

IN THE UNITED STATES DISTRICT COURT
for the
DISTRICT OF SOUTH CAROLINA

Civil Action No. 2:04-23286-DCN-GCK

CONSTANCE MILLS HAESELEY,
Plaintiff (Petitioner, former Wife)

v

DALE WAYNE MILLS,
Defendant, *pro se* (Respondent, former husband)

**DEFENDANT'S OBJECTION TO MAGISTRATE'S REPORT AND
RECOMMENDATION**

The Defendant, *pro se*, pursuant to 28 U.S.C. 636 (b)(1) (B) and (C), Fed. R. Civ. Proc. 72 (b) objects to the report and recommendation of the magistrate assigned without consent. The District Court must review the Magistrate's Report and Recommendation de novo. The objections are,

1. The Magistrate's Report and Recommendation misconstrues the Ankenbrandt doctrine as clarified in Elk Grove Unified School District v. Newdow, 542 U.S. ___ (2004).
2. . The Magistrate's Report and Recommendaion applies Ankenbrandt with a broad scope. The doctrine is very narrow. It was created as a jurisdictional limitation on diversity jurisdiction and applicable only where a divorce, alimony or child custody decree is requested. Pleadings were specific that no such decrees were requested in this case.(Verified Complaint [V.C.] # 16)
3. The Magistrate's Report and Recommendation misconstrues the scope of the Rooker-Feldman doctrine as clarified in Exxon Mobil v. Saudi Basic Industries, 544 US ____ (2005). The Rooker-Fledman Doctrine only applies to a party seeking to overturn a state court judgment. Relief here sought does not request overturning, modifying or altering a state court judgment. This was specifically pled. (V.C. # 17)

4. The Magistrate Report and Recommendation misstate (footnote in report and recommendation) the document upon which removal jurisdiction is predicated (28 U.S.C. 1441 (c)). The Report believes the removal document to be the initial pleading of 1996. The correct document (contempt order) as stated in the Notice of Removal is the state court order of contempt dated December 1, 2004 9 (See 28 U.S.C. 1446 (b) paragraph two). Removal was effected December 16, 2004 within the statutorily mandated 30 day period noted in 28 U.S.C. 1446 (b). Defendant filed a Notice of Notice of Removal, Notice of Removal and verified Complaint with the state court December 21, 2004.
5. The Magistrate Report and Recommendation of an award of attorney fees, though statutorily permitted, was an abuse of discretion as the removal was proper and a good faith attempt to change existing law.
6. The Magistrate Report and Recommendation overlooks the 42 U.S.C. 1983 claim and pleadings that meet the federal question original jurisdiction requirement of 28 U.S.C. 1331. (V.C. #1 and # 24; V.C. Count IV #90-#99)
7. The Magistrate Report and recommendation overlooks the general constitutional challenge raised that makes the Rooker-Feldman doctrine inapplicable. (V.C. Complaint # 15)
8. The Magistrate report overlooks the 28 U.S.C. 1443 jurisdictional claim raised in the Notice of Removal (Notice of Removal # 4) granting original jurisdiction.
9. Injunctive relief was requested. (Notice of Removal # 12 and Verified Complaint #14, # 18) Pursuant to 28 U.S.C. 636 (b)(1) (A) no authority existed for a magistrate to hear and rule on this pretrial matter.
10. Local Rule 73.02 (B) (2)(e) conflicts with 28 U.S.C. 636 (b)(1) (c) as well as violates equal protection and due process rights.

11. The Defendant was not noticed nor consented to a magistrate judge's hearing and determination of this civil matter pursuant to 28 U.S.C. 636 (c).
12. The Magistrate's Report and Recommendation errors by not declaring the South Carolina alimony provision of the divorce statute as within the umbrella of the state and federal Right of Privacy. Littlejohn v. Rose, 786 F.2d 785, 786 (6th Cir. 1985) (citing Zablocki v. Redhail, 434 at 385).
13. The Magistrate Report and Recommendation erred by not applying a strict scrutiny analysis in finding the South Carolina alimony statute, as infringing a liberty interest and fundamental right, presumptively unconstitutional and requiring the presentation of evidence as to a compelling state interest minimally applied to validate the statute.
14. The Magistrate's Report and Recommendation advising remand is improper.
15. The Magistrate's Report and Recommendation that this court lacks subject matter jurisdiction is erroneous. Original jurisdiction is evident on the federal questions pled. There exists in the state Court Order of Contempt dated December 1, 2004 first ascertainable federal questions which were timely and procedurally correctly removed.

