

Section B

Habeas Corpus-Gimme My Kid Back!

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Andrew B. Howie

Andrew B. Howie is an attorney and shareholder with the firm of Shindler, Anderson, Goplerud & Weese, P.C., in West Des Moines, where his career has focused almost exclusively on family law in both trial and appellate courts. Andrew is a Fellow in two national academies, the American Academy of Matrimonial Lawyers and the American Academy of Appellate Lawyers. As an Academy Fellow, Andrew is recognized as a leading practitioner in those fields. He is a highly skilled litigator representing individuals in all facets of domestic relations and appellate work.

Andrew earned his J.D. with distinction from the University of Iowa in 1996 after earning his Bachelor's Degree from Wartburg College in Waverly, Iowa, in 1993. He is licensed to practice law in Iowa (1996), the Northern and Southern Districts of the U.S. District Court of Iowa (1996), Eighth Circuit of the U.S. Court of Appeals (1996), and the U.S. Supreme Court (1999).

After graduating from law school in 1996, he served as a clerk for the Iowa District Court in Burlington for a year. He has primarily practiced in Polk County since 1997. He is a member of the Iowa State Bar Association' and Iowa Association for Justice. He authored the "Family Law Manual" published by the Iowa State Bar Association in 2008, 2012, and 2018.

Ryan A. Genest

Ryan A. Genest is an attorney and shareholder with the law firm of Simpson, Jensen, Abels, Fischer & Bouslog, P.C. where his practice is focused primarily on the areas of domestic relations, private termination of parental rights, and adoption. Before joining Simpson, Jensen, Abels, Fischer & Bouslog, P.C. in 2019 he practiced with attorney Eric Borseth as Borseth & Genest from 1992 to 2003; from 2003 to June of 2019 he was a partner with the law firm of Culp, Doran & Genest where he engaged in a general civil practice with emphasis on domestic relations, private termination of parental rights, and adoption.

Ryan earned his J.D. from Drake Law School in 1992 after earning his Bachelor's Degree from Southern Illinois University-Carbondale in 1989. He is licensed to practice law in Iowa (1992); the U.S. District Court of Iowa (1992); and the Tribal Court of the Sac & Fix Tribe of the Mississippi in Iowa (2007). He is a member of the Iowa State and Polk County Bar Association (Family Law section). He has presented on a variety of topics including adoption, termination of parental rights, the Uniform Child Custody and Jurisdiction Act and other matters related to domestic relations.

Habeas Corpus

1) Fundamental Law

a) Iowa Code chapter 663

b) Common Law

i) “Although habeas corpus was originally designed to test the legality under which a person was restrained of his liberty, it was long ago enlarged to include an inquiry into the proper custody of minor children.” *Lamar v. Zimmerman*, 169 N.W.2d 819, 821 (Iowa 1969).

ii) Standing

(1) **Parents** - “The common law of England, and the statutes of the states of civilized countries uniformly recognize the parents or parent as the legitimate, natural guardian of their child.” *Allender v. Selders*, 227 Iowa 1324, 291 N.W. 176, 179 (1940); see *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 518 (Iowa 1976) (granting writ of habeas corpus to natural mother who challenged the adoption of her child).

(2) **Unwed Father** – Child of unwed father was placed in the care of a state-licensed child-placing agency when child’s mother signed a form surrendering all parental rights, giving the baby’s care and custody to agency, authorizing the child’s adoption, and waiving all notice of adoption proceedings. *McCalester v. Hillcrest Servs. to Children & Youth*, 232

N.W.2d 1, 2 (Iowa 1975). Because unwed father never challenged the legality of his child's custody by the agency, habeas corpus was an improper means to obtain custody of his child. *Id.* at 3.

(3) Third-parties

(a) Habeas corpus was proper procedure by which to seek determination of custody of infant whose parents were killed in automobile accident.

Lamar v. Zimmerman, 169 N.W.2d 819 (Iowa 1969).

(b) In most cases, custody is given to a parent rather than a stranger.

However, when a person has been caring for the child with the parent's permission, that person *in loco parentis* is entitled to notice and an opportunity to be heard in the action and may be given custody over the consenting parent. *In re Herron*, 212 N.W.2d 474 (Iowa 1973).

