

1 STATE OF NEW YORK
2 SUPREME COURT : COUNTY OF NIAGARA

3 In the Matter of a Proceeding under Article 70 of
4 the CPLR for a Writ of Habeas Corpus,

5 THE NONHUMAN RIGHTS PROJECT, INC.,
6 on behalf of KIKO
7 Petitioners,

8 -against-

Index No. 151725

9 CARMEN PRESTI, Individually and as an Officer
10 and Director of The Primate Sanctuary, Inc.,
11 CHRISTIE PRESTI, Individually and as an Officer
12 and Director of The Primate Sanctuary, Inc.,
13 and THE PRIMATE SANCTUARY, INC.,
14 Respondents.

15 775 Third Street
16 Niagara Falls, New York
17 December 9, 2013

18 B e f o r e :

19 HONORABLE RALPH A. BONIELLO, III
20 Supreme Court Justice

21 A p p e a r a n c e s :

22 ELIZABETH STEIN, ESQ.,
23 5 Dunhill Road,
24 New Hyde Park, New York 11040,
25 Appearing via telephone
for the Petitioners.

STEVEN M. WISE, ESQ.,
5195 NW 112th Terrace,
Coral Springs, Florida 33076,
Appearing via telephone
for the Petitioners.

AMY E. COGHLAN
Senior Court Reporter

1 THE COURT: Good morning. I'm going to put you
2 on hands free here. And I have my court reporter in here.
3 And I have Elizabeth Stein, right? And are you alone?
4 And I have Steven Wise. And are you also alone? Okay.
5 Let me put you on hands free. Okay. Can you hear me all
6 right?

7 MS. STEIN: Yes.

8 THE COURT: All right. Who's going to be
9 speaking?

10 MS. STEIN: Well, if it's all right, your Honor,
11 we had made a motion to have Steven admitted pro hac vice,
12 if that's all right with you.

13 THE COURT: That's fine with me and I will grant
14 that motion.

15 MS. STEIN: Great. Thank you so much, your
16 Honor.

17 MR. WISE: In that case, it is I, Steven Wise,
18 and I'll be the person speaking.

19 THE COURT: Go ahead.

20 MR. WISE: Okay. Your Honor, this is a writ of
21 habeas corpus where we're asking you to grant it on behalf
22 of a chimpanzee named Kiko who is being held in Niagara
23 Falls. The petition sets up the facts that we are putting
24 in front of the Court, including nine affidavits from some
25 of the greatest primatologists that are working in the

1 world, and it sets out a series of facts that makes it
2 clear that chimpanzees have extraordinarily complex
3 cognitive abilities. On page four and five of our
4 memorandum and statement of facts we set out what those
5 are and together we argue and the professors too state
6 explicitly that they add up to autonomy. That chimpanzees
7 are autonomous things who are self-aware, self-conscious,
8 who can self determine and who choose the way in which
9 they live their lives.

10 Kiko is presently living alone in a cement
11 building in Niagara Falls and we through the writ of
12 habeas corpus are asking the Court recognize that these
13 extraordinarily complex cognitive abilities that add up to
14 human being and autonomous being is sufficient to have the
15 Court recognize Kiko as a legal person. And the
16 fundamental legal right or the fundamental common law
17 right of --

18 THE COURT: Liberty, is that what you said?

19 MR. WISE: Something like that. The common law
20 right of liberty that is protected by the common law writ
21 of habeas corpus. Did you get that? Thank you. And the
22 common law right of autonomy is something that is
23 protected under New York Law and under the general common
24 law. We cite the U.S. Supreme Court case of Union Pacific
25 versus Botsford. It says no right is held more sacred, or

1 more carefully guarded by the common law, than the right
2 of every individual to the possession and control of his
3 own body. And that the right to one's person may be said
4 to be a right of complete immunity, to be left alone.
5 This is exactly what we're seeking for Kiko.

6 And in New York specifically going back to
7 Justice Cardozo's ruling in the Schloendorff versus
8 Society of New York Hospital, through Rivers versus Katz
9 in 1986, the New York Supreme Court -- I'm sorry, the New
10 York Court of Appeals has made it clear year after year
11 that indeed the right to autonomy, the right to the
12 possession of one's own body to be left alone is
13 fundamental to a legal person. And we are arguing that
14 because Kiko has this sort of autonomy, he is indeed
15 entitled to be recognized as a legal person and to have
16 that autonomy protected by a common law writ of habeas
17 corpus. So the argument with respect to liberty is the
18 one I just gave.

