

# The Evolution of Legal Personhood for Nonhuman Animals in the United States

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The nascent body of law concerning the common law legal personhood and rights of nonhuman animals continues to grow in the United States. This note summarizes the developments of mid-2018 to the beginning months of 2019, in particular the work of the Nonhuman Rights Project (NhRP) seeking the first recognition of legal personhood for a nonhuman animal in the state courts of the United States. The Nonhuman Rights Project brought the world's first common law habeas corpus petition for a nonhuman animal in December 2013 in New York and filed its first Connecticut lawsuit in November 2017.

On November 16, 2018, for the second time in history<sup>1</sup>, a court issued a common law habeas corpus writ on behalf of a nonhuman animal. New York's Orleans County Supreme Court (trial court) issued an order to show cause<sup>2</sup> under New York's common law of habeas corpus and its habeas corpus procedural statute, Civil Practice Law and Rules (CPLR) Article 7003(a), on behalf of an imprisoned Asian elephant named Happy, who was born in the wild in 1971 and has been held captive at the Bronx Zoo in New York City since 1977. Happy was the first elephant documented to pass the "mirror self-recognition test." See Brandon Keim, "An Elephant's Personhood on Trial," *The Atlantic*, Dec. 28, 2018; "Gradually, Nervously Courts Are Granting Rights to Animals," *The Economist*, Dec. 18, 2018.

The NhRP sought the writ for Happy in Orleans County, which is over 300 miles from the Bronx Zoo and far beyond the limits of Bronx County as well as the mid-level appellate division of which it is part (there are four mid-level appellate divisions in New York).<sup>3</sup> It did so because Orleans County falls within the appellate jurisdiction of the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department"), which on June 15, 2018 became the first appellate court in the United States to acknowledge that legal rights can extend to nonhuman animals:

it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals . . . see also *Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334, 1335 [4th Dept 2015], lv denied 26 NY3d 901 [2015]). Indeed, the Court of Appeals has written that personhood is "not a question of biological or 'natural' correspondence" (*Byrn v. New York City Health & Hosps. Corp.*, 31 NY2d 194, 201 [1972]).

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<sup>1</sup> The first-ever common law habeas corpus issued to a nonhuman animal was the case of Hercules and Leo, two juvenile chimpanzees formerly owned by the State of Louisiana who were used for research experiments in New York. *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015). Hercules and Leo have since been transferred to sanctuary in northern Georgia, though they technically remain "property," i.e. legal things without the capacity for rights. "Visiting Our Clients Hercules and Leo at their New Sanctuary Home," *Nonhuman Rights Blog*, Nov. 18, 2018, available at: <https://www.nonhumanrights.org/blog/hercules-leo-project-chimps-sanctuary/>.

<sup>2</sup> An "order to show cause" issued under CPLR 7003(a) is utilized in a situation, such as this, where the petitioner is not asking the detained person (Happy) be physically produced in court.

<sup>3</sup> CPLR Article 70 (the state's habeas corpus procedural statute) allows a petitioner to seek a writ of habeas corpus on behalf of a privately detained person anywhere in the state.

*People v. Graves*, 163 A.D.3d 16, 21 (2018).

*Graves* is of particular interest because it followed closely on the heels of another historic step in the development of rights for nonhumans under the common law. On May 8, 2018, Judge Eugene M. Fahey of New York's Court of Appeals (the state's highest court) issued a concurring opinion in which he supported many of the arguments made in favor of legal personhood for two chimpanzees named Kiko and Tommy and concluded that "[t]he issue whether a nonhuman animal has a fundamental right to bodily liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054,1059 (2018) (Fahey, J., concurring). While this was only a concurring opinion and did not recognize rights or personhood for the chimpanzees, it was the first time an American high court judge opined on whether a nonhuman animal can be a "person" for the purpose of habeas corpus. It is noteworthy also that Judge Fahey formerly sat on the Fourth Department and was one of the judges who initially refused to hear Kiko's appeal to the Court of Appeals in 2015, when he was new to his post on the Court of Appeals. *Matter of Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d 1334 (4th Dept 2015), *lv denied*, 26 N.Y.3d 901 (2015). He prefaced the above statement with, "In the interval since we first denied leave to the Nonhuman Rights Project, I have struggled with whether this was the right decision . . . . I continue to question whether the Court was right to deny leave in the first instance." 31 N.Y.3d at 1058.

On December 14, 2018, the Orleans court held a hearing in Albion, New York and heard arguments over Happy's personhood, among other issues. See Transcript of Oral Arguments, available at: <https://www.non-humanrights.org/content/uploads/LATEST-Corrected-Transcript-1.10.19.pdf>. The judge ruled that day, despite the statutory and case law cited by the NhRP and over strong objections from NhRP lead attorney Steven M. Wise, that venue in Orleans County was improper and that the case would be transferred to Bronx County, the county of Happy's detention.

Bronx County falls within the First Appellate Department, which for purposes of nonhuman animal personhood is even further from the Fourth Department than a map would suggest. This is the same court that in 2017 denied habeas relief to Tommy and Kiko, leading to Judge Fahey's decision (which refused to hear an appeal of that denial). In that case, the First Department wrote that the argument advanced by the NhRP that "infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights . . . ignores the fact that these are still human beings, members of the human community." *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 78 (N.Y. App. Div. 1st Dept. 2017). Judge Fahey explicitly rejected this human-centric approach to rights: "The [First] Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' . . . is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Tommy*, 31 N.Y.3d at 1057.

The Fourth Department should decide the NhRP's venue appeal by sometime later in 2019 or early 2020. In the meantime, the NhRP is actively planning further elephant habeas corpus petitions in New York, as well as petitions on behalf of other species within the state. The first of these new petitions will be filed in or about May 2019.

Meanwhile, in the state of Connecticut, the NhRP is litigating two separate habeas corpus petitions on behalf of Beulah, Minnie, and Karen, three elephants stolen from the wild as babies and used in circus entertainment and other private use throughout the Northeastern United States for over three decades. On September 25, 2018, citing errors by the Connecticut Superior Court and New York judges' recent embrace of nonhuman

animal legal personhood and rights, the NhRP filed a brief in the Appellate Court of Connecticut, the state's intermediate appellate court, seeking review of the lower court's dismissal of our first petition on behalf of Beulah, Minnie, and Karen, in which it held that the NhRP lacked standing to bring the petition, and that in any event, the petition was "frivolous on its face in legal terms." *Nonhuman Rights Project, Inc. ex rel. Beulah, Minnie & Karen v. R.W. Commerford & Sons, Inc., et al.*, Judicial District of Litchfield, Docket No. LLI-CV-17-5009822 (Dec. 27, 2017).

On February 13, 2019, pending appeal of the above and following a second petition brought on behalf of the same three elephants, another trial court judge dismissed the second petition on the grounds that the second and first petitions "are exactly alike and are brought to adjudicate the same issues." The NhRP is challenging this decision as well.

It is expected that Connecticut's intermediate appeals court, the Appellate Court, will hear the appeal of the first denial in or about May 2019.