

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2017-404-000419
[2017] NZHC 499**

UNDER the Habeas Corpus Act 2001

BETWEEN N
Applicant

AND BUPA CARE SERVICES (NEW
ZEALAND) LIMITED
Respondent

Hearing: 17 March 2017

Appearances: Applicant in person
P Le Cren for Respondent

Judgment: 17 March 2017

JUDGMENT OF DOWNS J

*This judgment was delivered by me on Friday, 17 March 2017 at 3.30 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Claro Law, Christchurch.

Copy to: Applicant

[1] This is an application for a writ of habeas corpus pursuant to the Habeas Corpus Act 2001. The application must be dismissed for reasons that will quickly become apparent.

[2] Mrs N resides in a rest home at Wiri pursuant to orders made by the Manukau Family Court under the Protection of Personal and Property Rights Act 1998. Mrs N has been a resident at the rest home since 24 February 2016. Mrs N suffers dementia. She has significant cognitive impairment. Hence the orders. Now a little more background.

[3] In February 2016 the Counties Manukau District Health Board made application to the Family Court for personal orders under the Protection of Personal and Property Rights Act in relation to Mrs N's care and welfare. On 22 February that year, Judge Mahon made interim orders under that Act. Among other things, those orders required Mrs N to remain in secure care at the rest home. Visitors were permitted between 10 am and 2 pm on weekdays unless the rest home's manager decided otherwise.

[4] The Judge made final orders on 17 August 2016—and following a hearing. The only material change to the orders was that visitors were permitted only at times decided by the manager. Mrs N's husband, Mr N, had held an enduring power of attorney in relation to Mrs N's care and welfare. Judge Mahon revoked that power on 17 August 2016.

[5] The application for a writ of habeas corpus was filed on 13 March 2017. The application appears to have been signed by Mrs N, but, given her condition and presentation at the hearing, grave doubt attaches to whether she knew what she was signing.

[6] Mrs N did not appear to be sufficiently well to make submissions in support of the application. Nor, for completeness, was it obvious Mrs N knew what was going on. So, I permitted Mr N to advance submissions. Those submissions were wide-ranging, and notwithstanding my repeated invitation to Mr N to confine his submissions to the legality of Mrs N's detention. Mr N did submit Mrs N was

unlawfully detained. However, Mr N could not explain why the orders made by Judge Mahon on 17 August 2016 were other than decisive in connection with the legality of Mrs N's detention.¹

[7] Section 10 of the Protection of Personal and Property Rights Act invests the Family Court with a broad jurisdiction to make orders in relation to a person's care and welfare, and pursuant to s 10(1)(d) of that Act, the Family Court may direct a person to enter, attend at, or leave an institution specified in the order. The final orders in connection with Mrs N specifically refer to this provision, a copy of which were placed in evidence by the respondent.

[8] In any event, Mr N's complaint is not really about the legality of Mrs N's detention at the rest home. Rather, it is that Mrs N is not being sufficiently cared for there, and that she should be able to have visitors whenever she pleases—or I infer, whenever Mr N pleases. These complaints, however, are not relevant to the legality of Mrs N's detention or appropriately ventilated in connection with an application for a writ of habeas corpus. An example may be illustrative. Mr N appears to allege Mrs N has been exposed to a penis, presumably of a resident, while at the rest home. If true, this is a matter for the Family Court in connection with the administration of orders affecting Mrs N's welfare and care; it is not a matter for the High Court in the context of an application for a writ of habeas corpus.

[9] Consequently, not only am I satisfied Mrs N's detention is lawful,² this is also a case in which the application for a writ of habeas corpus is not the appropriate procedure for considering the allegations made by Mr N in relation to Mrs N.³

[10] Nor is this the first time Mrs N's rest home placement has been challenged. Mr N sought a writ of habeas corpus in respect of Mrs N on 25 February 2016. The application was dismissed by Thomas J in a comprehensive judgment the next day.⁴ Mr N applied for a recall of that judgment. Her Honour dismissed that application on 1 March 2016. Mr N later sought a transcript of the hearing. The Judge declined

¹ That term is defined broadly by s 3 of the Habeas Corpus Act 2001.

² Habeas Corpus Act 2001, s 14(1).

³ Habeas Corpus Act 2001, s 14(1A)(b).

⁴ *AN v Counties Manukau District Health Board* [2016] NZHC 277.

that application on 6 May 2016. Mr N then filed an appeal to the Court of Appeal. The Court of Appeal dismissed the appeal on the basis it was in substance an attempt to review the (then interim) orders made under the Protection of Personal and Property Rights Act.⁵ Mr N then sought leave to appeal to the Supreme Court. That Court declined leave on 1 July 2016.⁶ A final matter completes the narrative: Mr N lodged an appeal to the Family Court in connection with the orders affecting Mrs N but then abandoned it. The obvious should be repeated: the Protection of Personal and Property Rights Act contains mechanisms to deal with the types of point Mr N wishes to raise in connection with Mrs N’s care and welfare. These include review pursuant to s 86 of that Act and an appeal pursuant to s 83 of the Act.

[11] Mr Le Cren reserved the position of Bupa Care Services (New Zealand) Ltd, or Bupa, in relation to costs. That company operates the rest home. Costs are not normally awarded against an unsuccessful applicant for obvious reasons. But there is an exception when the application forms part of “a series of manifestly unmeritorious and vexatious applications”.⁷ I express no view on whether this (high) threshold is met.

[12] One last matter. Mr Le Cren submitted the correct respondent in this case is Bupa and not Ms Hegh, the manager. To the extent this remains relevant, I agree.⁸ The intituling reflects as much.

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Downs J

⁵ *AN v Counties Manukau District Health Board* [2016] NZCA 226. Because the orders were then interim, Mr Le Cren did not contend Thomas J’s judgment was determinative of this application; see s 15 of the Habeas Corpus Act 2001.

⁶ *AN v Counties Manukau District Health Board* [2016] NZSC 74.

⁷ *Manuel v Superintendent, Hawkes Bay Regional Prison* [2006] 2 NZLR 63, (2005) 22 CRNZ 331 at [35].

⁸ See High Court Rules, r 4.56. Ms Hegh is an employee of Bupa and the manager of the rest home, but Mrs N is ultimately detained by Bupa, not Ms Hegh. If Ms Hegh left, Mrs N would still be detained.