived the relator of his liberty without due process of law. *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980, orig. proceeding). A contempt order is void absent proof that an individual has violated a court's order. *Ex parte Williams*, 690 S.W.2d 243 (Tex. 1985, orig. proceeding); *Ex parte Green*, 603 S.W.2d 216 (Tex. 1980, orig. proceeding).

### Requirement of "Restraint"

Review by habeas corpus is appropriate when the relator is under some form of restraint. "Any character of restraint which precludes absolute and perfect freedom of action will justify the issuance of the writ." *Ex parte Calhoun*, 91 S.W.2d 1047, 1048 (Tex. 1936). A court order committing a person to jail should that person fail to abide by the terms and conditions of probation is a sufficient restraint on a relator's liberty to warrant of writ of habeas corpus. *Ex parte Conner*, 746 S.W.2d 527 (Tex. App. - Beaumont 1988, orig. proceeding). *See Ex parte Duncan*, 796 S.W.2d 562 (Tex. App. - Houston [1st Dist.] 1990, orig. proceeding) (order that person report to the probation officer once per month and obtain permission to travel outside the county constituted sufficient restraint for review by habeas corpus).

## Issues Relating to All Contempt Findings

**Issue 1: The trial court's order holding Relator in contempt and for commitment is void because the motion for enforcement upon which it is based failed to comply with the mandatory pleading requirements set forth in Tex. Fam. Code § 157.002(a)(1).**

Texas Family Code section 157.002(a)(1) states: “A motion for enforcement must, in ordinary and concise language: (1) identify the provision of the order allegedly violated and sought to be enforced.” None of the contempt motions identified “the provision of the order allegedly violated and sought to be enforced,” as is required by Tex. Fam. Code § 157.002(a)(1). The earlier pleadings state that the order alleged to be violated is attached as Exhibit 3, while the Second Supplement to First Amended Motion to Enforce and Motion for Contempt recites merely that: “On June 12, 2001, this Court signed the Order on Motion to Modify in Suit Affecting Parent-Child Relationship.”

The courts have followed the requirements of Tex. Fam. Code § 157.002(a)(1). In *Ex parte Arnold*, 926 S.W.2d 622 (Tex. App. - Beaumont 1996, orig. proceeding), the Beaumont Court of Appeals held that a motion for contempt failed to comply with Tex. Fam. Code § 157.002(a)(1) when the motion “did not include the part of the order which ordered Relator to surrender the children in a particular place at a particular time (violations 1 through 5), with the result that the trial court could not punish Relator for those violations.” *Id.* at 623.

The Fort Worth Court of Appeals made the same point in a pair of cases, one in which it found that the statutory requirements had been fulfilled, the other in which the court found them not to have been fulfilled. In *In re: Turner*, 177 S.W.3d 284 (Tex. App.

- Fort Worth 2005, orig. proceeding), the Fort Worth Court of Appeals found that the Real Party in Interest had met the requirements of Tex. Fam. Code § 157.002(a)(1) when the Real Party in Interest referenced the volume and page number of the order to be enforced in the trial court's minutes and then repeated "within the motion, verbatim, the portions of possession orders" allegedly violated. *Id.* at 289. In a later Memorandum Opinion, the Fort Worth Court of Appeals granted habeas corpus relief for failure of the motion for enforcement to comply with Tex. Fam. Code § 157.002(a)(1). The Real Party in Interest sought a contempt judgment for the Relator's alleged failure to maintain a life insurance policy. The court reasoned:

A motion for enforcement must identify the provision of the order allegedly violated, and, as we have already noted, an enforcement order must include, in ordinary and concise language, the provision of the order for which enforcement was requested. TEX. FAM. CODE ANN. §§ 157.002(a)(1), 157.066(a)(1) (Vernon 2002). The final divorce decree ordered Relator to maintain a life insurance policy, but neither Wisdom's motion nor the trial court's order recited the terms of that obligation. We therefore hold that the trial court's order is void with regard to the seventh enumerated basis for criminal contempt, and we sustain Relator's fourth issue.

*In re: Tomasz*, 2007 Tex. App. LEXIS 496, \*[9]-[10] (Tex. App. - Fort Worth Jan. 23, 2007, orig. proceeding) (Memorandum Opinion). No special exception to these pleading defects is required to preserve error in a habeas corpus proceeding. *In re: Mann*, 162 S.W.3d 429, 433-34 (Tex. App. - Fort Worth 2005, orig. proceeding) (collecting cases) (citing Tex. Fam. Code § 157.064).

