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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-414
[2023] NZHC 2115

UNDER	the High Court Rules 2016, r 19.2(h); the Habeas Corpus Act 2001; and the New Zealand Bill of Rights Act 1990
IN THE MATTER OF	an application for a writ of habeas corpus
BETWEEN	IAN ADAMSON First Applicant
	KATE JONES Second Applicant
AND	KATE JONES First Respondent
	JAMES ROBINSON Second Respondent

Teleconference: 7 August 2023

Appearances: Applicants in person
First Respondent in person
No appearance for Second Respondent

Judgment: 9 August 2023

JUDGMENT OF GWYN J
(Application for habeas corpus)

Introduction

[1] On 2 August 2023 the applicants filed an application under the Habeas Corpus Act 2001 (Act) on behalf of the child, who is the child of the second applicant and grandchild of the first applicant.

[2] In earlier litigation, involving the same applicants and in respect of the child, the parties' names have been changed to protect the identity of the child. Accordingly I will adopt those names and refer to the child as Alice, the first applicant as Mr Adamson and the second applicant/first respondent as Ms Jones. The second respondent will be referred to as Mr Robinson. This will allow the decision to be reported, while protecting the identity of the family, consistent with ss 11B–11D of the Family Court Act 1980 and s 437A of the Oranga Tamariki Act 1989.

[3] The application alleges that the Interim Parenting Order currently in force in relation to Alice, which makes an interim custody order in favour of the first and second respondents, is unlawful as it deprives Alice of her right to liberty and not to be subject to detention, contrary to ss 5, 18 and 22 of the New Zealand Bill of Rights Act 1990.

[4] The application was brought without notice on the basis that proceeding on notice would cause undue delay or prejudice to the applicant.

[5] I was not satisfied that urgency and prejudice were made out. Alice has been subject to the current Parenting Order since 14 December 2022 without, it appears, any specific supervening event since then that might provide a basis for a without notice application. The very brief affidavit initially filed in support of the application by Ms Jones did not address the issue. Accordingly I directed by minute of 3 August 2023 that the applicants serve Mr Robinson or his counsel with the application, together with further evidence that I required in the minute.

[6] Mr Adamson confirmed at the telephone conference that both Mr Robinson and his counsel had been served with all of the papers, as required by the Court.

Oranga Tamariki

[7] At the Court's request, Mr Britton for the Crown has filed a helpful memorandum. Counsel advises that there are no existing orders under the Oranga Tamariki Act and no open interventions or allocated social worker for Alice. Accordingly, at the present time, Oranga Tamariki's case for Alice is closed.

[8] Given that, there can be no detention of Alice by the Crown, which would have required the joinder of Oranga Tamariki to this application. Appearances by counsel for Oranga Tamariki were excused.

Background

[9] The background to Alice's current care arrangements has been traversed in some detail in a number of previous judgments in this Court.

[10] In an earlier application for habeas corpus filed by the applicants in August 2022, I recorded that background as follows:[1]

> The background to this case is set out in some detail in the judgment of Cooke J in *Adamson v Oranga Tamariki*.[2] In summary, Alice was born with complications affecting her ability to feed and to grow. She was removed from the care of her mother because paediatricians and other health professionals had significant concerns that Alice's special needs were not being properly addressed in the care of her mother and maternal grandparents.
>
> A guardianship order under s 110(1) and (2)(b) of the Act, in favour of the Chief Executive of Oranga Tamariki, was made by Judge T M Black in the Family Court on 11 April 2021 (guardianship order). That order was confirmed on appeal on 12 September 2021.[3]
>
> A custody order under s 101 of the Act was made by Judge Black in the Family Court on 12 October 2021 (custody order). That order was appealed but deemed abandoned for non-payment of security for costs on appeal.[4]
>
> Alice is presently in the custody and guardianship of the Chief Executive and in her paternal grandmother's day-to-day care.
>
> Extensive litigation has followed the making of the guardianship and custody orders. Alice's maternal family have filed at least 11 proceedings in relation

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1 *Adamson v Oranga Tamariki* [2022] NZHC 2153 at [5]–[9] (footnotes amended for clarity).
2 *Adamson v Chief Executive of Oranga Tamariki* [2021] NZHC 2530 at [5]–[21].
3 *Adamson v Chief Executive of Oranga Tamariki*, above n 2.
4 *Adamson v Chief Executive of Oranga Tamariki* HC Wellington CIV-2021-485-627 & CIV-2021-485-640, 11 March 2022 (Minute of Cooke J); and Certificate of Result of Appeal, 28 March 2022.

