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COURT OF APPEALS  
STATE OF NEW YORK

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CELINETTE H. H.,

Appellant,

-against-

No. 60

MICHELLE R. and WILLIE R.,

Respondents.

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20 Eagle Street  
Albany, New York  
September 12, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: The next matter on the  
2 calendar is number 60, matter of Celinette H.H. v. Michelle  
3 R. Counsel.

4 MS. KAHN: Carol Kahn, attorney for Celinette  
5 H.H. The mother, Celinette H.H., dismissal of her  
6 enforcement without prejudice to refile as a custody  
7 petition when the COVID siege was over - - - I'm sorry.  
8 The - - - the mother appeals the dismissal of her  
9 enforcement writ without prejudice to refile as a custody  
10 petition when the COVID freezelifts, to reclaim three  
11 children wrongfully detained by the father in South  
12 Carolina after overstaying a three-month vacation. And the  
13 writ was dismissed without prejudice to refile the custody  
14 petition.

15 The trial court ruled the mother lacked subject  
16 matter jurisdiction to file her writ because she never  
17 previously filed a custody petition. What we claim is  
18 wrong with this is that New York takes a functional  
19 approach to the foundation proceeding that will support an  
20 enforcement writ. For example, in matter of Miranda D.  
21 (sic), you didn't need a custody petition or even a  
22 visitation petition to create a jurisdictional foundation  
23 for a mother, who was the respondent in a neglect  
24 proceeding, to bring in an enforcement writ to enforce her  
25 right created by the neglect petition brought by ACS, which

1 gave her supervised visitation in New York. What I'm  
2 saying is, a liberty interest create - - - can be created  
3 in a petition where the person who has the liberty interest  
4 is not the petitioner. So long as they're a party to the  
5 foundation proceeding, they - - - their liberty interest  
6 can be created and can be enforced by a subsequent writ.

7 In this case, it was not the mother who filed the  
8 foundation proceeding; it was the paternal grandmother.  
9 Now, the paternal grandmother originally filed a custody  
10 proceeding which was converted into a visitation  
11 proceeding. And you have to look at the UCCJEA, which is  
12 an interstate compact to which New York and South Carolina  
13 are both signatories. And the UCCJEA says a visitation  
14 petition, as a term of art, is a first custody proceeding  
15 as to all the parties to that visitation proceeding. So in  
16 this case, there was a visitation proceeding in New York  
17 Family Court in 2018 initiated by the maternal (sic)  
18 grandmother. She initiated it as a custody proceeding; it  
19 was converted into a visitation proceeding. But whatever  
20 it was called, under the UCCJEA, it functioned as a first  
21 custody proceeding as to everybody for the following - - -

22 JUDGE TROUTMAN: Did it matter whether the father  
23 participated in that proceeding - - -

24 MS. KAHN: Yes.

25 JUDGE TROUTMAN: - - - or not?



1 MS. KAHN: Yes. He was a party to it. I - - - I  
2 got to explain further. One of the problems with this case  
3 is the law is interesting, but the facts are very  
4 complicated. And you can't understand the relevant law  
5 until you understand this horrible mess of facts. And the  
6 facts that you need to understand are in the foundation  
7 proceeding, the visitation case. The - - - the rest of it  
8 is pretty - - - relatively straightforward. Not to - - -

9 In the visitation case, you have to look at three  
10 documents. You have to look at the visitation petition,  
11 you have to look at a stipulation between the mother and  
12 the maternal (sic) grandmother, and then you have to look  
13 at the consent order, which says there was an allocution to  
14 which the father was a party.

15 Now if you look - - - first of all, the petition  
16 in the prior visitation case says the mother and the  
17 children have lived at 140th Street in Manhattan for nine  
18 years. The paternal grandmother also lives in New York.  
19 The father lives in South Carolina. The grandmother is  
20 seeking custody - - - she was originally seeking custody,  
21 and she converted her custody petition into a visitation  
22 petition. And the stipulation between the mother and the  
23 paternal grandmother is the paternal grandmother will pick  
24 the kids up at school in New York and deliver them to the  
25 physical custody of the mother every night she has

1 visitation, in New York at the mother's - - - at the mother  
2 and children's residence. Now, this is established both in  
3 that stipulation and in the petition, the visitation  
4 petition.

5 Now, the grandmother is acknowledging she's not  
6 getting custody out of thin air, she's getting it from the  
7 physical custody of the mother in New York where the mother  
8 lives with the children for nine years. And the father, in  
9 the consent order on the visitation case, allocuted - - -  
10 he consented to this. He appeared and allocuted knowing  
11 what was the contents of this order. Now, that means many  
12 things. That means number one, the mother had physical  
13 custody. Number two, the father appeared and was a party  
14 to that. Number three, New York is the home state, which  
15 has exclusive jurisdiction under Domestic Relations Law 76.

16 Now, the reason - - -

17 JUDGE CANNATARO: Excuse me, can I ask you, is -  
18 - - is that what Judge Arias meant when she came on a call  
19 and said, I have a custody order here. Is it the - - -

20 MS. KAHN: Yes.

21 JUDGE CANNATARO: - - - visitation - - -

22 MS. KAHN: That's - - - that's - - -

23 JUDGE CANNATARO: - - - order - - -

24 MS. KAHN: - - - what I'm - - - that's what I'm  
25 saying. That was her shorthand way of saying there's a

1 custody order here. And that's why she was - - -

2 JUDGE CANNATARO: Can I - - - can I also ask you  
3 - - -

4 MS. KAHN: Yeah.

5 JUDGE CANNATARO: - - - how did we know that  
6 that's true as opposed - - - there were a number of  
7 temporary orders of custody that had been issued at some  
8 point previously, or maybe - - - I don't know when, you can  
9 tell me when, but I'm - - - I'm just curious to know why we  
10 know that what Judge Arias is talking about is the  
11 visitation order and not something else.

12 MS. KAHN: The reason we know it is because she  
13 said to the father - - - I think it's about A33 to A35 of  
14 the - - - of the record. She said the mother has custody.  
15 She said I'm granting this writ. She said if you - - - if  
16 you have safety concerns, she said, you can file a  
17 modification petition. And obviously, since the only  
18 petition that had been filed in the past was this so-called  
19 visitation petition, which under the UCCJEA is a first  
20 custody petition - - -

21 JUDGE GARCIA: Counsel, I'm sorry. Are you - - -

22 MS. KAHN: Yeah.

23 JUDGE GARCIA: - - - are you - - - is your  
24 argument that that proceeding, which resulted in these  
25 visitation rights, resolved custody between father and

1 mother?

2 MS. KAHN: Well, it resolved - - -

3 JUDGE GARCIA: Impliedly.

4 MS. KAHN: - - - that the mother was the physical  
5 custodian, and that the father, if he wanted to - - - to  
6 modify - - - and he had consented to the grandmother's only  
7 getting one hour of visitation during - - - you know,  
8 during a school week. And any other visitation in that  
9 same order was limited when they weren't in school, was  
10 limited to one hour.

11 JUDGE GARCIA: Is your argument that then by  
12 doing that he is conceding that mother has sole custody?

13 MS. KAHN: He's conceding physical custody to  
14 her. Assuming that he has joint custody, in order to  
15 modify that - - - that relationship with the grandmother,  
16 he's got to come to New York and modify it.