Because Relator suffered a deprivation of due process caused by the failure of the Real Party in Interest to comply with the requirements of Tex. Fam. Code § 157.002(a)(1), the commitment is void, and the Court should grant Relator a writ of



habeas corpus.

**Issue 2: The trial court's order holding Relator in contempt and for commitment is void because the motion for enforcement upon which it is based failed to comply with the mandatory pleading requirements set forth in Tex. Fam. Code § 157.002(c).**

Texas Family Code section 157.002(c) states:

A motion for enforcement of the terms and conditions of conservatorship or possession of or access to a child must include the date, place, and, if applicable, the time of each occasion of the respondent's failure to comply with the order.

The Beaumont Court of Appeals applied this section in *Ex parte Arnold*, 926 S.W.2d 622 (Tex. App. - Beaumont 1996, orig. proceeding), where the court held that a motion for contempt “did not state the place where Relator failed to relinquish their son for weekend visitation (violations 1 through 3)” such “that the trial court could not punish Relator for those violations.” *Id.* at 623.

Judge XXX found Relator in contempt of court for several violations of the Order on Motion to Modify in Suit Affecting Parent Child Relationship. However, the Real Party in Interest failed to plead either the place of the alleged violation, the time of the alleged violation, or both the time and the place of the alleged violation, for every one of the violations the trial court found occurred. In particular:

- The violations alleged for May 19, 2005, and October 7, 2005, do not plead either the place or the time of violation. (Tab F, at 3 ¶ 13(c) (May 19); at 4 ¶ 13(d) (October 7)).
- The violation alleged for October 27, 2005, does not plead the time of violation. (Tab F, at 4-5 ¶ 13(e)).

- The violations alleged for March 28, November 1 and December 6, 2002; and February 2, March 3, March 28 and May 16, 2003, do not plead the place of violation. (Tab F, at 6 ¶ 13(f)).

As previously noted, special exceptions are not required to preserve error in a habeas corpus proceeding. *In re: Mann*, 162 S.W.3d 429, 433-34 (Tex. App. - Fort Worth 2005, orig. proceeding) (collecting cases) (citing Tex. Fam. Code § 157.064).

Because Relator suffered a deprivation of due process caused by the failure of the Real Party in Interest to comply with the requirements of Tex. Fam. Code § 157.002(c), the commitment is void, and the Court should grant Relator a writ of habeas corpus.

**Issue 3: The trial court's order holding Relator in contempt and for commitment is void because Relator was denied due process of law at the contempt hearing when the Real Party in Interest nonsuited his trial pleading such that Relator had no notice or inadequate notice of what contempt allegations the Real Party in Interest intended to pursue.**

On February 7, 2007, the trial court heard Mr. RPII's motion for contempt. During cross-examination of Mr. RPII, it became apparent that neither the Court's file nor the electronic filing system, Odyssey, contained a copy of the Second Supplement to First Amended Motion to Enforce and Motion for Contempt. (RR 43/16-25). The Amicus Attorney stated that "the motion before me is the First Amended." (RR 44/4-5). Counsel for Mr. RPII then informed the trial court that to her knowledge, there was no Second Supplement to First Amended Motion to Enforce and Motion for Contempt. (RR 44/25 to 45/1). Mr. RPII's counsel also said that the Second Supplement to First Amended Motion to Enforce and Motion for Contempt had been "removed." (RR 44/22-23; 45/17). After the trial court inquired whether Mr. RPII wished to nonsuit the

Second Supplement to First Amended Motion to Enforce and Motion for Contempt (RR 45/21-22), counsel for Mr. RPII announced: “We’re non-suiting it.” (RR 45/23). The trial court then inquired:

THE COURT: November the 1st, 2005. Are you non-suiting your entire second supplement?

MS. XXX: No, I’m non-suiting that provision only.

THE COURT: That provision only.

MS. XXX: Yes.

However, the Second Supplement to First Amended Motion to Enforce and Motion for Contempt does not cite Ms. Relator for any allegedly contemptuous act on November 1, 2005, or even at any time that month.

