

**Petition for Writ of Mandamus Conditionally Granted and Memorandum Opinion filed July 23, 2020.**



**In The  
Fourteenth Court of Appeals**

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**NO. 14-20-00072-CV**

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**IN RE ROBERT EGNATUK, Relator**

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**ORIGINAL PROCEEDING  
WRIT OF MANDAMUS  
257th District Court  
Harris County, Texas  
Trial Court Cause No. 2015-49789**

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**MEMORANDUM OPINION**

On January 27, 2020, relator Robert Egnatuk filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.22; *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Sandra Peake, presiding judge of the 257th District Court of Harris County, to set aside her October

14, 2019 order dismissing relator’s motion for enforcement and conduct a hearing.<sup>1</sup>  
We conditionally grant the petition.

## **BACKGROUND**

### **I. Divorce Decree**

On October 17, 2016, the trial court signed the final decree of divorce between relator and Mother. The trial court appointed relator and Mother joint managing conservators of their two children. The trial court awarded Mother the exclusive right to designate the primary residence of the children within “Harris County, Texas and contiguous counties” and ordered Mother, who was residing in Sulphur, Louisiana, “to move back to Harris County and contiguous counties within thirty (30) days from the entry date”:

. . . IT IS ORDERED that the primary residence of the children shall be Harris County, Texas and contiguous counties, and the parties shall not remove the children from Harris County, Texas and contiguous counties for the purpose of changing the primary residence of the children until modified by further order of the court of continuing jurisdiction or by written agreement signed by the parties and filed with the court.

IT IS FURTHER ORDERED that [Mother] shall have the exclusive right to designate the children’s primary residence within Harris County, Texas and contiguous counties.

IT IS FURTHER ORDERED that this geographic restriction on the residence of the children shall be lifted if, at the time [Mother] wishes to remove the children from Harris County, Texas and contiguous counties for the purpose of changing the primary residence of the

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<sup>1</sup> The court requested a response from Mother, who failed to file a response. *See* Tex. R. App. 52.4.

children, [relator] does not reside in Harris County, Texas and contiguous counties.

## **II. First Enforcement Motion and Order**

On June 23, 2017, relator filed a motion for enforcement of the final divorce decree, geographic restriction, and possession or access and order to appear. Relator alleged that Mother had violated the decree by failing to move back to Harris County or contiguous counties within 30 days of the entry of the decree. Relator further alleged that Mother had violated the decree by failing to surrender the children at the Chambers County Sheriff's Department Substation in Winnie, Texas, on December 2, 2016, December 8, 2016, April 7, 2017, and June 4, 2017. Relator requested that Mother be held in criminal contempt and jailed for each violation for a period of six months, sentences to run concurrently and fined an unstated amount for each violation. Relator further requested that Mother be held in civil contempt for a period not to exceed 18 months total for civil and criminal contempt or until Mother complied with the decree, whichever occurred first.

The trial court held a hearing on relator's motion to enforce on August 3, 2017. Relator alleged in the motion to enforce that date of the decree was October 14, 2016, and Mother failed to move back to Harris County or contiguous counties within 30 days of October 14, 2016. However, the trial court signed the decree on October 17, 2016. Because there was no October 14, 2016 decree, the trial court dismissed the alleged violation that Mother did not move back to Harris County or contiguous counties within 30 days of the date of the decree. On October 16, 2017, the trial court signed another order, which reads in relevant part:

On August 3, 2017[,], the Court heard Movant’s Motion for Enforcement of Final Decree of Divorce, Geographic Restriction, and for Possession or Access.

\* \* \*

*Findings*

After the witnesses were sworn and Movant called his first witness, the Court GRANTED the motion to dismiss as to Count I of the motion for enforcement.

After completion of his case and [sic] chief, the Court GRANTED Respondent’s motion for judgment as a matter of law as to remaining counts in the motion for enforcement.

*Relief Not Granted*

All relief requested and not expressly granted is denied.