17 JUDGE GARCIA: So if those proceedings had never  
18 taken place - - -

19 MS. KAHN: Excuse me?

20 JUDGE GARCIA: If those proceedings had never  
21 taken place, hypothetical - - -

22 MS. KAHN: Exactly.

23 JUDGE GARCIA: - - - hypothetical. If they had  
24 not taken place and this proceeding was brought, could the  
25 judge entertain this habeas?

1 MS. KAHN: Well, the point - - - the point was  
2 this, the mother filed her habeas petition - - -

3 JUDGE GARCIA: No, no, but could you answer my  
4 hypothetical?

5 MS. KAHN: Yeah.

6 JUDGE GARCIA: So this is not this case, I  
7 understand, but if there were no prior proceedings, could  
8 the mother come into this courtroom with this habeas  
9 proceeding?

10 MS. KAHN: I think she could because what - - -  
11 what she - - - well, she would say instead that the father  
12 has to file a modification petition to establish what  
13 visitation he wants.

14 CHIEF JUDGE WILSON: Well, let me - - - let me  
15 try Judge Garcia's question differently a little bit. I  
16 look at DRL section 70 and it seems to say that you can - -  
17 - you can file a habeas petition without any - - - it  
18 doesn't - - - it makes no reference to any prior proceeding  
19 at all. It seems to say, on its face, that you can  
20 initiate a proceeding under habeas. So I'm not - - - I  
21 mean we understand - - -

22 MS. KAHN: Okay.

23 CHIEF JUDGE WILSON: - - - at least I understand  
24 the argument you've made that - - -

25 MS. KAHN: Right.



1 CHIEF JUDGE WILSON: - - - turns - - - right.  
2 But it seems to me you have a simpler argument, that I do  
3 find in your papers, although not - - - you know, not as -  
4 - - it's not like in - - - highlighted.

5 MS. KAHN: Uh-huh.

6 CHIEF JUDGE WILSON: But that the Domestic  
7 Relations Law, section 70, and then you also refer, I  
8 think, to Family Court Act 651 and DRL 240.

9 MS. KAHN: Right.

10 CHIEF JUDGE WILSON: All either together or  
11 independently give you the right to start the proceeding  
12 even if there had been no prior order.

13 MS. KAHN: Okay. I'm - - - I'm happy to concede  
14 that, but I mean my - - - my real concern in this case, and  
15 I don't want to jump ahead, but I don't have - - - I don't  
16 know how much extra time I'm going to get - - - is that  
17 assuming the mother certainly has an enforcement writ  
18 because the father - - - the grandmother was not - - - the  
19 grandmother clearly, under her visitation right from the  
20 first proceeding, didn't have the right to leave the kids  
21 in South Carolina. And the judge, in the middle of - - -  
22 in colloquy says to the grandmother, go down and get the  
23 kids. And the grandmother says, no, I like - - - I think  
24 the father's a better custodian. So she was clearly in  
25 violation of her visitation order. But the judge said, if

1 I put her in jail for contempt, I don't get the kids back.

2 So at that point, the judge - - - anyhow, the  
3 judge on the writ was careful to serve him properly by - -  
4 - by a 3085 order for the only way she could reach him at  
5 that point since he had cut off all contact with the  
6 mother. Oh, well, he violated the mother's right to  
7 custody by cutting off all contact. She couldn't get the  
8 kids back. So since he was a party to that first order,  
9 you know, her - - - her rights, and - - - and the children  
10 were still New York residents because they lived with her,  
11 and then they went south and they were there for five  
12 months. It takes six months to create new home state  
13 jurisdiction under the UCCJEA, look at Domestic Relations  
14 Law 75-a(7) - - -

15 JUDGE TROUTMAN: But Counselor, as the Chief  
16 Judge just said, couldn't she just have proceeded with the  
17 habeas?

18 MS. KAHN: Well, the problem - - -

19 JUDGE TROUTMAN: Regardless.

20 MS. KAHN: Yeah. The problem with a habeas, it's  
21 more complicated because I have a feeling that the trial  
22 magistrate who dismissed this case without prejudice,  
23 dismissed it not because she thought, really, that there  
24 was a lack of subject matter jurisdiction for the habeas,  
25 but because she had been told that the South Carolina

1 Marshal would not enforce the writ unless she could  
2 establish emergency temporary jurisdiction to show that the  
3 mother - - - the father had been a dangerous father to the  
4 children. That's not necessary where there has been a  
5 wrongful taking. That's under 76-c, and that's a whole  
6 other layer.

7 But one of the problems under the UCCJEA is the  
8 different - - - different states interpret it differently.  
9 So I think what the reason why the trial judge acted - - -  
10 and the reason why, it seems to me clear, that the  
11 magistrate who dismissed the case knew that there had to be  
12 subject matter jurisdiction for the writ, was Judge Arias,  
13 who had conducted prior colloquy, had already said I - - -  
14 you know, the writ is granted, and - - - and a temporary  
15 custody order had been granted. And then it was revoked by  
16 the magistrate because the magistrate heard that the South  
17 Carolina Marshal would not enforce the writ order - - -  
18 would not issue a warrant unless the mother could establish  
19 emergency jurisdiction under 73 - - - Domestic Relations  
20 Law 73-c (sic).

21 JUDGE GARCIA: So Counsel - - -

22 JUDGE HALLIGAN: So Counsel - - -

23 JUDGE GARCIA: - - - was your - - - was your  
24 position in front of the family court that - - -

25 MS. KAHN: I wasn't the trial lawyer.

1 JUDGE GARCIA: Your client's, was the position  
2 that we have what is, in essence, a custody order, we don't  
3 need anything else, we just want the writ X, or - - -

4 MS. KAHN: Yes.

5 JUDGE GARCIA: - - - did you ask for custody - -  
6 - your client ask for a custody determination?

7 MS. KAHN: Well, she did both, and the reason for  
8 it was because she felt that South Carolina would, if she  
9 got a custody order, she could then docket it in South  
10 Carolina and South Carolina would have to honor it.

11 JUDGE GARCIA: Did she ask for that order based  
12 on the prior proceedings, or did she ask for that order in  
13 a new determination of custody between the parents?

14 MS. KAHN: I - - - I think the idea was that  
15 under 103(c) of the CPLR, if you've got subject matter and  
16 personal jurisdiction under the writ and the writ isn't the  
17 appropriate form of proceeding, it can be converted.

18 JUDGE GARCIA: And where in the record is that?  
19 That your client asked for that in family court?

20 MS. KAHN: It's - - - I know I cited it in the  
21 brief, I - - - I don't remember it - - - the - - - the - -  
22 - it's the citation to the record is there. I know it was  
23 her trial counsel who specifically asked, under 651(b),  
24 that the custody order be granted.

25 JUDGE SINGAS: And Counsel what - - - what relief

1 are you asking for from us?

2 MS. KAHN: Well, I would - - - I would like you  
3 to do both, I would like you to grant the writ, but I would  
4 also like you to look at - - - to analyze this underlying  
5 problem that I think - - - I mean what do you do when - - -  
6 and - - - and this happens a lot, the two - - - two states  
7 interpret the UCCJEA differently. In fact, there's a law  
8 review article, which I didn't tell you about, but you  
9 might like to read on your own, called Jurisdictional  
10 Boomerang, and it's about the problems with the UCCJEA  
11 because two states interpret it differently.