A person who is accused of violating a court order and thereby is subject to criminal sanctions for that violation has a due process right to notice of the charges that the person faces. The right to due process is violated when the trial court’s file does not contain a copy of the trial pleading, counsel for the Real Party in Interest states that she has no knowledge of the pleading but then states that the pleading has been removed, and then the trial pleading (or some unspecified part of it) is nonsuited during the course of the contempt proceeding.

The contempt hearing continued, apparently based upon the next-preceding pleading, which was the First Supplement to First Amended Motion to Enforce and for Contempt. However, the contempt hearing could not continue based on that pleading because it had been superseded and, under the Texas Rules of Civil Procedure, could not be revived.

The Texas Family Code is clear that proceedings under Title 5 of the Texas Family Code (of which enforcement proceedings - chapter 157 - are a part) “shall be as in civil cases generally.” Tex. Fam. Code § 105.003(a). Likewise, “the Texas Rules of Evidence apply as in other civil cases.” Tex. Fam. Code § 104.001.

Rule 65 of the Texas Rules of Civil Procedure states that when a successive pleading is filed, it becomes the trial pleading and supplants the prior pleadings:

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

Accordingly, when Mr. RPII nonsuited his Second Supplement to First Amended Motion to Enforce and Motion for Contempt, he nonsuited his entire contempt proceeding because there was, and could not be, a prior pleading to fall back onto under Rule 65. Accordingly, the commitment is void because not based on any motion for contempt, and the Court should grant Ms. Relator a writ of habeas corpus.

### **Issues Relating to Specific Contempt Findings**

**Issue 4: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for May 19, 2005, in that there was no evidence that the Real Party in Interest had given two weeks' notice of visitation as is required for visitation under the possession order.**

The violation alleged for May 19, 2005, appears to be based on subparagraph (3) of the Order on Motion to Modify in Suit Affecting Parent Child Relationship (Tab C, at 7) which requires Mr. RPII to give fourteen days' advance written notice of requested visitation. In each of his contempt pleadings, Mr. RPII pled that he gave the required notice fourteen days' notice for visitation on May 19, 2005. (*E.g.*, Tab F, at 3). However, there was no evidence at trial that Mr. RPII had given such notice for May 19, 2005. Thus, the Order Holding Respondent in Contempt and for Commitment to County Jail is void for lack of evidence that Ms. Relator committed a violation of the Order on Motion to Modify in Suit Affecting Parent Child Relationship on May 19, 2005.

**Issue 5: The trial court's order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, 2002, and March 28, 2003, because the Real Party in Interest failed to plead, and there was no evidence, that Relator failed to deliver the child at a time that allowed reasonable transportation to XXX, Texas, on the day the child was dismissed from school for Spring Break.**

**Issue 6: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for March 28, 2003, because the Real Party in Interest failed to plead, and there was no evidence, that the child's school was released for Spring Break on March 28, 2003, or that the Real Party in Interest gave Relator two weeks' notice of visitation.**

Mr. RPII accused Ms. Relator of refusing visitation on March 28, 2002, in violation of the Order on Motion to Modify in Suit Affecting Parent Child Relationship,

and the trial court so found. From the testimony at the hearing, it appears that this alleged violation was based upon subparagraph (7) of the Order on Motion to Modify in Suit Affecting Parent Child Relationship, which grants Mr. RPII visitation

beginning in the range of 4:00 to 6:00 p.m. or at a time that allows reasonable transportation to XXX, Texas on the day the child is dismissed from school for the school's spring vacation.

(Tab C, at 7).

Ms. Relator requests the Court to take judicial notice that March 28, 2002, was a Thursday. Mr. RPII tendered no evidence that, in fact, this was the first day of the school's Spring Break. The only evidence on that subject at the contempt hearing came from Ms. Relator, who testified that although Spring Break began March 28, 2002, the school conducted a spring party that afternoon so that instead of traveling to XXX the night of March 28, 2002, the child traveled to XXX at 8:00 a.m. the following day, Friday, March 29, 2002. (RR 96/17 to 4). Mr. RPII acknowledged that the child arrived in XXX at 2:59 p.m. March 29, 2002. (Tab F, at 6). Thus, although Spring Break began March 28, 2002, it began late on that day such that there was no "reasonable transportation" available to XXX until the following day. Accordingly, there was no evidence that Ms. Relator violated the Order on Motion to Modify in Suit Affecting Parent Child Relationship with respect to the Spring Break provision for March 28, 2002.

