NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995 AND S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA654/2020
[2020] NZCA 605

BETWEEN	D (CA6542020) Appellant
AND	HIGH COURT AUCKLAND Respondent

Hearing:	27 November 2020
Court:	Miller, Clifford and Collins JJ
Counsel:	Appellant in person V McCall for Respondent
Judgment:	2 December 2020 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Collins J)

[1] On 11 November 2020, Powell J dismissed an application for habeas corpus sought by Ms D on behalf of herself and her two children, R and K.[1] This Court was

[1] *Re [D] (writ of Habeas Corpus)* [2020] NZHC 2972.

scheduled to hear Ms D's appeal on 19 November 2020 but adjourned the hearing at Ms D's request.

[2] This is the second occasion in the past two months Ms D has pursued an appeal to this Court from judgments dismissing her habeas corpus applications. Both sets of proceedings have their genesis in a judgment of the Family Court in which Judge Adams declined an application by Ms D to relocate her children to Australia and to remove N, the former partner of Ms D, as guardian of R.[2] Judge Adams also made an order prohibiting either party from applying to take the children out of New Zealand before 31 January 2023. In rejecting Ms D's applications, Judge Adams appointed N as a guardian of K. Although N was not K's biological father, Judge Adams was satisfied that it was in K's best interests that N continue to play a significant role in the care of K. The effect of the parenting order made by the Family Court was that R and K spend one week with Ms D and the following week with N.

[3] Ms D responded to the Family Court judgment by filing an appeal to the High Court at Auckland and seeking writs of habeas corpus. The first application for habeas corpus was dismissed on 2 September 2020.[3] When this Court dismissed Ms D's appeal in relation to her first habeas corpus proceeding we said:[4]

(a) The High Court was right not to issue a writ of habeas corpus in relation to Ms D because she was never detained for the purposes of s 3 of the Habeas Corpus Act 2001.

(b) The parenting orders made in relation to R and K "could not possibly amount to unlawful detention" under the Habeas Corpus Act.[5]

(c) Even if it was arguable R and K were detained, an application for habeas corpus was not the appropriate procedure for considering the

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2 *[N] v [D]* [2020] NZFC 7185.
3 *[D] v Judge J G Adams* [2020] NZHC 2253.
4 *D (CA504/2020) v Judge J G Adams* [2020] NZCA 454.
5 At [10].

issues raised by Ms D's proceeding, which were to be dealt with in her appeal to the High Court.[6]

[4] The appeal from the Family Court judgment was to have been heard on 11 November 2020. Unfortunately, the appeal could not proceed on the scheduled date because counsel for the child suffered a sudden, serious medical event. The appeal has now been rescheduled to 10 February 2021. Ms D responded to this development by commencing her second habeas corpus proceeding.

[5] Before us Ms D:

(a) said she was not seeking to challenge the parenting orders and associated arrangements for the care of R and K;

(b) challenged the lawfulness of the order prohibiting the parties from applying to take either child out of New Zealand;

(c) said, absent COVID-19 travel restrictions, she wanted to be able to take the children to Australia but still allow N to exercise his rights under the Family Court orders pending the hearing of the appeal in February 2021; and

(d) maintained R and K are detained in New Zealand because she cannot currently take them to Australia.

[6] The first difficulty with Ms D's arguments is that on the face of it the Family Court has exercised a jurisdiction available to it under s 77 of the Care of Children Act 2004 when ordering the children remain in New Zealand. There is no reason to suppose the Family Court acted unlawfully when it made that order. Of course Ms D may challenge the order on its merits, but that leads to the second difficulty, which is that a successful challenge will require resolution of issues that are the subject of the appeal and ought to be resolved in that forum. A habeas corpus application is not the appropriate procedure for resolving those issues. The third

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

difficulty facing Ms D is that the only matter that has changed since we delivered our judgment on 28 September 2020[7] is that Ms D's appeal from the Family Court judgment has been adjourned from 11 November 2020 to 10 February 2021. That change of events does not impact upon the three conclusions we reached in our earlier judgment and which we have summarised at [3](a)–(c).

[7] Ms D has not been detained. The orders made by the Family Court do not constitute an unlawful detention of R and K. In any event, habeas corpus is not the appropriate procedure for considering Ms D's complaints.[8] Ms D's concerns are able to be dealt with in the appeal she is pursuing in the High Court.

[8] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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7 *D (CA504/2020) v Judge J G Adams*, above n 4.
8 Habeas Corpus Act, s 14(1A)(b).