12 So what I'm saying is, what good does it do the  
13 mother if you give her a writ and the kid is still in South  
14 Carolina at an unknown - - - I mean, I got an address from  
15 the police department, but they didn't give it to me under  
16 oath. And I - - -

17 JUDGE RIVERA: I'm sorry, Counsel, just a little  
18 clarity on this point about the analysis under the - - -

19 MS. KAHN: And - - - and - - -

20 JUDGE RIVERA: - - - under that particular  
21 statute. Is your argument that if a - - - if there had  
22 been an order of custody in favor of the mother - - -

23 MS. KAHN: Yeah.

24 JUDGE RIVERA: - - - that the - - - that - - -

25 MS. KAHN: So - - -



1 JUDGE RIVERA: - - - the other jurisdiction would  
2 not have recognized that order?

3 MS. KAHN: No, no, they - - -

4 JUDGE RIVERA: Put aside the writ for the moment.

5 MS. KAHN: -- would have.

6 JUDGE RIVERA: Just the order.

7 MS. KAHN: They - - - well, they would have - - -  
8 she could have docketed it as a custody order in South  
9 Carolina.

10 JUDGE RIVERA: So what is it that - - - then that  
11 Judge Arias did or didn't do that created an obstacle - - -

12 MS. KAHN: Well, she got - - -

13 JUDGE RIVERA: - - - to the mother doing exactly  
14 - - -

15 MS. KAHN: - - - she got off - - -

16 JUDGE RIVERA: - - - what you described?

17 MS. KAHN: - - - the case. Judge Arias got off  
18 the case, gave it to a magistrate to hold an inquest, and a  
19 - - - and issue a warrant on the writ because she felt that  
20 there was - - -

21 JUDGE RIVERA: So - - -

22 MS. KAHN: - - - jurisdiction.

23 JUDGE RIVERA: - - - Judge Arias issued the writ  
24 even though she was talking about custody and didn't sign  
25 an order of custody? Just to be clear - - -

1 MS. KAHN: Yeah, there was a - - -

2 JUDGE RIVERA: - - - obviously this writ - - -

3 MS. KAHN: - - - temporary - - -

4 JUDGE RIVERA: - - - and what the judge - - -

5 MS. KAHN: Oh, oh.

6 JUDGE RIVERA: - - - did or didn't do.

7 MS. KAHN: Well, there was a temporary order of  
8 custody issued. And then Judge Arias said to the  
9 magistrate, hold an - - - you know, send a notice of  
10 inquest, hold an inquest, and then issue a warrant. But  
11 the whole trouble was the magistrate never issued a notice  
12 of inquest. She then held an inquest, but it would have -  
13 - - it would have lacked due process because she - - - it  
14 says right in the record there was no notice of inquest.

15 JUDGE HALLIGAN: So after that, Counsel - - -

16 MS. KAHN: Yeah.

17 JUDGE HALLIGAN: - - - it looks to me like the  
18 determination by family court was that your client had  
19 failed to file a petition for custody.

20 MS. KAHN: Right.

21 JUDGE HALLIGAN: And - - - and could she have  
22 filed a petition for custody at that point?

23 MS. KAHN: No.

24 JUDGE HALLIGAN: Why not?

25 MS. KAHN: Because this was during the COVID

1 freeze, and there were three administrative orders issued  
2 by the chief judge of the family court, and - - - and the  
3 two sub-administrative judges holding up all custody  
4 petitions until the COVID freeze ended. There was - - -

5 JUDGE HALLIGAN: And is that point clear from the  
6 record? I take it you're saying she couldn't have filed -  
7 - - after being told there was no pending custody petition,  
8 I take it you're saying COVID freeze precluded her from  
9 doing that. Is that point - - -

10 MS. KAHN: And - - - and then about a month later  
11 she was able to file. But when she filed her writ  
12 petition, the COVID freeze was in effect, and she could not  
13 file.

14 JUDGE HALLIGAN: But after she was told that - -  
15 -

16 MS. KAHN: She did file. But the problem - - -  
17 oh, and the - - - the idea was, even though this writ was  
18 dismissed without prejudice, I'm saying she was prejudiced  
19 by the dismissal because in the writ petition she got both  
20 personal and subject matter jurisdiction over the father.  
21 He appeared, testified - - -

22 JUDGE HALLIGAN: But - - - but just so - - -

23 MS. KAHN: - - - and then - - - and then he just,  
24 you know, dropped the phone. But she couldn't get personal  
25 jurisdiction over him when she refiled the custody



1 proceeding - - -

2 JUDGE HALLIGAN: I see.

3 MS. KAHN: - - - because he disappeared. So that

4 - - -

5 CHIEF JUDGE WILSON: Thank you, Counsel.

6 MS. KAHN: - - - why she was prejudiced by the  
7 dismissal of the writ without prejudice. But what I'm  
8 saying to is, I don't know that she's going to be benefited  
9 if you just grant her - - - if you say it was wrong to  
10 dismiss the writ because functionally, the prior visitation  
11 proceeding really was her first custody proceeding to the  
12 mother. That's not going to do her a whole lot of good to  
13 get the kids back from South Carolina if the South Carolina  
14 Marshal won't enforce her writ - - - I mean, won't enforce  
15 the warrant on the writ without proof of temporary  
16 emergency jurisdiction.

17 CHIEF JUDGE WILSON: Okay. Thank you, Counsel.

18 MS. KAHN: Okay. Thank you.

19 CHIEF JUDGE WILSON: Counsel, you may want to  
20 stay for - - -

21 MS. KAHN: Sure.

22 CHIEF JUDGE WILSON: - - - the balance of the  
23 argument.

24 MS. KAHN: I'm sorry.

25 CHIEF JUDGE WILSON: That's all right.

1 MR. KATZ: May it please the court, Philip Katz,  
2 the attorney for the children.

3 Your Honor, I think while Counsel's arguments are  
4 compelling, I think, as was alluded to by the court, it's a  
5 lot simpler than that. This is a case where there was a -  
6 - - my clients were living in New York for years. They go  
7 on a visitation based on a - - - on a visitation order in  
8 2020, in the summer, that was issued for the grandmother,  
9 the paternal grandmother. Grandmother takes the children  
10 to South Carolina to visit their father, doesn't return  
11 them. That's when Counsel's client files her writ  
12 petition.

13 That writ petition, absolutely, without any  
14 regard for whether there was a prior custody order or  
15 getting into the semantics of any of that, under DRL 70,  
16 instilled within the court, the right - - - the  
17 jurisdiction to issue a writ. And in fact, it did issue a  
18 writ. But over the course of a year, as you've heard and  
19 you've seen in the record - - -

20 JUDGE CANNATARO: But - - -

21 MR. KATZ: Yes.

22 JUDGE CANNATARO: - - - the court issued the writ  
23 after stating that there was an underlying custody order,  
24 apparently, you would think, aware of what the current  
25 First Department law is on that issue. And I certainly

1 don't - - - I mean did - - - did the mother ever argue to  
2 the family court? It doesn't matter that there is or isn't  
3 a custody order?

