

# Federal Court Jurisdiction in the USA in Family Law Cases

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## Keywords

abstention, alimony, Ankenbrandt, appeal, appeals, appellate, Barber, Burrus, case, cases, court, courts, decree, decrees, district, diversity, divorce, doctrine, domestic, exception, family, federal, Feldman, history, husband, jurisdiction, law, marriage, matrimonial, matter, Popovici, relations, Richards, Rooker, Simms, state, states, subject, supreme, U.S., U.S.A., wife

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## Introduction

It is elementary, and somewhat over-simplified, law that the federal courts in the USA can *not* hear cases involving family law (e.g., divorce, alimony, child custody, etc.), which is also called “domestic relations law”. This essay examines the historical and technical reasons for excluding family law from subject matter jurisdiction of federal courts in the USA.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

### subject matter jurisdiction

Before a court can consider a case, it must have jurisdiction. There are two issues in jurisdiction: (1) personal jurisdiction and (2) subject matter jurisdiction. Personal jurisdiction is normally satisfied by the defendant either living or doing business in the geographical area served by the court. For federal courts, subject matter jurisdiction is satisfied by either:

1. arising under a federal statute or the U.S. Constitution (i.e., a “federal question”)
- 2.. civil cases in which *both* the plaintiff and defendant are citizens of different states (so-called “diversity jurisdiction”) *and* the total amount in controversy exceeds US\$ 75,000.
3. admiralty and maritime cases
4. cases in which the U.S. Government is a party
5. cases in which one state of the USA is a party
6. cases in which a foreign country is a party; cases involving interpretation of international treaties; cases involving Ambassadors

U.S. Constitution, Article III; 28 U.S.C. § 1331-33.

The minimum amount in controversy for diversity jurisdiction was originally \$500 in the Judiciary Act of 1789 and has subsequently been increased several times by the U.S. Congress.

There is nothing in either the U.S. Constitution or federal statutes that would prohibit a U.S. District Court from hearing a divorce case in which the husband and wife are currently living in separate states (i.e., diversity jurisdiction). However, the U.S. Supreme Court has declared that the federal courts shall not hear domestic relations cases. This essay discusses the history of the rule that federal courts do not hear cases that either:

1. grant a divorce decree,
2. distribute marital property at or after divorce,<sup>1</sup>
3. award or modify alimony, or
4. award or modify child custody.

## History

*Barry* (1844)

Judge Betts of the U.S. Circuit Court in New York City heard a child custody case in 1844. The opinion in this old case was published about 45 years later, on the recommendation of a justice of the U.S. Supreme Court in the *Burrus* case,<sup>2</sup> which is discussed later in this essay. Judge Betts wrote:

My opinion upon this review of this subject is that there is no foundation for the claim that there is vested in the United States government a common-law prerogative, by writ of habeas corpus, assume and exercise this function of *parens patriae* in relation to infant children held in detention by private individuals, not acting under color of authority from the laws of the United States. And it also seems equally clear to me that the authority given by the fourteenth section of the judiciary act to issue writs of habeas corpus 'for the purpose of an inquiry into the cause of commitment' necessarily restricts the jurisdiction of the courts to commitments under process or authority of the United States.

*In re Barry*, 42 F. 113, 125 (C.C.S.D.N.Y. 1844).

The case was appealed to the U.S. Supreme Court, which affirmed that there was no federal jurisdiction, because the value of the child custody decree (which had no monetary value) did not exceed the then \$2000 minimum threshold for diversity jurisdiction.

In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care, and society of their child. This is the matter in dispute. And it is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.

The question for this court to decide is, whether a controversy of this character can, by a fair and reasonable construction, be regarded as within the provisions of the twenty-second section of the [Judiciary] act of 1789. Is it one of those cases in which we are authorized to reexamine the decision of a Circuit Court of the United States, and affirm or reverse its judgment? We think not. The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law, which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be

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<sup>1</sup> But the topic of distribution of marital property is *not* explicitly excluded from jurisdiction by the U.S. Supreme Court's decision in *Ankenbrandt*, which is discussed below, beginning at page 12.

<sup>2</sup> *Ex parte Burrus*, 136 U.S. 586, 594 (1890) (Calling Judge Betts' decision "a very careful and a very able opinion".)

applied. Nor indeed is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the Circuit Court. And since this court can exercise no appellate power unless it is conferred by act of Congress, the writ of error in this case must be dismissed.

*Barry v. Mercein*, 46 U.S. 103, 120-121 (1847).

The holding in *Barry v. Mercein* was reiterated in *De Krafft v. Barney*, 67 U.S. 704 (1862) and *Perrine v. Slack*, 164 U.S. 452 (1896).

In 1867, the U.S. Congress changed the statute used in *Barry v. Mercein*, so that the U.S. Supreme Court had appellate jurisdiction of *all* cases from the U.S. Circuit Courts.<sup>3</sup>

### *Barber* (1858)

In the year 1844, there was a case involving a separation granted in New York state court, which awarded \$360/year alimony to the wife. The husband then moved, with all of the assets under his control, to Wisconsin, out of the jurisdiction of the New York state courts, and refused to pay alimony to his ex-wife. Worse, the husband fraudulently obtained a divorce in Wisconsin that did not order him to pay alimony to his ex-wife. The wife, who had remained in New York, then sued in federal court in Wisconsin to force her ex-husband to pay alimony to her. The case in federal court was eventually appealed to the U.S. Supreme Court, which held that:

Our first remark is — and we wish it to be remembered — that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.

*Barber v. Barber*, 62 U.S. 582, 584 (1858), quoted with approval in *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992).

... when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony.

*Barber*, 62 U.S. at 591, quoted with approval in *Ankenbrandt v. Richards*, 504 U.S. 689, 701 (1992).

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<sup>3</sup> 14 Statutes at Large 385 (1867); *Ex parte McCardle*, 73 U.S. 318 (1867).

We have already shown, by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and by cases decided by this court; that the jurisdiction of the courts of equity of the United States is the same as that of England, whence it is derived. On that score, alone, the jurisdiction of the court in the case before us cannot be successfully denied.

*Barber*, 62 U.S. at 592.

The U.S. Supreme Court reviewed the history of where the husband had lived and concluded: His voluntary change of domicile from New York to Wisconsin makes him suable there. That might have been done in a State court in equity as well as in the District Court of the United States; but she had a right to pursue her remedy in either. She has chosen to do so in a court of the United States, which has jurisdiction over the subject-matter of her claim to the same extent that a court of equity of a State has, and we think that the court below has not committed error in sustaining its jurisdiction over this cause, nor in the decree which it has made. We affirm the decree of that court, and direct a mandate to be issued accordingly.

*Barber*, 62 U.S. at 599-600.

Summarizing, *Barber*, which is still good law, federal courts hearing cases in diversity have jurisdiction to *enforce* an order for alimony, but *not* jurisdiction to grant or modify either a divorce or alimony decree. However, notice that the Court in *Barber* “was not relying on constitutional limits in justifying the exception.”<sup>4</sup> I discuss below, beginning at page 12, the apparent reasoning of the Court in *Barber*.

Incidentally, conventional legal history claims that *Barber* was the first case to mention the domestic relations exception to jurisdiction of federal courts, although *Barry* was decided 14 years before *Barber*. Furthermore, *Barry* declined jurisdiction, while in *Barber* the exception was only dicta that did not apply to that case.

#### *Burrus* (1890)

*Burrus* was a child custody case in which a boy’s father sued in federal district court the boy’s maternal grandfather for custody of the child. When the grandfather again took the boy and refused to deliver the boy to the father, a judge of the U.S. District Court in Nebraska had the grandfather arrested. The grandfather then applied for a writ of habeas corpus.

In a verbose opinion, the U.S. Supreme Court stated that the U.S. District Court had no diversity jurisdiction, hence it was without jurisdiction to hear this case and without jurisdiction to order the arrest the grandfather. Since *Burrus* was decided in 1890, the diversity jurisdiction statute has been amended to also give the U.S. District Courts diversity jurisdiction. It has been suggested<sup>5</sup> that a U.S. Circuit Court could have accomplished what was denied to the District

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<sup>4</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 696 (1992).

<sup>5</sup> See, e.g., *Solomon v. Solomon*, 516 F.2d 1018, 1031-32 (3dCir. 1975) (Gibbons, J., dissenting).

Court.

In dicta, the U.S. Supreme Court remarked:

The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of congress, or any treaty of the United States or its constitution.

*Ex parte Burrus*, 136 U.S. 586, 593-594 (1890).