2) Petition

a) **Contents** – Iowa Code § 663.1:

1. That the person in whose behalf it is sought is restrained of the person's liberty, and the person by whom and the place where the person is so restrained, mentioning the names of the parties, if known, and if unknown describing them with as much particularity as practicable.
2. The cause or pretense of such restraint, according to the best information of the applicant; and if by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence.
3. That the restraint is illegal, and wherein.
4. That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant.

5. Whether application for the writ has been before made to and refused by any court or judge, and if so, a copy of the petition in that case must be attached, with the reasons for the refusal, or satisfactory reasons given for the failure to do so.

- b) **Verification** – “The petition must be sworn to by the person confined, or by someone in the confined person’s behalf, and presented to some court or officer authorized to allow the writ.” Iowa Code § 663.2 (2019).

3) Venue

- a) Iowa Code § 663.4 –

i) File in the county “most convenient in point of distance to the applicant”.

ii) However, applicant may file in a “more remote court” if “sufficient reason” is provided “in the petition for not making the application to the more convenient court”.

- b) The trial court has discretion to deny a motion to change venue. *Lamar v. Zimmerman*, 169 N.W.2d 819, 822 (Iowa 1969). In other words, changing the venue to another more “convenient” county is not mandatory. *Id.*

4) Granting Writ

- a) Judge will refuse if plaintiff is “would not be entitled to any relief” on the face of the petition. Iowa Code § 663.6.

b) “If the writ is disallowed, the court or judge shall cause the reasons thereof to be appended to the petition and returned to the person applying for the writ.”

Iowa Code § 663.7.

c) If a judge “who wrongfully and willfully refuses the allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars.” Iowa Code § 663.10

5) **Writ**

a) Form – Iowa Code §663.8:

The State of Iowa,

To.....:

You are hereby commanded to have the body of, by you unlawfully detained, as is alleged, before the court (or before me, or before, judge, etc., as the case may be), at, on (or immediately after being served with this writ), to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises.

b) Issued by Clerk or Specific Judge. Iowa Code § 663.9.

c) Defects or Informalities

i) Defects in the form or misdescription of the plaintiff or defendant is not a defense to disobeying the writ. Iowa Code § 663.19.

ii) “Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to the person served by a wrong name or description, or to another person.” Iowa Code § 663.26.

d) If issuing court is “satisfied that the plaintiff would suffer any irreparable injury before the plaintiff could be relieved by the proceedings above authorized,” the court “may issue an order to the sheriff, or any other person selected instead, commanding the sheriff or other person to bring the plaintiff forthwith before such court or judge.” Iowa Code § 663.22.

e) **Arrest of Defendant** – “If the evidence is sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the order must also direct the arrest of the defendant.” Iowa Code § 663.23.

6) **Service** –

a) Iowa Code § 663.13

i) by the sheriff, or

ii) by any other person appointed in writing for that purpose by the court or judge by whom it is issued or allowed. If by another person, that person must have “the same power, and liable to the same penalty for a nonperformance of the duty, as though the person were the sheriff.”

b) **Manner** –

i) leave “the original writ with the defendant, and preserving a copy thereof on which to make the return of service, but a failure in this respect shall not be held material.” Iowa Code § 663.14.

- ii) If defendant attempts “hides, or refuses admittance to the person attempting to serve the writ, or if the defendant attempts wrongfully to carry the plaintiff out of the county or the state after the service of the writ” then the person serving the writ has the power to arrest the defendant and bring the defendant with the plaintiff to the court issuing the writ. Iowa Code §§ 663.16 & .17.
- iii) Penalty for attempting to elude a write is a serious misdemeanor. Iowa Code § 663.20.

7) **Appearance and Answer –**

- a) After service, “defendant must appear at the proper time and answer the petition, but no verification shall be required to the answer.” Iowa Code § 663.27.
- b) Defendant must state in his/her answer “whether the defendant then has, or at any time has had, the plaintiff under the defendant’s control and restraint, and if so the cause thereof.” Iowa Code § 663.31.
- c) “If defendant has transferred the plaintiff to another person, the defendant must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor.” Iowa Code § 663.32.
- d) “If the defendant holds the plaintiff by virtue of a legal process or written authority, a copy thereof must be annexed.” Iowa Code § 663.33.
- e) **Produce the Body –** “The defendant must also produce the body of the plaintiff, or show good cause for not doing so.” Iowa Code § 663.28.

f) **Plaintiff retained by defendant** – “Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in the defendant’s custody, and may use all necessary and proper means for that purpose.” Iowa Code § 663.38.