> to Alice's care and protection in 2021. In November 2021 Isac J struck out five further proceedings brought by the whānau.[5] That decision was appealed to the Court of Appeal but deemed abandoned for failure to pay security for costs on appeal.[6]

[11] The applicants appealed the High Court decision to the Court of Appeal. The appeal was dismissed by decision dated 21 October 2022.[7]

[12] The applicant sought leave of the Supreme Court to appeal against the Court of Appeal's decision. The application was adjudged abandoned on 22 November 2022.[8]

[13] Ultimately, following that wide-ranging litigation, settlement was reached between the concerned parties regarding the proceedings before the Family Court and the High Court and that settlement was recorded in a Consent Memorandum filed in the Family Court, dated 18 November 2022.

[14] The Consent Memorandum particularised the steps taken to resolve the contested issues about Alice's care arrangements. It set out the agreement reached between the parties regarding Alice's care, including the discharge of a Custody Order and an Additional Guardianship Order, made under ss 101 and 110(2)(b) of the Oranga Tamariki Act, respectively. Those orders were discharged by the Family Court on 18 November 2022.

[15] The Consent Memorandum anticipated Mr Robinson filing an application for a parenting order, seeking day to day care of Alice. It recorded that Alice was to remain in Ms Jones' day-to-day care until day-to-day care arrangements were either resolved between the parties or determined by the Family Court.

[16] Mr Adamson and Ms Jones agreed to discontinue their judicial review and habeas corpus applications.[9]

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5 *Adamson v Chief Executive of Oranga Tamariki* [2021] NZHC 3044.
6 *Adamson v Chief Executive of Oranga Tamariki* [2022] NZCA 89.
7 *Adamson v Oranga Tamariki* [2022] NZCA 505.
8 *Adamson v Oranga Tamariki* SC 110/2022.
9 I infer that this aspect of the agreement led to the application for leave to appeal the Court of Appeal's habeas corpus judgment being deemed abandoned (see [12] above).

[17] Subsequently, Mr Robinson filed a without notice application for a parenting order under s 47 of the Care of Children Act 2004. That application came before Judge R von Keisenberg who dismissed it on 23 November 2023. The Judge recorded that the application for leave without notice pursuant to s 139A of the Care of Children Act was not granted and directed that the application and affidavit be served. Judge von Keisenberg declined to make an interim parenting order pursuant to r 416J(2)(c) of the Family Court Rules 2002.

[18] The Judge noted:

> These are clearly complex proceedings which have continued unabated in the Family Court since 2018. On 18 November 2022 the parties signed a consent memorandum together with the Crown for OT and lawyer for child agreeing that the mother would withdraw her various appeals in the High Court and that for the time being the child the subject of these proceedings would remain with her until such time as the parties cross applications for the care of the child in the family court could be filed and dealt with. Barely 4 days later the father files this application on a without notice basis for a parenting order for the child to be returned to his care. In that regard I note that the mother unilaterally retained the child in her care in September 2022 after the child had been in the father's care with assistance from the grandmother since 2020. (I note that the court previously found in 2021 following a hearing that this child was a child in need of care and protection)
>
> There is no new evidence following the signing of the consent orders on 18 November which would justify the making of new orders and a change of care. It was clearly inappropriate to have filed this on that basis.
>
> However it concerns me greatly that the child is still being exposed to high parental conflict. The father alleges that the mother is refusing him contact. This needs to be addressed urgently. I today I [sic] have also dealt with the mother's without notice application for a protection order against the father which I have declined on a without notice basis for the reasons I have articulated. This file is case managed by Judge Black. The file needs to be referred to a local judge if Judge Black is unavailable. Lawyer for child is reappointed.