*Simms* (1899)

In 1894 the courts of the territory of Arizona denied a husband a divorce, and ordered the husband to pay \$150/month to the wife as alimony pendente lite plus \$750 of the wife's attorney's fees, for a total amount of \$5250. The \$5250 due, minus a payment of \$250 by the husband, was equal to the minimum threshold for the U.S. Supreme Court to have appellate jurisdiction. *Simms v. Simms*, 175 U.S. 162 (1899) was an appeal from the courts of the territory of Arizona, before Arizona became a state.

Commenting on *Barber*, the Court in *Simms* said:

It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the states of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state, and not to the laws of the United States. *Re Burrus*, 136 U. S. 586, 593, 594, 34 L. ed. 500, 503, 10 Sup. Ct. Rep. 850.

But those considerations have no application to the jurisdiction of the courts of a territory, or to the appellate jurisdiction of this court over those courts. In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory. [citations omitted]

*Simms v. Simms*, 175 U.S. 162, 167-68 (1899), part of first sentence quoted with approval in *Ankenbrandt v. Richards*, 504 U.S. 689, 702 (1992).

The U.S. Supreme Court declined jurisdiction over the matter of the divorce decree, because such a decree did not satisfy the minimum amount of money in the jurisdiction statute.

So far as the question of divorce was concerned, the matter in controversy was the continuance or the dissolution of the status or relation of marriage between the parties, and the decree cannot be reviewed on this appeal, both because that was a matter the value of which could not be estimated in money, and because the refusal of the divorce involved no matter of law, but mere questions of fact, depending on the evidence, and which this court is not authorized to reexamine. *Young v. Amy*, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802. *Simms v. Simms*, 175 U.S. 162, 168-169 (1899).

*De La Rama* (1906)

*De La Rama v. De La Rama*, 201 U.S. 303 (1906) was the appeal to the U.S. Supreme Court of a divorce case from courts in Philippine Islands, which were then a territory of the USA.

The opinion of the U.S. Supreme Court begins with the following words:

An important question of jurisdiction is presented by the record in this case. It has been a long-established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of the fact that the husband and wife cannot usually be citizens of different states so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value. *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, and the analogous cases of *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; *Durham v. Seymour*, 161 U. S. 235, 40 L. ed. 682, 16 Sup. Ct. Rep. 452; and *Perrine v. Slack*, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79. But the general rule above stated has no application to the jurisdiction of the territorial courts, or of the appellate jurisdiction of this court over those courts.

*De La Rama v. De La Rama*, 201 U.S. 303, 307-308 (1906), part quoted with approval in *Ankenbrandt v. Richards*, 504 U.S. 689, 696 (1992).

Back in the year 1858, when *Barber* was decided, married women in the USA had few legal rights. Upon marriage, the legal identity of the wife merged with the husband, and the husband had all of the legal rights.<sup>6</sup> When the wife wanted to sue for divorce, she — like a child — had to find a “next friend” to sue on her behalf. And, most importantly for diversity jurisdiction of federal courts, the domicile of the wife was identical to the domicile of the husband, so, as a matter of law, the husband and wife could *not* have diversity of citizenship that is required for jurisdiction of federal courts on matters of state law.

Incidentally, the U.S. Supreme Court heard a similar divorce case from the Philippines only five months earlier. *De Villanueva v. Villanueva*, 239 U.S. 293 (1915). This earlier case seems to have been overlooked by subsequent courts.

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<sup>6</sup> See, e.g., Ronald B. Standler, *Prenuptial and Postnuptial Contract Law in the USA*, <http://www.rbs2.com/dcontract.pdf> (August 2003), citing old legal cliché that “the husband and wife are one, the one is the husband.”

*Popovici (1930)*

Popovici was the Vice-Consul of Roumania and a citizen of that country, stationed and residing at Cleveland, Ohio. He married a resident of Ohio, who later sued him for divorce. The Wife first sued in U.S. District Court, which declined to hear the case, after citing the U.S. Supreme Court's decisions in *Barber*, *Burrus*, *Simms*, and *De La Rama*.

True it is that none of these cases involve a consideration of the case where the divorce action is against the consul of a foreign country, nevertheless it cannot be said that this positive language announced in successive cases by the Supreme Court is only to be decisive of the particular case under consideration.

It seems to me that these positive statements definitely establish that the courts of the United States will under no circumstances take jurisdiction of a suit for divorce or for alimony as an incident to a divorce proceeding. Rose, Federal Jurisdiction and Procedure (2d Ed.) Sec. 166.

....

If the question were presented in the absence of such positive declarations by the Supreme Court of the United States, and were one of first impression, I would be inclined to the view that the case comes within the original jurisdiction of this court; but it would be presumptuous for an inferior court to announce a conclusion adverse to that clearly stated by the Supreme Court on several occasions, on the ground that the high court opinion was dicta because not necessary to a decision of the question before it, or that it was not supported by adequate legal reasons.

These declarations are in unequivocal language and make no exception. It will be presumed that the Supreme Court had in mind and appreciated the full extent of its constitutional and statutory jurisdiction.

The motion to dismiss the petition for divorce and alimony will therefore be sustained. *Popovici v. Popovici*, 30 F.2d 185, 185-186 (N.D. Ohio 1927).

The Wife then sued in an Ohio state court for divorce. The Husband applied to the Supreme Court of Ohio for a writ of prohibition to stop the divorce litigation, because the U.S. Constitution gives federal courts exclusive jurisdiction of cases involving ambassadors and consuls. The Ohio Supreme Court denied the writ:

It may be doubted whether Congress would have the power to confer upon the federal courts exclusive jurisdiction, or any jurisdiction, over causes in which the domestic relations are involved. It has been definitely and repeatedly decided by the federal courts that under existing legislation those courts may not entertain jurisdiction over causes affecting the domestic relations. The earliest declaration upon that subject is found in *Barber v. Barber*, 21 How. (62 U. S.) 582, 16 L. Ed. 226:

'This court disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to a divorce a vinculo, or to one from bed and board.' That case was decided in 1858. .... The same doctrine was applied in the case of *In re Burrus*, 136 U. S. 586, 10 S. Ct. 850, 34 L. Ed. 500, in which a writ of habeas corpus was applied for to restore a son to the custody of his father, unlawfully detained by his

grandparents. Mr. Justice Miller declared in the opinion (136 U. S. at page 593, 10 S. Ct. 853):

'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.'

*State ex rel. Popovici v. Agler*, 164 N.E. 524, 525 (Ohio 1928).

The Ohio Supreme Court then discussed *Simms* and *De La Rama*, and concluded:

If any further citation of authority is necessary to be shown to establish the principle that the federal courts will not entertain jurisdiction of divorce and alimony cases, that authority may be found in the experience of Helen Popovici. She brought her action in the District Court of the United States for the Northern District of Ohio, and a motion to dismiss was filed by relator in this case, and after full consideration, and rendering an elaborate opinion [*Popovici v. Popovici*, 30 F.2d 185] the court dismissed the petition on the ground that it had no jurisdiction over an action for divorce and alimony. It would seem, therefore, that if the state courts cannot entertain jurisdiction of this cause Mrs. Popovici has one of two alternatives, either to continue to occupy the status of a deserted wife, with the attendant obligation of rearing, supporting, and educating her infant child, or to go to Roumania and invoke the jurisdiction of the courts of that kingdom to obtain a legal separation, and support for herself and child. The Federal Constitution did not definitely and in terms give to the federal courts exclusive jurisdiction over all controversies in which a foreign representative is a party. It provided that the jurisdiction of the federal courts should extend to such causes, and further that the Supreme Court of the United States should have original jurisdiction.

In neither event was it declared to be exclusive.

*State ex rel. Popovici v. Agler*, 164 N.E. 524, 526 (Ohio 1928).

The Ohio Supreme Court then considered the issue of whether the Consul from a foreign country was entitled to have his case heard in federal court.

Since March 3, 1911, it is unquestioned that the jurisdiction of the federal courts is exclusive of the jurisdiction of state courts in all causes affecting consuls, in so far as the federal courts themselves have jurisdiction over the subject-matter of the controversies.

Our sole inquiry in the instant case is whether the state courts are excluded from jurisdiction over those controversies affecting ambassadors, other public ministers and consuls, where the federal courts disclaim jurisdiction entirely. It is at least significant that Congress, having the right to assert exclusive jurisdiction in the federal courts, did not exercise that right for a period of 37 years. It is equally significant that Congress has not at any time established a special court, or given jurisdiction to the District Courts over causes involving domestic relations affecting foreign ministers and consuls. Whether this omission has been due to a willingness to leave all matters affecting the domestic relations to the state courts, or whether the omission is for the reason that such jurisdiction would be an unconstitutional usurpation of power, we need not at this time inquire. It is sufficient to say that at this time Mrs. Popovici is wholly without redress, unless her cause can be heard and decided by the courts of this state. The constitutional provision had its origin in the law of nations, and, while its wisdom is undoubted, there must necessarily be some limitations upon its application. That there are certain well-defined limitations and exceptions is fully established by the authorities. Unfortunately no cause has ever come before the federal courts involving the right of a state court to hear and decide a suit for divorce and alimony affecting a foreign consul.