19 We have another right, which is the common law
20 right of equality, and we also discuss that in our
21 memorandum. That under the common law of New York,
22 equality forbids a discrimination that's founded upon
23 unreasonable means or unjust ends and New York common law
24 forbids equality that is based upon an unjust private
25 discrimination. And we argue that essentially, Kiko is

1 the victim of an unjust end. That the sole purpose of
2 treating him as a legal thing is to achieve the unjust end
3 of essentially treating him as a slave. And as we form
4 that in our cases, slavery or basically ownership of a
5 legal person is something that the New York courts have
6 indeed frowned upon for well over a century or a century
7 and a half. And indeed the case of People versus Lemmon,
8 which we cite, was one of the strongest cases that came
9 out of the Northern courts in the years before the
10 American Civil War, which made it clear that slavery is
11 something that the New York courts frown upon.

12 We have an alternative equality argument and
13 where he derive that, the Romer versus Evans case, which
14 also the New York courts have accepted, and the kind of
15 the critical sentence that Justice Kennedy set out there
16 was his concern and the reason it was overturned was an
17 Amendment number 2 to the Colorado Supreme Court in which
18 it identified persons, and they're gay persons, by a
19 single trait, the fact that they were gay, and then it
20 denied them protection across the board. A similar thing
21 is happening with the viewing of a chimpanzee as a legal
22 thing based solely upon his species without looking at the
23 incredibly, you know, broad and deep complex cognitive
24 abilities that make it clear that a chimpanzee is
25 autonomous and self-determined and can choose how to live

1 his life, is self-aware. That by simply denying him the
2 protection of these extraordinarily complex cognitive
3 abilities that would be wholly protected if only he was a
4 human being, and then denying him protection across the
5 board just because he's not a human being but is a
6 chimpanzee, is also a violation of the common law right to
7 equality and which also entitles him to be viewed as a
8 legal person and to be protected by the common law writ of
9 habeas corpus.

10 I would like to raise the issue of where else
11 the Court is looking with respect to whether Kiko is a
12 legal person and we're looking at Article 70. Article 70
13 is the procedural statute that allows us to raise Kiko's
14 common law habeas corpus rights. It refers to person --
15 the statute itself does not define person. Instead it's
16 going to look to the common law definition of person which
17 is what we're -- what we're bringing before the Court now.
18 But importantly, the New York courts have said that
19 Article 70 is not meant at all to cut back on the common
20 law writ of habeas corpus. It's simply a procedural
21 device by which someone, a legal person can use to bring
22 his or her detention to the notice of the Court and then
23 these common law rights come into play.

24 There is a little bit of a -- of -- I'm not sure
25 how I can -- what exactly -- how exactly I want to phrase

1 it. It was something that has always been confronted by
2 common law courts as far back as Lord Mansfield in the
3 Somerset versus Stewart case, which we also cite, and
4 which has also been a part of the New York common law and
5 was cited in the London versus People case.

6 You have to -- the Court has to assume that
7 Tommy is a person for the purpose of deciding whether he
8 is a person. So that's what Lord Mansfield did. That's
9 what the Northern courts did in the years before the
10 American Civil War. It's not what the Southern courts did
11 when black slaves would try to use the writ of habeas
12 corpus. The Southern courts would say you are not a legal
13 person and the slaves would say we are legal persons, we
14 want to be able to prove that to the Court. The Southern
15 courts said no, the Northern courts and English courts
16 said yes and said we will assume without deciding that you
17 are a legal person for the purpose of deciding whether you
18 are a legal person in raising the issue. And that is
19 exactly what's going on with Article 70. It is referring
20 to the issue of a person as it is defined in the common
21 law. So this court should assume without deciding that
22 Tommy is a person within the meaning of Article 70, which
23 refers it back to the common law, in order to decide
24 whether indeed he is.

25 And for the -- for the reasons that I just gave,

1 both as a matter of liberty and as a matter of equality,
2 we urge that this court indeed finds that Tommy is a legal
3 person. That he has the capacity for rights and that he
4 be -- he be protected by the common law writ of habeas
5 corpus.

6 Finally, we have one other argument as well,
7 which is that the legislature has already found that Tommy
8 is a legal person. It passed the so -- the so called pet
9 trust statute. I'm starting to get a full head of steam.
10 I'll just take a deep breath. Sorry. The pet trust
11 statute was enacted in the 1990's by the New York
12 Legislature and it has been -- it has been the subject of
13 one case, which was in 1996, and it was the In Re Fouts,
14 F-O-U-T-S, Fouts case in which there were five chimpanzees
15 who were the beneficiaries there and the Surrogate Court,
16 it's again we stated in our memo had no problem finding
17 that indeed these five chimpanzees were the subject of the
18 trust.

19 Even at that time, the title of the pet trust
20 statute referred to as being honorary was removed by the
21 New York Legislature, the word honorary was. And so it is
22 now clear that the nonhuman animals who are the
23 beneficiaries, and that's the term of the trust, honorary
24 trust, they're not honorary beneficiaries, they are true
25 beneficiaries of a pet trust.