8) **Response to Defendant’s Answer** – Plaintiff may reply to the defendant’s answer without verification. Iowa Code § 663.34. All issues raised will be tried to the court.
Id.

9) **Penalties Not Appearing** – If defendant willfully fails to appear at the designated time or fails to produce the plaintiff, the defendant is subject to

- a) contempt and its penalties;
- b) imprisoned until defendant complies;
- c) forfeit \$1000 to the aggrieved party.

10) Trial

- a) Evidence presented as basis of application. Iowa Code § 663.35.
- b) Improper to “question the correctness” of the court’s authority when acting lawfully. Iowa Code § 663.36.
- c) Standard or burden of proof is ultimately what is in the child’s “best interests”.

Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517 (Iowa 1976); *Lamar v. Zimmerman*, 169 N.W.2d 819, 821 (Iowa 1969); *In re Melsha*, No. 07-0376, 2007 WL 4322235, at *2 (Iowa Ct. App. 2007).

11) Remedy

- a) If defendant's basis for restraining plaintiff is insufficient, the plaintiff must be discharged from defendant's care. Iowa Code § 663.37.

12) Penalties Failure to Discharge – Iowa Code § 663.42. Defendant is subject to:

- a) contempt, and
- b) forfeiture of one thousand dollars to the party aggrieved, and
- c) all damages sustained by the plaintiff in consequence thereof.

13) Other remedies

- a) **Contempt application** – defendant has willfully disobeyed a court order

- b) **Tortious interference with custodial rights**

- i) Iowa recognizes a parent's claim for monetary damages against another individual, including the other parent, for that person's interference with the plaintiff-parent's custodial rights. *Wood v. Wood*, 338 N.W.2d 123, 125–27 (Iowa 1983) (adopting Restatement (First) of Torts § 700 (1938)); accord *Lansky by Brill v. Lansky*, 449 N.W.2d 367, 368 (Iowa 1989). In 2005, the Iowa Supreme Court affirmed a punitive damage award in a similar case. *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005).

- ii) Restatement (First) of Torts § 700 (1938) states:

Causing Minor Child to Leave or not to Return Home. One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its

custody or not to return to the parent after it has been left him, is subject to liability to the parent.

c) Request County Attorney to press criminal charges Iowa Code § 710.6

Violating custodial order. A relative of a child who, acting in violation of an order of any court which fixes, permanently or temporarily, the custody or physical care of the child in another, takes and conceals the child, within or outside the state, from the person having lawful custody or physical care, commits a class “D” felony.

A parent of a child living apart from the other parent who conceals that child or causes that child’s whereabouts to be unknown to a parent with visitation rights or parental time in violation of a court order granting visitation rights or parental time and without the other parent’s consent, commits a serious misdemeanor.

Practice Tips

Before filing a Writ Consider

- 1) What goal are you trying to achieve? If the ultimate goal is punishment then a Show Cause may be a better course of action, or you may wish to file a Show Cause in Addition to seeking a Writ.
- 2) Time and cost considerations: Assuming you are successful will there be a sufficient time left for your client to enjoy with his child? If it takes 2-3 days to get into court it may not be worth it if it's for a week.
- 3) The Legal Standard: Remember the standard is the best interest of the child. Take the time to make sure you have, as nearly as possible, the whole story.
- 4) Ramifications of Losing: If you file and lose you probably will not be able to file a contempt. If the court found that the child's best interest requires your Writ be denied how can you prove wrongful, much less willful, conduct?
- 5) Contacting the parent who is refusing to turn over the child, or better yet their attorney. Don't use a Howitzer if a rifle would have sufficed. Even if your efforts to resolve it are unsuccessful at you can show you tried less litigious tactics before resorting to the courts. Document all efforts to resolve without having to file.
- 6) Within your time constraints Try to locate witnesses who could corroborate your client's version of events and who would support their claims.
- 7) Manage client expectations.

IN THE IOWA DISTRICT COURT FOR HENRY COUNTY

CODY JONES, a minor child, COLTON JONES, a minor child, and MADISON JONES, a minor child, by and through their next best friend, DESMOND C. JONES)
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)
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Plaintiffs,)
)
)
vs.)
)
)
MOLLY SUE WOODS f/k/a MOLLY SUE JONES,)
)
)
)
Defendant.)

