Lower Federal Court Cases 1968-82 on the Domestic Relations Exception

Keywords

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Introduction

This essay is a part of my essay, *Federal Court Jurisdiction in the USA in Family Law Cases,* which is posted at http://www.rbs2.com/dfederal.pdf , that explains the domestic relations exception to subject matter jurisdiction in federal courts of the U.S.A.

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 v. Richards* in 1992, these decisions of the lower federal courts are only of historical interest. I believe that the analysis in some of these cases is much better than what the U.S. Supreme Court has provided in its opinions on domestic relations cases.

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.*

Spindel (1968)

Wife, a resident of New Mexico, sued her husband, a resident of New York, in the U.S. District Court in New York for a declaratory judgment that his divorce decree was invalid for fraud. Judge Weinstein, in a tour de force of legal scholarship, held that jurisdiction was proper. Any attorney who wants to understand the history of the domestic relations exception should read the entire opinion by Judge Weinstein. Here, I only quote a few paragraphs.

> Beginning in 1859, the Supreme Court has repeatedly stated that the federal courts lack divorce jurisdiction. See *Barber v. Barber,* 62 U.S. (How. 21) 582, 16 L.Ed. 226 (1859); *Simms v. Simms,* 175 U.S. 162, 20 S.Ct. 58, 44 L.Ed. 115 (1899); *De La Rama v. De La Rama,* 201 U.S. 303, 26 S.Ct. 485, 50 L.Ed. 765 (1906); *State of Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489 (1930). See also *In re Burrus,* 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890). Nevertheless, the Court has heard appeals in divorce actions from territorial courts (*Simms v. Simms,* 175 U.S. 162, 20 S.Ct. 58, 44 L.Ed. 115 (1899); *De La Rama v. De La Rama,* 201 U.S. 303, 26 S.Ct. 485, 50 L.Ed. 765 (1906)) and a similar jurisdiction has been exercised by the Court of Appeals for the District of Columbia. E.g., *Bottomley v. Bottomley,* 104 U.S.App.D.C. 311, 262 F.2d 23 (1958); *Moncure v. Moncure,* 51 App.D.C. 292, 278 F. 1005 (1922). See also *Glidden Co. v. Zdanok,* 370 U.S. 530, 581, n. 54, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962).

> If a federal 'constitutional court' (*Glidden Co. v. Zdanok,* 370 U.S. 530, 534, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962)) is competent to enforce policy on matrimonial status when it is laid down by a territorial legislature or Congress, there appears to be no constitutional compulsion to find lack of competence to apply analogous state substantive law in a diversity case. The Supreme Court's disclaimer of divorce jurisdiction in diversity cases thus seems predicated upon a implied limiting construction of the statute granting Federal District Courts jurisdiction in diversity cases.

Spindel v. Spindel, 283 F.Supp. 797, 800 (E.D.N.Y. 1968).

Judge Weinstein *may* have confused the federal court's jurisdiction in diversity cases with jurisdiction of federal courts to hear appeals from territorial courts and the District of Columbia.

Judge Weinstein wrote a terse paragraph with ideas that would later be used by the U.S. Supreme Court in *Ankenbrandt v. Richards,* but without citing Judge Weinstein.

> Although the diversity statute was subsequently amended in 1948 to provide that the diversity jurisdiction shall extend to 'all civil actions' (Act of June 25, 1948, Sec. 1, 62 Stat. 930, 28 U.S.C. § 1332), no substantive change in the limitation imposed by the phrase 'suits * * * at common law or in equity' was intended. The change was made merely 'to conform to Rule 2 of the Federal Rules of Civil Procedure.' Revisor's Notes to 28 U.S.C. § 1332. Readoption and repeated amendment of the diversity statute since 1859 may be considered a sign of Congressional concurrence in the Supreme Court's construction excluding competence to grant divorces.

Spindel v. Spindel, 283 F.Supp. 797, 801 (E.D.N.Y. 1968).

Later in his opinion, Judge Weinstein considered the "power of District Courts in matrimonial cases where divorce is not sought."

> Issues of marital status are not alien to the federal courts. [citations to four cases and one law review article omitted]
>
> Some lower courts have sweepingly applied the Supreme Court's dicta disowning power to grant relief in matrimonial disputes. Thus, it has been asserted that the federal courts are barred from entertaining not only actions involving matrimonial status, but also any case concerned with 'domestic relations,' in the broad sense of the term. See *Albanese v. Richter,* 161 F.2d 688 (3d Cir.), *cert. denied,* 332 U.S. 782, 68 S.Ct. 49, 92 L.Ed. 365 (1947) (suit by illegitimate child against putative father to invalidate agreement allegedly obtained by fraud and for support); *Bercovitch v. Tanburn,* 103 F.Supp. 62 (S.D.N.Y. 1952) (action to recover money for necessaries supplied to wife); *Linscott v. Linscott,* 98 F.Supp. 802 (S.D.Iowa 1951) (action to have property settlement agreement, entered into before divorce, declared void on grounds of fraud and duress); *Garberson v. Garberson,* 82 F.Supp. 706 (N.D.Iowa 1949) (suit for separate maintenance); cf. *Hernstadt v. Hernstadt,* 373 F.2d 316 (2d Cir. 1967) (custody and visitation rights); *Southard v. Southard,* 305 F.2d 730, 731 (2d Cir. 1962) (matrimonial 'actions may not be entertained in federal courts'). See also 1 Barron and Holtzoff, Federal Practice and Procedure, p. 214 (Wright ed. 1960) ("The lower courts have applied the principle more broadly, however, and will not take jurisdiction of cases which can be labelled as 'domestic relations' cases even where only property rights are involved").
>
> This broad interpretation is unwarranted by the Constitution, any statute, holding of the Supreme Court or current jurisdictional theory and we decline to follow it. ....

Spindel v. Spindel, 283 F.Supp. 797, 805-806 (E.D.N.Y. 1968).

Spindel was apparently not appealed, as there is no further opinion for this case in the Westlaw database.