Ms. Relator requests the Court to take judicial notice that March 28, 2003, was a Friday. Nowhere in Mr. RPII's contempt motions is it revealed whether Mr. RPII contended that this was the first day of Spring Break, in which case subparagraph (7) of the Order on Motion to Modify in Suit Affecting the Parent Child Relationship would apply (Tab C, at 6); or that instead, Mr. RPII contended that this was an additional

weekend visitation in XXX, in which case subparagraph (3) of the Order on Motion to Modify in Suit Affecting the Parent Child Relationship would apply (Tab C, at 6). If the former, then Mr. RPII failed to plead or prove that the child's school was released for Spring Break on March 28, 2003; if the latter, Mr. RPII failed to plead or prove that he gave the requisite two weeks' notice of visitation. There was no evidence that Ms. Relator had violated the Order on Motion to Modify in Suit Affecting Parent Child Relationship on March 28, 2003.

**Issue 7: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for October 7, 2005, in that the possession order on which it is based required Relator to surrender the child at the airport nearest the residence of the Real Party in Interest, and not in Relator's county of residence, which was the violation found by the trial court.**

The trial court found Ms. Relator in contempt for failing "to surrender the minor child to Petitioner as ordered by the Court for Petitioner's weekend possession in Respondent's County of Residence beginning on October 7, 2005." (Tab A, at 3, violation 2). However, Ms. Relator was not required to surrender the child to Mr. RPII in her county of residence on October 7, 2005. Ms. Relator requests the Court to take judicial notice that October 7, 2005, was the first Friday in October 2005 such that Mr. RPII's possession was governed by subparagraph (2)(a) of the Order on Motion to Modify in Suit Affecting Parent Child Relationship (Tab C, at 6). According to the last full paragraph on page eight of the Order on Motion to Modify in Suit Affecting Parent Child Relationship, Ms. Relator's responsibility for visitation governed by subparagraph (2)(a) was to "surrender the child at the beginning of each period of possession at the airport nearest [Mr. RPII's] residence." (Tab C, at 8). This finding of

contempt cannot stand because Ms. Relator has been held in contempt for an action that the Order on Motion to Modify in Suit Affecting Parent Child Relationship did not command her to do.

The Court will note, in reviewing the reporter's record, that Ms. Relator was asked at trial whether she "denied visitation" for the weekend of October 7, 2005, and also for the weekend of October 28, 2005. (RR 71/23 to 72/6). Ms. Relator responded that she had denied visitation because her son had made an outcry of sexual abuse against Mr. RPII. (RR 72/7 - 11). As counsel later observed to the trial court, Ms. Relator acknowledged only that she "denied visitation" but denied that she had contemptuously disobeyed the Order on Motion to Modify in Suit Affecting Parent Child Relationship. (RR 73/10 - 16). If a person admits guilt by confessing to the elements of a crime, then that person has waived any error that might have occurred at trial. However, there can be no judicial confession when a person admits some elements of an offense but refutes other elements of the offense. *E.g., Ludwig v. State*, 969 S.W.2d 22 (Tex. App. - Fort Worth 1998, pet. ref'd) (no judicial confession to burglary of a habitation with intent to commit murder or aggravated assault when appellant admitted entering a dwelling and shooting his ex-girlfriend but denied intent to enter the dwelling for any purpose other than to retrieve his daughter). Accordingly, Ms. Relator's statement that she "denied visitation" does not operate to waive this Issue in this Petition for Writ of Habeas Corpus.

**Issue 8: The trial court's order holding Relator in contempt and for commitment is void with respect to the violation found for October 27, 2005, because no pleading supports that alleged violation.**

**Issue 9: The trial court's order holding Relator in contempt and for**



**commitment is void with respect to the violation found for October 27, 2005, in that there was no evidence that the Real Party in Interest had given two weeks' notice of visitation as is required for visitation under the possession order.**

As noted above, Mr. RPII nonsuited his Second Supplement to First Amended Motion to Enforce and Motion for Contempt, at least in part, at the contempt hearing. The Second Supplement to First Amended Motion to Enforce and Motion for Contempt is the only pleading that complains of events occurring in late October 2005. (Tab F, at 4-5). If the Second Supplement to First Amended Motion to Enforce and Motion for Contempt was nonsuited only in part, and the hearing continued based on the First Supplement to First Amended Motion to Enforce and for Contempt, then the trial court's finding of a contempt violation for October 27, 2005, is not based on a live pleading and therefore is void.