4 MR. KATZ: So I was there, so I was - - - and I  
5 don't recall that, and I don't see that in the record. But  
6 I don't think that's necessarily relevant to the issuance  
7 of a writ. I think - - -

8 JUDGE GARCIA: But Counsel, is your argument that  
9 the writ issues for the violation of the visitation order?  
10 Is that what - - -

11 MR. KATZ: No, what I'm saying - - -

12 JUDGE GARCIA: Let's say you have a couple, they  
13 have joint custody, one spouse takes the kids to New Jersey  
14 for the week and goes to the shore. Can the other spouse  
15 go in and get a writ?

16 MR. KATZ: So the - - - the answer is, arguably,  
17 yes, the court has the power to consider that. Absolutely,  
18 the court has the power to consider that, and the court  
19 should consider that. Of course, Your Honors has certain  
20 facts that make it obvious that it's not appropriate in  
21 that case - - -

22 JUDGE GARCIA: But what's the - - - as I  
23 understand it - - - and I think section 70's title - - -  
24 what's the unlawful detention there, right? We have joint  
25 custody - - - the couple has joint custody. The one spouse

1 takes the kids to New Jersey for the - - - for the week to  
2 the shore. And what would be the authority under habeas  
3 corpus for child detained by parent to issue a writ?

4 MR. KATZ: So the - - - the facts that Your Honor  
5 are describing, I still would argue the court has the right  
6 to, at least, consider it, and make sure those are the  
7 facts.

8 JUDGE GARCIA: Well, let's say we - - - there's  
9 an argument that that's not a good result - - -

10 MR. KATZ: Right.

11 JUDGE GARCIA: - - - what would the distinction  
12 be?

13 MR. KATZ: The distinction here is that the court  
14 is aware from the history, at the very least, that these  
15 children were living with their mother. Forgetting about  
16 whether there's a valid custody order, a visitation order,  
17 or whether the visitation order should be called a - - -  
18 considered a custody order the UCCJEA. I submit to the  
19 court that that's not really what the analysis is.

20 JUDGE GARCIA: So is - - - in essence you have to  
21 come in and prove you have custody, and in one way or  
22 another, and isn't that asking the court to make a custody  
23 determination?

24 MR. KATZ: I don't think you have to prove you  
25 have custody, Your Honor. I think the purpose - - - - my -

1 - - my ask of this court is to consider the court's power  
2 of issuing a writ under DRL 70, its power to protect these  
3 children under the doctrine of *parens patriae*, is one where  
4 the court is obligated to take a look and see if these  
5 children are safe. And this court didn't do that. It  
6 failed to do that.

7 JUDGE GARCIA: But you have an interstate  
8 component here, and I think Counsel alluded to that. And  
9 we have some issues with enforcement, which I'm concerned  
10 about, and I feel like I don't have a good idea about from  
11 - - - from what I've read. What would the effect of New  
12 York's enforcement capability, a New York family court  
13 judge, issuing a writ like that in South Carolina, right, I  
14 mean, without a custody determination?

15 MR. KATZ: So let me say this to Your Honor  
16 first, in sort of answering that question. I - - - I was  
17 reading recently a study, and I'm sure this wouldn't be a  
18 surprise in terms of these numbers to this court, that was  
19 done by Columbia University and an organization called  
20 Robin Hood. It's a 2017 study that finds that in the City  
21 of New York there are a quarter million single-parent  
22 households. And in those households live approximately  
23 580,000 children. So this - - - so they are coming to  
24 these family courts every day with these types of  
25 situations. There is a mother or a father who's been

1 taking care of a child or children for years. If the other  
2 parent wants to come in and just take that child out and  
3 walk into another state with those children, as far as I'm  
4 asking this court, this court should tell every court  
5 beneath it, that it should take a look to make sure that  
6 they're not detained. Issue the writ.

7 CHIEF JUDGE WILSON: Let me - - - let me ask you  
8 a question. My understanding, generally, of the writ of  
9 habeas corpus is it's a command to bring the body of a  
10 person to the court.

11 MR. KATZ: Correct.

12 CHIEF JUDGE WILSON: That's what it is.

13 MR. KATZ: That's all it is.

14 CHIEF JUDGE WILSON: It brings the - - - the  
15 subject of the writ in front of the court.

16 MR. KATZ: Correct.

17 CHIEF JUDGE WILSON: The court, from that point,  
18 needs some other vehicle if it's going to determine custody  
19 or whatever, but the purpose of the writ is just to bring  
20 the person.

21 MR. KATZ: That is correct.

22 CHIEF JUDGE WILSON: So as I understand Judge  
23 Garcia's hypothetical to you out in the Jersey Shore, say  
24 my wife takes the kids there and I don't know about it, I  
25 could come to court and say that. The court might well

1 deny the writ on his facts, right?

2 MR. KATZ: Sure.

3 CHIEF JUDGE WILSON: If it granted the writ, that  
4 doesn't mean that I would get custody. It means it would  
5 then have a determination about that problem.

6 MR. KATZ: That's right.

7 CHIEF JUDGE WILSON: Likewise, if my wife,  
8 instead, which she would never do, took the kids to Chile  
9 and didn't return for a year and I filed the writ, I would  
10 hope I would get a somewhat different result. And as to  
11 the interjurisdictional, in that case, you know, Chilean  
12 problem, you'd have a real problem with service. But in  
13 this case the defendant had appeared, and so you don't have  
14 a problem with service.

15 MR. KATZ: That's correct. There's absolutely no  
16 problem with service. In fact, the defendant just hung up  
17 the phone when he didn't like what he was hearing. And  
18 that's exactly what happened.

19 JUDGE GARCIA: Do you think there's any -- what  
20 does section 71 - - - it says "detained", but section A  
21 says, "where a minor child is residing within the state",  
22 right?

23 MR. KATZ: And that's another good question, Your  
24 Honor. So - - - and I've provided some case law in my - -  
25 - in my letter brief. Where a party takes a child outside

1 of the jurisdiction, this court has said, in fact I - - - I  
2 think I refer - - -

3 JUDGE GARCIA: Because just to back it up, what -  
4 - - the problem I have with comparing a writ, habeas writ,  
5 to just bringing someone to court, I mean that's kind of  
6 like a subpoena. And I guess if you're within the state,  
7 no harm no foul, the court has jurisdiction, everyone come  
8 to court. Where you're dealing with another sovereign,  
9 South Carolina, they're going to look at what you've done,  
10 and they may take a very different view of - - - use this  
11 like a subpoena. So don't you think we should consider New  
12 York's enforceability rights, and the way states look at  
13 what we're doing here, when we issue a writ, and whether or  
14 not they're going to honor it, when we make a determination  
15 of what you need to get a writ in the first place?

16 MR. KATZ: Well, that's a great question, Your  
17 Honor, and I think that DRL 70 is a - - - a UCCJEA-  
18 supported statute. And in fact, if - - - if the defendant  
19 father had a concern, he could very well have gone to the  
20 court in South Carolina and filed something, and then there  
21 would have been a UCCJEA conference. It happens all the  
22 time. And then it could have been reconciled, but he  
23 didn't do that, which should have made this court in New  
24 York more worried about what was going on. You have a  
25 defendant who hangs up the phone. You have a history of a





1 case where you have the mother who had the - - - who had  
2 these three children in New York for years. Father  
3 conceded as much when he - - - he consented to the order  
4 giving the paternal grandmother access, returning the child  
5 to the mother at the end of the access, so this is not the  
6 Jersey Shore example.

