

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION - THIRD DEPARTMENT**

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

THE NONHUMAN RIGHTS PROJECT, INC.,  
on behalf of TOMMY,

**Index No. 518336**

Petitioners-Appellants,  
v.

**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR  
PRELIMINARYINJUNCTION  
PURSUANT TO CPLR 6301**

PATRICK C. LAVERY, individually and as an  
officer of Circle L Trailer Sales, Inc., DIANE  
LAVERY, and CIRCLE L TRAILER SALES,  
INC.,

Respondents-Respondents.

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**I. Petitioners-Appellants are entitled to a Preliminary Injunction**

“The appellate division may grant . . . a preliminary injunction or temporary restraining order pending an appeal.” CPLR 5518. Section 6301 provides in part:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

CPLR 6301. A preliminary injunction prevents “litigants from taking actions that they are otherwise legally entitled to take *in advance of an adjudication on the merits*[.]” *Uniformed Firefighters Ass'n v. New York*, 79 N.Y.2d 236, 241 (1992) (emphasis in original). In the present case, Petitioners-Appellants seek to restrain Respondents, their agents, employees, servants and all persons acting on their behalf, from removing Petitioner-Appellant Tommy from the State of New York pending completion of the appeal or further order of this Court, as there exists a

colorable claim that such removal might moot the appeal, which would cause irreparable harm to Petitioners-Appellants.

Courts have “jurisdiction to issue a prohibitory injunction as part of habeas corpus proceedings.” *Y. v. Y.*, 403 N.Y.S.2d 855, 856 (N.Y. Fam. Ct. 1978). In exercising its discretion to issue a preliminary injunction, the Court must balance the following factors: (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party. *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (2005).

Injunctive relief is particularly appropriate where, as here, it preserves the status quo pending resolution of the action. *Heisler v. Gingras*, 656 N.Y.S.2d 70, 71 (3d Dept. 1997); *Gambar Enters., Inc. v. Kelly Servs., Inc.*, 418 N.Y.S.2d 818, 824 (4th Dept. 1979).

As shown below, each of these factors weighs in favor of this Court issuing the preliminary injunction.

## **II. Likelihood of Success**

By their Brief filed in this Court on March 24, 2014, which is hereby incorporated into this Memorandum of Law, Petitioners-Appellants demonstrate that they are likely to prevail on the merits of their appeal. Further, Respondents intentionally waived their right to file an opposing brief and engage in oral argument (Wise Aff. ¶15).

A *prima facie* showing of a right to relief on the merits is all that is required to demonstrate a “likelihood of success on the merits.” *Akos Realty Corp v Vandemark*, 550 N.Y.S.2d 650, 652 (1st Dept. 1990). Actual proof should be left to further proceedings. *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 498 N.Y.S.2d 146, 152 (2d Dept. 1986). *See also Tucker v. Toia*, 388 N.Y.S.2d 475, 478 (4th Dept. 1976). Moreover, courts relax

the standard of proof required where the denial of a preliminary injunction would render its judgment ineffectual, and issue them even in the face of “grave doubts regarding the likelihood of plaintiffs’ success on the merits.” *Schlosser v. United Presbyterian Home at Syosset, Inc.*, N.Y.S.2d 880, 881 (2d Dept. 1977). *Accord Hudson River Tel. Co. v. Watervliet T. & R. Co.*, 121 N.Y. 397, 405 (1890) (affirming grant of preliminary injunction though Court had “very grave doubts whether, . . . any cause of action exists in favor of the plaintiff” because “[t]he questions are new and difficult”) (emphasis added); *Wainer v. Village of Ellenville*, 429 N.Y.S.2d 72, 74 (3d Dept. 1980). *See also State v. City of New York*, 713 N.Y.S.2d 360, 361 (2d Dept. 2000); *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566, 568-69 (1st Dept. 1990); *Bisca v. Bisca*, 108 Misc.2d 227, 233 (Sup. Ct. 1981); *Valdez v. N.E. Brooklyn Hous. Dev. Corp.*, 801 N.Y.S.2d 782 (Sup. Ct. 2005); *DiCostanzo v. Ct. Tower Corp.*, 410 N.Y.S.2d 212, 215 (Sup. Ct. 1978).