1 So Tommy -- I'm sorry, Kiko is indeed the true
2 beneficiary of the trust that the nonhuman project has
3 made for him. That means that he has all the rights of a
4 usual human beneficiary. He owes the corporates of the
5 trust. He can indeed sue if the trust is not being used
6 correctly. There is an enforcer of the trust, who is
7 Attorney Stein, who is also on the phone. And so since
8 Kiko is the beneficiary of the trust and has these rights
9 with respect to the trust, he implicitly must be a legal
10 person because a legal person has the capacity to have a
11 right. If he has a right then he has to have the capacity
12 to have the right.

13 So, therefore, Tommy has already been designated
14 a legal person with certain rights around the trust and we
15 would therefore ask this court to recognize alternatively
16 that he is a statutory legal person. And we are now
17 asking that the Court recognize, based upon the affidavits
18 that have been filed in this court that shows that he is
19 an autonomous thing, that he also has the fundamental
20 common law right to bodily liberty that is protected by
21 the common law right -- I'm sorry, by the common law writ
22 of habeas corpus.

23 And I guess finally finally, I'd just like to
24 point out that as we talked about in our memorandum, that
25 legal person is indeed not synonymous with human beings.

1 At one time in the United States and elsewhere there were
2 human beings that were not legal persons and certainly in
3 the United States after the 13th Amendment all human
4 beings became legal persons. And on the other side, there
5 are many entities that are not human beings who are indeed
6 legal persons, and these include ships, partnerships,
7 corporations. And in other common law countries it's been
8 even more clear that a legal person does not need to be a
9 human being. And I point out in my memorandum to the
10 decisions of Indian courts, one pre-Independence decision
11 in which a Hindu idol was held to be a legal person. One
12 that was in 2000 in which the holy books of the Sikh
13 region was held to be a legal person. And I point out in
14 New Zealand there was a treaty between the Crown and the
15 indigenous peoples of New Zealand in which a river was
16 held to be a legal person.

17 A legal person is not a human being. A legal
18 person is an entity of whatever kind -- a river, a holy
19 book, a corporation, a ship -- that the legal system
20 either through the legislature, executive or the judiciary
21 holds that it has interests that should be protected.
22 That it should not be a legal thing. It should not be
23 invisible to the civil law but is a legal person and
24 therefore has at least the capacity to have rights, even
25 though the recognition that the entity is a legal person

1 does not necessarily mean that it does have rights, but
2 once it's recognized as a legal person then the arguments
3 can proceed as ours is proceeding now. That it ought to
4 have certain kinds of rights. And the rights we're
5 seeking for Kiko, the right we're seeking for Kiko is
6 indeed the fundamental right to the liberty that protects
7 his, as the scientists show, his fundamental interest in
8 bodily liberty because he is autonomous.

9 We ask this court then to recognize that he is a
10 legal person. That he does have this fundamental right.
11 That it is protected by a common law writ of habeas
12 corpus. And we ask that this court order him evaluated by
13 the North American Primate Sanctuary Alliance and that
14 Kiko then be sent to one of the most suitable sanctuaries,
15 where he will then be able to spend the rest of his life
16 not alone, not in solitary confinement, which is a
17 terrible thing, as the affidavits show, for a social being
18 such as a chimpanzee, but in a place where he'll see the
19 light of day. He'll be able to play every day. He'll be
20 able to become part a chimpanzee community of ones or
21 dozens or even hundreds of chimpanzees.

22 THE COURT: All right. I just have a couple of
23 questions for you. Do you have any case that equates a
24 chimpanzee with a human being? And when I say equate, I
25 don't mean -- any case that defines a human being to

1 include a chimpanzee?

2 MR. WISE: We are not claiming, your Honor, that
3 Kiko is a human being. It's clear that he is a
4 chimpanzee. And we're not seeking human rights for Kiko.
5 We understand that he's not entitled to human rights.
6 We're saying he's entitled to chimpanzee rights. So there
7 are no cases that specifically do what you say. Because
8 this -- these are the first cases of their kind as far as
9 we understand.

10 THE COURT: Yes. I think you're right on that.
11 Now, under the Agricultural & Markets Law of the State of
12 New York section 350, it says an animal includes every
13 living creature except a human being, so wouldn't that
14 preclude me from issuing a writ of habeas corpus?

15 MR. WISE: If I may ask my co-counsel to chime
16 in on that. I think she's more qualified to do that
17 than --

18 MS. STEIN: Yes, your Honor. No, it would not
19 prevent you from issuing the writ of habeas corpus because
20 what the Agricultural & Markets Law, particularly you
21 referred to section 350, I'm thinking probably of section
22 350 as the definitional section, 353 is the misdemeanor
23 animal cruelty section where it really comes into play.
24 Those sections are not applicable to our situation. We
25 are seeking a common law writ of habeas corpus which would

1 be applicable to any person and that definition of person
2 could under an extension of the common law be deemed to
3 include a chimpanzee. We are not trying in any way to
4 change the definition of what an animal is under the
5 Agricultural & Markets Law or how the Agricultural &
6 Markets Law would be applicable.

