UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

DORENE DISANTO, KAREN LAWSON, MARGARET CARTWRIGHT, MIKE DEWINE, Plaintiff-Respondents, v. THOMAS L. THOMAS, Defendant-Petitioner.	)	Case No. 5:15-cv-00036 –LGW-RSB

REPLY OF PLAINTIFF-RESPONDENTS KAREN LAWSON AND MARGARET CARTWRIGHT IN SUPPORT OF MOTION FOR REMAND

Now come Plaintiff-Respondents Karen Lawson and Margaret Cartwright, by and through their trial counsel and respectfully urge this Honorable Court for remand of this matter to the Common Pleas Court of Lake County, Ohio because Defendant-Petitioner has not identified a basis in fact or in law for the action to have been removed to this Honorable Court, as more fully set forth in the attached and incorporated Brief.

Respectfully submitted,

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BRIEF

In their Motion for Remand (Doc. #12), Plaintiff-Respondents Karen Lawson and Margaret Cartwright argued:

1) "[A]ll uncertainties as to removal jurisdiction are to be resolved in favor of remand." **Russell Corp.**, 264 F.3d at 1050, citing **Burns v. Windsor Ins. Co.**, 31 F.3d at 1095. (Doc. #12-1, p. 3-4);

2) 28 U.S.C. Sections 1442, 1442a, 1444, and 1452 do not apply as a basis for removal jurisdiction in the present case. (Doc. #12-1, p. 4);

3) 28 U.S.C. Section 1443 does not authorize the exercise of removal jurisdiction in this case because even if the Indian Child Welfare Act (ICWA) is deemed to apply – which Lawson and Cartwright dispute, *infra* – it is not a proper basis for removal under **Miller v. Bunn-Miller**, Case No. SACV 11-1465-JST, 2011 U.S. Dist. LEXIS 113048 (Cent. Dist. Ca. Sept. 27, 2011); and **Belinda K. v. Baldovinos**, Case No. 10-CV-02507-LHK, 2010 U.S. Dist. LEXIS 105500 (N.D. Ca. Sept. 21, 2010). (Doc. #12-1, p. 4-6);

4) 28 U.S.C. Section 1441 does not apply because the action could not have been filed in federal court originally and because by removing the case from a Lake County, Ohio court to a Georgia federal district court Mr. Thomas did not meet the geographical component of Section 1441(A). (Doc. #12-1, p. 6-7);

5) 28 U.S.C. Section 1331 does not apply and thus does not provide a basis for removal because the action, which addresses questions of paternity, child custody, parenting, time, and child support, does not raise a federal question. (Doc. #12-1, p. 8-9);

6) 28 U.S.C. Section 1332 does not apply and thus does not provide a basis for removal because despite the diversity of citizenship, the relief Mr. Thomas seeks does not include an amount of $75,000.00 or more in controversy. (Doc. #12-1, p. 9); and

7) 25 U.S.C. Section 1901 *et seq*., the Indian Child Welfare Act, does not apply and thus does not provide a basis for removal because:

   a) the Penbina [sic] Nation Little Shell Band of North America is not a federally recognized Native American tribe. (Doc. #12-1, p. 10-12);

   b) the dispute between Mr. Thomas and Ms. DiSanto is a matter between what are or purport to be the subject child's parents and, therefore, the ICWA is not implicated. (Doc. #12-1, p. 12-13); and

   c) On its face, the ICWA confers jurisdiction – where it applies – on tribal, not federal district, courts. (Doc. #12-1, p. 13-14).

In response, Mr. Thomas does not argue that federal removal jurisdiction is or should be more broadly construed. He does not argue that the case could have been filed in this Honorable Court originally. He does not claim that the geographical requirement of 28 U.S.C. Section 1441(a) was met or should be waived here. Indeed, he does not directly address any argument contra removal jurisdiction in this case.

However, if liberally construed, Mr. Thomas' argument can be read to assert that the ICWA applies, that the case implicates a federal question (either under the ICWA or for federal habeas corpus relief), and that it meets the requirements of 28 U.S.C. Section 1332 because of a diversity of citizenship and a $100,000.00 amount in controversy. Nevertheless, removal to this Honorable Court remains improper and should be corrected by an Order for remand.

First, it is not "racist" for Lawson and Cartwright to assert that the ICWA does not apply in this case because the Pembina Nation Little Shell Band of North America is not a federally recognized Native American tribe. To qualify as an "Indian child" within the meaning of the ICWA, a child must either himself be or have eligibility to be and be the biological child of a member of an "Indian tribe." 25 U.S.C. Section 1903(4). Because the statute defines "Indian tribe" to mean only those tribes, bands, nations, and other organized groups or communities "recognized as eligible for the services provided to Indians by the Secretary [of the Interior]," the absence of recognition for the "Penbina," or Pembina, Nation Little Shell Band renders the minor child in this case *not* an "Indian child" under the ICWA. 25 U.S.C. Section 1903(4) and (8).