As Petitioners-Appellants have stated a *prima facie* case for habeas corpus relief, this factor weighs in favor of the Court granting the preliminary injunction.

### **III. Irreparable Harm**

Petitioners-Appellants are likely to suffer irreparable harm if Tommy is removed from the State of New York pending completion of the appeal or further order from this Court because such removal may moot the appeal.<sup>1</sup> This Court has both inherent power and power under CPLR

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<sup>1</sup> Although the Court may still determine the merits of whether a chimpanzee is a person under the common law of New York by invoking the exception to the mootness doctrine, such ruling will have no direct benefit to Tommy, whose personhood may never be decided and who may never be transferred to an appropriate sanctuary. *See, e.g., People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 690 (1986) (invoking mootness exception in habeas case; even though the petitioner had been released, the case presented a “question of public importance and one which is likely to reoccur and to evade review.”); *People ex rel. Leonard HH v. Nixon*, 543 N.Y.S.2d 998, 1001 (3d Dept. 1989) (same); *People ex rel. Forshey v. John*, 904 N.Y.S.2d 620 (4th Dept. 2010) (invoking mootness exception in habeas case after petitioner was already released on parole). *See*

6301 “to protect its jurisdiction and to prevent devices which will have the purpose alone of frustrating a final determination.” *Ohrbach v. Kirkeby*, 161 N.Y.S.2d 371, 373 (1st Dept. 1957). This includes issuing a preliminary injunction when it appears the respondent has threatened to take action “tending to render the judgment ineffectual.” CPLR 6301.

This harm is also irreparable because Petitioners-Appellants have no adequate remedy at law. *See Poling Transp. Corp. v. A & P Tanker Corp.*, 443 N.Y.S.2d 895, 897 (2d Dept. 1981). Damages cannot compensate for Tommy’s loss of bodily liberty. That is why courts issue preliminary injunctions in habeas corpus proceedings to enjoin the removal or transfer of petitioners.<sup>2</sup> *Y. v. Y.*, 403 N.Y.S.2d 855, 856 (N.Y. Fam. Ct. 1978). *See, e.g., Nye v. Marcus*, 502 A.2d 869, 870 (Conn. 1985); *Orsi v. Senatore*, 645 A.2d 986, 989 (Conn. 1994); *Bacon v. Bacon*, 351 S.W.2d 313 (Tex. Civ. App.--Waco 1961); *State in Interest of Jennifer W.*, 485 So. 2d 504, 505 (La. 1986); *Fletcher v. Fletcher*, 404 S.W.2d 866, 867 (Tex. Civ. App.--Corpus Christi 1966). *Cf. White v. King County*, 748 P.2d 616, 617 (Wash. 1988) (extradition case).

Likewise, courts issue preliminary injunctions to prevent the removal or transfer of a child in a pending action for child custody. *Janecka v. Franklin*, 516 N.Y.S.2d 85 (2d Dept. 1987); *Schwartz v. Schwartz*, 895 N.Y.S.2d 206, 207 (2d Dept. 2010); *Richardson v. Howard*,

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*also People ex rel. McManus v. Horn*, 18 N.Y.3d 660, 662-663 (2012) (converting moot habeas corpus proceeding into a declaratory judgment action).

<sup>2</sup> Indeed, the CPLR contemplates irreparable injury from a respondent removing a habeas petitioner out of the State of New York. CPLR 7007 (“A court authorized to issue a writ of habeas corpus, 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, shall issue a warrant of attachment directed to an appropriate officer requiring him immediately to bring the person detained before the court.”).