Wherefore the Defendant requests the District Court review the Magistrate's Report and Recommendation de novo and find all of the objections with merit sufficient to overturn the Magistrate's Report and recommendation and order.

Further that the District Court declare South Carolina alimony statute impermissibly infringes the federal Right of Privacy, federal equal protection, federal 13th amendment ban on involuntary servitude; that the state court judge, acting in a ministerial capacity, not as a neutral adjudicator, by enforcing the unconstitutional alimony statute created a 42 U.S.C. 1983 claim that should be tried, and that the challenged statute impermissibly infringes the South Carolina state Right of Privacy.

Respectfully submitted,

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DATED this 1 day of July, 2005

**MEMORANDUM OF LAW TO OBJECT TO MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION**

"When we discussed abstention in *Ankenbrandt*, we first noted that abstention rarely should be invoked, because the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them. *Id.*, at 705 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976))." *Elk Grove Unified School District v. Newdow*, 542 U.S. __ (2004).

Introduction

The Magistrate Judge's Report and Recommendation appears to have fallen under the spell of a recognized judicial psychological bias, hindsight bias. (See Heuristics and Biases in the Courts: Ignorance or Adaptation, 79 Or. L. Rev. 61, 2000, Jeffrey J. Rachlinski,; Inside the Judicial Mind, Cornell Law Review, Vol. 86, No. 4, May 2001 Chris Guthrie , Jeffrey J. Rachlinski and Andrew J. Wistrich.)

The judicial decision making flaw stemmed from the hindsight bias that *pro se* defendants arguments are not of the caliber of experienced federal attorneys, the novelty of the legal argument that an alimony statute violates constitutional rights, that the legal argument is one of first impression here and therefore must lack merit when raised by a *pro se* defendant. All of these heuristics precondition the decision maker to short circuit otherwise in depth analysis of the law offered for the argument. The hindsight bias and heuristic made it easy for the decision maker to apply experienced misperceptions of expansive District Court rulings on Rooker-Feldman and Ankenbrandt doctrines. This

misperception occurred despite fairly recent United State Supreme Court rulings that reaffirmed their very narrow scope.

The defendant merely ask the District Court to set aside its *pro se*, alimony, involuntary servitude definition, Right of Privacy and constitutional challenge heuristics and review the objections raised with the caselaw and legal logic offered in support.

Standard of Review

Because the removed proceedings sought injunctive relief U.S. 636 (b)(1)(B) is applicable triggering de novo determination by a judge of the court pursuant to 28 U.S.C. 636 (b)(1)(C).

De novo review is also mandatory because the Magistrate's Report and Recommendation contains a remand order which is a dispositive ruling subject to de novo review. (See Vogel v. United States Office Prods. Co., 258 F.3d 509, (6th Cir. 2001) for an analysis of dispositive/nondispositive rulings and applicability of the proper subsection of 28 U.S.C. 636 (b)(1)).

Also Fed. R. Civ. P. 72 (b) mandates a de novo determination on a dispositive motion. Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, (1st Cir. 1999). The Motion at issue here is a Motion to Dismiss or Remand.

Rooker-Feldman

Though the Magistrate's Report and Recommendation (M.R.R.) does not use the words Rooker-Feldman, the discussion reflects the concept. The M.R.R. speaks of the traditional erroneous expansive scope of the Rooker-Feldman Doctrine. The U.S. Supreme Court in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 US ____ (2005) reiterated its original concept of a very narrow application.

"The Rooker-Feldman doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."

Exxon Mobil at 544 also reiterates that general challenges to the constitutionality of state statutes is outside the scope of Rooker-Feldman.