Buechold (1968)

This is a child custody case brought in U.S. District Court in California to establish paternity and to obtain child support payments. The child was the "illegitimate offspring" of a father (Ortiz) who was a member of the U.S. Military, later living in California, and mother (Buechold) who was a German citizen and a resident of Germany. The District Court refused jurisdiction and the U.S. Court of Appeals consolidated the case with a similar one, and then affirmed both.
Judge Crocker wrote for the Court of Appeals:

> Thus, only if a United States citizen could maintain these actions for paternity and child support in a federal court could appellants maintain them. It has been held that even though there is diversity of citizenship and a sufficient amount in controversy to satisfy the technical jurisdictional requirements, the federal courts have no jurisdiction of suits to establish paternity and child support. *Albanese v. Richter* (CCA 3rd, 1947), 161 F.2d 688, *cert. denied* 332 U.S. 782, 68 S.Ct. 49, 92 L.Ed. 365. Furthermore, it is well recognized that the federal courts must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife. [citations to 14 cases omitted] As Justice Holmes said in State of Ohio ex rel. *Popovici v. Agler,* supra: "It has been understood that, 'the whole subject of 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."
>
> Thus, although appellants are citizens of Germany and appellees are citizens of the State of California, and the prayer is for more than $10,000, exclusive of interest and costs, the District Court properly declined jurisdiction.
>
> There are many criteria to be considered in child support cases, such as the standard of living, employment and wages of the father, most of which are intimate to the parties and dependent upon the particular conditions existing in the area where the parties reside. State courts deal with these problems daily and have developed an expertise that should discourage the intervention of federal courts. As a matter of policy and comity, these local problems should be decided in state courts. Domestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts.

Buechold v. Ortiz, 401 F.2d 371, 372-373 (9th Cir. 1968).

Judge Crocker believed that jurisdiction was proper in the California state courts, and he cited relevant state statutes, and concluded:

> Such a long standing and comprehensive statutory scheme manifests the States' abiding concern for the welfare of illegitimate children. Because of these factors this court feels that the State of California is particularly equipped to dispose of such suits and their courts should not be circumvented.

Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968).

Judge Crocker wrote in dicta:

> Refusing original diversity jurisdiction of these paternity and child support actions does not mean that the Supreme Court would decline review of a state court decision in this area if a constitutional issue were raised in the state court proceeding. While it is the business of the state to decide who is the father and how much he shall pay as child support, if the administration by the state is so unreasonable as to amount to a denial of due process or of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, certiorari to the Supreme Court is available.

Buechold v. Ortiz, 401 F.2d 371, 373-374 (9th Cir. 1968).

While Judge Crocker is technically correct, near the end of my main essay[1] I cite the paucity of U.S. Supreme Court decisions in domestic relations cases since the year 1940 and argue that the U.S. Supreme Court, in practice, avoids such cases.

Williamson (1969)

Judge Daugherty of the U.S. District Court in Oklahoma denied subject matter jurisdiction in a case involving diversity of citizenship and a division of marital property after a divorce in Texas.

> The Court has suggested to the parties that the granting of this type of relief involves the Court in the field of domestic relations and that even though there may exist diversity jurisdiction under 28 U.S.C. 1332, [FN1] such matters may be beyond its competence. The Court called for briefs on this point which have been filed. It does not appear that counsel for either party pursued the question suggested by the Court with any enthusiasm, for the briefs wholly fail to meet the question propounded to them at pretrial. No case dealing with federal jurisdiction of domestic relations matters is cited.
>
> FN1. Plaintiff is alleged to be a citizen of Texas and Defendant is alleged to be a citizen of Oklahoma, and the amount involved in the relief requested by Plaintiff is alleged to exceed $10,000.
>
> There is no dearth of authority. For more than 100 years in this country, marital combatants have sought to make the federal courts their arena. Their attempts have been singularly unsuccessful. No federal district court sitting in any state of the union has entertained a divorce action. [FN2] There are, of course, two notable exceptions: territorial courts [FN3] and the District Court of Columbia. [FN4] The origin of the idea that divorce and related matters are not within the subject matter jurisdiction of the federal courts is found in an early Supreme Court case [FN5] and has been reiterated in numerous cases.
>
> FN2. *Druen v. Druen,* 247 F.Supp. 754 (Colo. 1965); *Garberson v. Garberson,* 82 F.Supp. 706 (Iowa 1949); *Bowman v. Bowman,* 30 F. 849 (7 Cir., 1887), were all state actions removed to federal court; all were remanded for lack of subject matter jurisdiction although diversity jurisdiction was present.
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> FN3. *De La Rama v. De La Rama,* 201 U.S. 303, 26 S.Ct. 485, 50 L.Ed. 765 (1906) (Appeal from Philippines territorial courts); *Simms v. Simms,* 175 U.S. 162, 20 S.Ct. 58, 44 L.Ed. 115 (1899) (Appeal from Arizona territorial courts).

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[1] Ronald B. Standler, *Federal Court Jurisdiction in the USA in Family Law Cases,* (May 2004), http://www.rbs2.com/dfederal.pdf .

FN4. *Bottomley v. Bottomley,* 104 U.S.App.D.C. 311, 262 F.2d 23 (1958).

FN5. *Barber v. Barber,* 62 U.S. (21 How.) 582, 16 L.Ed. 226 (1859), "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." 62 U.S. at p. 584, 16 L.Ed. at p. 227.

While the field of domestic relations may be the sacrosanct preserve of the state courts, there are instances where rights arising out of domestic relations law have been given effect in federal courts. A common example is a suit to enforce the provisions of a state divorce decree. [FN6] Less common examples appear from time to time. It has been held that one may proceed on a tort theory to obtain custody of a child. [FN7] Likewise, suits based on the Declaratory Judgments Act, 28 U.S.C.A. § 2201 et seq., have been permitted to determine the validity of other decrees affecting the parties' marital status. [FN8]

FN6. *Lynde v. Lynde,* 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810 (1901), set down the rule that such decrees may be enforced for the payment of money where the state decree creating the debt is no longer modifiable. Likewise, a settlement agreement may be enforced on the basis that it is a mere contract. *Manary v. Manary,* 151 F.Supp. 446 (Cal. 1957). Nevertheless, no action will lie on a foreign divorce decree to require one to execute a document, according to *Ostrom v. Ostrom,* 231 F.2d 193 (Ninth Cir. 1955), for two reasons: The party sought to be charged with the decree has passed from the equitable jurisdiction of the court issuing the decree and because an action on a foreign judgment can only be maintained for the payment of money.