7 JUDGE HALLIGAN: So what - - - what happens as a  
8 practical matter? I take it from your brief, you - - - you  
9 are of the view that the children are still in New York  
10 State for purposes of DRL 70.

11 MR. KATZ: That's true.

12 JUDGE HALLIGAN: Okay. And so if, as your  
13 response to the Chief Judge indicates, the function of the  
14 writ is to secure the children physically, bring them to  
15 the state, I - - - I take it that, first of all, you have  
16 to figure out how to enforce that vis-a-vis the South  
17 Carolina authorities. And secondly, once the child gets  
18 here, if the enforcement is viable, does then a custody  
19 determination need to be made? I - - - I take it from your  
20 answer to the Chief that - - - that the habeas proceeding  
21 itself is not dispositive of a custody dispute.

22 MR. KATZ: Correct. The habeas position, Your  
23 Honor, is not the conclusion.

24 JUDGE HALLIGAN: So - - -

25 MR. KATZ: It's the start.

1 JUDGE HALLIGAN: - - - so can - - - how do we  
2 know, and - - - and this goes to Judge Garcia's point, I  
3 think, whether South Carolina will, in fact, respect a DRL  
4 Section 70 order and assist in the - - - the return of the  
5 children to the state, if - - - if the order were so  
6 issued?

7 MR. KATZ: So I believe, and this is, again, just  
8 my understanding based upon the facts of this particular  
9 case, that the problem with getting the order enforced in  
10 the first place is that it was a temporary custody order.  
11 And I think that was something that was difficult for  
12 Counsel's - - - Counsel's client to get enforced because it  
13 was a temporary custody order.

14 JUDGE HALLIGAN: But you think a habeas writ  
15 would be enforced even though a temporary custody order  
16 would not be?

17 MR. KATZ: So I think a habeas - - - habeas writ  
18 will either be enforced, or at the very least, it could be  
19 - - - it could be domesticated and considered there. I  
20 don't think these court - - - the courts of this state  
21 should - - - should not act because they're concerned about  
22 what another state will do. This court should focus on  
23 what's best for these children. That's this - - -

24 JUDGE CANNATARO: Do you agree with Counsel that  
25 that's what stopped the referee in this case, the



1 intimidation by the fact that South Carolina wasn't going  
2 to - - -

3 MR. KATZ: No - - -

4 JUDGE CANNATARO: - - - enforce the order?

5 MR. KATZ: - - - I don't believe that at all.

6 No, I don't believe that at all. I mean I believe - - - I  
7 honest - - - I mean there was a combination of things. I  
8 think we heard about COVID, we heard about fatigue - - - I  
9 think some fatigue with this case. I - - - I think it was  
10 a bad decision, and that's, I think, why we are here, we're  
11 here - - -

12 JUDGE RIVERA: Well, I may have misunderstood. I  
13 thought the point was that they didn't think that the  
14 mother had a custody order, that she's got to go file for  
15 that so they can determine whether or not she should have  
16 custody - - -

17 MR. KATZ: So - - -

18 JUDGE RIVERA: - - - versus the father.

19 MR. KATZ: - - - it's a fair point - - -

20 JUDGE RIVERA: Legal and physical.

21 MR. KATZ: - - - Your Honor, that that was said,  
22 but I'm in those family courts every day - - -

23 JUDGE RIVERA: Uh-huh.

24 MR. KATZ: - - - and that's not how it works.

25 When you're in those family courts, if - - - if a child is

1 brought in pursuant to a writ, they're able to talk to  
2 their attorney, which these children weren't able to talk  
3 to me at that time. I've spoken with them previous to that  
4 and post that, but at that time, their father kept them  
5 away from me. They talked to their attorney. Then the  
6 court exercises its parens patriae authority and  
7 responsibility to make sure those children are safe. And  
8 that may be directing a party or both parties to file  
9 custody petitions to figure things out.

10 JUDGE CANNATARO: Counsel, I need to ask before  
11 your time's up.

12 MR. KATZ: Yes.

13 JUDGE CANNATARO: This is a fascinating  
14 discussion about what the jurisdictional predicates for a  
15 writ are and whether it would be enforceable or not. Why  
16 wasn't any of this passed upon at the Appellate Division?  
17 I'm trying desperately to understand why the Appellate  
18 Division dismissed the appeal.

19 MS. KAHN: Can you explain?

20 MR. KATZ: I cannot - - -

21 JUDGE CANNATARO: Well, you can explain too, but  
22 I want to hear his answer.

23 MR. KATZ: I cannot explain why it happened. I  
24 mean, it's disappointing that it did happen, but I cannot  
25 explain why it happened. I honestly can't.

1 JUDGE RIVERA: Well, it seems, based on your  
2 prior answer, that they don't see the practicalities the  
3 way you do, right? They're saying you've got to have a  
4 custody order before you can go about the business of  
5 demanding that these children be brought back to New York.

6 MR. KATZ: And I think - - - I mean, I can - - -

7 JUDGE RIVERA: Maybe that's right, maybe that's  
8 wrong, but that seems to be the Appellate Division's - - -

9 MR. KATZ: Maybe they were focusing - - -

10 JUDGE RIVERA: - - - the law they developed.

11 MR. KATZ: - - - on DRL 76 not on 70.

12 JUDGE RIVERA: Uh-huh.

13 MR. KATZ: And quite frankly, if you're looking  
14 at DRL 76, I do not think this court should rule in a way,  
15 in this case, that sends the message to the lower courts  
16 that custody is simply an order. It's not simply an order.  
17 There are facts - - -

18 JUDGE RIVERA: Well, would all of - - -

19 MR. KATZ: - - - that have to be involved.

20 JUDGE RIVERA: - - - this have been avoided if at  
21 the point in time when she's filing the writ or at some  
22 point during the various appearances before Judge Arias, at  
23 that point, she files a petition for custody. Would it  
24 have, perhaps, avoided some of this given the Appellate  
25 Division's law?

1 MR. KATZ: So I do not have a crystal ball, it  
2 may have, it very well may have. But it shouldn't have  
3 been dispositive, is what I'm saying to you.

4 CHIEF JUDGE WILSON: Thank you, Counsel.

5 MR. BERMAN: Good afternoon, Your Honors. My  
6 name is Geoffrey P. Berman, and I represent the respondent,  
7 Mr. Willie R.

8 Yes, I think it's absolutely accurate that the  
9 main issue here is the interpretation of Domestic Relations  
10 Law, Section 70. And the question - - - the - - - the - -  
11 - on its face, the statute says that either parent can  
12 apply for a writ. However, both the First Department and  
13 the Second Department have interpreted it to mean that  
14 there has to be a prior order of custody in place to give  
15 the parent a greater right to the custody of the child. So  
16 for example, as Your Honor said, one parent can't go to  
17 Jersey - - -

18 JUDGE RIVERA: Well, where in the law is that  
19 required? I understand you're saying that's the way they  
20 interpreted it. Where - - - where is that - - - that's not  
21 what the section says. What's the hook for that?

22 MR. BERMAN: Right, so the - - - so the statute  
23 is silent on that. And the - - - departments have said  
24 that, I think their reasoning, while they're not long  
25 decisions, they do say that the one parent has to have a

1 greater right to custody than the other, which would be set  
2 forth in an order of custody.

