
INTRODUCTION

Title 28, section 1332 of the United States Code provides that “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between . . . citizens of different states. . . .” Despite this broad language granting diversity jurisdiction, two early Supreme Court cases, Barber v. Barber and In re Burrus, established what has been referred to as the “domestic relations exception” to federal jurisdiction. From these cases it has been established that federal courts are without power to grant a divorce, determine alimony or child support payments, or decide a child custody issue. Although the domestic relations exception has been criticized, and its historical basis to an extent discredited, it remains a viable principle, rigidly adhered to by the federal courts.

In Bennett v. Bennett, the United States Court of Appeals for the District of Columbia Circuit ruled that the domestic relations exception rendered it without jurisdiction to consider the plaintiff father’s request for injunctive relief against the defendant mother to prevent her from interfering with his custody rights over two of their children. In contrast, the court also concluded that the domestic relations exception did not apply to the plaintiff’s claim for damages against the defendant for the tort of child enticement and the removal of their son from his possession.

This article traces the evolution of the domestic relations exception, focusing on how it first arose through judicial interpretation of federal equity powers, to its present basis—a general belief that the already overcrowded federal docket demands that most domestic relations cases be left to the special expertise of the state courts. Although the decision by the Court of Appeals was the correct application of the domestic relations exception, this article

2. 62 U.S. (21 How.) 582 (1858).
3. 136 U.S. 586 (1890).
4. 62 U.S. at 584; 136 U.S. at 593-94.
5. See notes 64-79 and accompanying text infra.
6. 682 F.2d 1039 (D.C. Cir. 1982).
7. Id. at 1042-43.
8. Id. at 1044.
questions whether parties with legitimate claims, such as in Bennett, should be refused adjudication at the federal level.

This article does not delve into the specific problems created by child-snatching, such as the traumatic affects upon children and parents. Examination of the Parental Kidnapping Prevention Act (PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA) shall be limited to how these acts are concerned with access to federal courts.

**HISTORICAL BACKGROUND**

The domestic relations exception was established early in this country's judicial history by the case of Barber v. Barber. That case involved a divorced wife's attempt to enforce an alimony decree obtained in New York against her ex-husband after he moved to Wisconsin. Writing for the majority, Justice Wayne pointed out that the Court's task was not to determine the amount of alimony to be paid, but rather whether it could entertain an action to enforce the decree. Disclaiming "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," the Court nevertheless concluded that the requisite diversity of citizenship had been satisfied and the wife could enforce the valid New York alimony decree in a Wisconsin federal court.

Justice Daniel dissented, urging that federal courts were totally precluded from hearing cases involving the marital relation.


The author recognizes that in common usage there are alternative spellings of "kidnapping." Therefore, whenever quoting specific language of other authority, the source's original spelling is maintained. However, this author will follow 5 OXFORD ENGLISH DICTIONARY 691 (1933) ("kidnapping").


11. For a better understanding of these Acts the diligent researcher should have no problem as many articles concerning this subject have recently been published. *See generally* P. HOFF, J. SCHULMAN, A. VOLENÍK, J. O’DANIEL, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW (1982) [hereinafter cited as HOFF, CHILD CUSTODY]; S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN (1981); COOMBS, INTERSTATE CHILD CUSTODY: JURISDICTION, RECOGNITION AND ENFORCEMENT, 66 MINN. L. REV. 711 (1982); MORAN, UNIFORM CHILD CUSTODY JURISDICTION ACT: AN ANALYSIS OF ITS HISTORY, A PREDICTION OF ITS FUTURE, 84 W. VA. L. REV. 135 (1981).

12. 62 U.S. (21 How.) 582, 584 (1858).

13. *Id.* at 583-84.

14. *Id.* at 584.

15. *Id.*

16. *Id.* at 597-99. *But see* note 18 infra.

17. *Id.* at 602-05.
In addition to arguing that there was no diversity, he posited that the equity powers of American federal courts were jurisdictionally limited much in the same manner as the chancery courts of England. In England, the chancery courts were without power to grant a divorce—that power was reserved to the ecclesiastical courts. Since the ecclesiastical court system was not established in the United States, the power over marital relations was assumed by the state legislatures. Consequently, Justice Daniel concluded that the federal courts were completely barred from hearing any matter related in any respect to the marital relation.