523 N.Y.S.2d 272, 273 (4th Dept. 1987); *Scannevin v. Scannevin*, 856 N.Y.S.2d 882 (2d Dept. 2008); *Zaken v. Zaken*, 702 N.Y.S.2d 839 (2d Dept. 2000).<sup>3</sup>

Once courts enjoined masters from selling or removing their slaves from the jurisdiction pending actions that challenged their ownership, when it was merely “rumored” the slave would be removed from the state, *Swindall v. Bradley*, 56 N.C. 353, 355 (1857), or respondent had made “idle threats” of a “purpose to sell them out of the State” without any actual intention to do so. *Wilcox v. Wilcox*, 36 N.C. 36, 42 (1840). See also *Mayrant v. Dickerson*, 1832 WL 1588 (S.C. App. L. & Eq. 1832); *Bush v. Groom*, 72 Ky. 675, 677 (1873); *Pearson v. Darrington*, 32 Ala. 227, 266 (1858); *Johns v. Davis' Ex'r*, 41 Va. 729, 732 (1844); *Cross v. Camp*, 42 N.C. 193, 196 (1851); *Steele v. Shirley*, 21 Miss. 196, 197-98 (Miss. Err. & App. 1849); *Dunn v. Amey*, 28 Va. 465, 467-68 (1829). Tommy cannot be meaningfully distinguished from the children and slaves in the above-cited cases.

Finally, the evidence before the Court shows that the threatened irreparable harm to Tommy is highly likely to occur. As discussed in detail in the attached Affidavit of Steven M. Wise, Esq., Respondent Patrick Lavery has repeatedly and publicly indicated his continuing desire to remove Tommy from the State of New York and has demonstrated the ability to do so. Moreover, he refused to defend the case in this Court, which implies an intent to remove Tommy from New York, and he refused to agree not to remove Tommy pending final disposition of this case. (Wise Aff. at ¶¶11-17). This evidence is sufficient to support the issuance of a preliminary

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<sup>3</sup> A preliminary injunction is proper “so as to preserve the status quo until the issue of ownership is tried and resolved.” See, e.g., *Robjudi Corp. v. Quality Controlled Products, Ltd.*, 488 N.Y.S.2d 787, 788 (2d Dept. 1985) (preliminary injunction to prevent the sale of chattels in an action for replevin); *Poling Transp. Corp. v. A & P Tanker Corp.*, 443 N.Y.S.2d 895 (2d Dept. 1981); *Vincent v. Seaman*, 544 N.Y.S.2d 225, 227 (3d Dept. 1989); *Sure-Fit Plastics L.L.C. v. C & M Plastics Inc.*, 700 N.Y.S.2d 273, 274 (3d Dept. 1999); *Walsh v. St. Mary's Church*, 670 N.Y.S.2d 220 (3d Dept. 1998). Of course, a determination of personhood is much more compelling than a determination of ownership.

injunction that would prevent Tommy's removal from New York pending completion of the appeal or further order of this Court.

#### **IV. Balance of Equities**

The balance of the equities tips in favor of Petitioners-Appellants because “the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant[s] through imposition of the injunction.” *Poling Transp. Corp. v. A & P Tanker Corp.*, 443 N.Y.S.2d 895, 898 (2d Dept. 1981) (citation omitted). *See also McNulty v. Chinlund*, 406 N.Y.S.2d 558, 561 (3d Dept. 1978); *Walsh v. St. Mary's Church*, 670 N.Y.S.2d 220, 222 (3d Dept. 1998). Petitioners-Appellants seek to preserve the status quo pending completion of the appeal or further order of this Court. Respondents will not be prejudiced from having to wait for a final ruling on the merits and there is no evidence they will be financially harmed by such order. *See In re Est. of Kalichman*, 820 N.Y.S.2d 648, 651 (3d Dept. 2006). In light of the important stake Petitioners-Appellants have in a final adjudication of their habeas corpus petition, and the fact that personhood is one of the most important legal issues that a court may be asked to decide, the equities tip in their favor.

#### **V. Conclusion**

Having shown each preliminary injunction factor weighs in their favor, Petitioners-Appellants respectfully request that this Court GRANT their motion for a preliminary injunction pending completion of the appeal or further order of this Court. Petitioners-Appellants further request that this Court waive the bond requirement or impose a nominal undertaking in light of the fact that Respondents will in no way be financially harmed from the issuance of this preliminary injunction.

Dated: May 29, 2014

Respectfully submitted,

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