[19] On 23 November 2022 the Family Court directed that a Notice of Response to Mr Robinson's application, and any supporting affidavit, be filed with seven days of the date of service.

[20] Ms Jones' notice of response is dated 1 December 2022. It records that Ms Jones opposes leave being granted to Mr Robinson, on the ground there had been

no material change of circumstance since the consent memorandum was signed on 18 November 2022.

[21] The matter then came before Judge T M Black on 14 December 2022. The Judge first set a timetable for hearing Ms Jones' application for a protection order. The Judge then turned to the Care of Children Act proceedings and considered Mr Adamson's request to bring an application for a parenting order in respect of Alice, or to be a joint applicant with Ms Jones, and Mr Adamson's application to be appointed as an additional guardian for Alice. The Judge indicated he would not grant leave in relation to Mr Adamson's application to be a party to the parenting order. He did not give an indication of his view on the additional guardianship application and recorded that it would need to be dealt with down the track.

[22] The Judge indicated he was not in a position to determine a longer term parenting order on the day. He indicated that he was not prepared to make an order reversing the care arrangements, as recorded in the Consent Memorandum. The Judge acknowledged the Memorandum recorded that Mr Robinson would be making his own application, but said "… there's no basis for me to disturb that status quo on an urgent basis … the issue for today is contact".

[23] Although I do not have all the papers before me on this application, I infer from the transcript of the discussion before Judge Black, that Ms Jones had proposed that Mr Robinson's contact be on the basis of supervision. The Judge was not persuaded there was an evidential basis for supervision, specifically noting that the expert report on which Ms Jones relied did not support the contention that there was a risk to Alice in having unsupervised contact with her father.

[24] The Judge then indicated he would make an interim order, confirming Ms Jones' day-to-day care of Alice and setting out contact arrangements for Mr Robinson.

Interim parenting order

[25] At the Court's request, the applicants have now filed a joint affidavit annexing a number of documents, including the current Parenting Order made by Judge Black

in respect of Alice (Parenting Order). The Parenting Order provides that Ms Jones has day-to-day care of Alice, and that Mr Robinson has the following contact arrangements:

(a) Every second weekend from collection from school on Friday until drop off to school on Monday morning.

(b) One week of the school term holidays with each parent's contact running on from their normal weekend.

(c) From 1 pm on Christmas day until 1 pm on Boxing Day.

(d) For 2 non-consecutive one-week periods during the Christmas/Summer holidays.

Is Alice presently detained?

[26] The applicants contend that Alice is unlawfully detained under the Parenting Order, on the basis that her freedom of movement is unjustifiably impeded. They say that is in the very nature of a parenting order, and is the case whether Alice is in Ms Jones' day-to-day care, or when she has contact with Mr Robinson. The orders allow an individual (whether Ms Jones or Mr Robinson) to have custody, power and control of Alice.

[27] The applicants rely particularly on the decision of the House of Lords in *Barnardo v Ford, Gossage's Case*,[10] for that submission.

[28] The second respondent was not represented at the telephone conference, but Mr Nicholls, counsel for Mr Robinson, subsequently filed a memorandum, noting that he had not been aware of the telephone conference convened by the Court at the time.

[29] The submission Mr Nicholls makes is that pursuant to s 48(1) and (2) of the Care of Children Act, Alice's father has responsibility for her care during the time

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10 *Barnardo v Ford, Gossage's Case* [1892] AC 326, [1891–4] All ER Rep 522 (HL).

specified and it is for him to decide how and with whom she spends that time. When Alice is having contact with her father pursuant to the provisions of the Parenting Order, she is not detained.

[30] Section 3 of the Act defines detention broadly, as including "every form of restraint of liberty of the person". While the writ of habeas corpus has most commonly been used in the context of those detained by the state, such as prisoners, there have been applications concerning the custody of children.

