

## NEW YORK COURT OF APPEALS ROUNDUP

### HABEAS RELIEF NOT APPLICABLE TO NON-HUMAN ANIMALS

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We note that Chief Judge Janet DiFiore announced on July 11, 2022 that she will be stepping down as of Aug. 31, 2022. She has served admirably for the past six years and has managed the court and the court system in New York extremely effectively during remarkably difficult circumstances. While we wish her well in her future endeavors, we recognize that this is a tremendous loss to the New York state judiciary and the New York state court system.

The Court of Appeals ruled last month that an elephant is not entitled to bring a habeas corpus petition with respect to her confinement at the Bronx Zoo. In *Matter of Nonhuman Rights Project v. Breheny*, a five-judge majority lead by the Chief Judge determined that writs of habeas corpus only protect the liberty rights of human beings and are not available to animals regardless of their respective level of functional intelligence. Judges Wilson and Rivera each submitted a dissent in which they argue that autonomous beings with substantial cognitive abilities such as the elephant at issue in this case are entitled to the protections that the writ has historically provided.

The petitioner in this case is a non-profit organization called the Nonhuman Rights Project (NRP) that seeks to establish that at least certain animals are “legal persons” entitled to fundamental rights. It has commenced a number of actions in New York and other states on behalf of chimpanzees and elephants arguing that they are being unlawfully confined and are entitled to the issuance of a writ of habeas corpus. All of their actions to date have been unsuccessful.

NRP commenced this action in Supreme Court, Bronx County in 2018 seeking a writ of habeas corpus on behalf of an Asian elephant named Happy. Index No. 260441/19, 2020 WL 1670735 at \*2 (Sup. Ct., Bronx Cty. Feb. 18, 2020). The defendants were the Director of the Bronx Zoo, James J. Breheny, and the Wildlife Conservation Society—the conservation organization that operates the Bronx Zoo. NRP alleged that Happy was unlawfully confined in violation of her right to bodily liberty. Happy has been in captivity since she was one year old and has lived at the Bronx Zoo for the past 45 years. Happy had been paired with two different elephants over the years but each of them was euthanized after one was injured in a fight with other elephants and the other fell ill. The Bronx Zoo has announced that it does not intend to acquire any more elephants and is phasing out its captive elephant program. Accordingly, Happy and another female elephant with whom Happy has a hostile relationship are the only remaining elephants at the Zoo.

In support of its petition for a writ of habeas corpus, NRP asserted that Happy is an “extraordinarily cognitively complex and autonomous nonhuman” that should be “recognized as a legal person with the right to bodily liberty protected by the common law” and released from confinement at the Zoo. NRP acknowledged that Happy could not be released into the wild or let loose onto the streets and it sought that she be transferred to an appropriate sanctuary where she could be integrated with other elephants. NRP did not allege that the Zoo had failed to comply with any applicable federal or state statutes or regulations regarding elephant care, but it did submit affidavits from several experts asserting the elephants are intelligent beings with the capacity for self-awareness, long-term memory, intentional communication, problem-solving skills and empathy.

The respondents opposed NRP's application and sought dismissal of the petition on grounds of lack of standing and failure to state a claim, arguing that there was no legal basis for habeas relief and that Happy's living conditions comply with all applicable laws and accepted standards of care. The Supreme Court dismissed the petition on the grounds that animals are not "persons" entitled to habeas relief and that a habeas writ will not issue when the relief sought is not release but transfer from one lawful confinement to another. Index No. 260441/19, 2020 WL 1670735 at \*9 (Sup. Ct., Bronx Cty. Feb. 18, 2020). The Appellate Division, First Department, unanimously affirmed and found that "the writ of habeas corpus is limited to human beings." 189 A.D.3d 583, 583 (1st Dep't 2020). The Court of Appeals granted leave to appeal and affirmed.

The majority rejected NRP's contention that Happy is entitled to seek a writ of habeas corpus and ruled that the writ is available to secure the liberty rights of human beings who are unlawfully restrained but is not available to nonhuman animals. The majority described the nature, history and importance of the habeas corpus doctrine and noted that no court in New York or any other state has ever ruled that it is applicable to nonhuman animals. The writ protects the liberty rights of humans precisely because they are humans with certain fundamental liberty rights recognized by law. Nonhuman animals, on the other hand, have never been considered persons with a right to liberty under New York law.

The majority noted that the relief requested was not Happy's complete release from captivity, but her transfer to a different confining facility. To the majority, the fact that the greatest possible relief was simply the transfer from one lawful confinement to another lawful confinement demonstrates the incompatibility of habeas relief in the nonhuman context. Courts have consistently found legal personhood is connected with the capacity to assume legal duties and social responsibilities and, accordingly, the rights and responsibilities associated with legal personhood are not bestowed on nonhumans. The majority also cautioned against the effect that a contrary ruling would have on human and animal interaction in all facets of life and noted the difficulty of articulating any nonarbitrary standard for determining which animals would be entitled to recognition as legal "persons." While nonhuman animals are afforded various forms of legal protections and New York law imposes a duty on humans to treat them with dignity and respect, nonhuman animals nevertheless do not have common law liberty rights protectable by the issuance of a writ of habeas corpus. According to the majority, any continuing dialogue regarding the protection and welfare of nonhuman animals is a subject for the legislature rather than the courts.

Judges Wilson and Rivera each issued a dissenting opinion. Judge Wilson's dissent presented a lengthy historical overview of the writ of habeas corpus and argued that the novelty of the concept of extending the writ to nonhuman animals should not doom it to failure. He described numerous historical examples of the use of habeas corpus to expand liberty interests that had not been legally recognized, including the rights of women, children and Black slaves. He summarized the evidence concerning Happy's significant cognitive and social abilities and the effect that her current confinement is having on her, and argued that this at least entitles her to a hearing on the merits. Judge Rivera agreed with Judge Wilson's comprehensive analysis of the writ of habeas corpus and described this case as "an opportunity to affirm our own humanity by committing ourselves to the promise of freedom for a living being with the characteristics displayed by Happy." To Judge Rivera, the evidence regarding Happy's status as an autonomous being is sufficient to support the granting of the habeas corpus petition brought on her behalf.

Given the 5 to 2 decision in this case, if NRP wants to establish through judicial action a common law right of nonhuman animals to bring a habeas corpus petition, it will have to attempt to do so in a state other than New York.

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