"...Thus, the Court reasoned, 28 U. S. C. § 257 did not bar District Court proceedings addressed to the validity of the accreditation Rule itself. *Feldman*, 460 U. S., at 486. The Rule could be contested in federal court, this Court held, so long as plaintiffs did not seek review of the Rule application in a particular case. *Ibid.*"

Ankenbrandt

The M.R.R. cites but misconstrues Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. ____ (2004). The M.R.R. wishes to use the Ankenbrandt v. Richards, 504 U. S. 689 (1992) to remand the proceeding. It attempts to view the proceeding as a family law matter when it is actually a constitutional challenge to a state statute. The Defendant is not requesting any adjudication of the parties or the rights of the family parties.

Ankenbrandt at 504 itself and as clarified again in Elk Grove at 542 is very narrow and inapplicable to this proceeding. Elk Grove at 542, Rehnquist concurring,

"The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, 28 U. S. C. §332, which divests the federal courts of power to issue divorce, alimony, and child custody decrees, *Ankenbrandt*, 504 U. S., at 703."

"...concluding that the domestic relations exception only applies when a party seeks to have a district court issue a divorce, alimony, and child custody decree, *Ankenbrandt*, 504 U. S., at 704. We further held that abstention was inappropriate because the status of the domestic relationship ha[d] been determined as a matter of state law, and in any event ha[d] no bearing on the underlying torts alleged, *id.*, at 706." Elk Grove at 542

"As in *Ankenbrandt*, the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the under-lying [constitutional violation] alleged.?"

"The Court cites *Palmore v. Sidoti*, 466 U. S. 429 (1984), as an example of the exceptional case where a substantial federal question that transcends or exists apart from the family law issue" makes the exercise of our jurisdiction appropriate."

In this proceeding as in Palmore at 466 and Elk Grove at 542, the pleadings raise a substantial federal question that transcends and exists apart from the family law issue. That is the gravamen of this proceeding.

Attorney Fee Award

The Defendant acknowledges the award of attorney fees under 28 U.S.C. 1447 (c) and that bad faith is not a requirement for the award. In re Lowe, 102 F.3d 731, 733 n.2 (4th Cir. 1996)

The District court is granted wide discretion in the award of attorney fees but caselaw guidelines help determine the appropriateness of costs and fees awards.

It is not customary for District Courts to award costs and fees. It is even less customary to award costs and fees against a *pro se* litigant.

In this proceeding the *pro se* litigant has made a good faith attempt to ask the court to consider the constitutionality of a state statute the enforcement of which against him can deny him his physical liberty and property rights in current and future earnings.

This proceeding was not improvidently removed and this District Court does have jurisdiction.

The Defendant cannot but help believe the heuristic analysis and the novelty of the claim preconditions the magistrate's report miss the legal target and fail to recognize the Defendant's conduct and effort is in good faith to make a challenge to a state statute that is well grounded and supported by substantial caselaw enough to create a justiciable issue for this court.

For these reasons the District court should not award costs and fees in this proceeding because a good faith removal, justiciable claims, removal jurisdiction and original jurisdiction all are present. See generally Borneman v. United States, 213 F.3d 819, (4th Cir. 2000 on appeal to the U.S. Supreme Court)

42 U.S.C. Claim

The M.R.R. completely looks past the 42 U.S.C. 1983 claim pled and for which jurisdiction is claimed. This claim fulfills the 28 U.S.C. 1331 federal question requirement. All necessary elements for a valid cause of action to survive dismissal and remand are pled. The Defendant deserves the opportunity to put on evidence to support his allegations pled.

28 U.S.C. 1443

The M.R.R. completely looks past the 42 U.S.C. 1443 claim pled and for which jurisdiction is claimed. This claim fulfills the 28 U.S.C. 1331 federal question requirement. All necessary elements for a valid cause of action to survive dismissal and remand are pled. The Defendant deserves the opportunity to put on evidence to support his allegations pled.

Injunctive Relief and 28 U.S.C. 636 (b)(1) (A)

Injunctive relief was requested and under 28 U.S.C. 636 (b)(1) (A) there was no authority for a magistrate judge to hear and determine this proceeding.

Local Rule 73.02 (B) (2)(e) conflicts with 28 U.S.C. 636 (c) and Fed. R. Civ. P 72

28 U.S.C. 636 (c) (1) requires,

" Upon the *consent* of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer *may conduct any or all proceedings* in a jury or *nonjury civil matter* and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." [Emphasis added]

Fed. R. Civ. P. Rule 72's history states,

HISTORY: (Added Aug. 1, 1983) (Amended Aug. 1, 1987; Dec. 1, 1993; Dec. 1, 1997)

EXPLANATORY NOTES: A prior Rule 73 was abrogated effective July 1, 1968. It provided for an appeal to a Court of Appeals.