In the instant case it must be borne in mind that an alien took up his abode in the city of Canton, contracted marriage with a resident of Ohio, with the incidental obligations which that marriage involved, including support of wife and support, maintenance, and education of a child. The wife and child are not only the beneficiaries of those obligations, but by reason of

the breach of the marriage contract the wife is entitled to the restoration of her former status, so far as lies in the power of the courts to grant. The relator, having invoked the laws of Ohio to contract a valid marriage, should not lightly be heard to deny the right of the other party to the contract to invoke the remedial laws of the same state to compel the performance of the obligations of that contract. If relator is entitled to immunity from a divorce suit in the state courts, the privilege is one which belongs to his home government, and is one which he cannot waive, and, even though he should neglect to assert it in the first instance, he would not be estopped from asserting it at any time before the litigation is ended.

....

The general intent of Congress upon this entire subject is manifested by what is done and omitted, rather than by what is said. By its omission to make any provision for the trial of divorce and alimony suits against foreign consuls in the federal courts, it has manifested an intent and purpose to leave such controversies to the courts of the states.

*State ex rel. Popovici v. Agler*, 164 N.E. 524, 526-527 (Ohio 1928).

The U.S. Supreme Court agreed to hear the case on appeal, and Justice Oliver Wendell Holmes, one of the most famous justices in the first half of the Twentieth Century, wrote a terse opinion that affirmed the Ohio Supreme Court's decision.

It has been understood that, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States,' *Ex parte Burrus*, 136 U. S. 586, 583, 594, 10 S. Ct. 850, 853, 34 L. Ed. 500, and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied. *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226. *Simms v. Simms*, 175 U. S. 162, 167, 20 S. Ct. 58, 44 L. Ed. 115; *De La Rama v. De La Rama*, 201 U. S. 303, 307, 26 S. Ct. 485, 50 L. Ed. 765. A suit for divorce between the present parties brought in the District Court of the United States was dismissed. *Popovici v. Popovici* 30 F.2d 185.

The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 18 S. Ct. 685, 42 L. Ed. 1126. The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States. Therefore they do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. 'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.

It is true that there may be objections of policy to one of our States intermeddling with the domestic relations of an official and subject of a foreign power that conceivably might regard jurisdiction as determined by nationality and not by domicile. But on the other hand if, as seems likely, the wife was an American citizen, probably she remained one notwithstanding her marriage. Act Sept. 22, 1922, c. 411, § 3, 42 Stat. 1021, 1022 (8 USCA § 9). Her position certainly is not less to be considered than her husband's, and at all events these considerations are not for us.

In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go.

*State of Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930)

## Lower Federal Courts 1968-1982

During the years 1968-1982, several judges in U.S. District Courts and U.S. Courts of Appeals wrote thorough summaries of the history of the domestic relations exception to diversity jurisdiction in federal courts, with some critical commentary. However, after the U.S. Supreme Court's decision in *Ankenbrandt* in 1992, these decisions of the lower federal courts are only of historical interest.

To shorten this essay, I have put the discussion of these lower court cases to a separate document at <http://www.rbs2.com/dfederal2.pdf>. There, I have quoted longer passages from these lower federal court cases than from the above-mentioned U.S. Supreme Court cases, because I believe that the analysis in some of these cases is much better than what the U.S. Supreme Court has provided. The cases quoted and discussed there are:

- *Spindel v. Spindel*, 283 F.Supp. 797 (E.D.N.Y. 1968);
- *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968);
- *Williamson v. Williamson*, 306 F.Supp. 516 (W.D.Okla. 1969);
- *Magaziner v. Montemuro*, 468 F.2d 782 (3rd Cir. 1972);
- *Phillips, Nizer, Benjamin, Krim and Ballon v. Rosenstiel*, 490 F.2d 509 (2nd Cir. 1973);
- *Armstrong v. Armstrong*, 508 F.2d 348 (1st Cir. 1974);
- *Solomon v. Solomon*, 516 F.2d 1018 (3rd Cir. 1975);
- *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212 (6th Cir. 1981);
- *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982);
- *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982).

Incidentally, citations in these cases show that the phrase “domestic relations exception” to federal jurisdiction was apparently created by Prof. Charles Alan Wright in the first edition of his book *HANDBOOK OF THE LAW OF FEDERAL COURTS*, § 25, which was published in 1963.

*Ankenbrandt v. Richards* (1992)

Despite a clear doctrine for more than 130 years of denying subject matter jurisdiction in federal courts to granting divorces and to granting/modifying alimony, the U.S. Supreme Court never explained *why* it excluded divorces and alimony. Then, in 1992, the Court finally gave an explanation, which was based on the diversity jurisdiction statute.

The U.S. Supreme Court discussed *Barber*, where the domestic relations exception was supposedly first articulated, more than 130 years earlier.

The statements disclaiming jurisdiction over divorce and alimony decree suits, though technically dicta, formed the basis for excluding "domestic relations" cases from the jurisdiction of the lower federal courts, a jurisdictional limitation those courts have recognized ever since. The *Barber* Court, however, cited no authority and did not discuss the foundation for its announcement. Since that time, the Court has dealt only occasionally with the domestic relations limitation on federal-court jurisdiction, and it has never addressed the basis for such a limitation. Because we are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction.

*Ankenbrandt v. Richards*, 504 U.S. 689, 694-695 (1992).

The Court then reviewed its earlier decision in *Barber* and briefly mentioned *De la Rama* and *Simms*. After a few pages of historical analysis, the Court gasps:

We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." As the court in *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 514 (CA2 1973), observed: "More than a century has elapsed since the *Barber* dictum without any intimation of Congressional dissatisfaction.... Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant." Considerations of *stare decisis* have particular strength in this context, where "the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989).

*Ankenbrandt*, 504 U.S. at 700.

Although *In re Burrus* technically did not involve a construction of the diversity statute, as we understand *Barber* to have done, its statement that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," *id.*, at 593-594, has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction. See, e.g., *Bennett v. Bennett*, 221 U.S. App.D.C. 90, 93, 682 F.2d 1039, 1042 (1982); *Solomon v. Solomon*, 516 F.2d 1018, 1025 (CA3 1975); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (CA2 1967); see generally 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* 3609, pp. 477-479, nn. 28-32 (1984). This application is consistent with *Barber*'s directive to limit federal courts' exercise of diversity jurisdiction over suits for divorce and alimony decrees. See *Barber*, 21 How., at 584. [FN6] We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to

issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.

FN6. The better reasoned views among the Courts of Appeals have similarly stated the domestic relations exception as narrowly confined to suits for divorce, alimony, or child custody decrees. See, e.g., *McIntyre v. McIntyre*, 771 F.2d, at 1317 (opinion of Kennedy, J.) ("[T]he exception to jurisdiction arises in those cases where a federal court is asked to grant a decree of divorce or annulment, or to grant custody or fix payments for support"); *Lloyd v. Loeffler*, 694 F.2d, at 492 (same); *Bennett v. Bennett*, 221 U.S.App.D.C., at 93, 682 F.2d, at 1042 (same); *Cole v. Cole*, 633 F.2d, at 1087 (same).

Not only is our conclusion rooted in respect for this long-held understanding, it is also supported by sound policy considerations. Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees. See *Lloyd v. Loeffler*, 694 F.2d 489, 492 (CA7 1982).

*Ankenbrandt*, 504 U.S. at 703-704.

The public policy considerations mentioned in the preceding quotation from *Ankenbrandt* are, I believe, mostly propaganda. Social workers are *not* needed to "monitor compliance" with either divorce decrees or alimony payments. The Court does not specify what kind of "conflicts over divorce, alimony" need "the close association with state and local government organizations". Below, beginning at page 19, I argue that the "special proficiency" of family courts operated by the governments of the states is actually an overcrowded legal disaster that is ripe for *unfairness* and *injustice*. Further, cases in family law are *not* more intellectually complex than patent infringement cases that are exclusively heard in federal courts, and *not* more intellectually complex than medical malpractice and products liability cases that are routinely heard in federal courts. In short, the Court uses some reasons that might be valid *only* for child custody cases (e.g., *Lloyd v. Loeffler*) to justify the exception to jurisdiction for divorce and alimony cases.