FN7. *Abdul-Rahman Omar Adra v. Clift,* 195 F.Supp. 857 (Md. 1961). Another interesting circumvention of the *Barber* doctrine is *Daily v. Parker,* 152 F.2d 174, 162 A.L.R. 819 (Seventh Cir. 1945), where minor children sued their father's paramour for alienation of his affections.

FN8. *Spindel v. Spindel,* 283 F.Supp. 797 (N.Y. 1968), an action to determine validity of Mexican divorce and seeking damages for fraud in obtaining same; *Rosenstiel v. Rosenstiel,* 278 F.Supp. 794 (N.Y. 1967), suit to determine marital status and the effectiveness of various state decrees; *Rapoport v. Rapoport,* 273 F.Supp. 482 (Nev. 1967), suit to determine validity of divorce.

After extensive research, the Court can find no case in which the relief sought herein by Plaintiff has been granted in a federal court proceeding. [FN9] The cases do show that subject matter jurisdiction of the matters presented by Plaintiff is wholly lacking in a federal court in spite of the fact that the parties may be of diverse citizenship and the amount in controversy required by 28 U.S.C.A. § 1332 may be involved. The determination of the marital rights of the parties herein with respect to a division of the marital estate or a part thereof is a matter reserved exclusively to the states and not within the judicial power granted to the federal courts by the Constitution.

FN9. In *McCarty v. Hollis,* 120 F.2d 540 (Tenth Cir. 1941), the Tenth Circuit was presented with a claim for alimony, division of property, etc., which it summarily rejected as being without the subject matter jurisdiction of the federal courts. See also *Druen v. Druen,* supra, footnote 2.

Although the statements of the Supreme Court in *Barber v. Barber,* supra, footnote 5, *Ex parte Burrus,* 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890), [FN10] *Simms v. Simms,* supra, footnote 3, [FN11] *De La Rama v. De La Rama,* supra, footnote 3, [FN12] have been criticized as strictly obiter dicta and unnecessary to the cases then before the Supreme Court (see, in this connection, *Spindel v. Spindel,* supra, footnote 8), the rule that domestic relations matters are reserved to the several states was reaffirmed by the United

States Supreme Court as recently as 1930 in *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489 (1930).

> FN10. "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." 136 U.S. at pp. 593-594, 10 S.Ct. at p. 853, 34 L.Ed. at p. 503.
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> FN11. "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." 175 U.S. at p. 167, 20 S.Ct. at p. 60, 44 L.Ed. at p. 117.
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> FN12. "It has been a long-established rule that the courts of the United States have no jurisdiction upon the subject of divorce, ..." 201 U.S. at p. 307, 26 S.Ct. at p. 486, 50 L.Ed. at p. 767.

Inasmuch as the case presented by Plaintiff is not within the judicial power of this Court, for which reason any action taken by this Court would be a nullity, Plaintiff's action should be and hereby is dismissed sua sponte.

Williamson v. Williamson, 306 F.Supp. 516, 517-518 (W.D.Okla. 1969).

Williamson was apparently not appealed, as there is no further opinion for this case in the Westlaw database.

Magaziner (1972)

In 1972, Judge Aldisert of the U.S. Court of Appeals in Philadelphia decided a case involving appointment of counsel on behalf of children in a custody dispute in Pennsylvania state court. By the time the case reached the Court of Appeals, the counsel had become a judge and the case was moot. However, the judge wrote:

> Traditionally, it has been the policy of federal courts to avoid assumption of jurisdiction in this species of litigation. "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." *In re Burrus,* 136 U.S. 586, 593-594, 10 S.Ct. 850, 853, 34 L.Ed. 500 (1890). [FN3] Indeed, this court has explicitly held there is no federal diversity jurisdiction in a domestic relations case involving a child. *Albanese v. Richter,* 161 F.2d 688 (3d Cir. 1947).
>
> FN3. Professors Hart and Wechsler have commented: "The Burrus case actually involved only the question of the power of a United States district court, under the *habeas corpus* statutes, to make an award of an infant's custody in the absence of diversity of citizenship jurisdiction. The question of power, given such jurisdiction and the requisite jurisdictional amount, was expressly reserved (136 U.S. at 597, [10 S.Ct. 850]). But the quoted dictum nevertheless has been taken as referring to judicial competence as well as legislative." The Federal Courts and the Federal System, 1016-1017.
>
> "As a matter of policy and comity, [child support cases are] local problems [which] should be decided in state courts. Domestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts." *Buechold v. Ortiz,* 401 F.2d 371, 373 (9th Cir. 1968). For other cases to the same effect, see 1 Barron and Holtzoff, (Wright Ed.) 40.1 n.36.11. Thus, putting aside equal protection considerations, [citation omitted] not present here, the federal courts, and especially this circuit, have steered a

course away from domestic relations cases. [footnote omitted]

In recent months, this court has invoked the doctrine of abstention even in a diversity case, because of deference to the expertise of the Orphans Court of Pennsylvania, recognizing "the special ability of the state court to decide those issues in view of its exclusive state jurisdiction over trusts and estates." [citations omitted] Similarly, in [citation omitted] abstention was allowed, not only because of the teachings of [citation to *Burford* and one other case omitted], but because we found the presence of significant state concerns and the absence of corresponding federal concerns. This consideration has been the philosophical underpinning of the reluctance of federal courts to intrude upon domestic relations problems, traditionally governed by the domestic policies of the several states. Professor Wright observes that the domestic relations and probate exceptions, see *Reichman v. Pittsburgh National Bank, supra,* to federal jurisdiction, may "rationally be defended on the ground that these are areas of the law in which the states have an especially strong interest and a well-developed competence for dealing with them." Wright, Federal Courts, § 25 at 84.

Because of our finding of mootness, the unsettled state of Pennsylvania law in this area, and the re-affirmation of our policy of non- intrusion by federal courts in domestic relations problems, we agree that dismissal of the complaint was proper.

The judgment of the district court will be affirmed.

Magaziner v. Montemuro, 468 F.2d 782, 787-788 (3rd Cir. 1972).