3 CHIEF JUDGE WILSON: So historically, when the  
4 writ of habeas corpus was used in England, and one parent,  
5 let's say, was seeking to - - - it was used a bunch of  
6 different ways. For example, sometimes a child who had  
7 been married to somebody, the parents then claimed that  
8 that was - - - the marriage was unlawful, the person had  
9 been abducted, and would use the writ to try and - - -  
10 there's no prior order in those cases, right?

11 MR. BERMAN: Right.

12 CHIEF JUDGE WILSON: So historically, I don't see  
13 any requirement that there be a prior order for invoking  
14 the writ where, at least as I understand it, the writ is  
15 just to bring the body to the court. It's not a decision;  
16 it's just bring the body to me. And you do have to make a  
17 showing.

18 MR. BERMAN: Yeah, right.

19 CHIEF JUDGE WILSON: But I don't think the  
20 showing has to be that you have a right by a prior order.

21 MR. BERMAN: Yeah. I mean that could - - -

22 CHIEF JUDGE WILSON: So if that's the historical  
23 practice and then our statute doesn't have that requirement  
24 - - - but you're saying the Appellate Divisions have  
25 grafted it. Why should we follow that?

1 MR. BERMAN: Yeah, and I - - - I agree to a  
2 certain extent. I think the - - - one of the cases cited  
3 by Ms. Kahn, the one from, I think, 1976 maybe, the First  
4 Ddepartment, they - - - they didn't require a prior custody  
5 order and these more recent cases have, and I'm not quite  
6 sure why.

7 JUDGE TROUTMAN: So does it seem in a - - - at  
8 minimum, that they implicitly determined there was a lack  
9 of standing that deprived them of subject matter  
10 jurisdiction? The AD?

11 MR. BERMAN: I'm sorry, I - - - I didn't - - -

12 JUDGE TROUTMAN: The AD dismissed - - -

13 MR. BERMAN: Right, yes.

14 JUDGE TROUTMAN: - - - so was there, at least,  
15 some implicit finding that there was a lack of standing  
16 that deprived them of subject matter jurisdiction to - - -

17 MR. BERMAN: Yeah, I mean - - -

18 JUDGE TROUTMAN: - - - the case?

19 MR. BERMAN: - - - I mean, that's the only reason  
20 why I could - - -

21 JUDGE CANNATARO: Is standing jurisdictional?  
22 Does the lack of standing mean there's a lack of subject  
23 matter jurisdiction?

24 MR. BERMAN: It sounds like they equate the two.

25 CHIEF JUDGE WILSON: Well, more importantly, I



1 mean, anyone can file a writ of habeas corpus on behalf of  
2 anybody else. You don't have the - - - the petitioner of  
3 writ doesn't have to have any relation to the subject of  
4 the writ. That's historical practice, right? I mean if I  
5 thought you were being illegally detained somewhere, I  
6 could file a writ on your behalf.

7 MR. BERMAN: Yeah, I mean - - -

8 CHIEF JUDGE WILSON: So I'm not sure how standing  
9 figures in to the writ of habeas corpus at all.

10 JUDGE CANNATARO: You were the movant for  
11 dismissal, correct?

12 MR. BERMAN: No, that was - - - that was actually  
13 the - - - there were two respondents on this case. There  
14 was the - - - there was the respondent grandmother and the  
15 respondent father.

16 JUDGE CANNATARO: Oh, it was the grandmother who  
17 moved for dismissal?

18 MR. BERMAN: Yeah, she - - - she moved for  
19 dismissal, and the court granted the dismissal. I was - -  
20 - I was surprised also, just as everybody else, that the  
21 court dismissed the case. I thought they would've decided  
22 on the merits. But the - - - you know the reason I imagine  
23 they didn't was because of the subject matter jurisdiction  
24 issue.

25 JUDGE TROUTMAN: Because they first started it,

1           there was a - - - there were orders issued or - - - or  
2           writs issued, and it just seemed like everybody got tired  
3           because he wouldn't participate, he stopped participating,  
4           that is the father.

5                         MR. BERMAN:    Yeah.

6                         JUDGE TROUTMAN:  And then the case just went  
7           away.  And then there's a question out there of at least  
8           one child that nobody even knows where the child is.

9                         MR. BERMAN:  Yeah - - -

10                        JUDGE RIVERA:  It does seem that departmental  
11           rule rewards - - -

12                        JUDGE TROUTMAN:  Uh-huh.

13                        JUDGE RIVERA:  - - - bad conduct.

14                        MR. BERMAN:  I mean that's what happened in this  
15           case.  However, the - - - still the mother could have come  
16           in and filed a proper custody petition.  I'm surprised for  
17           all that time that at any point nobody said, you know,  
18           there's - - -

19                        JUDGE TROUTMAN:  But why couldn't she?

20                        JUDGE CANNATARO:  What proper custody - - -

21                        JUDGE RIVERA:  Well, there's a service issue,  
22           right?

23                        MR. BERMAN:  Well, there - - - there became a  
24           service issue.

25                        JUDGE RIVERA:  Uh-huh.

1 MR. BERMAN: But you know, the way she was  
2 awarded service of her writ was by email, so there  
3 shouldn't be any reason why she couldn't get the same - - -

4 JUDGE TROUTMAN: But why couldn't she?

5 JUDGE CANNATARO: Didn't we just hear there was a  
6 moratorium on custody proceedings?

7 JUDGE TROUTMAN: Right.

8 JUDGE CANNATARO: The administrative judge placed  
9 a moratorium on filing new custody petitions.

10 MR. BERMAN: I think that was only for about  
11 three months. I'm not - - - I'm not sure - - -

12 JUDGE TROUTMAN: But doesn't - - -

13 MR. BERMAN: - - - if it was an - - -

14 JUDGE TROUTMAN: - - - family court - - -

15 MR. BERMAN: - - - extended period of time.

16 JUDGE TROUTMAN: - - - convert different  
17 proceedings all the time?

18 MR. BERMAN: So - - -

19 JUDGE TROUTMAN: Even if it was determined by the  
20 court below that, well, no, you can't proceed under a hab,  
21 family court, they convert proceedings on an hourly basis.

22 MR. BERMAN: Yeah I mean, according to CPLR  
23 103(c), the referee probably could have converted it. I  
24 think she might have been hesitant to do it because since  
25 there was no order of custody, perhaps she didn't want to

1 say, well, wait a minute, there's no - - - we don't have  
2 in-person jurisdiction, and it might be an abuse of  
3 discretion if I just confer in person jurisdiction on the  
4 court without any - - - you know without having the proper  
5 - - -

6 JUDGE TROUTMAN: She felt hampered by the  
7 Appellate Division rulings that you had to have a prior  
8 order of custody and that no one was looking at what had  
9 occurred between grandma and the mom as being that  
10 appropriate order?

11 MR. BERMAN: I think for sure she looked at it  
12 and said, wait a minute, we don't have an order of custody,  
13 we don't have a petition for custody, so looking at the  
14 First Department rule and their case law and their  
15 precedent, I can't grant a writ of habeas corpus without an  
16 order of custody.