The historical analysis in *Ankenbrandt* is sketchy and far from reliable. The Court uses phrases like "it is logical to presume that the Court", "it may be inferred fairly", and "we presume Congress did so". However, the Court fails to cite any solid evidence to support what is really the Justices' guesswork. One particular assumption by the Court is worth quoting, because it is central to the Court's explanation of the reason for the domestic relations exception.

When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic

relations matters. With respect to the 1948 amendment, the Court has previously stated that "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." [citations omitted] *Ankenbrandt*, 504 U.S. at 700.

Justice Blackmun concurred with the result in *Ankenbrandt*, but he did not agree with the majority's explanation of the diversity statute as the reason for declining subject matter jurisdiction. Justice Blackmun said:

I agree with the Court that the District Court had jurisdiction over petitioner's claims in tort. Moreover, I agree that the federal courts should not entertain claims for divorce, alimony, and child custody. I am unable to agree, however, that the diversity statute contains any "exception" for domestic relations matters. The Court goes to remarkable lengths to craft an exception that is simply not in the statute and is not supported by the case law. In my view, the longstanding, unbroken practice of the federal courts in refusing to hear domestic relations cases is precedent at most for continued discretionary abstention rather than mandatory limits on federal jurisdiction. For these reasons I concur only in the Court's judgment.

*Ankenbrandt*, 504 U.S. at 707 (Blackmun, J. concurring in the judgment).

Justice Blackmun later says:

I have great difficulty with the Court's approach. Starting at the most obvious point, I do not see how a language change that, if anything, expands the jurisdictional scope of the statute can be said to constitute evidence of approval of a prior narrow construction. [footnote omitted] Any inaction on the part of Congress in 1948 in failing expressly to mention domestic relations matters in the diversity statute reflects the fact, as is discussed below, that Congress likely had no idea until the Court's decision today that the diversity statute contained an exception for domestic relations matters.

This leads to my primary concern: the Court's conclusion that Congress understood *Barber* as an interpretation of the diversity statute. *Barber* did not express any intent to construe the diversity statute — clearly, *Barber* "cited no authority and did not discuss the foundation for its announcement" disclaiming jurisdiction over divorce and alimony matters. As the Court puts it, it may only be "inferred" that the basis for declining jurisdiction was the diversity statute. It is inferred not from anything in the *Barber* majority opinion. Rather, it is inferred from the comments of a dissenting Justice and the absence of rebuttal by the *Barber* majority. [footnote omitted] The Court today has a difficult enough time arriving at this unlikely interpretation of the *Barber* decision. I cannot imagine that Congress ever assembled this construction on its own. [citations to page numbers of the majority opinion omitted]

*Ankenbrandt*, 504 U.S. at 708-709 (Blackmun, J. concurring in the judgment).

Finally, Justice Blackmun explains how the Court's decisions in *Simms*, *De La Rama*, and *Popovici* "seriously undermine any inference that *Barber's* recognition of a domestic relations 'exception' traces to a 'common law or equity' limitation of the diversity statute."<sup>7</sup>

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<sup>7</sup> *Ankenbrandt*, 504 U.S. at 709-713 (Blackmun, J. concurring in the judgment).

Justice Blackmun wrote an elegant few sentences that explains what is included within the phrase "domestic relations exception".

"Domestic relations" actions are loosely classifiable into four categories.

- (1) The first, or "core," category involves declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity.
- (2) The second, or "semicore," category involves declarations of rights or obligations arising from status (or former status), *e.g.*, alimony, child support, and division of property.
- (3) The third category consists of secondary suits to enforce declarations of status, rights, or obligations.
- (4) The final, catchall category covers the suits not directly involving status or obligations arising from status but that nonetheless generally relate to domestic relations matters, *e.g.*, tort suits between family or former family members for sexual abuse, battering, or intentional infliction of emotional distress. [numbers in parentheses added for clarity]

*Ankenbrandt*, 504 U.S. at 716 (Blackmun, J. concurring in the judgment).

I believe that the U.S. Supreme Court in *Ankenbrandt* confused two distinctly different issues:

1. Should U.S. District Courts have original jurisdiction in domestic relations cases?  
For example, can a plaintiff file a valid complaint in a U.S. District Court seeking a divorce decree?
  2. Should the U.S. Supreme Court hear appeals from state courts on domestic relations issues?
- The answer to the first question is no, because marriage and divorce are issues of status that is purely state law. I believe the answer to the second question should be yes, although the U.S. Supreme Court appears to say no. However, the U.S. Supreme Court has jurisdiction to consider conflicts between judgments from family courts in two different states in one case, see below, beginning at page 24.

Writing six years after *Ankenbrandt*, a U.S. Court of Appeals said about the Supreme Court's decision in *Ankenbrandt*:

There, the Court (impressed that the doctrine's pedigree, though dubious, was certainly very old; and supposing that the jurisdictional limit had been ratified by Congressional silence) reaffirmed the existence of the doctrine, but gave it narrow scope:

[quotation from *Ankenbrandt* omitted]

*Catz v. Chalker*, 142 F.3d 279, 292 (6th Cir. 1998).

The history is "dubious", because the *Barber* majority gave no reason for the doctrine and subsequent U.S. Supreme Court opinions gave conflicting explanations. The U.S. Supreme Court in *Ankenbrandt* grasped at the idea that the rule "had been ratified by Congressional silence", but there is absolutely no evidence cited in *Ankenbrandt* to show that Congress was aware of, or considered, this antique rule when Congress revised the jurisdictional statute for federal courts. However, five years after *Ankenbrandt*, a dissenting opinion of the U.S. Supreme Court noted that Congress had finally indirectly approved of the domestic relations exception to federal court jurisdiction:

In enacting the Violence Against Women Act of 1994, 108 Stat. 1916, 42 U.S.C. § 13931 *et seq.*, Congress reinforced *Ankenbrandt* by providing expressly that 28 U.S.C. § 1367 shall not be construed, by reason of a claim arising under the Act, "to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."

42 U.S.C. § 13981(e)(4).

*City of Chicago v. International College of Surgeons*, 522 U.S. 156, 190, n. 6 (1997) (Ginsberg, J., dissenting).

### Reasons for Exception

Instead of a piecemeal discussion of the reasons for the domestic relations exception to diversity jurisdiction in federal courts in the above recitation of the history of this exception, I have collected all of the various alleged reasons in this section, together with my critical comments.

1. Divorce, alimony, and child custody are purely concepts of state law. See *Burrus* and *Popovici*, above. The federal government, including federal courts, must not intrude on the rights of the states. In the particular situation of divorce, because only states<sup>8</sup> can issue a marriage license, by symmetry, only states (*not* the federal government) can issue a divorce decree. However, federal courts might decide the *validity* of a divorce decree issued by a state, territory, or foreign nation. Despite the simplicity and plausibility of this reason, *Ankenbrandt* did not choose this reason.
2. The U.S. diversity jurisdiction statute prior to the year 1948 said that federal courts had jurisdiction of "all suits of a civil nature at common law or in equity". The dissenting justices of the U.S. Supreme Court in *Barber* noted that divorce was granted by ecclesiastical courts in England during the 1700s, and was part of neither the civil law courts nor the equity courts. *Ankenbrandt* speculated that this is the historical reason why federal courts are barred from considering divorce cases. Whatever the merits of that argument,<sup>9</sup> it seems additionally irrelevant after the revision of that statute in the year 1948 to give subject matter jurisdiction to "all civil actions" involving parties from diverse states in which the amount in controversy exceeds some minimum amount of money. However, there was no explicit expression by

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<sup>8</sup> The validity of this sentence is restricted to people residing within the fifty states of the USA. The law is different for territories of the USA and for the District of Columbia.

<sup>9</sup> I believe this historical argument is irrelevant to the consideration of divorce in the USA, because "the concept of secular divorce as we know it did not exist in England ... church courts would only grant separation decrees (divorce a mensa et thoro)." *Spindel v. Spindel*, 283 F.Supp. 797, 803 (E.D.N.Y 1968) (Judge Weinstein's through analysis). Furthermore, ecclesiastical courts have *not* been recognized by either state or federal governments in the USA since the First Amendment of the U.S. Constitution prohibits government involvement with religion, so this role of ecclesiastical courts in England must be fulfilled by civil courts in the USA.