[31] As in *TWA v HC*,[11] the Court of Appeal noted the specialist jurisdiction and powers of the Family Court mean that resort to habeas corpus in custody cases "will be rare in modern times" but continues to exist and does not depend on the physical restraint or the absence of consent on the part of the child. In that case, the Court quoted the Farbey and Sharpe text to the effect that habeas corpus in custody cases "differs fundamentally from its use to secure personal liberty" as it is used "not for the body, but for the soul of the child".[12]

[32] In a very recent decision of the High Court, *TP v SB*,[13] Ellis J considered a similar argument to that advanced by the applicants in this case. The Court, while noting that it was not finally determining the question, did observe that the interim parenting order in that case "is an independent legal constraint on [the child's] ability to have contact with his mother".

[33] In *TWA*, the Court found that there were problems with the legal basis for the custody arrangements relating to the child concerned — custody orders under s 101 of the Care of Children Act had been discharged and other Family Court orders were invalid. The Court of Appeal therefore quashed the High Court's orders dismissing the habeas corpus application, but the Court of Appeal did not itself issue a writ of habeas corpus. It transferred the application back to the Family Court for determination.

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11 *TWA v HC* [2016] NZCA 459, [2017] NZAR 129 at [10], cited in *L v Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* [2017] NZHC 3008 [*L v CE*] at [15].

12 Judith Farbey and R J Sharpe *The Law of Habeas Corpus* (3rd ed, Oxford University Press, Oxford, 2011) at 188, citing *In Re Carroll* [1931] 1 KB 317 (Hong Kong) at 331.

13 *TP v SB* [2023] NZHC 1503 at [35].

[34] Similarly, in *L v Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki (L v CE)*[14] Palmer J concluded that the relevant order had expired and accordingly L had been unlawfully detained. As in *TWA*, the Court did not consider that a finding of unlawful detention must lead to issuing a writ of habeas corpus.[15] There the Court transferred the application for a writ of habeas corpus to the Family Court, which was then required to treat it as an application under the Care of Children Act.

[35] As in *TP v SB*, without finally determining the question, I am prepared to proceed on the basis that there is an arguable element of "detention" in the care and contact arrangements relating to Alice and go on to consider the question of the lawfulness of any "detention".

Is any "detention" unlawful?

[36] Counsel for Mr Robinson submits that the Parenting Order was lawfully made, being made following a hearing that occurred at the Hutt Valley Family Court on 14 December 2022.

[37] Mr Nicholls says that the Act and the New Zealand Bill of Rights Act do not apply in this case.

[38] The applicants rely on *Gossage's Case* as authority for the further proposition that the "detention" is per se unlawful.

[39] They also submit that Judge Black considered the case and made the Parenting Order on the basis that all parties consented to him dealing with the applications before him (albeit the parties did not agree with what the other had sought). But Ms Jones says she did not consent to the Judge continuing to hear the applications and Mr Adamson says he had no status to consent, as the Judge had already indicated he would not consider Mr Adamson's application to be a party to a Parenting Order. Any "consent" he gave was to the Judge's observation that his application to be an additional guardian could be considered at a later point.

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14 *L v CE*, above n 11, at [25]–[27].
15 At [28].

[40] The applicants filed a copy of the transcript of the hearing before Judge Black. It is correct that Judge Black thought the parties were consenting to him hearing the applications. The Judge observed that there is an exception to the Court needing to give leave if everyone consents to the proceedings being brought; "…presumably the fact that everyone's brought proceedings mean everyone consents to the proceedings being brought, so just think it's a non-issue." After an exchange with Mr Adamson the Judge concluded "Okay, so consent is there from both parties. The proceedings can proceed …."

[41] Despite Mr Adamson's clear recollection of what took place, it is not at all clear from the transcript that the Judge and Mr Adamson were talking at cross purposes, as Mr Adamson asserts. The relevant part of the transcript is set out below:

> The Court to Mr [Adamson]
>
> Q. Well you don't need to reach agreement about the order you just need to agree that the Court can deal with the applications.
>
> A. Yes, that's right.
>
> Q. Is that agreed?
>
> A. Well, to be able to go forward, you'd need to, wouldn't you?
>
> Q. Yes.
>
> A. Yes.

