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LAW AND THE FAMILY

## **"Who's Child Is It? Habeas Corpus Proceedings"**

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IN WHAT OFTEN ARISES as an emergency, it may be necessary to prepare the quickest, most efficient method to seek a change that limits a child's visitation with its father - a writ of habeas corpus.

The writ of habeas corpus is the oldest remedy known to determine custody or visitation of children. Yet its use is the least understood. Domestic Relations Law (DRL) s70(a) [FN1] entitled "Habeas Corpus for child detained by parent" authorizes either parent [FN2] to apply to the Supreme Court for a writ of habeas corpus to determine custody or visitation of their child whether or not the parents are married, [FN3] living together, separated or divorced, provided the child is residing within the State of New York. [FN4] It provides in part:

(a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

Section 70(b), [FN5] added to the DRL in 1988 allows enforcement of visitation rights under DRL s70 against persons holding the child in foster care pursuant to Part 8 of Article 10 of the Family Court Act, pursuant to

ss358-a and 384-a of the social services law and any other applicable provisions of law. [FN6]

In 1989, DRL s71 was added to permit a brother, sister, stepbrother, stepsister or a proper person on his or her behalf if he or she is under the age of 18, to apply to the Supreme Court by a writ of habeas corpus for visitation rights with such brother or sister. [FN7] DRL s72 authorizes grandparents to bring on habeas corpus proceedings for visitation with their grandchildren. [FN8]

DRL s240 specifically authorizes a proceeding to be brought by writ of habeas corpus to determine the custody or right of visitation with any child of the marriage, and in such a proceeding, the court "must give such direction, between the parties for the custody and support of any child ...." [FN9] A habeas corpus proceeding is maintainable even though a matrimonial action is pending in which custody [FN10] is sought. [FN11]

### Custody Proceedings

Most habeas corpus proceedings involving children are custody proceedings in which it is contended that some change in the existing custody of the child should be ordered. In such case, the Supreme Court, as the guardian of all infants, has inherent power to award custody in a proper case by way of habeas corpus. [FN12]

Unlike habeas corpus proceedings generally, however, most habeas corpus proceedings involving the custody of minors are not predicated upon an illegal detention. Thus DRL s70(a), in authorizing a parent to institute habeas corpus proceedings to determine rights to custody of his or her child, makes no reference to any illegal detention of the child and is entitled "Habeas corpus for child detained by parent." [FN13]

The writ of habeas corpus was limited in its origin to cases of restraint under color or claim of law. In time it was extended to controversies touching the custody of children, which were governed by considerations beyond strictly legal rights. They were driven for the most part by a need for expediency, equity and, above all, the interests of the child. [FN14] The availability of habeas corpus to effect a change of custody is not affected by the fact the existing custody is legal; [FN15] the primary factor in invoking the writ to change custody is consideration of the child's best interests. [FN16]

At issue in a habeas corpus proceeding under DRL s70(a) is the apportionment of custody (and visitation) between the parents. That is the ultimate fact to be determined. [FN17] The proceeding is maintainable even though a matrimonial action is pending in which the custody of the

children of the marriage is sought. [FN18] Before its amendment in 1964 one of the parents had to be an inhabitant of the state, the parents had to be husband and wife and living in a state of separation without being divorced. [FN19] The current statute does not require that either of the parents be an inhabitant of the state, married to one another or divorced or that they be separated from one another if they are married. The proceeding may be brought by a parent against any person having his or her child.

The existence of an order purporting to pass upon temporary custody of children of parties to a pending annulment action in another country, does not bar the right of a parent to a writ of habeas corpus to have that custody passed upon in habeas corpus proceedings. [FN20] The DRL provision is not the exclusive authority for the exercise in a habeas corpus proceeding of the power of a New York court over the custody of minor children. [FN21] It has been held that the statute never limits the common law jurisdiction of the court to entertain habeas corpus proceedings, [FN22] nor curtail the broad inherent equitable powers of the court concerning custody of the children. [FN23]