Rosenstiel (1973)

In this case, a New York City law firm sued in U.S. District Court an ex-husband, Rosenstiel, for his wife's debts during the end of their marriage and also for his wife's legal fees during six years of divorce litigation. The judge found for plaintiff and Rosenstiel appealed.
Judge Friendly of the U.S. Court of Appeals was clearly unhappy that the District Court had accepted jurisdiction in this case, but Judge Friendly reluctantly ruled that jurisdiction was proper.
In reviewing the history of the domestic relations exception to jurisdiction, Judge Friendly wrote:

In *Simms v. Simms,* 175 U.S. 162, 167, 20 S.Ct. 58, 44 L.Ed. 115 (1899), the Court reaffirmed the *Barber* dictum, although in that case it exercised appellate jurisdiction over a divorce decree of a territorial court. [FN4] The Court applied the dictum in *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489 (1930), in refusing to issue a writ of prohibition against an Ohio proceeding in which a consul was sued for divorce, despite the constitutional provisions on the subject and the statutory reservation to the federal courts of exclusive jurisdiction 'of all suits and proceedings' against consuls and the grant of jurisdiction of such suits and proceedings to the district courts and the Supreme Court. After stating that the exclusive jurisdiction statutes "do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States," Mr. Justice Holmes, no tyro in legal history, continued,

> 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 viceconsuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.

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

FN4. In *De la Rama v. De la Rama,* 201 U.S. 303, 26 S.Ct. 485, 50 L.Ed. 765 (1906), the Court again heard an appeal from a divorce decree granted by a territorial court, but it cited only two reasons supporting the dictum in *Barber* that federal courts lack diversity jurisdiction in divorce actions or suits for alimony: first, that husband and wife cannot normally be citizens of different states, and second, that a suit for divorce involves no pecuniary value. 201 U.S. at 307, 26 S.Ct. 485. The Court has subsequently rejected the first justification for the *Barber* rule, see *Haddock v. Haddock,* 201 U.S. 562, 571, 26 S.Ct. 525, 50 L.Ed. 867 (1906); *Williamson v. Osenton,* 232 U.S. 619, 625-626, 34 S.Ct. 442, 58 L.Ed. 758 (1914), and the second has been criticized, see *Spindel v. Spindel,* 283 F.Supp. 797, 812 (E.D.N.Y. 1968); Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn.L.Rev. 1, 28 (1956). In any event, by twice taking jurisdiction in appeals from territorial divorce actions, the Court seemed to suggest that these actions are within the judicial power of the federal courts but outside the scope of the diversity statute. See Wright, Federal Courts § 25, at 84.

Judge Weinstein's criticism that in *Simms* and *De la Rama,* 'the Court said federal courts lacked jurisdiction and then acted as if they possessed judicial power over divorce cases,' *Spindel v. Spindel,* supra, 283 F.Supp. at 803, while seemingly unanswerable if the Court was proceeding on a constitutional basis, id. at 804, is lacking in force if, as indicated, the basis for lack of jurisdiction was the language of the diversity statute. While the latter spoke of 'all suits of a civil nature at common law or in equity,' the appellate jurisdiction statute applicable in *Simms,* Rev.Stat. § 702, empowered the Supreme Court to review 'the final judgments and decrees of the supreme court of any Territory,' and the statute applicable in *De la Rama,* 32 Stat. 695, permitted it to review 'the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes and proceedings . . ..'

> We have no disposition to question that conclusion, whether the history was right or not, cf. *Spindel v. Spindel,* supra, 283 F.Supp. at 802-803. More than a century has elapsed since the Barber dictum without any intimation of Congressional dissatisfaction. It is beyond the realm of reasonable belief that, in these days of congested dockets, Congress would wish the federal courts to seek to regain territory, even if the cession of 1859 was unjustified. Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant.

Phillips, Nizer, Benjamin, Krim and Ballon v. Rosenstiel, 490 F.2d 509, 513-514 (2nd Cir. 1973). The final quoted paragraph was endorsed by the U.S. Supreme Court in *Ankenbrandt v. Richards,* 504 U.S. 689, 700 (1992), although the same thought has been expressed five years earlier by Judge Weinstein in *Spindel v. Spindel,* 283 F.Supp. 797, 801 (E.D.N.Y. 1968).

Judge Friendly explained why he was unhappy that the U.S. District Court had accepted the case:

> The holding that, with one possible exception, federal jurisdiction was not barred by the dictum in *Barber v. Barber,* supra, 62 U.S. (21 How.) at 584, 16 L.Ed. 226, does not necessarily entail a conclusion that the district court should have adjudicated this action. It would be difficult to think of a case where invocation of federal jurisdiction by a plaintiff was less justified than here; indeed, anyone challenged to produce an example why diversity jurisdiction should be abolished or severely curtailed would hardly have conceived so dramatic an illustration. The action not only presents the anomaly of a jurisdiction intended to protect out-of-staters against local prejudice being invoked by an instater, [FN6] see ALL, Study of the Division of Jurisdiction Between State and Federal Courts 99-110 (1968), but the instater is a law firm that has practiced, long and successfully, in the New York courts. The defendant, although a resident of Connecticut or later of Florida, maintained a New York City apartment and his business interests were focused in New York. The services for which compensation is sought were rendered in New York courts. Most important of all, decision requires exploration of a difficult field of New York law with which, because of its proximity

> to the exception for matrimonial actions, federal judges are more than ordinarily unfamiliar. Moreover, the claim for services on appeal on the award of alimony and counsel fees necessitates the interpretation of a decree of a New York Supreme Court Justice who sits only a few hundred yards from the Federal Courthouse in New York City

Rosenstiel, 490 F.2d at 515 (2nd Cir. 1973).

> Despite the expansive language used thirty years ago in *Meredith v. Winter Haven,* 320 U.S. 228, 236-238, 64 S.Ct. 7, 88 L.Ed. 9 (1943), we do not believe that the Supreme Court today would demand that federal judges waste their time [FN8] exploring a thicket of state decisional law in a case such as this. Some movement away from *Meredith* took place in *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), [FN9] and again in *Kaiser Steel Corp. v. W. S. Ranch Co.,* 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968). Although these cases concerned state law issues important to the state itself, courts of appeals, inspired no doubt by feelings akin to those we have voiced, have stayed diversity actions for resolution of difficult state law problems by the state courts even when the issues were of concern mainly to the parties. See *United Services Life Ins. Co. v. Delaney,* 328 F.2d 483 (5 Cir. (1964); *Reichman v. Pittsburgh Nat'l Bank,* 465 F.2d 16, 18 (3 Cir. 1972) (similar issues concerning construction of trust pending in Pennsylvania Orphans' Court which has 'special ability . . . to decide those issues in view of its exclusive state jurisdiction over trusts and estates'); *Magaziner v. Montemuro,* 468 F.2d 782, 787 (3 Cir. 1972) (expertise of Family Division of Pennsylvania Court of Common Pleas with respect to child support). As the two latter cases suggest, there is particularly strong reason for abstention in cases which, though not within the exceptions for matters of probate and administration or matrimony and custody actions, are on the verge, since like those within the exception, they raise issues 'in which the states have an especially strong interest and a well-developed competence for dealing with them.' Wright, Federal Courts § 25, at 84 (2d ed. 1970). *Beach v. Rome Trust Co.,* 269 F.2d 367 (2 Cir. 1959), is not to the contrary since that case involved 'no controlling or obscure question of state law.' Id. at 374.
>
> FN8. The word 'waste' is appropriate not only because we cannot predict New York law with authority and our attempt to do so prevents a clarification by the state courts that would otherwise have occurred, but also because of the unlikelihood that any of the federal judges who have been concerned with this case will ever have to confront these or similar issues again.