CASE NO. _____

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Plaintiff, Cody Jones, a minor child, Colton Jones, a minor child, and Madison Jones, a minor child, by and through their next best friend, their father, primary care provider and legal custodian, Desmond C. Jones, and states in support of their Petition for Writ of Habeas Corpus, the following:

1. Plaintiffs, Cody Jones, born August 26, 2011, Colton Jones, born April 2, 2013, and Madison Jones, born June 20, 2014 (hereinafter cumulatively referred to as "Plaintiffs"), are all minor children and have been in the physical care of Desmond C. Jones and residing with him in Mount Pleasant, Iowa, since their births.
2. Desmond C. Jones (hereinafter "Desmond") and Defendant, Molly Sue Woods f/k/a Molly Sue Jones (hereinafter "Molly"), are the parents of the Plaintiffs.
3. Desmond and the Plaintiffs reside in Mount Pleasant, Henry County, Iowa.
4. Molly resides in Odessa, Texas.
5. The Court has jurisdiction over the parties and subject matter herein.

6. On March 9, 2016, the Court entered an Order stating: “Molly and Desmond shall have joint legal and physical custody of their minor children with the children primarily residing with Desmond.” (*See* p. 2 ¶ 1 of “Stipulated Order Modifying Decree of Dissolution of Marriage”, attached hereto, incorporated by reference herein, and labeled “Exhibit A”). That Order modified the parties’ decree of dissolution of marriage previously filed on September 22, 2015. (Attached hereto, incorporated by reference herein, and labeled “Exhibit B”.)
7. Pursuant to the March 2016 Order, Molly was entitled to visitation with the Plaintiffs, particularly two months each summer. (*See* Ex. A p. 2 ¶ 2(a)(ii).) Molly has been exercising her visitation with the Plaintiffs in Texas since June 2008.
8. On August 14, 2008, Molly informed Desmond: “Under no circumstances will I return possession of our children to you on Saturday.” (*See* email message from Molly to Desmond, dated August 14, 2008, attached hereto, incorporated by reference herein, and labeled “Exhibit C”).
9. Molly and Desmond had previously agreed that the Molly’s visitation children would end and she would return the children to Desmond on Saturday, August 16, 2018. (*See* Ex. C.)
10. That the persons in whose behalf this Petition is sought – the Plaintiffs herein – are restrained of their liberty, and Molly is restraining the Plaintiffs at her residence in Odessa, Texas, from returned to Desmond’s care.
11. Molly’s restraint of the Plaintiffs is illegal, and in willful and wanton disregard of the Court’s existing custody order (Ex. A), and without a legal excuse.
12. The legality of Molly’s restraint of the Plaintiffs has not already been adjudged upon a prior proceeding of the same character, to Desmond’s best knowledge and belief.
13. Desmond has attempted to have Plaintiffs return to Iowa, but Molly has refused all such

efforts and attempts. (*See* Ex. C.)

14. Desmond, as the primary care provider and legal custodian of the Plaintiffs, is entitled to the Plaintiffs custody immediately.
15. Unless the writ is issued forthwith, Desmond is concerned that Molly will never permit the Plaintiffs to return to his care and continue to violate the Court's previous Order.
16. Desmond believes that Molly and the Plaintiffs are located at Molly's residence at 3 Abbey Road, Odessa, Texas 79761.
17. Desmond has registered the Plaintiffs at their schools of previous years, in the Central Decatur School District in Iowa. Classes start on Thursday, August 21, 2018. Desmond has concerns that Molly will keep the Plaintiffs from school which is not in the Plaintiffs' best interests.
18. As far as Desmond knows, the Plaintiffs are not enrolled in any school in Texas.
19. Every day that the Plaintiffs are not returned to Desmond and to their school and home in Iowa, the Plaintiffs may suffer irreparable injury, including interruption of her educational process, truancy, and psychological distress.

WHEREFORE Desmond C. Jones respectfully requests this Court to issue a writ of habeas corpus and, at the hearing on the writ, turn over custody of Cody Jones, Colton Jones, and Madison Jones to Desmond C. Jones.

Respectfully submitted,

Andrew B. Howie, AT0003716