[42] In any event, the issue does not ultimately turn on whether the parties had consented to Mr Robinson's application being considered. There had been an earlier discussion about whether Mr Robinson needed leave to bring his application. The Judge agreed with Mr Adamson that, because the Court had discharged the previous parenting order in June 2022, that would bring s 139A of the Care of Children Act [which required leave] into play, because s 139A applies if an order was made or discharged in the preceding two-year period.

[43] However, the Judge then stated that there had clearly been a material change of circumstances because at the time the order was discharged the Court was intending

to make a s 101 custody order in favour of Oranga Tamariki, but now the order has been discharged "there can be no sensible argument that leave shouldn't be granted".

[44] It is plain that Judge Black had concluded that he could grant leave for Mr Robinson's application to be heard, given the material change of circumstances. While the Judge endeavoured to deal with the application by consent, and thought he had consent, that was not necessary.

[45] The applicants' concerns about consent do not go to the validity of the Parenting Order.

[46] While in *DE v Chief Executive of the Ministry of Social Development*, the Court of Appeal held that the mere existence of a Family Court order would not be a conclusive answer to an application for habeas corpus,[16] that observation is less relevant where the Court can be satisfied as to the validity of the relevant orders. Here, the applicants have not pointed to any invalidity in the Parenting Order, as in, for example, *L v CE* or *TWA*.

"Appropriate procedure"?

[47] Even if I had found a technical invalidity, I would have been satisfied that habeas corpus is not the appropriate procedure for considering the allegations made by the applicant.

[48] Section 14(1A) of the Act provides:

> **14 Determination of applications**
>
> (1) If the defendant fails to establish that the detention of the detained person is lawful, the High Court must grant as a matter of right a writ of habeas corpus ordering the release of the detained person from detention.
>
> (1A) Despite subsection (1), the High Court may refuse an application for the issue of the writ, without requiring the defendant to establish that the detention of the detained person is lawful, if the court is satisfied that—
>
> (a) section 15(1) applies; or

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[16] *DE v Chief Executive of the Ministry of Social Development* [2007] NZCA 453, [2008] NZAR 226, [2008] NZFLR 85 at [39].

> (b) an application for the issue of a writ of habeas corpus is not the appropriate procedure for considering the allegations made by the applicant.
>
> …

[49] Section 14(1A)(b) is relevant in this case. A variation or discharge of the Parenting Order may be sought under s 56(1) of the Care of Children Act. The applicants advise that they have applied to vary or discharge the Parenting Order, but have no date(s) from the Court for their applications to be heard. They are anxious about the delay given, they say, Alice returns from each contact with Mr Robinson with some sort of medical condition or injury.

[50] While I do not doubt the applicants' concerns that Alice should be safe at all times, I have only the applicants' oral submissions about Alice's health and an exchange of correspondence from late July/early August 2023 between Ms Jones and Mr Robinson where Mr Robinson acknowledges that Alice hit her head when he was running, holding her. The correspondence indicates a dispute between the parties as to the seriousness of the injury to Alice and the extent of fault, if any, on Mr Robinson's part.

[51] I am concerned that this application is an attempt to relitigate decisions made by the Family Court, essentially on the basis that the applicants would have preferred the Court to reach a different view.

[52] There is nothing in the evidence filed in the support of the habeas corpus application that causes me to question the general position that a decision on any variation to Alice's care and custody arrangements is best made by the Family Court having received up to date reports from appropriate professionals. As I have found there is no invalidity in the parenting Order, this is not a case (such as *L v CE*)[17] where the habeas corpus application should be referred to the Family Court to consider. The applicants' proper remedy is to pursue their applications in the Family Court for variation or discharge of the Parenting Order.

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17 *L v CE*, above n 11.

Result

[53] I am satisfied that the Interim Parenting Order currently in force in respect of Alice is validly made and that she is not unlawfully detained.

[54] For the reasons I have given, the application for a writ of habeas corpus is dismissed.

Gwyn J