Rosenstiel, 490 F.2d at 516 (2nd Cir. 1973).

Incidentally, I like Judge Friendly's paragraph about the Wife's attorneys seeking to have the Husband pay their legal fees of $25,000 for defending Wife in her sham action to keep the Husband's furniture.

> The state court granted judgment for Lewis [i.e., Husband] in the replevin action, enabling him to recover his furniture and other possessions, which Susan [i.e., Wife] had retained, and awarding him $150,000 damages for the loss of his property that Susan had disposed of without his permission. In addition, the state court referee pointed out that Susan's defense was founded largely on fabrications and falsehoods, including her wholly baseless claim that some of Lewis' property had been destroyed in a fire when, in fact, she had caused it to be sold. Plaintiff correctly points out that victory is not a prerequisite to recovery of legal fees. But Susan's case in the replevin action was not simply a losing one, it was a sham. [footnote omitted]
>
> Although we have not been able to find any New York cases directly in point, we do not think the New York courts would require a husband to underwrite his wife's legal fees under these circumstances. To permit the wife to impose huge attorney's fees on her husband in a

> meritless defense to a suit he had been forced to bring against her would encourage frivolous litigation and impose a double burden on the husband in his efforts to vindicate his rights. It would seem odd, at the least, to require Lewis to pay debts incurred by Susan in a unjustified attempt to block him from recovering his own property. We therefore reverse the award of $25,000 to plaintiff for defense of the replevin action and direct that plaintiff recover nothing against Lewis for these services.

Rosenstiel, 490 F.2d at 519-520 (2nd Cir. 1973).

Armstrong (1974)

Husband and wife were divorced in Rhode Island state court, which made no order for alimony, but did incorporate a "memorandum of understanding" in the divorce decree that specified that husband would pay to wife $18,000/year for the next 16 years. When husband failed to make the payments, wife, who was now a resident of Florida, initiated legal proceedings that were removed to federal court. The U.S. District Court dismissed the complaint for lack of jurisdiction and the U.S. Court of Appeals instructed the District Court to remand the action to state court. Judge Campbell of the U.S. Court of Appeals summarized the domestic relations exception in the following words.

> It has often been said that federal courts are without jurisdiction to decide domestic relations case. Cf. C. Wright, Federal Courts 84 (2d ed. 1970); H. Hart & H. Wechsler, The Federal Courts and the Federal System 1189-92 (2d ed. 1973). The limitation goes back to a dictum in *Barber v. Barber,* 62 U.S. (21 How.) 582, 584, 16 L.Ed. 226 (1859),
>
> > 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.
>
> Quite likely, as Judge Weinstein shows in *Spindel v. Spindel,* 283 F.Supp. 797, 800-801 (E.D.N.Y. 1968), the Article III judicial power is broad enough to cover even such matrimonial matters if Congress were to provide, but the force of *Barber* was that divorce and alimony actions were not 'suits of a civil nature at common law or in equity' within Congress' original grant of diversity jurisdiction, Act of Sept. 24, 1789, 11, 1 Stat. 72, 78, Id. at 804. [FN1] The current wording of 28 U.S.C. § 1332, 'civil actions,' is not deemed to have altered this rule, and we agree with Judge Friendly that 'it is beyond the realm of reasonable belief that, in these days of congested dockets, Congress would wish the federal courts to seek to regain territory, even if the cession of 1859 was unjustified.' *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel,* 490 F.2d 509, 514 (2d Cir. 1973).
>
> Lower federal courts have had difficulty determining when to decline cases which, though not strictly speaking actions for divorce or for alimony, are related to those subjects. The purely jurisdictional exception has been narrowly confined. But it has been held that a federal court — even when it has jurisdiction — may abstain for reasons of comity and common sense from cases better handled by the state courts having authority over matrimonial and family matters. *Phillips,* supra at 515-516; *Magaziner v. Montemuro,* 468 F.2d 782, 787 (3dCir. 1972); *Buechold v. Ortiz,* 401 F.2d 371, 373 (9th Cir. 1968).

Armstrong v. Armstrong, 508 F.2d 348, 349-350 (1st Cir. 1974).

Solomon (1975)

Solomon involved allegations of the ex-husband's failure to pay child support, as required by a separation agreement. The case could be postured as a contract law dispute, because there was no evidence that the separation agreement had been merged into the divorce decree by a state court.[2] Judge Van Dusen of the U.S. Court of Appeals in Philadelphia wrote:

> Traditionally, the federal courts have evinced great reluctance to entertain cases involving domestic relations. This doctrine is not premised upon explicit statutory language limiting the jurisdictional authority of federal courts. Indeed, the jurisdictional statute utilized by plaintiff to bring suit grants original jurisdiction to federal district courts "in all civil actions" [FN9] where there is jurisdictional amount and diversity of citizenship. [footnote omitted] 28 U.S.C. § 1332. Rather, the jurisdictional exception for domestic relations has been judicially carved, beginning with and extending through a series of dicta in decisions of the United States Supreme Court.
>
> FN9. The original diversity statute of 1789 specified "all suits of a civil nature at common law or in equity . . . ." Act of September 24, 1789, § 11, 1 Stat. 73, 78. Various commentators have explained that, initially, the refusal to exercise federal jurisdiction was grounded at least in part upon the rationale that, since domestic relations cases were historically heard in ecclesiastical courts, they did not come within the compass of this provision. See, e. g., Wright, Federal Courts, 2d ed. § 25 at p. 84. This phraseology was maintained (28 U.S.C. § 41(1), 1940 ed.) until 1948, when Congress revised Title 28 of the United States Code, and the phrase "all civil actions" was substituted. Act of June 25, 1948, c. 646, 62 Stat. 930. The Revisor's Notes to 28 U.S.C. § 1332 suggest that the sole purpose of the amendment was to produce conformity with the language of Rule 2 of the Federal Rules of Civil Procedure. The legislative history of the 1948 amendment in no way suggests that this particular change was motivated by a desire to expand or contract the jurisdictional scope of the federal courts. *Spindel v. Spindel,* 283 F.Supp. 797, at 801 (E.D.N.Y. 1968).