17 JUDGE TROUTMAN: Was there ever a request for a  
18 conversion?

19 MR. BERMAN: I'm not sure. I don't remember  
20 seeing it in the record. I didn't appear - - - I didn't  
21 appear as the trial attorney below. I'm not sure.

22 JUDGE RIVERA: And absent such a request there's  
23 no sua sponte recognition.

24 MR. BERMAN: She - - - she - - -

25 JUDGE RIVERA: The thing when - - -

1 MR. BERMAN: - - - could have - - -

2 JUDGE RIVERA: - - - a parent says I want  
3 custody, one would assume the parent has to request it.

4 MR. BERMAN: Yeah, in terms of custody, yes, yes.  
5 Now, in terms of sua sponte, converting it, maybe she could  
6 have done it. I'm - - - I'm not sure. I don't know what  
7 her state of mind was.

8 JUDGE SINGAS: Did the lower court decisions  
9 actually support your position that explicitly, that you  
10 need a custody order, Kiara and Toussaint? Do you think  
11 they're that explicit?

12 MR. BERMAN: I think so. I think so. And  
13 because - - - because given the fact that the First  
14 Department ended up dismissing in this instead of hearing  
15 it on the merits, I think they relied on those cases to say  
16 that, yes, that's - - - that's it. If there's no final  
17 custody order, then there can't be - - - there can't be a  
18 writ.

19 CHIEF JUDGE WILSON: So where are the - - - my  
20 understanding is two of the children are back with the  
21 mother now; is that correct?

22 MR. BERMAN: As far as I know, Ms. Kahn did  
23 investigate and she - - -

24 CHIEF JUDGE WILSON: And then one is not.

25 MR. BERMAN: One is not, as far as I know.

1 CHIEF JUDGE WILSON: And we don't know where that  
2 child is or - - - so - - - suppose we were to reverse, and  
3 I'm not even sure what that means, what practical effect  
4 does that have?

5 MR. BERMAN: I don't know if it has any effect.  
6 I mean my client, I - - - I can't speak for him, I haven't  
7 had contact with him. I don't know where the child is.  
8 The child might be with him; the child might not be with  
9 him. Unfortunately, none of us know. It's an unfortunate  
10 situation for - - - for the child, as well as for, you know  
11 - - - for all the children and for the mother. So I don't  
12 know what effect it would have.

13 So in addition, as far as the - - - I know Mr.  
14 Katz mentioned the - - - the parens - - - parens patriae  
15 obligation of the court to the children, and that's - - -  
16 that's certainly a factor. The court does do things like  
17 convert; they - - - they do have that. They've done that  
18 in the past, and they do it often. But I still think that,  
19 you know, the family court has to respect the precedent of  
20 the Appellate Division, and they can't just sort of do,  
21 well, we have - - - you know, I have a responsibility to  
22 the children so I'm just going to disregard the, you know,  
23 the First Department precedent and just, you know, issue  
24 this - - - issue this writ.

25 JUDGE CANNATARO: But all of this seems to me

1           like a justification for converting the habeas petition  
2           into a custody. That - - - and I'm not at all clear on  
3           whether that was even asked for. I know it's an item of  
4           relief in the mother's brief here. But I - - - I suspect,  
5           based on what I see in the record, that the - - - since  
6           Judge Arias had already declared that there was a custody  
7           determination, they were doubling down on the theory, we  
8           have a custody order. We have a UCCJEA custody order. So  
9           - - - but even so, the court could have done it themselves  
10          if they disagreed with that. Why wouldn't that happen as  
11          opposed to just a straight up dismissal?

12                       MR. BERMAN: Yeah, I mean that's - - - that's a  
13          good question. I think Judge Arias might have been  
14          mistaken. I'm not sure - - - I think she probably - - -  
15          she - - - she might have thought that was a custody order,  
16          because I don't think she would have referred to it. It  
17          was - - - it was pretty clearly a visitation order. I  
18          don't - - -

19                       JUDGE CANNATARO: Well, it does say that at the  
20          end of the visitation, the children shall be returned to  
21          the mother.

22                       MR. BERMAN: Yeah, right.

23                       JUDGE CANNATARO: Strongly suggesting that the  
24          mother is the custodial parent.

25                       MR. BERMAN: Yeah, right. That's true. But it's

1 - - - but it's not a final order of custody, and there is a  
2 distinction in the law. You know, there has to be - - - I  
3 think what the referee was looking at was the fact that  
4 there was nothing that said, final order of custody to the  
5 mother, which gives me the basis for issuing a writ.

6 JUDGE CANNATARO: So convert - - - convert the  
7 habeas into a custody and then make that determination.

8 MR. BERMAN: And maybe she could have, but I  
9 still think that she felt constrained by the First  
10 Department precedent that said that she did not have - - -  
11 she didn't have subject matter jurisdiction - - -

12 JUDGE TROUTMAN: And the reason the habeas wasn't  
13 an appropriate vehicle for her is why?

14 MR. BERMAN: Because there was no underlying  
15 final order of custody.

16 JUDGE SINGAS: So that would exclude most married  
17 parents from asking for a habeas, right?

18 MR. BERMAN: Yeah, I mean, it might. They might  
19 have to take that first step. I mean, it doesn't make a  
20 lot of sense, but they might have to take that first step  
21 of filing for custody, getting a custody order, and then  
22 going about it that way because then there would be an  
23 illegal detention.

24 JUDGE GARCIA: But I guess what we're struggling  
25 with a little bit here is was that ever requested here?



1 MR. BERMAN: I - - - I mean, I'm not sure. I  
2 mean, I'm not sure if the mother had requested that below.

3 JUDGE GARCIA: And do you know if these facts - -  
4 - if this proceeding had taken place in South Carolina and  
5 a writ issues without any custody order and the kids are in  
6 New York, would New York honor the writ?

7 MR. BERMAN: I don't know.

8 JUDGE GARCIA: Do you think we would probably  
9 want to know that before we allowed this to happen in New  
10 York?

11 MR. BERMAN: I - - - I think so. I think - - - I  
12 think the - - - you know, the State would have a, you know,  
13 legitimate curiosity about that. But - - - but still, I  
14 mean, I still think they should also honor out of state - -  
15 - I do think out-of-state jurisdiction should honor the  
16 other states' writs. I mean even - - - even if it was - -  
17 - I don't know how closely they would look at it, but a  
18 valid writ from an out of state - - -

19 JUDGE GARCIA: I don't either.

20 MR. BERMAN: Yeah, I mean - - - but a valid writ,  
21 if I was South Carolina, I would - - - I would honor it.  
22 Same with New York as to South Carolina.

23 JUDGE RIVERA: Was - - - was a temporary order of  
24 custody in furtherance of getting the children for the  
25 court back in New York, then the court could render its

1 decision as to custody?

2 MR. BERMAN: I think the temporary - - - I don't  
3 know - - - really know what purpose the temporary order  
4 served. I think they were trying to - - -

5 JUDGE RIVERA: The mother must have - - -

6 JUDGE TROUTMAN: To prove the mother - - -

7 JUDGE RIVERA: - - - thought it - - - I'm sorry.

8 Certainly the mother is thinking, the court  
9 understands these children are living with me and are  
10 coming back to me.

11 MR. BERMAN: Yeah. Yeah. I think the - - - I  
12 think the family court was trying to do what it could, but  
13 I still think they're, or at least the referee, had the  
14 impression that a petition had to be filed for a final  
15 order of custody. And the temporary order of custody would  
16 not suffice.