#### Petition in Equity

In *Finlay v. Finlay*, [FN24] the Court of Appeals stated that except when adjudged as an incident to a suit for divorce or separation, the custody of children was to be regulated as it had always been, either by writ of habeas corpus or by petition to the chancellor, and that whether or not the statute in question affected the availability of the remedy of habeas corpus, either spouse might resort to a petition in equity to determine custody of children, since the habeas corpus act did not effect that jurisdiction inherent in courts of equity or change or diminish the remedy available. However, in deciding that one spouse could not bring an action against the other solely for the purpose of recovering custody of infant children, the court found it unnecessary to decide whether DRL s70 affected the availability of habeas corpus in actions not within the statute, but it held that plaintiff's remedy was by way of a petition in equity. Except when adjudged as an incident to an action for divorce or separation, the custody of children is to be determined in a habeas corpus proceeding or by petition and order to show cause.

The DRL does not set forth the procedure applicable to proceedings to determine custody or visitation by writ of habeas corpus. When a writ of habeas corpus comes before the court pursuant to DRL s70, it must heard and determined in conformity with the rules of practice governing writs. [FN25] Thus, it is our position that the procedure in CPLR Article 70 governs procedure for both common law and statutory writs of habeas corpus, [FN26] to the extent it does not conflict with the provisions of the

DRL. [FN27] A proceeding under Article 70 is a special proceeding [FN28] and, as such, the Civil Practice Law & Rules provides that the court shall proceed in a summary manner to "hear the evidence" and to dispose of the proceeding. [FN29]

The proceeding is commenced by petitioning the court without notice for a writ of habeas corpus. The CPLR authorizes "a person legally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf or a party in a child abuse proceeding subsequent to an order of the family court, to petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance. [FN30] As previously noted, this provision is not the exclusive authority for a person to file a petition for a writ of habeas corpus since such authority exists under the provisions of the DRL and Family Court Act authorizing writs of habeas corpus. A petition for the writ must be made to a special term of the supreme court, held in the judicial district in which the person is detained; or the appellate division in the department in which the person is detained; or any justice of the Supreme Court; or a county judge being or residing within the county in which the person is detained; where there is no judge within the county capable of issuing the writ, or if all within the county capable of doing so have refused, the petition may be made to a county judge being or residing within an adjoining county. [FN31]

The petition for the writ must be verified. It must state, or be accompanied by an affidavit that shall state:

1. that the person in whose behalf the petition is made is detained, naming the person by whom he is detained and the place of detention if they are known; where the detention is by virtue of a mandate, a copy of it must be annexed to the petition, or sufficient reason why a copy could not be obtained shall be stated;
2. the cause or pretense of the detention, according to the best knowledge and belief of the petitioner;
3. that a court or judge of the United States does not have exclusive jurisdiction to order him released;
4. if the writ is sought because of an illegal detention, the nature of the illegality;
5. whether any appeal has been taken from any order by virtue of which the person is detained, and, if so, the result;
6. the date, and the court or judge to whom made, of every previous application for the writ, the disposition of each such application and of any

appeal taken, and the new facts, if any, presented in the petition that were not presented in any previous application; and

7. if the petition is made to a county judge outside the county in which the person is detained, the facts that authorize such judge to act. [FN32]

The writ must be issued on behalf of the state, and where issued upon the petition of a private person, the writ must show that it was issued upon his relation. [FN33] Thus, the reason for the caption "People ex rel." It is directed to, and the respondent shall be, the person having custody of the person detained. [FN34] In a custody or visitation case, the writ is usually directed to the parent having the child. The writ must be made returnable in the county where it was issued, except that where the petition was made to the Supreme Court or to a Supreme Court justice outside the county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention. [FN35]

The writ may be made returnable forthwith or on any day or time certain, as the case requires. [FN36]

The CPLR provides that a court issuing a writ directed to any person other than a public officer may require the petitioner to pay the charges of bringing up the person detained and to deliver an undertaking to the person having him in custody, in an amount fixed by the court, to pay the charges for taking back the person detained if he should be remanded. In such case service of the writ is not complete until the charge is paid or tendered and the undertaking is delivered. [FN37]

The court to whom the petition is made must issue the writ without delay on any day, which would include Sunday. Where the petitioner does not demand production of the person detained or it is clear that there is no disputable issue of fact, the court must order the respondent to show cause why the person detained should not be released. The Civil Practice Law & Rules provides that if it appears from the petition or the documents annexed thereto that the person is not illegally detained or that a court or judge of the United States has exclusive jurisdiction to order him released, the petition must be denied. [FN38] This provision has no application to child custody or visitation proceedings under DRL s70 because DRL s70 does not require that an illegal detention be alleged to commence a habeas corpus proceeding and United States judges do not have exclusive jurisdiction over custody and/or visitation matters.