Solomon v. Solomon, 516 F.2d 1018, 1021-22 (3rd Cir. 1975).

The U.S. Court of Appeals in *Solomon* then summarized the U.S. Supreme Court's decisions in *Barber, In re Burrus, Simms, De La Rama,* and also *Popovici.* Finally, the court said:

> Our understanding of these cases requires us to conclude that the district court properly refused to exercise jurisdiction over the instant case. The import of the Supreme Court's language in these cases is that the federal courts do not have jurisdiction in domestic relations suits except where necessary to the effectuation of prior state court judgments involving the same matters [FN13] or where jurisdiction lies by dint of the participation and review of territorial courts.[FN14] The case at bar cannot be categorized into either narrow exception. In fact, assumption of jurisdiction in this case would, as the district court recognized, have precisely the opposite effect since it would undermine and derogate both the state court's contempt citation against plaintiff and its decision to continue generally her support action until such time as plaintiff purged herself of contempt.[FN15]
>
> FN13. *Barber v. Barber,* supra. See, e. g., *Cain v. King,* 313 F.Supp. 10, 16 (E.D.La. 1970) (merger of separation agreement into divorce decree). The Full Faith and Credit Clause (Article IV, Section 1, of the Constitution) requires that the domestic relations decrees of the courts of one state be given proper recognition in other states. See *Sutton v. Leib,* 342 U.S. 402, 72 S.Ct. 398, 96 L.Ed. 448

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[2] *Solomon v. Solomon,* 516 F.2d 1018, 1021, n. 6 (3rd Cir. 1975).

(1952); *Williams v. North Carolina,* 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Williams v. North Carolina,* 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942). In the second *Williams* case, the Court said at 237 of 325 U.S., at 1098 of 65 S.Ct.: " . . . in (the) federal system . . . (the) regulation of domestic relations has been left with the States and not given to the national authority. . . ."

FN14. *De La Rama v. De La Rama,* supra ; *Simms v. Simms,* supra.

FN15. We reiterate that plaintiff did not appeal either of these decisions in the state courts of Pennsylvania.

Nor do we accept plaintiff's contention that a divorce decree without more removes this case from the arena of domestic relations and permits the intervention of federal courts to adjudicate issues unaffected by that decree. [footnote omitted] At the core of both parties' contentions is the parent- child relationship. The divorce decree in this case did not sever that relationship. There is no evidence that it either incorporated the terms of the separation agreement or merged with it. The state courts have not rendered any judgment on support payments which requires our invocation of jurisdiction to assure its efficacy. In *Albanese v. Richter,* 161 F.2d 688, 689 (3d Cir. 1947), we disclaimed jurisdiction over the suit of an illegitimate child against his putative father for support and education. [footnote omitted] That case made clear the fact that the classification of a suit as one in domestic relations does not depend upon the existence, and impliedly the continuation, of a marriage relationship. [footnote omitted]

In holding that the domestic relations doctrine applies to the case before us, we do not mean to suggest that a separation agreement may never be litigated in the federal courts by parties between whom there is diversity of citizenship. In a different case, in which the custody of no child was involved, in which there was neither pending state court action nor an agreement to litigate in the state courts, and in which there was no threat that a feuding couple would play one court system off against the other, we might well assume jurisdiction. But all the above dangers are involved in the present case and lead us to the conclusion that the domestic relations doctrine should apply. See *In re Burrus,* supra.

The domestic relations exception to the jurisdictional powers of federal courts represents an historically engrained limitation upon us. It is true that the rationale upon which it is premised has shifted from conceptions regarding the powers of ancient ecclesiastical courts, see note 8, supra, the non-diversity of married couples, and the lack of monetary value of a divorce, see *De La Rama,* supra, to the modern view that state courts have historically decided these matters and have developed both a well-known expertise in these cases and a strong interest in disposing of them. See C. Wright, Handbook of the Law of Federal Courts 84 (2d ed. 1970). In *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel,* 490 F.2d 509 (2d Cir. 1973), Judge Friendly used this language ....

[quotation of several paragraphs from Judge Friendly deleted]

Concededly, this judge-made doctrine is not without its critics.[FN19] But until such time as either Congress or the Supreme Court sees fit to amend or emasculate this exception, we are bound by the precedent of the Supreme Court's language and the weight of federal authority [FN20] to apply it to the broad area of domestic relations. Its application in this case preserves the sanctity of state court judgments and protects against confusing and complicated piecemeal litigation. Although plaintiff repeatedly stated in open court that she "submitted to the jurisdiction of the" state court, as noted at page 1020 above, she seeks to have the federal

court nullify its rulings in this action.

> FN19. See, e. g., *Spindel v. Spindel,* 283 F.Supp. 797 (E.D.N.Y. 1968). See generally Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn.L.Rev. 1, at 25 (1956). It is noteworthy, however, that when the Supreme Court created or enforced even the two narrow exceptions to the rule against federal jurisdiction in domestic relations cases, the majority of the Court encountered stiff opposition from justices who believed that there was no jurisdiction in the federal courts over these cases. *De La Rama v. De La Rama,* supra ; *Barber v. Barber,* supra. Unanimity occurred when the Court refused jurisdiction. *Ohio ex rel. Popovici v. Agler,* supra.
>
> FN20. See, e. g., *Hernstadt v. Hernstadt,* 373 F.2d 316, 317-18 (2d Cir. 1967) (custody and visitation rights); *Blank v. Blank,* 320 F.Supp. 1389, 1391 (W.D.Pa. 1971) (divorce action remanded to state court); *Linscott v. Linscott,* 98 F.Supp. 802, 804-05 (S.D. Iowa 1951) (property settlement agreement).