7 Your question is actually quite interesting,
8 your Honor, because even though Kiko would be deemed a
9 legal person for the common law writ of habeas corpus, he
10 still would not be deemed a human being. So in fact the
11 Agricultural & Markets Law would still be applicable to
12 him because definitionally, the Agricultural & Markets Law
13 apply to any living being other than a human being.

14 THE COURT: Okay. All right. Well --

15 MS. STEIN: I hope I answered your question.

16 THE COURT: You did answer it. I mean -- all
17 right. Anything else you want to add?

18 MR. WISE: Yes, your Honor. If I may just jump
19 in a little to talk about this conceptually. That the --
20 with respect to the last question, which is that Kiko
21 indeed would be a legal person. He would be recognized as
22 a legal person for the purposes of the common law, which
23 would mean that he would have the capacity to have certain
24 rights. We know right now that he already has rights
25 under the pet trust statute to the corporates of the trust

1 and to be able to enforce the trust. But those are the
2 only rights he has. And we're asking this court to add in
3 another right, which is viewing him as a person who has
4 the right to a -- to a common law writ of habeas corpus to
5 protect his common law rights to bodily liberty, but that
6 does not mean at all that he would somehow be seen as a
7 legal person with the rights to have any other rights.
8 That would be done on a case by case basis. And he might
9 also be seen to not be considered a legal person for other
10 reasons. And indeed there are many many cases like that,
11 especially cases that revolve around the human fetus in
12 New York. And in other cases there are statutes or
13 decisions that view a fetus as a person for some purposes
14 but not as a person for other purposes and that is a
15 similar thing that we're seeking for Kiko.

16 THE COURT: The pet trust statute that you refer
17 to, that applies to other pets in addition to or other
18 animals in addition to chimpanzees, does it not?

19 MS. STEIN: Yes. And, your Honor, let me refer
20 you to the exact section. It is EPTL section 7-8.1, which
21 deals with pets and companion animals. So, yes, the pet
22 trust statute is applicable to pet beneficiaries other
23 than chimpanzees.

24 THE COURT: Are you then saying that those other
25 animals would also be considered legal persons?

1 MR. WISE: I think it's fair to say that we
2 don't have any -- we don't have any opinion on anything
3 other than chimpanzees. That we feel confident that
4 indeed Kiko is a legal person. Certainly once we had
5 created the trust for him he is a legal person within the
6 meaning of the pet trust statute.

7 THE COURT: Okay. Well, thank you for your
8 arguments and I have to say your papers were excellent.

9 MS. STEIN: Thank you, your Honor.

10 THE COURT: However, I'm not prepared to make
11 this leap of faith and I'm going to deny the request for a
12 petition for writ of habeas corpus. I think personally
13 this is more of a legislative issue than a judicial issue.
14 So at this point the request is denied.

15 MR. WISE: Your Honor, would you be so kind as
16 to just place that in writing so that indeed we can take
17 it up on appeal?

18 THE COURT: Well, what I would -- yes. What
19 I'll do is I'll issue an order denying the request. And
20 I'll attach the -- or you can attach the transcript of
21 these proceedings to that order.

22 MS. STEIN: That's fantastic.

23 THE COURT: Is that all right with you?

24 MS. STEIN: Yes.

25 MR. WISE: If I can just have one question. Are

1 you saying -- I just want to make it as clear as possible.
2 That we understand that Tommy, that you're finding that --

3 THE COURT: Kiko.

4 MR. WISE: I mean Kiko. You're finding that
5 Kiko is not a person within the meaning of the -- of a
6 writ of habeas corpus?

7 THE COURT: Yes.

8 MR. WISE: Thank you.

9 MS. STEIN: Thank you so much, your Honor.

10 THE COURT: All right. Good luck. Thank you.

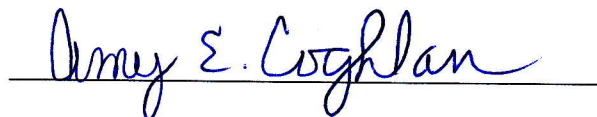
11 MS. STEIN: Thank you.

12 MR. WISE: Thank you, your Honor.

13 THE COURT: You're welcome.

14 * * * * *

15
16 This is to certify that the foregoing is a
17 correct transcription of the proceedings recorded by me in
18 this matter.

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22 AMY E. COGHLAN
23 Senior Court Reporter
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