**III. Second Enforcement Motion and Order**

On June 27, 2019, relator filed a second motion for enforcement. Relator alleged 693 separate violations, from August 4, 2017, through June 27, 2019, of the order to move back to Harris County or contiguous counties. Relator further alleged that Mother had failed to surrender the children at the Chambers County Sheriff’s Department Substation in Winnie, Texas on December 8, 2017. Relator requested that Mother be held in civil contempt and jailed for each violation for a period of six months, sentences to run concurrently and fined \$500.00 for each violation.<sup>2</sup> Relator

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<sup>2</sup> This is actually a request for Mother to be held in criminal contempt. Civil contempt is considered remedial and coercive in nature. *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976 (orig. proceeding)). Imprisonment is conditioned upon obedience and therefore the civil contemnore “carries the keys of (his) prison in (his) own pocket.” *Id.* (quoting *Shillitani v. United States*, 384 U.S. 364, 368 (1966)). Criminal contempt differs from civil contempt because criminal contempt is punitive in nature. *Id.* With criminal contempt, “the punishment is fixed and definite

further requested that Mother be held in criminal contempt for a period not to exceed 18 months total or until Mother complied with the decree.<sup>3</sup>

In response to the second motion for enforcement, Mother pleaded the affirmative defenses of (1) *res judicata* because relator previously had sought enforcement of the same provisions of the decree and (2) double jeopardy because she already had been prosecuted for the same offense.. The trial court held a hearing on relator's motion to enforce on August 29, 2019, and signed the following order dismissing relator's motion for enforcement on October 14, 2019:

On August 29, 2019. the Court called the above styled and numbered cause for trial on [relator's] motion for enforcement and order to appear. Prior to the commencement of the hearing, Non-Movant, [Mother], raised affirmative defenses of *res judicata* and double jeopardy. The [C]ourt reviewed the Order on Motion for Enforcement dated 08/03/2017, and finds that this Court has already ruled there was no violation on the date that fell 30 days from the date of the entry of the decree (10/14/2017) so there is no basis to find separate and distinct violations for the 693 days following.

After reviewing the record, and the prior motion for enforcement, this Court grants [Mother's] plea of double jeopardy and *res judicata*. **IT IS THEREFORE ORDERED** that on the Court's own motion, that the Motion for Enforcement is **DISMISSED** and all requested relief in the Motion is **DENIED**.

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and no subsequent voluntary compliance on the part of the defendant can enable him to avoid punishment for his past acts." *Id.* at 546 (quoting *Ex parte Hosken*, 480 S.W.2d 18, 23 (Tex. App.—Beaumont 1972, orig. proceeding)).

<sup>3</sup> This is a request for Mother to be held in civil contempt, not criminal contempt, because the requested punishment is conditioned on Mother's compliance with the divorce decree. *See Werblud*, 536 S.W.2d at 545.

Relator brings this mandamus proceeding challenging the trial court's October 14, 2019 order dismissing relator's second enforcement motion as to allegations of Mother's failure to move back to Harris County or contiguous counties for res judicata and double jeopardy.

### STANDARD OF REVIEW

Ordinarily, to be entitled to a writ of mandamus, the relator must show that the trial court clearly abused its discretion, and that the relator lacks an adequate remedy by appeal. *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (original proceeding) (per curiam). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302–03 (Tex. 2016) (orig. proceeding) (per curiam); *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). Contempt proceedings are not appealable. *Hooper v. Hooper*, No. 14-09-01024-CV, 2011 WL 334198, at \*1 (Tex. App.—Houston [14th Dist.] Feb.3, 2011, no pet.) (mem. op.).

### ANALYSIS

## II. Abuse of Discretion

### A. Res Judicata

Relator contends that res judicata does not apply here. The elements of res judicata are: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first

action *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). As addressed below, Mother has not established the first or third elements of res judicata.

The first element requires that there is a final prior judgment by a court of competent jurisdiction. An order failing to hold a person in contempt is not a final, appealable judgment. *Norman v. Norman*, 692 S.W.2d 655, 655 (Tex. 1985); *Wagner v. Warnasch*, 295 S.W.2d 890, 892–93 (Tex. 1956); *In re B.A.C.*, 144 S.W.3d 8, 11 (Tex. App.—Waco 2004, no pet.); *Chambers v. Rosenberg*, 916 S.W.2d 633, 634 (Tex. App.—Austin 1996, writ denied). The October 16, 2017 order dismissing relator’s motion for enforcement is not a final judgment. Therefore, Mother failed to establish the first element of res judicata.