The district court was justified in concluding that it lacked jurisdiction of this case. *Solomon v. Solomon,* 516 F.2d 1018, 1024-26 (3rd Cir. 1975).

Judge Gibbons wrote a dissenting opinion in *Solomon,* of which I am quoting a few paragraphs to show how a few judges regard the domestic relations exception to federal diversity jurisdiction.

> But more to the point, there is no well-established domestic relations exception to our subject matter jurisdiction as is announced so confidently by the majority. Rather there is a collection of misstatements of ancient holdings and of ill-considered dicta. I think that the myth of a broad exception to the judicial power of the United States with respect to questions of "domestic relations" was exposed completely and finally by Judge Weinstein's opinion in *Spindel v. Spindel,* 283 F.Supp. 797 (E.D.N.Y. 1968). If that historical review was not sufficient, Judge Friendly's opinion in *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel,* 490 F.2d 509 (2d Cir. 1973) should have nailed the lid on the coffin. But the majority opinion proposes to give new currency to a hoary heresy. *Spindel v. Spindel,* supra, holds that there is diversity jurisdiction over a suit seeking damages because the defendant fraudulently induced the plaintiff to marry him and then fraudulently procured a Mexican divorce. Judge Weinstein discussed, and I suggest effectively explained, the sources of confusion arising from misapplication of dicta in cases such as *Barber v. Barber,* 62 U.S. (21 How.) 582, 16 L.Ed. 226 (1859), and *In re Burrus,* 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890). He concluded that there was no bar to adjudications by the federal courts of the status of persons, even married or formerly married persons. *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel,* supra, holds that there is diversity jurisdiction to entertain a suit by a New York law firm to recover attorneys fees purportedly authorized by New York law as necessaries for defending a wife in an annulment suit by the husband. Judge Friendly discusses the same group of cases and reaches the same conclusion as did Judge Weinstein in *Spindel v. Spindel.* He suggests that if there is anything at all to the rule that diversity jurisdiction does not extend to domestic relations matters it narrows down to the possibility, though not the certainty, that a diversity court may not grant a divorce.[FN3] No useful purpose would be served by repeating the arguments set forth by Judges Friendly and Weinstein in these two well-researched and well-reasoned opinions. Judges Friendly and Weinstein say it as well as it need be said. They make clear that it simply has never been the law that because the dispute is between a present or former husband and wife and involves the marital status it is nonjusticiable in a federal district court. See also Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of the Federal Courts, 41 Minn.L.Rev. 1, 29-31 (1956). I will only add that the holding in *Barber v. Barber,* supra, compels the conclusion

that there is diversity subject matter jurisdiction in this case, since the court there enforced the financial provisions of a separation decree.

> FN3. The proposition that a diversity court may not grant a divorce, Judge Friendly explains, may be traced to *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489 (1929). Dictum so suggesting appears in that case, but the holding is no more than that the courts of Ohio did have jurisdiction to hear a divorce case involving a consul despite the provisions of the Judicial Code dealing with jurisdiction in suits against consuls. See 28 U.S.C. §§ 1251, 1351. *Popovici v. Agler* as a matter of statutory interpretation is unexceptional. Congress could have made federal jurisdiction exclusive over any dispute to which a consul was a party. The case holds that it did not. But the fact that the Ohio court had jurisdiction tells us nothing about the presence or absence of federal district court jurisdiction.

Solomon, 516 F.2d at 1030-31 (Gibbons, J., dissenting).

Firestone (1981)

In 1981, Judge Phillips of the U.S. Court of Appeals in Ohio summarized the law:

> Although a domestic relations case may meet the technical requirements for diversity jurisdiction, federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes. *Gray v. Richardson,* 474 F.2d 1370, 1373 (6th Cir. 1973); *Gargallo v. Gargallo,* 472 F.2d 1219, 1220 (6th Cir.), *cert. den.,* 414 U.S. 805, 94 S.Ct. 77, 38 L.Ed.2d 41 (1973); *Harris v. Turner,* 329 F.2d 918, 923 (6th Cir.), *cert. den.* 379 U.S. 907, 85 S.Ct. 202, 13 L.Ed.2d 180 (1964). Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained in a federal court. *Denman v. Leedy,* 479 F.2d 1097, 1098 (6th Cir. 1973).
>
> Valid reasons have been given in support of federal courts abstaining from exercising jurisdiction over domestic relations cases. The field of domestic relations involves local problems "peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts." *Buechold v. Ortiz,* 401 F.2d 371, 373 (9th Cir. 1968). "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." *In re Burrus,* 136 U.S. 586, 593-94, 10 S.Ct. 850, 852, 34 L.Ed. 500 (1890); *Magaziner v. Montemuro,* 468 F.2d 782, 787 (3rd Cir. 1972). Because state courts historically have decided these matters, they have developed a proficiency and expertise in these cases and a strong interest in disposing of them. *Solomon v. Solomon,* 516 F.2d 1018, 1025 (3rd Cir. 1975); *Cherry v. Cherry,* 438 F.Supp. 88, 90 (D.Md. 1977). Some states now have specialized courts which adjudicate only domestic relations cases and are better suited to process the large volume of such cases. See for example, Ala.Code § 12-17-70 (Supp. 1981); Cal.Civ.Pro.Code § 1740 et seq. (West, Supp. 1981); La.Rev.State.Ann. 13:1138 (West, Supp. 1981); N.Y.Family Ct. Act §§ 411, 511, 652 (McKinney); Ohio Rev.Code Ann. § 2301.03 (Page, Supp. 1981).

Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981).

Csibi (1982)

Marcella and Antal Csibi were married in Rumania in 1946. Antal emigrated to California in 1969, leaving Marcella in Rumania. In 1970, Antal married Ms. Fustos, without divorcing Marcella. In 1975, Antal died without leaving a Will. Marcella then sued Ms. Fustos in U.S. District Court in California for the inheritance from Antal. The case involved concepts of California state law about the rights of a good-faith putative spouse against a legal spouse. The District Court ruled against Marcella and dismissed the action. The U.S. Court of Appeals held that the District Court lacked subject matter jurisdiction and should have dismissed for that reason.