The next development in the domestic relations exception occurred in a child custody case, In re Burrus. In Burrus, the father, a citizen of Ohio, sought a federal writ of habeas corpus to obtain the return of his daughter from the child's maternal grandparents. Upon issuance of the writ, the child was turned over to her father. Subsequently, the grandfather forcefully took the child back to Nebraska. The grandfather was arrested and held in contempt by the federal district court. He then sought habeas corpus relief on his own behalf. The Supreme Court ruled that the initial writ never should have issued because the district court

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18. Id. at 601-02. Justice Daniel observed:

Both parties remain subject to the obligations and duties of husband and wife. Neither can marry during the lifetime of the other, nor do any act whatsoever which is a wrong upon the conjugal rights and obligations of either. From these views it seems to me to follow, that a married woman cannot during the existence of the matrimonial relation, and during the life of the husband the wife cannot be remitted to the civil or political position of a femme sole, and cannot therefore become a citizen of a State or community different from that of which her husband is a member.

Id.

19. Id. at 604-05.

20. Id. at 604. Justice Daniel noted that "it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised." Id.

21. Id. at 605.

22. Id. Justice Daniel reasoned:

As the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States in chancery is equally excluded.

Id.

23. 136 U.S. 586 (1890).

24. Id. 586-87.

25. Id. at 588.

26. Id. As this case illustrates, child-snatching has been a problem in this country for quite some time.

27. Id. at 588-89.

28. Id.
lacked the authority to issue it, and ordered the grandfather released.²⁹

Speaking through Justice Miller, the Court further entrenched the exception:

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.³⁰

Although the Court limited its opinion to habeas corpus actions at the federal district court level,³¹ this sweeping statement came to stand for the proposition that all federal courts were precluded from becoming involved in any case involving child custody.³²

The extensive reach of the Barber and Burrus decisions left the lower federal courts to determine how far the domestic relations exception extended. Adding to this confusion was a series of cases in which the Supreme Court allowed federal jurisdiction to determine a limited class of marital disputes.³³

In Simms v. Simms,³⁴ the Supreme Court examined whether the domestic relations exception precluded it from reviewing a divorce proceeding appealed from a territorial court.³⁵ After acknowledging the language in Barber and Burrus and the federal courts' general lack of power in this area, the Court concluded that the exception did not apply to suits brought in territorial courts.³⁶

Speaking through Justice Gray, the Court stated:

But those considerations have no application to the jurisdiction of the courts of a Territory, or to the appellate ju-

²⁹. *Id.* at 596-97.
³⁰. *Id.* at 593-94.
³¹. *Id.* at 597. The Court reserved judgment upon whether federal circuit courts had diversity jurisdiction in such questions. *Id.*
³². Many courts and commentators have noted that Burrus does not directly state that federal courts are precluded under diversity jurisdiction to hear child custody cases, but they still acknowledge that the broad statement by the Court has been interpreted to mean just that. See generally H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 1189-92 (2d ed. 1973). See Jagiella v. Jagiella, 647 F.2d 561, 564 (5th Cir. 1981); Solomon v. Solomon, 516 F.2d 1018, 1032 (3d Cir. 1975) (Gibbons, J., dissenting); Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972); Cherry v. Cherry, 438 F. Supp. 88, 89 (D. Md. 1977); Spindel v. Spindel, 283 F. Supp. 797, 804 (E.D.N.Y. 1968).
³³. See notes 34-55 and accompanying text infra.
³⁴. 175 U.S. 162 (1899).
³⁵. *Id.* at 167.
³⁶. *Id.*
risdiction of this court over those courts. . . . By the territorial statutes of Arizona, the original jurisdiction of suits for divorce is vested in the district courts of the Territory; and their final judgments in such suits, as in other civil cases, may be reviewed by the Supreme Court of the Territory on writ of error or appeal.\textsuperscript{37}

In a similar case seven years later, \textit{De La Rama v. De La Rama},\textsuperscript{38} the Supreme Court cited \textit{Simms} favorably, upheld jurisdiction, and reversed the Philippine Supreme Court's grant of a divorce.\textsuperscript{39} In an opinion by Justice Brown, the Court reiterated that the general rule of \textit{Barber} and \textit{Burrus} had no application in a territorial proceeding.\textsuperscript{40} The Court even went so far as to examine the record de novo and decided the husband was not entitled to the divorce decree.\textsuperscript{41} It must be noted, however, that four Justices, including Justice Holmes, dissented from the opinion, questioning the Court's jurisdiction.\textsuperscript{42}

Following \textit{Simms} and \textit{De La Rama}, the lower federal courts might have been led to believe that the domestic relations exception was eroding. Any such thoughts were put to rest by Justice Holmes's opinion in \textit{Popovici v. Agler}.\textsuperscript{43} In \textit{Popovici}, a vice consul of Rumania was sued for divorce by his American wife in federal district court.\textsuperscript{44} After her case was dismissed there, she brought suit in Ohio state court.\textsuperscript{45} The vice consul sought a writ of prohibition, claiming that jurisdiction could be obtained only at the federal level pursuant to Judicial Code section 256.\textsuperscript{46} Section 256 provided: The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States . . . of all suits and proceedings against ambassadors, or other public ministers . . . or against consuls or vice-consuls.'"\textsuperscript{47} Despite the specific language of the statute, Justice Holmes reasoned that "'[s]uits against consuls and vice-consuls' must be taken to refer to ordinary civil proceed-