Congress in 1948 “to expand or contract the jurisdictional scope of the federal courts”.<sup>10</sup>

3. Respect for an old rule that had persisted for 133 years at the time *Ankenbrandt* was decided by the U.S. Supreme Court. See *Ankenbrandt*.
4. As discussed above in connection with the *De La Rama* case, during the mid-1800s, a married woman, as a matter of law, had the same domicile as her husband, so there could not possibly be diversity of citizenship that was necessary for jurisdiction of a federal court in a civil case. While this reason *might* explain the Court’s decision in *Barber*, this reason has absolutely no valid application today, so, this reason can not continue to justify the domestic relations exception in modern practice.
5. *Barry* held that a child custody decree had no monetary value, and *Simms* held that a divorce decree has no monetary value, therefore cases involving these decrees were excluded from diversity jurisdiction for failure to satisfy the minimum threshold amount of money for jurisdiction under a federal statute. I think this is a strange reason, as federal courts in diversity cases issued injunctions, which also have no monetary value, as the only remedy. Furthermore, just because a monetary value can not be placed on a decree does not make that decree *insignificant* or worthless.

I suggest that the second and third reasons above are actually a convenient excuse for modern federal courts to avoid the quagmire of domestic relations law, as suggested in the sixth, seventh, and eighth reasons.

domestic relations cases  
are too much work

6. The modification of alimony, child support payments, and child custody in each case is a continuing problem that federal courts wish to avoid.

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<sup>10</sup> *Spindel v. Spindel*, 283 F.Supp. 797, 801 (E.D.N.Y. 1968); *Phillips, Nizer, Benjamin, Krim and Ballon v. Rosenstiel*, 490 F.2d 509, 514 (2nd Cir. 1973), accepted by the majority opinion of the U.S. Supreme Court in *Ankenbrandt*, 504 U.S. at 700-701 (1992).

7. Although very rarely explicitly said in opinions of federal courts, federal judges are afraid of opening the “floodgates of litigation” if federal judges were to hear domestic relations cases.<sup>11</sup> There are many tens of thousands of grieved litigants in divorce cases in the USA every year.
8. As mentioned in the following section of this essay, divorce law in the USA is based on anachronistic and archaic concepts about the role of men and women, and there are a number of highly controversial social issues in divorce law. Federal judges may be afraid to touch such political “hot potatoes”, because, no matter what the judge decides, many people will be angry.

Whatever the real reason for the domestic relations exception to federal jurisdiction, it is clear that the reason is neither in the U.S. Constitution nor in the federal statutes.<sup>12</sup> However, the persistence of this exception for more than 140 years in the federal common law apparently makes it a valid rule. While the U.S. Supreme Court has the power and authority to make federal common law, it would be nice if the Court would give us a plausible reason for its rules.

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<sup>11</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996) (In a case involving termination of a mother’s parental rights: “Respondents and the dissenters urge that we will open floodgates if we do not rigidly restrict *Griffin* to cases typed “criminal.” But we have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody.” [citations omitted]); *U.S. v. Bailey*, 115 F.3d 1222, 1226 (5th Cir. 1997) (“... the diversity of residence between parent and child alone is insufficient to bestow upon Congress the power to regulate under the Commerce Clause. If we were to so hold, we would unwittingly open the floodgates to allowing Congress to regulate any and all activity it so desired, even those activities traditionally reserved for state regulation, so long as opposing parties are diverse.”); *Thrower v. Cox*, 425 F.Supp. 570, 573 (D.S.C. 1976) (“Today there are additional policy reasons for the federal courts to leave domestic relations law to the state whenever possible. Domestic relations matters, such as divorce and child custody, are very common types of litigation which, even with the diversity requirements, would greatly increase the workload of an already overburdened court system. The nature of domestic relations law is such that this is not merely a recapitulation of the old “flood gates” argument. In granting alimony and deciding matters of child custody, the court must retain jurisdiction and frequently reconsider the case to determine if changed circumstances warrant a change in the original decree. This requires constant supervision of the court. Additionally, in order to perform the job adequately, state family courts out of necessity frequently work in close conjunction with social welfare agencies which assist them in carrying out their functions. Such assistance is not presently available in the federal system, nor do we need to create an additional bureaucracy to needlessly duplicate these state services. Perhaps the most convincing evidence that the federal courts should refuse jurisdiction in this area is the state’s own treatment of this type of litigation. The field of domestic relations is so vexatious, time-consuming and specialized that virtually every state in the Union has established a separate system of family courts to prevent their own trial courts from being overburdened. As it has done consistently in the past, the federal court system should allow them that dubious honor exclusively.”), cited with approval in *Cole v. Cole*, 633 F.2d 1083, 1088 (4th Cir. 1980).

<sup>12</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 694-696 (1992).

## Should S.Ct. hear divorce cases?

The truth is that divorce is a common phenomenon in the USA. Most states have created separate trial courts to handle divorces, alimony, and child custody issues. These courts are swamped with cases and judges dispose of the cases on an assembly line basis, with little consideration in each case for either any unusual issue or novel argument. The emphasis on quickly disposing of a case, instead of carefully considering it, is a necessity given the large number of cases per judge and the limited amount of time that a judge can spend on each case. In my opinion, such an assembly line situation is an ideal breeding ground for *unfairness* and *injustice*, as well as infringement of civil liberties that are supposedly protected by state and federal constitutions. Furthermore, much of current divorce law is based on archaic and anachronistic concepts about the role of men and women, which adds more civil liberties issues that should be carefully considered. State appellate courts are *inhospitable* places to get state statutes, or the common law made by state family courts, declared unconstitutional, which makes appellate jurisdiction of the U.S. Supreme Court desirable, to protect individuals against the abuse of power by state governments.<sup>13</sup>

These anachronistic concepts in divorce law produce many controversial social issues. While it is outside the scope of this essay to discuss such social issues, these controversial social issues include:

1. Why does the wife always receive approximately half of the marital assets at divorce, when she typically contributed much less than half (sometimes less than 10%) to the acquisition of those assets?
2. Why award alimony (or alimony pendente lite) to an ex-wife who is physically able to earn an income?
3. Why order a husband to pay for his wife's attorney to attack the husband?<sup>14</sup>
4. Why do judges in divorce courts ignore clearly written statutes and state appellate court decisions?<sup>15</sup>

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<sup>13</sup> The U.S. Supreme Court often reverses decisions of state appellate courts. If state appellate courts use *unconstitutional* law in criminal and tort cases, then those state appellate courts probably also use *unconstitutional* law in divorce cases.

<sup>14</sup> For citations to some court cases about the conventional view of divorce courts in awarding attorney's fees, and a discussion of how a carefully drafted prenuptial contract might help avoid an expensive, litigated divorce, see: Ronald B. Standler, *Some Provocative Suggestions for Drafting Prenuptial Contracts in the USA*, (April 2004) <http://www.rbs2.com/dcontract2.pdf> .

<sup>15</sup> See, e.g., the section "erroneous 50/50 presumption in Pennsylvania" in Ronald B. Standler, *Reimbursement of Educational Expenses at Divorce in the USA*, (Sep 2003) [http://www.rbs2.com/ed\\_reimb.pdf](http://www.rbs2.com/ed_reimb.pdf) .

5. Is it a denial of due process for a judge to simply invent numbers in a division of marital property at divorce (e.g., “the husband is entitled to 45%, and the wife to 55%, of the marital property”), without any calculations to support those numbers?<sup>16</sup>
6. Is it a denial of equal protection of laws for courts to sometimes require divorced parent(s) to pay for their child(ren)’s college education, but never require nondivorced parents to pay such expenses?<sup>17</sup>
7. Is it a denial of due process for a judge to make decisions about division of marital assets and alimony on the basis of trial for only 1 to 3 days duration, when tort and contract cases involving similar amounts of money routinely get 7 to 15 days of trial time? In other words, should states hire more family court judges, so that the judges can make a fair decision based on adequate presentation of facts and issues, without hastily considering a case and without ignoring novel arguments?
8. Is it proper for a paternalistic judge to refuse to enforce a clearly written prenuptial or postnuptial contract that was signed by the parties, simply because the judge believes it was a bad bargain for one of the parties?

No matter what position a judge takes on such social issues, some people will be dissatisfied, even angry, with the law. Hence, I suggest the U.S. Supreme Court wants to avoid handling this political “hot potato”. And the state legislatures also want to avoid this political hot potato, so divorce statutes are rarely revised.

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<sup>16</sup> See, e.g., the section “Judges in Divorce Courts Are *Not* Scientists”, in Ronald B. Standler, *Prenuptial and Postnuptial Contract Law in the USA*, (August 2003) <http://www.rbs2.com/dcontract.pdf> .

<sup>17</sup> See, e.g., the section “equal protection” in Ronald B. Standler, *Legal Duty of Parent in USA to Pay for Child’s College Education*, (Aug 2003) [http://www.rbs2.com/son\\_edu.pdf](http://www.rbs2.com/son_edu.pdf) .