The U.S. Court of Appeals cited federal statutes, the U.S. Supreme Court's decisions in *Simms, De La Rama,* and *Popovici,* and the U.S. Courts of Appeals' decisions in *Buechold* and *Rosenstiel,* then said:

> As a jurisdictional limitation, the domestic relations exception has been narrowly confined. *Sutter v. Pitts,* 639 F.2d 842, 843 (1st Cir. 1981). Only those cases most closely resembling historically ecclesiastical actions have been considered absolutely outside federal court jurisdiction. These cases, at the core of the domestic relations exception, are cases where a federal court is asked to grant a divorce or annulment, determine support payments, or award custody of a child. The cases are in agreement that there is no subject-matter jurisdiction over these types of domestic disputes. See, *Cole v. Cole,* 633 F.2d 1083, 1087 (4th Cir. 1980); *Sutter v. Pitts,* supra, 639 F.2d at 843.
>
> There is another class of cases also involving domestic relations which federal courts have jurisdiction over, but often refrain from adjudicating. This second class of cases consists of those where domestic relations problems are involved tangentially to other issues determinative of the case. Federal courts may exercise their discretion to abstain from deciding such cases. See *Bossom v. Bossom,* 551 F.2d 474, 475 (2d Cir. 1976) (federal courts may decline to exercise jurisdiction over matters "on the verge" of the domestic relations exception if the interests of justice would be served by state court resolution). Cases where jurisdiction has been considered discretionary are those requesting a federal court to enforce a defaulting spouse's obligations under a state support decree, to enforce a final state divorce decree under the Full Faith and Credit clause, to invalidate a state divorce decree obtained without personal jurisdiction, to award damages in a suit between two spouses for breach of contract, and to determine the rights of spouses under federal statutes.[FN6]
>
> FN6. See, e.g., *Sutton v. Leib,* 342 U.S. 402, 72 S.Ct. 398, 96 L.Ed. 448 (1952) (enforcing a final divorce decree); *Williams v. North Carolina,* 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945) (full faith and credit clause); *Rapoport v. Rapoport,* 416 F.2d 41, 43 (9th Cir. 1969), *cert. denied,* 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970) (state decree void for want of personal jurisdiction); *Erspan v. Badgett,* 647 F.2d 550 (5th Cir. 1981) (contract between spouses and rights of spouses under federal bankruptcy law); *Stone v. Stone,* 450 F.Supp. 919 (N.D.Cal. 1978), *aff'd,* 632 F.2d 740 (9th Cir. 1980), *cert. denied,* --- U.S. ----, 101 S.Ct. 3158, 69 L.Ed.2d 1004 (1981) (division of rights under a federal statute.).

Csibi v. Fustos, 670 F.2d 134, 137 (9th Cir. 1982).

Lloyd (1982)

A Maryland state court awarded the father custody of his daughter, but gave visitation rights to his ex-wife. The wife, apparently aided by both her new husband's parents and her parents, kept the daughter. The father sued those parents in U.S. District Court in Wisconsin for various torts. The District Court accepted jurisdiction and rendered a judgment for the father. *Lloyd v. Loeffler,* 539 F.Supp. 998 (E.D.Wis. 1982). The U.S. Court of Appeals affirmed. 694 F.2d 489 (7th Cir. 1982).

Judge Richard Posner, one of the most intellectual judges in the USA today, wrote in *Lloyd* the following about the domestic relations exception.

> The usual account of the domestic relations exception, as of the probate exception discussed recently in *Dragan v. Miller,* 679 F.2d 712 (7th Cir. 1982), is a historical one. The first judiciary act gave the federal courts diversity jurisdiction of "all suits of a civil nature at common law or in equity," Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 (simplified in the present diversity statute, but without change of meaning, see Reviser's Note to 28 U.S.C. § 1332 (1976), to "all civil actions," 28 U.S.C. § 1332(a)); and divorce, custody, and related matters were in England the province of the ecclesiastical courts (on which see 3 Blackstone, Commentaries on the Laws of England 87-103 (1768)) rather than of the common law and equity courts. The historical account is unconvincing. See *Spindel v. Spindel,* 283 F.Supp. 797, 802-03, 806-09 (E.D.N.Y. 1968). It exaggerates the nicety with which the jurisdictional distinctions among the English courts were observed. Applied to this case, it overlooks the extensive custody jurisdiction of the Court of Wards and Liveries, a royal court distinct from the ecclesiastical courts. See Bell, An Introduction to the History and Records of the Court of Wards & Liveries 112-32 (1953). And it assumes without discussion that the proper referent is English rather than American practice, though if only because there was no ecclesiastical court in America American law and equity courts had a broader jurisdiction in family-law matters than their English counterparts had. Probably the reference to law and equity in the first judiciary act is mainly to English practice rather than to the diverse judicial systems of the colonies and states; but it would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts.
>
> The historical account would be of little assistance in this case even if it were sound. The tort of wrongful interference with a child's custody did not exist at the time the first judiciary act was passed, and it would strain our historical imagination to the breaking point to try to determine whether, had there been such a tort then in England, it would have been within the exclusive jurisdiction of the ecclesiastical courts.
>
> However dubious and unhelpful its historical pedigree, the domestic relations exception is too well established to be questioned any longer by a lower court. See e.g., *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel,* 490 F.2d 509, 512-14 (2d Cir. 1973); *Solomon v. Solomon,* 516 F.2d 1018, 1021-26 (3d Cir. 1975). This is so even though one might question, see *Dragan, supra,* 679 F.2d at 713, the suggestion in *Rosenstiel, supra,* 490 F.2d at 514, that a century of congressional silence constitutes legislative adoption of what was originally, and maybe still is today, a purely judge-made exception to the diversity jurisdiction. The boundaries of the exception are uncertain, however; and to fix them we must consider what contemporary function the exception might be thought to serve.

> At its core are certain types of cases, well illustrated by divorce, that the federal courts are not, as a matter of fact, competent tribunals to handle. The typical divorce decree provides for alimony payable in installments until the wife remarries, and if there are children it will provide for custody, visitation rights, and child support payments as well. These remedies — alimony, custody, visitation, and child support — often entail continuing judicial supervision of a volatile family situation. The federal courts are not well suited to this task. They are not local institutions, they do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity.

Lloyd v. Loeffler, 694 F.2d 489, 491-492 (7th Cir. 1982).

Judge Posner's thoughts in this last paragraph were endorsed by the U.S. Supreme Court in *Ankenbrandt v. Richards,* 504 U.S. 689, 703-704 (1992).

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