Ends of Justice

CPLR s7003 (b) provides that a court is not required to issue a writ of habeas corpus if the legality of the detention has been determined by a New York court in a prior proceeding for a writ of habeas corpus and the petition presents no ground not previously presented and determined and the court is satisfied that the ends of justice will not be served by granting it. [FN39]

A judge who violates CPLR s7003 by refusing to issue a writ, or, if the petition was made to a court, each member of the court who assents to the violation, forfeits to the person detained \$1,000. An action must be commenced, to recover the penalty by the person detained or in the name of the petitioner for his benefit. [FN40]

A court that is authorized to issue a writ of habeas corpus, may issue a warrant of attachment, upon satisfactory proof that a person is wrongfully detained and will be removed from the state or suffer irreparable injury before he can be relieved by habeas corpus. The warrant can be effective where one parent is about to abscond from the state with the child. It may be directed to an appropriate officer requiring him immediately to bring the person detained before the court. A writ of habeas corpus shall also be issued directed to the person having custody of the person detained. Where it appears that the detention constitutes a criminal offense, the warrant may order the apprehension of the person responsible for the detention, who shall then be brought before the court issuing the warrant and examined as in a criminal case.

A writ of habeas corpus may be served on any day. Service is made by delivering the writ and a copy of the petition to the person to whom it is directed. If he cannot with due diligence be found, the writ may be served by leaving it and a copy of the petition with any person who has custody of the person detained at the time. Where the person to whom the writ is directed conceals himself or refuses admittance, the writ may be served by affixing it and a copy of the petition in a conspicuous place on the outside either of his dwelling or of the place where the person is detained and mailing a copy of the writ and the petition to him at such dwelling or place, unless the court that issues the writ determines, for good cause shown, that such mailing be dispensed with, or directs service in some other manner that it finds reasonably calculated to give notice to such person of the proceeding. If the person detained is in the custody of a person other than the one to whom the writ is directed, a copy of the writ may be served upon the person having such custody with the same effect as if the writ had been directed to him. [FN41]

A person upon whom the writ or a copy of the writ is served, whether it is directed to him or not, must make a "return" to it and, if required by the writ, produce the body of the person detained at the time and place

specified, unless the person detained is too sick or infirm to make the required trip. A writ of habeas corpus may not be disobeyed for defective form so long as the identity of the person detained may be derived from its contents. [FN42]

#### Warrant of Attachment

If the person upon whom the writ or a copy of the writ is served, refuses or neglects fully to obey it, without showing sufficient cause, the court before whom the writ is returnable, upon proof of service, must forthwith issue a warrant of attachment against him directed to the sheriff in any county in which such person may be found, requiring him to be brought before the court issuing the warrant; he may be ordered committed to the county jail until he complies with the order of the court. [FN43]

A court issuing a warrant of attachment may, at the same time, or thereafter, issue a precept to the person to whom the warrant is directed ordering him immediately to bring before the court the person detained. [FN44]

The "return" to the writ is an affidavit that is to be served in the same manner as an answer in a special proceeding and filed at the same time and place specified in the writ, or, where the writ is returnable forthwith, within 24 hours after its service. [FN45]

The affidavit must fully and explicitly state whether the person detained is or has been in the custody of the person to whom the writ is directed, the authority and cause of the detention, whether custody has been transferred to another and the facts of and authority for any such transfer. A copy of any mandate by virtue of which the person is detained must be annexed to the affidavit, and the original mandate must be produced at the hearing; where the mandate has been delivered to the person to whom the person detained was transferred, or a copy of it cannot be obtained, the reason for failure to produce it and the substance of the mandate must be stated in the affidavit. [FN46]

Where the detention is by virtue of a mandate, the court may not adjudicate the issues in the proceeding until written notice of the time and place of the hearing has been served either personally eight days before the hearing or in any other manner or time as the court may order:

1. where the mandate was issued in a civil cause, upon the person interested in continuing the detention or upon his attorney; or,
2. where a person is detained by order of the family court, or by order of any court while a proceeding affecting him is pending in the family court,

upon the judge who made the order. In all such proceedings the court shall be represented by the corporation counsel of the city of New York, or outside the city of New York by the county attorney; or,

3. in any other case, upon the district attorney of the county in which the person was detained when the writ was served and upon the district attorney of the county from which he was committed. [FN47]

The petitioner or the person detained may deny under oath, orally or in writing, any material allegation of the answering affidavits or allege any fact showing that the person detained is entitled to be discharged. [FN48]

The court must proceed in a summary manner to hear the evidence produced in support of and against the detention and to dispose of the proceeding as justice requires. [FN49]

Where it is proved to the satisfaction of the court that the person detained is too sick or infirm to be brought to the appointed place, the hearing may be held without his presence, may be adjourned, or may be held at the place where the "prisoner" is detained. [FN50]

Pending final disposition, the court may place the person detained in custody or parole him or admit him to bail as justice requires. [FN51]

CPLR s7010 provides that if the person is illegally detained, a final judgment shall be directed discharging him forthwith. This section as many other sections in Article 70 of the CPLR, which is entitled "Determination of Proceeding," does not apply to custody or visitation cases as it is inconsistent with DRL s70.

As the proceeding is a Special Proceeding, the provisions of Article 4 of the CPLR applicable to judgments should apply and the court should be required to determine the proceeding by directing that a judgment be entered determining the rights of the parties. [FN52] However, DRL s70(a) indicating that an order should be made by the court awarding custody, which order it may thereafter "vacate or modify."

An appeal may be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of s 7003, or from a judgment made upon the return of such a writ or order to show cause. A person to whom notice is given pursuant to subdivision (a) of the s 7009 is a party for purposes of appeal. [FN53]

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FN1 L. 1909, Ch 19; Amended L. 1923, Ch. 235; L. 1964, Ch. 564, s1; Amended L. 1988, Ch. 457, s7 eff Nov. 1, 1988, designating existing text as subd. (a). See also FCA 651(b), which authorizes the commencement of habeas corpus proceedings in Family Court.

FN2 Alison D. v. Virginia M., 77 NY2d 651, 569 NYS2d 586, held that a woman who had a live-in relationship with the child's mother was not a parent within the meaning of this statute.

FN3 Peo ex Rel Francois v. Ivanova (1961) 14 AD2d 317, 221 NYS2d 75, held that father of illegitimate child may be awarded custody in habeas corpus proceeding.

FN4 In re Forbell (1957) 198 Misc. 753, 103 NYS2d 242, affd. 278 App Div 953, 105 NYS2d 992.

FN5 L. 1988, Ch. 457, Sec. 7, eff. Nov. 1, 1988, adding subdiv.(b).

FN6 DRL s70(b) provides:

"Any order under this section which applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act or pursuant to an instrument approved under s358-a of the social services law, shall be enforceable pursuant to the provisions of part eight of article ten of such act, ss358-a and 354-a of the social services law and other applicable provisions of law against any person or official having care and custody, or temporary care and custody, of such child." (As amended L.1988, c.467, s7).

FN7 DRL s71 provides:

"Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant siblings where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought

before such court, or may apply to the family pursuant to subdivision (b) of s651 of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such brother or sister in respect to such child." (emphasis supplied).

FN8 DRL s72 provides:

"Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant grandchildren. Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.";

See, Freed, Brandes, & Weidman, "Visitation Rights of Grandparents, Siblings and Others," NYLJ, Sept. 24, 1991, p.3, col.1;

See also DRL s240, which authorizes the Supreme Court in an action for divorce, separation or annulment or in a proceeding to obtain custody or visitation, to "provide for reasonable visitation rights to maternal and/or paternal grandparents of any child of the parties."

FN9 See DRL s240;

See also FCA 651(b), which provides:

"When initiated in the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody or visitation of minors, including applications by a grandparent or grandparents for visitation rights pursuant to ss72 or 240 of the domestic relations law."