### Lower Federal Courts After *Ankenbrandt*

*Ankenbrandt v. Richards* clearly asserts that federal courts have no subject matter jurisdiction over cases involving divorce, alimony, or child custody. The following post-*Ankenbrandt* cases in lower federal courts are particularly significant.

- *Lannan v. Maul*, 979 F.2d 627, 630-31 (8th Cir. 1992);
- *Nwankwo v. Nwankwo*, 1992 WL 474105 (1st Cir. 1992) (Conflicting child custody decrees from courts in New Hampshire and Florida.);
- *Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994);
- *Allen v. Allen*, 48 F.3d 259, 261-262 (7th Cir. 1995);
- *Brown v. District of Columbia*, 1997 WL 235605 (10th Cir. 1997) (Former wife repeatedly attempted to get her 1973 divorce invalidated.);
- *U.S. v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997) (Enforcement of Child Support Recovery Act does *not* implicate domestic relations exception to jurisdiction of federal courts.), *cert. den.*, 522 U.S. 1082 (1998);
- *Catz v. Chalker*, 142 F.3d 279, 292 (6th Cir. 1998);
- *Friedlander v. Friedlander*, 149 F.3d 739 (7th Cir. 1998) (Judge Posner says that federal courts do have jurisdiction over intentional infliction of emotional distress claim arising out of failure to pay alimony.);
- *McLaughlin v. Cotner*, 193 F.3d 410, 413 (6th Cir. 1999) (Alleged breach of separation agreement.);
- *Westover ex rel. Gray v. Durant*, 75 F.Supp.2d 31, 34 (N.D.N.Y. 1999) (Domestic relations exception does *not* apply to determination of paternity.);
- *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103 (10th Cir. 2000) (challenge to Utah adoption law by biological father), *cert. den.*, *sub nom. Johnson v. Adoption Center of Choice*, 537 U.S. 1111 (2003);
- *Dunn v. Cometa*, 238 F.3d 38, 41 (1st Cir. 2001) (But federal courts do have jurisdiction to hear suit by father alleging torts by ex-wife against his child.).

### *Rooker-Feldman Doctrine*

Furthermore, the U.S. District Courts and the U.S. Courts of Appeals do not have appellate jurisdiction over cases tried in state courts.<sup>18</sup> *Schmitt v. Schmitt*, 165 F.Supp.2d 789, 793-97 (N.D.Ill. 2001) (sanctioning husband for filing frivolous complaint), *aff'd*, 324 F.3d 484, 485-86 (7th Cir. 2003). See also:

- *Alpern v. Lieb*, 38 F.3d 933 (7th Cir. 1994);
- *Datka v. Kennedy*, 1995 WL 261119 (7th Cir. 1995);
- *Powell v. Powell*, 80 F.3d 464, 466-67 (11th Cir. 1996);
- *Foroohar v. Supreme Court of State of Illinois*, 1997 WL 661180 (7th Cir. 1997);
- *Read v. Klein*, 1 Fed.Appx. 866, 2001 WL 20818 (10th Cir. 2001);
- *Sosa v. Illinois*, 50 Fed.Appx. 777, 2002 WL 31430296 (7th Cir. 2002) (“No matter how erroneous or unconstitutional the state court judgment may be, the Supreme Court of the United States is the only federal court that could have jurisdiction to review a state court judgment.”);
- *Holland v. New York*, 63 Fed.Appx. 532, 2003 WL 1868483 (2nd Cir. 2003);
- *Evans v. Franklin County Court of Common Pleas, Div. of Domestic Relations*, 66 Fed.Appx. 586, 587, 2003 WL 21259704 (6th Cir. 2003);
- *Partridge v. State of Ohio*, 79 Fed.Appx. 844, 2003 WL 22474620 (6th Cir. 2003) (Father asserted federal civil rights violation in child custody case.).

In doing legal research for this essay, I found a number of federal court opinions in Westlaw where a grieved party in a divorce case in state court then sued *pro se* in federal courts, typically alleging that their ex-spouse, their ex-spouse’s attorney, the judge(s) in state court, and sometimes also the state attorney general or the state bar association had all conspired to deny the grieved party various civil rights. These cases are tersely dismissed in federal court, because of lack of subject matter jurisdiction according to the *Rooker-Feldman* Doctrine. Furthermore, such a plaintiff in federal court is also often sanctioned for filing a frivolous complaint. The following paragraphs are quoted from a leading opinion of U.S. Court of Appeals in Illinois.

In May 2001, already 15 months after Mrs. Schmitt filed for divorce, Mr. Schmitt filed a federal claim under 42 U.S.C. § 1983, arguing that the Illinois state courts infringed upon his due process rights. The district court granted Mrs. Schmitt's motion to dismiss for lack of subject-matter jurisdiction, finding support for its decision in both the substantiality doctrine

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<sup>18</sup> *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (“If the decision [of a state court] was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [citations omitted] Under the legislation of Congress, no court of the United States other than this [U.S. Supreme] court could entertain a proceeding to reverse or modify the judgment for errors of that character. [citation omitted]”); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) (“... a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this [U.S. Supreme] Court.”).

and the *Rooker-Feldman* doctrine. The district court also ordered Mr. Schmitt, CBC Bricks, and his attorneys to show cause why they did not deserve to have Rule 11 sanctions imposed on them. After denying their motion for reconsideration, the district court sanctioned Mr. Schmitt and his attorneys under Rule 11. The court also ordered Mr. Schmitt and CBC to pay Mrs. Schmitt's attorneys' fees and costs. Mr. Schmitt, his attorneys, and CBC Bricks appeal, asking us to reverse both the district court's dismissal of their suit and the decision to impose sanctions.

Although the district court offered both the substantiality doctrine and the *Rooker-Feldman* doctrine to support the dismissal, we need choose only one on which to affirm. And since this case goes to the heart of the *Rooker-Feldman* doctrine, *see Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 509 (7th Cir. 1996) ("At its core, the doctrine is a recognition of the principle that the inferior federal courts generally do not have the power to exercise appellate review over state court decisions."), that's the route we'll take. In *Rooker v. Fidelity Trust Co.*, the Supreme Court held:

If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923) (citations omitted). We have interpreted *Rooker-Feldman* to ask "whether the federal plaintiff seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim. Put another way, if the injury which the federal plaintiff alleges resulted from the state court judgment itself, then *Rooker-Feldman* controls, and the lower federal courts lack jurisdiction over the claim. It does not matter that the state court judgment might be erroneous or even unconstitutional." *Kamilewicz*, 92 F.3d at 510 (citations omitted). Our cases reflect *Rooker's* basic principle that once a case is litigated in state court, a federal district court does not have jurisdiction to review it. *See Garry v. Geils*, 82 F.3d 1362, 1366 (7th Cir. 1996) ("Thus *Rooker* and *Feldman* both proclaimed that if a federal plaintiff claims injury at the hands of a state court, due to its decision in a civil case, federal district courts have no jurisdiction to hear the case; and the only appeal is to the Supreme Court after a final judgment by the highest state court."); *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993) (Appellant "may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." (quoting *Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984), *cert. denied*, 474 U.S. 968, 106 S.Ct. 333, 88 L.Ed.2d 317 (1985))).

*Schmitt v. Schmitt*, 324 F.3d 484, 485-86 (7th Cir. 2003).

The entire terse opinion in another federal case says:

Reza Foroohar appeals the district court's *sua sponte* dismissal of his complaint. We affirm.

Foroohar's appellate brief, like his complaint in the district court, is a morass of claims that all of the judges involved in hearing his lengthy divorce-related proceedings in the Circuit Court of Cook County, as well as his ex-wife's lawyers, the Appellate Court of Illinois, the Supreme Court of the State of Illinois, the Judicial Inquiry Board and the Attorney Registration and Disciplinary Commission, were biased against him and conspired to deprive

him of a fair hearing. The defendants assert that federal review of these claims is barred by the *Rooker-Feldman* doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983). The doctrine recognizes that federal district and appellate courts have no subject matter jurisdiction to review the civil judgments of state courts.

The *Rooker-Feldman* doctrine applies here and prevents our consideration of Foroohar's claims. Although Foroohar's complaint alleges due process claims, those claims are inextricably intertwined with the state court orders related to his divorce proceedings. Foroohar's claims of bias and procedural unfairness stem from his belief that the judges must have been biased because they issued orders to which he objects. Such claims must be dismissed for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. See *Wright v. Tackett*, 39 F.3d 155 (7th Cir. 1994). The judgment of the district court is AFFIRMED.