Moreover, the trial court found that Ms. Relator had violated the possession order on October 27, 2005. In contrast, the Second Supplement to First Amended Motion to Enforce and Motion for Contempt pleads that Ms. Relator denied him possession for three days "beginning on October 28, 2005." (Tab F, at 5). Even if the Second Supplement to First Amended Motion to Enforce and Motion for Contempt retained vitality as a trial pleading, it did not plead that Ms. Relator withheld possession on October 27, 2005, as the trial court found. Again, this finding of contempt is not supported by a pleading and therefore is void.

Finally, this alleged violation appears to be based on subparagraph (3) of the Order on Motion to Modify in Suit Affecting Parent Child Relationship (Tab C, at 7) which requires Mr. RPII to give fourteen days' written notice of requested visitation. In the Second Supplement to First Amended Motion to Enforce and Motion for Contempt,

Mr. RPII pled that he gave the required fourteen days' notice. (Tab F, at 4 & n.4). However, there was no evidence at trial that Mr. RPII had given such notice for October 27, 2005. The Order Holding Respondent in Contempt and for Commitment to County Jail is void for lack of evidence that Ms. Relator committed a violation of the Order on Motion to Modify in Suit Affecting Parent Child Relationship on October 27, 2005.

As noted at the end of the argument under Issue 7 above, Ms. Relator did not judicially confess to violating the Order on Motion to Modify in Suit Affecting Parent Child Relationship on October 27, 2007, by stating that she “denied visitation.” That discussion is not repeated here, for the sake of brevity.

**Issue 10: The trial court's order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, November 1 and December 6, 2002; and February 2, March 3, March 28 and May 16, 2003, because the possession order on which the order holding Relator in contempt and for commitment is based is insufficiently specific to be enforced by contempt.**

**Issue 11: The trial court's order holding Relator in contempt and for commitment is void with respect to the violations found for March 28, November 1 and December 6, 2002; and February 2, March 3, March 28 and May 16, 2003, because the the Real Party in Interest failed to plead, and there was no evidence, that the child's transportation to Dallas was unreasonable.**

The Spring Break provision of the Order on Motion to Modify in Suit Affecting Parent Child Relationship states that visitation shall begin “in the range of 4:00 to 6:00 p.m. or at a time that allows reasonable transportation to XXX, Texas.” (Tab C, at 7). Similarly, the part of the Order on Motion to Modify in Suit Affecting Parent Child Relationship governing possession on the first weekend of each month states that visitation shall begin “in the range of 4:00 to 6:00 p.m. Pacific Standard Time or at the earliest time that allows reasonable transportation to XXX, Texas, on the first Friday of

each month.” (Tab C, at 6).

As noted above, the trial court found Ms. Relator in contempt under the Spring Break provision for March 28, 2002. It is unclear whether Ms. Relator was found in contempt for March 28, 2003, for violation of the Spring Break or the “additional weekend” provision of the Order on Motion to Modify in Suit Affecting the Parent Child Relationship. (*see* Issue 6 above). It appears that the trial court found Ms. Relator in contempt for violations of the “additional weekend” provision for May 16, 2003. Finally, the trial court found Ms. Relator in contempt for violating the “first weekend” provision for the dates of November 1 and December 6, 2002; and February 2 and March 3, 2003.

For each of these dates, Mr. RPII pled and testified that the child had arrived in Dallas at times ranging from 9:03 p.m. to 9:07 p.m. Mr. RPII contended that Ms. Relator should be held in contempt on each occasion because, Pacific Standard Time being two hours earlier than Central Standard Time, the child had been just over an hour late on each of these occasions. With respect to these violations, the Order Holding Respondent in Contempt and for Commitment to County Jail assumes that it is possible to calculate a precise “time that allows reasonable transportation to XXX, Texas” for placing the child on an airplane because it finds Ms. Relator in contempt for failing to surrender the child “at the designated time.” (Tab A, at 4).

To the extent that the trial court found Ms. Relator in contempt for March 28, 2003, and May 16, 2003, for violations of the “additional weekend” provisions of the Order on Motion to Modify in Suit Affecting the Parent Child Relationship, the findings cannot stand in light of subparagraph (3) of the Order on Motion to Modify in Suit

Affecting the Parent Child Relationship which governs such visitation. (Tab C, at 7). The only allegations against Ms. Relator on these dates relate to the time of arrival in XXX. (Tab F, at 6). However, subparagraph (3) of the Order on Motion to Modify in Suit Affecting the Parent Child Relationship requires visitation where Ms. Relator resides, in [another state], not in XXX. Thus, Ms. Relator cannot be held in contempt of court for violations said to occur on Marcy 28 and May 16, 2003.