17 JUDGE RIVERA: Did the father sign that  
18 stipulation related to the mother having physical custody  
19 while the grandmother had visitation?

20 MR. BERMAN: The father - - -

21 MS. KAHN: No.

22 MR. KATZ: No.

23 MR. BERMAN: I'm not sure he did. I think he did  
24 appear in that matter, but I'm not sure he signed - - -

25 JUDGE RIVERA: Okay.

1 MR. BERMAN: - - - off on the - - -

2 JUDGE RIVERA: That's what I thought.

3 MR. BERMAN: - - - stipulation.

4 JUDGE RIVERA: Just wanted to confirm.

5 MR. BERMAN: Yeah. Yeah. But again, I would  
6 argue that that is just a order of visitation to the  
7 grandmother. And it - - - while it does say that, you  
8 know, the child is ultimately returned to the mother, it's  
9 really not a valid order of custody.

10 CHIEF JUDGE WILSON: Thank you, Counsel.

11 MR. BERMAN: All right. Thank you very much,  
12 Your Honors.

13 MS. KAHN: Your Honor, I know I'm not - - - I'm  
14 out of order to say anything, but in the Second Department  
15 - - -

16 MR. BERMAN: I have no - - - I have no objection,  
17 Your Honors.

18 MS. KAHN: - - - if something is said that's  
19 incorrect, you're allowed to correct it.

20 CHIEF JUDGE WILSON: So Ms. Kahn - - -

21 MS. KAHN: As I understand - - -

22 CHIEF JUDGE WILSON: Hold on. Just hold on.

23 MS. KAHN: Yeah.

24 CHIEF JUDGE WILSON: Could you come up to the  
25 podium so you're in front of the microphone, please?

1 MS. KAHN: Oh, I'm sorry.

2 CHIEF JUDGE WILSON: So you didn't reserve time,  
3 but I'll give you a minute.

4 MS. KAHN: Okay. I would just ask that you look  
5 at Domestic Relations Law 75-a(3) and (4), which say that a  
6 first visitation order is a custody order under the UCCJEA.  
7 And a first visitation proceeding is a first custody  
8 proceeded. So if there's any question as to whether there  
9 was first custody proceeding, the first visitation order to  
10 the grandmother, is a first custody order to the mother.  
11 It doesn't say that the petitioner in that first proceeding  
12 has to be the petitioner on the writ. That's all.

13 JUDGE HALLIGAN: Can I ask one - - -

14 JUDGE CANNATARO: So just to be - - - so just to  
15 be clear, Ms. Kahn, you're arguing here, and I think your  
16 argument below, is simply that I don't need a conversion to  
17 custody because I have a custody order under UCCJEA, under  
18 75-a(3). I don't - - - I don't need to argue whether a  
19 custody order is required for a habeas writ because I have  
20 a custody order now. That was the argument below and here.

21 MS. KAHN: Yeah, but part of the problem is South  
22 Carolina warrant squad doesn't see it that way.

23 JUDGE CANNATARO: We have to deal with South  
24 Carolina, but - - - but - - -

25 MS. KAHN: So that's my - - -



1 JUDGE CANNATARO: - - - I just want to - - -

2 MS. KAHN: - - - problem.

3 JUDGE CANNATARO: - - - make sure I understand  
4 what your legal approach was, both here and below.

5 MS. KAHN: Yeah.

6 JUDGE CANNATARO: It is, essentially, that you  
7 have a custody order.

8 MS. KAHN: Yes.

9 JUDGE SINGAS: If I may, Chief?

10 CHIEF JUDGE WILSON: Yes, of course.

11 JUDGE SINGAS: I think you had an answer for us,  
12 a purported answer for why the AD dismissed. I'd like you  
13 to share that.

14 MS. KAHN: Well, because - - - oh, the reason the  
15 AD dismissed was I filed my appellant's brief, and then I -  
16 - - and then they - - - the other side didn't file any  
17 briefs. I also filed a motion to ask in the Appellant  
18 Division to judicially notice the prior visitation  
19 proceeding because that wasn't a formal part of the  
20 mother's writ proceeding. And I felt it was critical that  
21 the Appellate Division understand the foundation on which  
22 we were requesting the enforcement writ.

23 Instead of the respondents filing answering  
24 briefs, the father's - - - I think it was the father's  
25 counsel, Mr. Calderone (ph.), filed a motion - - - a cross

1 motion, to dismiss the appeal for lack of subject matter  
2 jurisdiction. And I filed a reply, but mainly I - - - I  
3 was - - - you know, I felt that - - - that my - - - since  
4 it was all one ball of wax, and I had made all my  
5 jurisdictional arguments on the motion to - - - for  
6 judicial notice, I - - - I - - -

7 JUDGE TROUTMAN: So in the very - - -

8 MS. KAHN: - - - I was a little sloppy in my  
9 reply.

10 JUDGE TROUTMAN: - - - in the very least - - -

11 MS. KAHN: Huh?

12 JUDGE TROUTMAN: - - - in the very least, are  
13 your arguing that they improperly dismissed it without full  
14 briefing?

15 MS. KAHN: I never did. But - - -

16 JUDGE TROUTMAN: No, no, what I'm - - - saying -  
17 - -

18 MS. KAHN: Yeah.

19 JUDGE TROUTMAN: - - - they dismissed it.

20 MS. KAHN: They dismissed it.

21 JUDGE TROUTMAN: Now that you're in front of us -  
22 - -

23 MS. KAHN: Yeah.

24 JUDGE TROUTMAN: - - - are you arguing that it  
25 was error for the Appellate Division to dismiss without

1 full briefing?

2 MS. KAHN: Yes. And one other thing you should  
3 know, the children - - - the children's counsel never  
4 submitted a brief to the Appellate Division because he - -  
5 - somehow he wasn't expected to. It was true he couldn't  
6 communicate with his clients, but he's told me repeatedly,  
7 and the record reflects that procedurally, he agreed with  
8 me that the first - - - the first visitation order was a  
9 physical custody order to the mother. And the father had a  
10 duty to come back to New York if he wanted to file a  
11 modification petition. And he also said in - - - in the  
12 trial transcript, he said that the father - - - father  
13 appeared at the allocution and knew perfectly well in the  
14 visitation proceeding that the mother had physical custody  
15 and - - - and the paternal grandmother only got her hour of  
16 visitation from the physical custody of the mother.  
17 Because you don't get - - - you don't get visitation from  
18 thin air. You've got to get it from physical somebody.  
19 And if you look at the grandmother's petition, which is  
20 part of the record because it was part of the judicial  
21 notice motion, you'll see she specifically says, I, the  
22 paternal grandmother, live in New York. The mother and the  
23 children have lived in New York at 140th Street for nine  
24 years - - -

25 CHIEF JUDGE WILSON: Counsel - - -

1 MS. KAHN: - - - and the father lives in - - -

2 CHIEF JUDGE WILSON: - - - we have your point.

3 MS. KAHN: - - - South Carolina.

4 CHIEF JUDGE WILSON: Thank you.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Ashley Bennett, certify that the foregoing transcript of proceedings in the Court of Appeals of Celinette H.H. v. Michelle R., No. APL-2021-56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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