*Foroohar v. Supreme Court of State of Illinois*, 1997 WL 661180 (7th Cir. 1997).

### **S.Ct. rarely hears family law cases**

On rare occasions, the U.S. Supreme Court grants a certiorari petition and considers a case incidentally involving marriage, divorce, or alimony. An annotated list of cases heard by the U.S. Supreme Court since the year 1940 that involve marriage, divorce, or alimony includes the following. (The following list may not be complete, but it is true that there are only a few cases during the past sixty years.)

- *Williams v. State of North Carolina*, 317 U.S. 287 (1942) (North Carolina must give full faith and credit to Nevada divorce, where one party was domiciled in Nevada.); *Williams v. State of North Carolina*, 325 U.S. 226 (1945) (However, North Carolina was allowed to challenge the finding of Nevada court that one party was domiciled in Nevada. Held that Nevada divorce was invalid and parties were guilty of bigamous cohabitation.);
- *Barber v. Barber*, 323 U.S. 77 (1944) (alimony order not entitled to "full faith and credit" in Tennessee because it was not a final judgment of the North Carolina court.);
- *Esenwein v. Com. of Pennsylvania ex rel. Esenwein*, 325 U.S. 279 (1945) (Pennsylvania courts not required to give full faith and credit to Nevada divorce, when neither party was domiciled in Nevada.);
- *Griffin v. Griffin*, 327 U.S. 220 (1946) (New York state court awarded \$3000/year alimony in 1926, wife got judgment in New York state court for arrears on alimony in 1938, wife later sued husband in U.S. District Court for District of Columbia and was awarded \$25383. S.Ct. reversed.);
- *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (Courts in Massachusetts must accord full faith and credit to divorce granted in Florida, where Wife was a resident of Florida and Husband appeared in Florida court.);
- *Kreiger v. Kreiger*, 334 U.S. 555 (1948) (Alimony arrears case from New York, husband lived in Nevada while wife lived in New York.);

- *Coe v. Coe*, 334 U.S. 378 (1948) (Courts of Massachusetts must accord full faith and credit to a decree of divorce rendered by a court of the State of Nevada, where both Parties appeared in court in Nevada.);
- *Estin v. Estin*, 334 U.S. 541 (1948) (Wife obtained a decree of separation and an award of alimony from a New York state court. Husband then moved to Nevada and obtained a divorce there that did not mention alimony. Nevada court did not have personal jurisdiction over Wife. When Husband stopped paying alimony, Wife sued Husband in New York state court. Held that Nevada divorce extinguished marriage, but not the alimony order. However, still an unresolved question whether Nevada must give full faith and credit to New York's alimony order.);
- *Rice v. Rice*, 336 U.S. 674 (1949) (Husband obtained divorce from Nevada court, which had no personal jurisdiction over Wife, who was a resident of Connecticut. After Husband's death, Wife filed suit in Connecticut to attack validity of Nevada divorce.);
- *Cook v. Cook*, 342 U.S. 126 (1951) (Parties married in Virginia in 1943. Husband discovered that Wife was still married to another man, so Wife went to Florida and obtained a divorce from the other man. Parties were married again in Virginia. Wife got decree of separation and alimony from Hawaii court. Husband then filed litigation in Vermont, arguing that Wife's Florida divorce was invalid, because Wife was then not a resident of Florida. Held that Vermont must *presume* that Wife had domicile in Florida when she obtained divorce there in 1943, unless there are facts that show otherwise.);
- *Sutton v. Leib*, 342 U.S. 402 (1952) (Squabble involving divorce in Illinois that required payment of alimony to wife until she remarried, wife remarried in Nevada, but wife subsequently obtained annulment of Nevada marriage in a New York state court. Wife then sued in federal court in Illinois to enforce payment of alimony from her ex-husband.);
- *May v. Anderson*, 345 U.S. 528 (1953) (A divorce court in Wisconsin awarded custody of children to father, where court had no personal jurisdiction over wife. Held court in Ohio, where wife and children lived, was not required to give full faith and credit to Wisconsin child custody decision.);
- *Armstrong v. Armstrong*, 350 U.S. 568 (1956) (Court in Florida granted divorce but did not award alimony. Florida court had no personal jurisdiction over wife, who lived in Ohio. Wife then sued in Ohio state court and obtained award of alimony. Held that ex-husband owes alimony.);
- *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) (Husband obtained divorce in Nevada court that had no personal jurisdiction over wife. Held that Nevada divorce did not prevent wife from seeking alimony in a New York state court, when wife was domiciled in New York.);
- *Aldrich v. Aldrich*, 378 U.S. 540 (1964) (Final order of Florida court granting alimony was entitled to "full faith and credit" by court in West Virginia.);
- *Simons v. Miami Beach First Nat. Bank*, 381 U.S. 81 (1965) (Parties obtained separation decree in New York state that awarded wife alimony. Husband then moved to Florida and obtained a valid divorce, without Florida court having personal jurisdiction over wife. After husband's death, wife sued in Florida court to take dower under Florida law.);

- *Loving v. Virginia*, 388 U.S. 1 (1967) (Miscegenation statutes are unconstitutional.);
- *Boddie v. Connecticut*, 401 U.S. 371 (1971) (Indigent people have the right to divorce without paying filing fees and other costs to court.);
- *Sosna v. Iowa*, 419 U.S. 393 (1975) (Upheld Iowa statute that required plaintiff to be a resident of Iowa for at least one year before filing for divorce in an Iowa court.);
- *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Held unconstitutional state statute forbidding marriage to people who could not meet their existing child support obligations.);
- *Kulko v. Superior Court of California In and For City and County of San Francisco*, 436 U.S. 84 (1978) (Parties were married in California, but spent their entire married life (1961-72) in New York state. Separation agreement in New York state ordered Husband to pay child support. Wife then moved to California, while Husband remained in New York. Held that California court had no personal jurisdiction over Husband and so California court could not decide child custody issue and could not increase child support amount.);
- *Orr v. Orr*, 440 U.S. 268 (1979) (Alabama's alimony statute, in which only women could be awarded alimony, violated U.S. Constitution's "equal protection of laws" clause.);
- *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604 (1990) (Husband was a New Jersey resident who was personally served with a Divorce Complaint during a visit to California. Held that California court had personal jurisdiction over Husband.);

Notice that many of the above-cited cases involve consideration of whether one state must recognize a divorce decision granted by another state, a controversy that involves the "full faith and credit" clause of the U.S. Constitution, and which is properly before the U.S. Supreme Court only for that reason. These kinds of cases seem to end in the mid-1960s as the U.S. Supreme Court finally explained how to apply the "full faith and credit" clause in each of the various ways that the problem arises in divorce and alimony cases.

There are also a few U.S. Supreme Court cases in which the Court considered the division of retirement pension or life insurance at divorce.<sup>19</sup>

The paucity of divorce or alimony cases accepted by the U.S. Supreme Court since 1940 shows, in my opinion, that the Court avoids such cases. The domestic relations exception to subject matter jurisdiction in diversity cases does *not* apply to cases (e.g., *Orr v. Orr*) that were appealed from a state appellate court and allege a violation of the 14<sup>th</sup> Amendment to the U.S. Constitution. A number of divorce cases have been appealed to the U.S. Supreme Court since 1975, but the Court regularly either denies the writ of certiorari or dismisses the appeal.

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<sup>19</sup> See. e.g., *Wissner v. Wissner*, 338 U.S. 655 (1950); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *McCarty v. McCarty*, 453 U.S. 210 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); *Boggs v. Boggs*, 520 U.S. 833 (1997); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).

For example, see:

*appeal dismissed for want of a substantial federal question:*

- *Rosenbaum v. Rosenbaum*, 475 U.S. 1078 (1986).

*cert. denied:*

- *Milhan v. Milhan*, 421 U.S. 976 (1975);
- *Schulke v. Schulke*, 439 U.S. 861 (1978);
- *Lopp v. Lopp*, 439 U.S. 1116 (1979);
- *Winegard v. Gilvin*, 444 U.S. 951 (1979);
- *Operating Engineers Pension Trust v. Lionberger*, 446 U.S. 951 (1980);
- *Gracey v. Miller*, 446 U.S. 969 (1980);
- *Cullen v. Cullen*, 465 U.S. 1102 (1984);
- *Majcina v. Majcina*, 467 U.S. 1207 (1984);
- *Ramos v. Ramos*, 471 U.S. 1017 (1985);
- *Riggin v. Riggin*, 479 U.S. 1090 (1987);
- *Hadley v. Hadley*, 493 U.S. 892 (1989);
- *Hopkins v. Schaumberg*, 506 U.S. 825 (1992);
- *Weaver v. Weaver*, 520 U.S. 1166 (1997);
- *Boharski v. Boharski*, 522 U.S. 840 (1997);
- *Nik-Khah v. Zandi*, 523 U.S. 1081 (1998);
- *Grams v. Morgenstern*, 535 U.S. 1102 (2002).