With respect to the remaining findings relating to the time of arrival at XXX - violations found for March 28, November 1 and December 6, 2002, and February 2 and March 3, 2003 - and to the extent that the violation alleged for March 28, 2003, was intended to allege a violation of the Spring Break subparagraph of the Order on Motion to Modify in Suit Affecting the Parent Child Relationship - the Order on Motion to Modify in Suit Affecting the Parent Child Relationship, in requiring arrival at a time that “allows reasonable transportation to XXX, Texas” - is not sufficiently specific to be enforced by contempt.

A possession order must be sufficiently specific to be enforceable by contempt. *Ex parte MacCallum*, 807 S.W.2d 729 (Tex. 1991); *Ex parte Brister*, 801 S.W.2d 833 (Tex. 1990). In short, an accused person must know exactly what is required of him under a court order to be held in contempt of court for disobeying the order. *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967). Court orders that rely on a party’s discretion or agreement to permit visitation are inherently unenforceable by contempt. *E.g.*, *In re: A.P.S.*, 54 S.W.3d 493 (Tex. App. - Texarkana 2001, no pet.); *In re: Walters*, 39 S.W.3d 280 (Tex. App. - Texarkana 2001, no pet.); *Roosth v. Roosth*, 889 S.W.2d 445 (Tex. App. - Houston [14th Dist.] 1994, writ denied); *Wright v. Wentzel*, 749 S.W.2d 228 (Tex. App. -

Houston [1st Dist.] 1988, no writ); *Hill v. Hill*, 404 S.W.2d 641 (Tex. Civ. App. - Houston [1st Dist.] 1966, no writ). Accordingly, the Order Holding Respondent in Contempt and for Commitment to County Jail is void with respect to its contempt findings on these dates.

Moreover, at the contempt hearing, there was no evidence that Ms. Relator had failed to allow visitation “at a time that allows reasonable transportation to XXX, Texas.” Mr. RPII tendered no evidence on this issue; Ms. Relator testified that she had to take the child out of school on these Fridays to get him to XXX as early as she did. (RR 82/2 - 10). A court order is insufficient to support a judgment of contempt if its interpretation requires inferences or conclusions about which reasonable persons might differ. *Ex parte MacCallum*, 807 S.W.2d 729 (Tex. 1991). Thus, there was no evidence to support the trial court’s findings that Ms. Relator had violated the Order on Motion to Modify in Suit Affecting Parent Child Relationship on these dates.

#### **PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Relator prays that the Court:

1. Find the Order Holding Respondent in Contempt and for Commitment to County Jail void for the reasons aforesaid.
2. Relator prays for general relief.

Respectfully submitted,

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Jimmy L. Verner, Jr.  
SBN 20549490  
Verner & Brumley, P.C.  
3131 TurtleCreek Blvd.  
Penthouse Suite  
Dallas, Texas 75219

214.526.5234  
214.526.0957.fax  
jverner@vernerbrumley.com  
www.vernerbrumley.com

Attorney for Relator,  
XXX

### Certificate of Service

I certify that I have served a true and correct copy of the above and foregoing document on the following:

XXX

by the following method:

- hand-delivery
- facsimile
- certified mail, return receipt requested

on this \_\_\_\_\_ day of May, 2007.

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Jimmy L. Verner, Jr.

### VERIFICATION

STATE OF TEXAS

COUNTY OF XXX

Before me, the undersigned notary, on this day personally appeared Jimmy L. Verner, Jr., a person whose identity is known to me. After I administered the oath, to Jimmy L. Verner, Jr., upon his oath he said the following:

1. “My name is Jimmy L. Verner, Jr., I am capable of making this affidavit, and the

facts in this affidavit are true and correct.

2. “I am one of the attorneys for Relator. All the documents included with the petition for writ of habeas corpus are true copies.”

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Jimmy L. Verner, Jr.

SWORN TO AND SUBSCRIBED before me, a notary public, on this \_\_\_\_\_ day  
of May, 2007.

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Notary Public