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 167-68.
\item 201 U.S. 303 (1906).
\item \textit{Id.} at 308, 319.
\item \textit{Id.} at 307-08.
\item \textit{Id.} at 310.
\item \textit{Id.} at 319.
\item 280 U.S. 379 (1930).
\item \textit{Id.} at 382-83.
\item \textit{Id.} at 382.
\item Judicial Code (Act of March 3, 1911, c. 231) § 256 is now codified as 28 U.S.C. § 1351 (Supp. IV 1980) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against consuls or vice consuls of foreign states . . .").
\item 280 U.S. at 382-83.
\end{enumerate}
\end{footnotesize}
ings and not to include what formerly would have belonged to the ecclesiastical Courts." The case before the Court, Justice Holmes concluded, could not be classified as an ordinary civil proceeding, and the domestic relations exception prevented federal courts from intermeddling in matters reserved to the states. Recognizing the potential imprudence of allowing a state court to adjudicate a matter involving a foreign dignitary, he nevertheless decided that the domestic relations exception was applicable because one of the parties was possibly an American citizen.

Finally, despite the lurking proposition that federal courts are totally precluded from hearing any cases involving domestic relations, the Court, in Williams v. North Carolina, while still acknowledging the domestic relations exception, emphasized that a federal court had jurisdiction to determine the validity of a final state divorce decree. In Williams, the principal issue facing the Court was when a state must give full faith and credit to a sister state's divorce decree. In his opinion, Justice Frankfurter supplied some necessary guidance as to the scope of the domestic relations exception:

The rights that belong to all the States and the obligations which membership in the Union imposes upon all, are made effective because this Court is open to consider claims, such as this case presents, that the courts of one State have not given full faith and credit to the judgment of a Sister State that is required by Art. IV, § 1 of the Constitution.

But the discharge of this duty does not make of this Court a court of probate and divorce.

After this series of Supreme Court cases, it became evident to

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48. Id. at 383, (quoting Judicial Code § 256). By this language Justice Holmes seems to endorse Justice Daniel's argument that federal courts are precluded from hearing any cases involving the domestic relations. See notes 20-22 and accompanying text supra.

49. 280 U.S. at 384.

50. Id. Justice Holmes noted:

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. Her position certainly is not less to be considered than her husband's, and at all events these considerations are not for us.

Id.

51. 325 U.S. 226 (1945).

52. Id. at 233.

53. Id.

54. Id.
the federal courts that the domestic relations exception was not a total ban to federal review of all domestic relations cases. Following Williams, however, federal courts were presented with some cases where it was unclear whether the issues could be classified as involving domestic relations. In these cases, the federal courts reasoned that the actions fell under the domestic relations exception and could not be heard by the federal courts.

The decision to apply the domestic relations exception to these cases invoked criticism. In their analysis of the exception, Alan Vestal and David Foster concluded that the exception involved two general areas—status and property. They argued that federal courts should differentiate between the two categories, focusing upon the nature of the action, and not upon the parties involved. They concluded that federal courts should refuse jurisdiction in cases involving status, but hear cases which involve property rights. Despite this criticism of the domestic relations exception, the federal courts declined to differentiate between sta-

55. *After Williams*, the federal courts reviewed final state divorce and alimony decrees, but correctly declined jurisdiction in those cases where the decree was not final. See *e.g.*, *Rapoport v. Rapoport*, 416 F.2d 41, 43 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970) (jurisdiction found when judgment attacked is a final divorce decree); *Maner v. Maner*, 401 F.2d 616, 618 (5th Cir. 1968) (court denies review of an alimony decree in futuro); *Southard v. Southard*, 305 F.2d 730, 731 (2d. Cir. 1962) (federal district court review of a final divorce decree held proper); *Morris v. Morris*, 273 F.2d 678, 681 (7th Cir. 1960) (federal court declines jurisdiction when state divorce judgment is subject to modification); *Ostrom v. Ostrom*, 231 F.2d 193, 195-96 (9th Cir. 1955) (federal district court lacked jurisdiction over interlocutory decree); *Manary v. Manary*, 151 F. Supp. 446, 448 (N.D. Cal. 1957) (court declines original jurisdiction in suit for alimony).


58. See *Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Courts*, 41 Minn. L. Rev. 1, 31 (1956) [hereinafter cited as *Vestal & Foster, Diversity Jurisdiction*].