The third element—a second action based on the same claims as were raised or could have been raised in the first action—also has not been established. In the first enforcement motion, relator alleged that Mother failed to move back to Harris County or contiguous counties within 30 days of the entry of the divorce decree. In this second enforcement motion, relator asserted new violations of the divorce decree for Mother’s failure to move back to Harris County or contiguous counties, which relator did not allege as violations in his first enforcement motion and which were not the subject of the first enforcement proceeding or the October 16, 2017 order. Specifically, relator has claimed separate violations on new dates, which arose after the trial court held the hearing on the first enforcement order from August 4, 2017, through June 27, 2019. Mother may only be subject to any potential contempt finding on the violations alleged in relator’s second enforcement motion. *See In re Office of the Att’y Gen.*, 422 S.W.3d 623, 630 (Tex. 2013) (orig.

proceeding) (stating that respondent may be found in contempt only for violations that are specifically pled in motion for enforcement); *see also* Tex. Fam. Code Ann. § 157.002(a) (providing that motion for enforcement must identify provision allegedly violated and sought to be enforced and state manner of noncompliance). The trial court abused its discretion by dismissing relator's second enforcement motion on res judicata.

### **B. Double Jeopardy**

Relator also contends that double jeopardy does not bar his second enforcement motion as to alleged violations of Mother's failure to move back to Harris or contiguous counties from August 4, 2017, through June 27, 2019.

The Fifth Amendment to the United States Constitution guarantees that a person shall not "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. There are three types of double jeopardy claims: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014). Double jeopardy does not apply to an action for civil contempt. *Ex parte Hudson*, 917 S.W.2d 24 (Tex. 1996). In his second enforcement motion, relator sought to hold Mother in both civil and criminal contempt. Because relator is seeking criminal contempt, any request for civil contempt does not bar the application of double jeopardy.

Mother contended, in the trial court, that jeopardy attached in the first enforcement proceeding because she already had been prosecuted for the same



conduct for which relator was seeking to prosecute her in the second enforcement proceeding. The violations in the second enforcement motion are alleged to have occurred from August 4, 2017, through June 27, 2019, and could not have been decided in the first enforcement proceeding. Nor has relator sought to hold Mother in contempt for not moving back to Harris County or contiguous counties within 30 days of the entry of the divorce decree. Here, because relator is attempting to have Mother punished for separate occurrences of the same conduct, each occurrence constitutes a distinct offense for which Mother may be prosecuted separately without violating the double jeopardy clause. *See State v. Johnson*, 948 S.W.2d 39, 40 (Tex. App.—Houston [14th Dist.] 1997, no pet.). “To hold otherwise would be tantamount to saying that if an individual assaults his neighbor on Tuesday and then assaults that same individual again on Wednesday, he could not be charged with two separate crimes of assault. This is simply not the rule.” *Id.* The second enforcement motion does not implicate double jeopardy, and the trial court abused its discretion by dismissing relator’s second enforcement motion on the ground of double jeopardy.

**B. Lack of Adequate Remedy by Appeal**

Having shown that the trial court abused its discretion, relator also must establish that he lacks an adequate remedy by appeal. Relator cannot appeal the trial court’s October 14, 2019 order dismissing relator’s second enforcement motion because it is not a final, appealable judgment. *See Norman*, 692 S.W.2d at 655; *Wagner*, 295 S.W.2d at 892–93; *B.A.C.*, 144 S.W.3d at 11; *Chambers*, 916 S.W.2d at 634. Relator has shown that he does not have an adequate remedy by appeal.

## CONCLUSION

We conclude that the trial court abused its discretion by dismissing relator's second enforcement motion for res judicata and double jeopardy and relator does not have an adequate remedy by appeal. Accordingly, we conditionally grant relator's petition for writ of mandamus and direct the trial court to set aside the October 14, 2019 order dismissing relator's motion for enforcement and to conduct a hearing. The writ will issue only if the trial court fails to act in accordance with this opinion.

## PER CURIAM

Panel consists of Chief Justice Frost and Justices Christopher and Bourliot.