FN10 DRL s75-c defines custody to include visitation. See McMahon v. Thompson, 68 AD2d 68,416 NY2d 411 (3d Dept., 1979) holding that

"custody" includes visitation. See also Ex Parte Enaresen, 277 App. Div. 894, 98 NYS2d 275.

FN11 People Ex Rel McCanliss v. McCanliss, 255 NY456; Comfort v. Comfort, 227 App. Div. 1, 236 NYS 544.

FN12 Application of Smith, (1959, 3d Dept.) 7 App Div 2d 344, 183 NYS2d 511 affd. 6 NY2d 941, 190 NYS2d 1008, 161 NE2d219.

FN13 See also, Re Standish, 197 App Div 176, 188 NYS 900, affd 223 NY 689

FN14 People ex rel. Riesner v. New York Nursery & Child's Hospital (1920) 230 NY 119, 129 NE 341.

FN15 See, for example, People ex rel. I. v. Convent of Sisters of Mercy (1951) 200 Misc 115, 104 NYS2d 939.

FN16 Bachman v. Mejias (1956) 1 NY2d 575, 154 NYS2d 903, 136 NE2d 866; People ex rel. Choolokian v. Mission of Immaculate Virgin (1949) 300 NY 43, 88 NE2d 362, remittitur den 300 NY 622, 90 NE2d 486 and cert den 339 US 912, 94 L Ed 1338, 70 S Ct 570; People ex rel. Sisson v. Sisson (1936) 271 NY 285, 2 NE2d 660; People ex rel. Riesner v. New York Nursery & Child's Hospital (1920) 230 NY 119, 129 NE 341; People ex rel. Pruyne v. Walts (1890) 122 NY 238, 25 NE 266.

FN17 People ex rel. McCanliss v. McCanliss (1931) 255 NY 456, 175 NE 129, 82 ALR 1141.

FN18 People ex rel. McCanliss v. McCanliss (1931) 255 NY 456, 175 NE 129, 82 ALR 1141.

FN19 Before April 16, 1964, when DRL s70 was amended by L.1964 Ch. 564, the first sentence provided: "A husband or wife, being an inhabitant of this state, living in a state of separation without begin divorced, who has a minor child may apply to the Supreme Court for a writ of habeas corpus." L. 1923, Ch. 235.

FN20 Marx v. Holloran (1932) 236 App Div 680, 257 NYS 879.

FN21 Finlay v. Finlay, 240 NY 419; Ex parte Rich (1938) 254 App Div 6, 3 NYS2d 689; Ex Parte People ex rel. Cox (1953, Sup) 124 NYS2d 511.

FN22 People Ex Rel Sisson v. Sisson, 153 Misc 434, 275 NYS 299.

FN23 Ex parte Rich, supra, n.21.

FN24 (1925) 240 NY 429, 148 NE 624.

FN25 Ex Parte Mather, 140 App Div 478, 125 NYS 483.

FN26 CPLR s7001.

FN27 We reach this conclusion based upon McKinneys Statutes, s221, which provides that statutes "in pari materia" (enacted at different times but with reference to the same subject matter), are to be construed as though forming part of the same statute and McKinney's Statutes s143, which provides that statutes be given a reasonable construction.

FN28 Id.

FN29 CPLR s7009(c).

FN30 CPLR s7002(a).

FN31 CPLR s7002(b).

FN32 CPLR s7002(c).

FN33 CPLR s7004(a).

FN34 CPLR s7004(b).

FN35 CPLR s7004(c); See Morton v. Morton, 79 Misc2d 915, 361 NYS2d 617 (Fam. Ct., 1974) holding that the writ should be made returnable in the county of detention.

FN36 CPLR s7004(a).

FN37 CPLR s7004(e).

FN38 CPLR s7003(a).

FN39 CPLR s7003(b)

FN40 CPLR s7003(c).

FN41 CPLR s7005.

FN42 CPLR s7006(a).

FN43 CPLR s7036(b).

FN44 CPLR s7036(c).

FN45 CPLR s7008(a).

FN46 CPLR s7008(b).

FN47 CPLR s7009 (a).

FN48 CPLR s7009(b).

FN49 CPLR s7009(c).

FN50 CPLR s7009(d).

FN51 CPLR s7009(e).

FN52 CPLR s411.

FN53 CPLR s7011.

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