So it is an *unanswered* question why the U.S. Supreme Court avoids these divorce cases.

#### S.Ct. does hear child custody/support cases

Unlike the situation with divorce or alimony cases, the U.S. Supreme Court frequently has heard appeals of cases involving child support payments or child custody issues. Because of lack of time, I have searched for Supreme Court cases on child custody only from the year 1975 up to 2 May 2004.

- *Stanton v. Stanton*, 429 U.S. 501 (1977) (Utah statute that emancipated women at age 18 y and men at age 21 y was unconstitutional), *on remand*, 564 P.2d 303 (Utah 1977) (everyone emancipated at age 18 y);
- *Quilloin v. Walcott*, 434 U.S. 246 (1978) (adoption);
- *Caban v. Mohammed*, 441 U.S. 380 (1979) (New York child custody statute violated 14<sup>th</sup> Amendment.);
- *Little v. Streater*, 452 U.S. 1 (1981) (paternity and child support);
- *Santosky v. Kramer*, 455 U.S. 745 (1982) (S.Ct. reverses ruling of New York state court that children were “permanently neglected”, thus terminating natural parents’ rights.);
- *Mills v. Habluetzel*, 456 U.S. 91 (1982) (paternity and child support);
- *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982) (Federal courts refused to decide child custody dispute.);

- *Pickett v. Brown*, 462 U.S. 1 (1983) (paternity and child support);
- *Lehr v. Robertson*, 463 U.S. 248 (1983) (Putative father contests adoption.);
- *Palmore v. Sidoti*, 466 U.S. 429 (1984) (White mother began cohabitating with black man, Florida gave custody of mother's daughter to father, U.S. S.Ct. reversed.);
- *U.S. v. Morton*, 467 U.S. 822 (1984) (State could garnish U.S. Air Force officer's pay for alimony and child support.);
- *Rose v. Rose*, 481 U.S. 619 (1987) (contempt for failure to pay child support, held that state court could order Husband to pay child support from his veterans' disability benefits);
- *Rivera v. Minnich*, 483 U.S. 574 (1987) (paternity case);
- *Thompson v. Thompson*, 484 U.S. 174 (1988) (Federal courts refused to decide which of two conflicting child custody decrees (i.e., from California and Louisiana courts) was valid.);
- *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988) (contempt for failure to pay child support);
- *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (paternity case);
- *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (Mother sued on behalf of her children, alleging abuse of children by her ex-husband.). The jurisdictional issues in this case were discussed above, beginning at page 12.
- *DeBoer by Darrow v. DeBoer*, 509 U.S. 1301 (1993) (West headnote: "Michigan courts were obligated to give effect to Iowa [child custody] proceedings, and neither Iowa, Michigan, or federal law authorized unrelated persons to retain custody of child whose natural parents were not unfit.");
- *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (West headnote: "Mississippi Chancery Court terminated mother's parental rights, and mother appealed. Appeal was thereafter dismissed because of mother's financial inability to comply with Mississippi statutes that required her to pay in advance record preparation fees estimated at \$2,352.36.");
- *Troxel v. Granville*, 530 U.S. 57 (2000) (West headnote: "Paternal grandparents petitioned for visitation with children born out-of-wedlock.").

The fact that the U.S. Supreme Court frequently considers child custody and child support cases, but *not* other kinds of domestic relations cases, seems strange to me. This fact clearly indicates that a misunderstanding of the "domestic relations exception" is *not* the explanation for the Supreme Court's refusal to hear divorce or alimony cases.

federal courts do hear family law cases from territories

When there is no state government (e.g., a territory of the USA or District of Columbia) and the federal courts are the *only* courts, then, obviously, the federal courts need to hear domestic relations cases. See, for example:

- *Maynard v. Hill*, 125 U.S. 190 (1888) (territory of Washington);
- *Simms v. Simms*, 175 U.S. 162 (1899) (divorce in territory of Arizona);
- *De La Rama v. De La Rama*, 201 U.S. 303 (1906) (Philippines);
- *Thompson v. Thompson*, 31 App.D.C. 557, 14 Am. Ann. Cas. 879 (App.D.C. 1908), *aff'd*, 218 U.S. 611 (1910) (battery of wife by husband in District of Columbia); *Thompson v. Thompson*, 35 App.D.C. 14 (App.D.C. 1910), *aff'd*, 226 U.S. 551 (1913) (Husband obtained divorce in Virginia, Wife sued in District of Columbia for alimony);
- *Moncure v. Moncure*, 278 F. 1005 (App.D.C. 1922) (Divorce granted in District of Columbia.)
- *Granville-Smith v. Granville-Smith*, 214 F.2d 820 (3rd Cir. 1954), *aff'd*, 349 U.S. 1 (1955) (Virgin Islands, a territory of the USA, has no authority to grant divorces to nonresidents of VI.).
- *Bottomley v. Bottomley*, 262 F.2d 23 (D.C.Cir. 1958) (appeal of divorce case in District of Columbia)
- *Glidden Co. v. Zdanok*, 370 U.S. 530, 581, n. 54 (1962) (Dicta that residents of the District of Columbia may sue for divorce in federal court.).

The domestic relation exception to subject matter jurisdiction of federal courts *might not* apply in cases involving a foreign citizen.

- *State of Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) (An consul to the U.S.A. could be sued personally for divorce only in state court.);
- *Abdul-Rahman Omar Adra v. Clift*, 195 F.Supp. 857, 865 (D.Md. 1961) (Father was citizen of Lebanon, who was residing in Iran. Father was given legal custody of his daughter by divorce court in Lebanon. Mother was residing in Maryland and had married a man who was a U.S. citizen. Father wanted Mother to surrender daughter to him.)

## Conclusion

In summary, there is neither a constitutional nor a statutory basis for the refusal of federal courts in the USA to accept cases involving either divorce or change in alimony. So, does this lack of basis mean that you can file in a Federal District Court a divorce complaint involving a husband and wife who now live in separate states? Nope! It is now traditional that federal courts do not hear divorce cases, and the rule was accepted again by the U.S. Supreme Court in their 1992 decision in *Ankenbrandt*.

I believe that there are good reasons for federal courts refusing to grant original jurisdiction to domestic relations cases arising from the fifty states, because of an exception to subject matter jurisdiction in diversity cases:

1. granting a *decree* of either divorce or child custody should be forbidden to federal courts because issues of status are purely matters of state law.
2. awarding alimony or child support payments is probably forbidden to federal courts, because the continuing jurisdiction for future modifications would be burdensome to federal courts.
3. supervising child custody is probably forbidden to federal courts, because state courts already have specialized resources, including social workers, to aid them in such matters, and because the continuing jurisdiction for future modifications of custody would be burdensome to federal courts.

However, I believe that the U.S. Supreme Court should accept more domestic relations cases on appeal from state appellate courts, to consider alleged violations of the 14<sup>th</sup> Amendment.

Occasionally in divorce cases there is a serious issue of constitutional law. State courts are *inhospitable* places to get state statutes, or the common law made by state family courts, declared unconstitutional.<sup>20</sup> U.S. District Courts and the U.S. Courts of Appeals do *not* have appellate jurisdiction over cases tried in state courts. And the U.S. Supreme Court very rarely accepts domestic relations cases. So, in this scheme, *if* divorce law violated a right in the U.S. Constitution, then we would have no federal judicial forum willing to consider the complaint. As mentioned briefly above, beginning at page 19, I believe it is likely that serious constitutional (and social) issues in family law are being ignored by courts in the USA. The archaic nature of divorce law in many states, the paternalistic nature of many judges in divorce courts who ignore the law, and the lack of careful consideration given by overloaded judges in divorce courts all contribute to a situation that is ripe for injustice and unfairness.

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<sup>20</sup> The U.S. Supreme Court often reverses decisions of state appellate courts. If state appellate courts use *unconstitutional* law in criminal and tort cases, then those state appellate courts probably also use *unconstitutional* law in divorce cases.

The subject of federal court jurisdiction in marriage and divorce will take on new importance in the context of marriage and divorce of same-gender couples. In the year 2004, San Francisco, Portland Oregon, and the entire state of Massachusetts<sup>21</sup> began marrying same-gender couples. These marriages might not be recognized in other states, which may trigger litigation in federal courts.

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<sup>21</sup> *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).