Notes of Advisory Committee on Rules. Subdivision (b).

This subdivision implements the blind consent provision of 28 U.S.C. § 636(c)(2) and *is designed to ensure that neither the judge nor the magistrate attempts to induce a party to consent to reference of a civil matter under this rule to a magistrate.* See House Rep. No. 96-444, 96th Cong. 1st Sess. 8 (1979).

The rule opts for a uniform approach in implementing the consent provision by directing the clerk to notify the parties of their opportunity to elect to

proceed before a magistrate and by requiring the execution and filing of a consent form or forms setting forth the election. However, flexibility at the local level is preserved in that local rules will determine *how* notice shall be communicated to the parties, and local rules will specify the time period within which an election must be made. [Emphasis added]

Local Rule 73.02 (B) (2) (e) mandates that the Clerk of the District Court of South Carolina shall assign " All pretrial proceedings involving litigation by individuals proceeding *pro se*;"

There appears to be conflict between the federal statute/federal rule and the Local Rule, 73.02 (B) (2)(e) on the issue of prior consent for a magistrate to conduct proceedings in non jury civil matters. The issue hinges on whether entertaining, hearing and determining pretrial motions constitutes "proceedings" under this statute and rules.

Alimony Sections of Divorce Statutes Are within the Umbrella of the Right of Privacy

Littlejohn v. Rose, 786 F.2d 785, 786 (6th Cir. 1985) (citing Zablocki v. Redhail, 434 at 385)

[The Court] "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Zablocki v. Redhail, 434 U.S. 374, 384-85, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978) (citing Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40, 39 L. Ed. 2d 52, 94 S. Ct. 791 (1974).

"The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). Given the 'associational interests that surround the establishment and dissolution of [the marital] relationship', such 'adjustments' as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy. See Zablocki, 434 U.S. at 385; U.S. v. Kras, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1975)" Littlejohn v. Rose, 786 F.2d 785, 786 (6th Cir. 1985)

Thus there is precise recognition of divorce as included within the umbrella of protection accorded to the Right of Privacy.

Further, The 14th Amendment substantive due process clause Right of Privacy encompasses a Privacy Protected Zone of "personal decisions relating to marriage."

Divorce (dissolution of marriage) is a "personal decision relating to marriage."

Carey v. Population Serv. Int'l., 431 U.S. 678, 684-685 (1977) "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage..." Therefore the alimony statute is encompassed within the umbra of the 14th Amendment Right to Privacy

A statute infringing a fundamental right or liberty interest requires a standard of strict scrutiny analysis.

"The Court has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny - that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. Griswold v. Connecticut, 381 U.S. 479, 485 (1965)." Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833, 929 (1992)

The first step in strict scrutiny analysis is a presumption the statute is unconstitutional.

"It is well settled that . . . if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.'" Harris v. McRae, 448 U.S. 297, 312 (1980) (quoting City of Mobile v. Bolden, 466 U.S. 55, 76 (1980))

Next, the state must prove a compelling state interest minimally applied to rehabilitate the alimony statute.

"Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." City of Boerne v. Flores 521 U.S. 507, 534 (1997)

In fact, there simply is no "compelling" state interest for the alimony statute. This Court should permit the admission of evidence by the state to attempt to prove the existence of a compelling state interest minimally applied that achieves the interest.

Other Claims

If the District Court finds the South Carolina permanent alimony statute impermissibly infringes Federal liberty interest and the Federal Right of Privacy there is no need for the Defendant to go farther as the necessary declaratory relief has been granted to protect the Defendant, and all South Carolinians civil rights.

If the District Court finds the South Carolina permanent alimony statute does not infringe Federal liberty interest and Federal Right of Privacy all other federal claims and the pendant state claim should be recommended for trial.

Prayer for Relief

The Defendant prays this Court, review de novo all objections to the Magistrate's Report and recommendation, agree with all objections, find the South Carolina Alimony statutes impermissibly infringe federal liberty interest and Right of Privacy.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion has been served via U.S. mail this 1st day of July. 2005

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