This is true regardless whether Mr. Thomas asserts the child is a member by and through him or the child's mother. It is true regardless whether Mr. Thomas believes the tribe should be federally recognized. It is true regardless why federal recognition has been denied. It matters only that – on its face – the ICWA has no application unless the child is or is claimed to be a member of a federally recognized Native American group. Thus, no federal question arises in this case under the ICWA.

To the extent that Mr. Thomas seeks to vest jurisdiction in this Honorable Court on the basis of his demand for a writ of habeas corpus, his application should be dismissed because "federal habeas has never been available to challenge parental rights or child custody." **Lehman v. Lycoming Cty. Children Services Agency**, 458 U.S. 502, 511, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982). Moreover, it appears that Mr. Thomas seeks, at least in part, to use this Court's authority to reverse orders the Lake County Juvenile Court issued. The **Rooker-Feldman** doctrine prohibits such an action,

holding that federal courts lack subject matter jurisdiction over claims seeking review of state court decisions, even if the claims assert that the state court action is unconstitutional. See, **Rooker v. Fidelity Trust Co.**, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68 L. Ed. 362 (1923); and **District of Columbia Court of Appeals v. Feldman**, 460 U.S. 462, 482 and 486, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

Thus, contrary to Mr. Thomas' argument, the 28 U.S.C. Section 1738A requirement of full faith and credit for child custody determinations in no way alters the analysis on Lawson and Cartwright's Motion for Remand. *If* the pending Lake County Juvenile Court action violated 28 U.S.C. Section 1738A, Mr. Thomas' recourse would be state court review, not to recast the matter as a civil rights action. See, **Rooker** and **Feldman**, both *supra*. See also, **Rolleston v. Eldridge**, 848 F.2d 163, 165 (11th Cir. 1988).

Moreover, as argued in Lawson and Cartwright's Memorandum Contra Plaintiff's Motion to Amend or Supplement, both Georgia and Ohio state law contain custody provisions that are operatively identical to 28 U.S.C. Section 1738A. O.C.G.A. Section 19-9-61(a) and (b); R.C. 3127.15(A) and (B). Under all three statutes, the undisputed fact that Ohio is the minor child's "home state" authorizes Ohio to exercise of jurisdiction over questions of his custody. 28 U.S.C. Section 1738A; O.C.G.A. Section 19-9-41(7); R.C. 3127.01(B)(7). Because Ohio has exercised such jurisdiction, no other court may do so. 28 U.S.C. Section 1738A; O.C.G.A. Section 19-9-61(a) and (b); R.C. 3127.15(A) and (B). As such, the pending Lake County Juvenile Court action is consistent with 28 U.S.C. Section 1738A, as stated in paragraph (c) thereof.

Finally, even if Mr. Thomas' filings with this Court asserted cognizable claims within the Court's subject matter jurisdiction, the domestic relations exception to federal jurisdiction compels remand to the Lake County Juvenile Court. **Elk Grove Unified School Dist. v. Newdow**, 542 U.S. 1, 124 S.Ct. 2301, 2309, 159 L.Ed.2d 98 (2004); and **Ankenbrandt v. Richards**, 504 U.S. 689, 701, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). The Supreme Court reasons that "[a]s a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts," and state courts have a "special proficiency . . . in handling issues that arise in the granting of such decrees." **Id.** at 704.

Relevant to Mr. Thomas' claim that this case involves diversity of citizenship and an amount in controversy of at least $75,000.00, in **Ingram v. Hayes**, 866 F.2d 368 (11th Cir. 1988), the U.S. Court of Appeals for the Eleventh Circuit held:

> Although diversity of citizenship existed, the district court properly abstained from exercise jurisdiction in the case. The federal judiciary has traditionally abstained from deciding cases concerning domestic relations. *See Crouch v. Crouch*, 566 F.2d 486 (5th Cir.1978). As a result, federal courts generally dismiss cases involving divorce and alimony, *child custody, visitations rights, establishment of paternity, child support*, and enforcement of separation or divorce decrees still subject to state court modification. *Crouch*, 566 F.2d at 487.

Id. at 369. (Emphasis added). Although the domestic relations exception is read narrowly, it is appropriate to decline jurisdiction if hearing the claim would mandate inquiry into the parent-child relationship. **Id.** at 370, citing **Jagiella v. Jagiella**, 647 F.2d 561, 565 (5th Cir. 1981). See also, **Stephens v. Sluss**, Case No. CV407-089, 2007 U.S. Dist. LEXIS 52167 (S.D. Ga. Jul. 18, 2007), in which the district court first found that an action removed from Indiana to a Georgia federal court should be remanded for failure to meet the geographic component of 42 U.S.C. Section 1441(a) and then held

that "[e]ven if the action were pending within the geographical boundaries of the Southern District of Georgia, this Court lacks original jurisdiction of the matter" because of the domestic relations exception to jurisdiction. **Id.** at *4, citing **Ingram**, 866 F.2d at 369.

For the foregoing reasons and for the reasons stated in the Memorandum in Support of their Motion for Remand, Plaintiff-Respondents Karen Lawson and Margaret Cartwright respectfully request that this Honorable Court GRANT their Motion and remand this matter to the Lake County, Ohio Court of Common Pleas.

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

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