59. Id. at 23. Although Vestal and Foster do not define what specific issues are part of the broad category of status, by their discussion of the relevant Supreme Court cases—*Barber, Burrell, Simms, De La Rama and Popovici*—it could be implied that status includes the traditional issues of divorce, alimony and child custody. See *generally id.* at 23-28, 31-32. For a general discussion of marital status, see *Barney v. Tourtelotte*, 138 Mass. 106 (1884).

60. *Vestal & Foster, Diversity Jurisdiction, supra* note 58 at 31. Vestal and Foster limit the category of property to actions involving contract, quasi-contract or a tortious wrong. Id.

61. Id.

62. Id.
Finally, in 1968, in a thoroughly researched and well-reasoned opinion, the historical basis for the domestic relations exception was criticized by Judge Weinstein in *Spindel v. Spindel.* In *Spindel,* the wife sought a declaratory judgment to invalidate a Mexican divorce obtained by her husband. She further sought $500,000 in compensatory and punitive damages, alleging that the defendant fraudulently induced her to marry him. Judge Weinstein reasoned that a federal court is competent to determine the validity of both a final state divorce or alimony decree, and a tort claim despite the fact that the dispute is classified as a marital dispute. Since the principal issue before the court was the validity of the divorce decree, Judge Weinstein could have found jurisdiction based on the holdings in *Barber* and *Williams.* Because a tort claim which touched upon the marital relation was also at issue, he explained why the court was competent to decide both issues. Focusing upon the majority's dictum and Justice Daniel's dissent in *Barber,* he questioned that if federal courts had no power in the domestic relations area, by what source was the power removed. Looking first to the Constitution, he found nothing in article III, section 1 to prohibit federal review, especially in light of the Supreme Court's review of the *Simms* and *De La Rama* deci-


> It has been suggested that a distinction should be made between cases involving "status" and those involving "property rights" with federal courts accepting jurisdiction only of the latter. The difficulty is that many cases involve both. Moreover, there is no persuasive reason why jurisdiction should be decided by such an arbitrary formula. Much more persuasive is reasoning based on sound policy considerations in the light of the circumstances within which litigants find themselves.

*Id.* at 654.

*See also* Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969) ("The determination of the marital rights of the parties herein with respect to a division of the marital estate . . . is a matter reserved exclusively to the states and is not within the judicial power granted to the federal courts by the Constitution."). *But c.f.* Richie v. Richie, 186 F. Supp. 592, 594 (E.D.N.Y. 1960) (Court allowed jurisdiction in a proceeding involving the enforcement of a separation agreement, "[t]he plaintiff's claim does not involve domestic relations. It is one to recover damages for breach of contract between parties who are not husband and wife.").

64. 283 F. Supp. 797 (E.D.N.Y. 1968).

65. *Id.* at 798.

66. *Id.* at 811-12 ("A federal court is not deprived of competence merely because the parties involved are husband and wife or the controversy might be termed a 'marital dispute.' "). *Id.* at 812.

67. *See* notes 12-22, 51-55 and accompanying text *supra.*

68. 283 F. Supp. at 812.

69. *Id.* at 800-03.
sions. Next, Judge Weinstein turned to the Judiciary Act of 1789, focusing upon the “all suits of a civil nature at common law or in equity” language. Noting Justice Daniel’s analysis in Barber, and Justice Holmes’ approval of that analysis in Popovici, that proceedings involving the marital relation were not matters which could be resolved by the equity courts of England, he concluded that such an analysis overlooked the fact that English chancery courts were not completely barred from hearing domestic relations cases.

Thus, under Judge Weinstein’s analysis, the exception is not statutorily based, but instead, judicially based. Nevertheless, he concluded that even if the historical basis for the domestic relations exception is not as broad as the Court has stated, the fact that Congress has the power to override Barber, and has chosen not to do so, suggests that the limitations established by the Court are consistent with national policies. Even so, by allowing jurisdiction in a case which only touched upon the marital relation, Judge Weinstein sent a signal to other federal courts that the domestic relations exception should at least be given cursory examination before being blindly applied to all cases.

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70. Id. at 803-04. The court reasoned:

It is difficult to understand how the Court could have exercised jurisdiction if it construed Barber as standing for the proposition that the Constitution denies judicial power to federal courts in divorce cases. The Supreme Court is a constitutional court, having been created by Article III of the Constitution. Consequently, it can only hear those cases that are within the “judicial power” within the meaning of section 2 of Article III. The fact that the Supreme Court may review the decisions of territorial courts in divorce cases would seem to suggest that such cases are not excluded from the national judicial power by the Constitution.

71. Id. at 801.
72. Id. at 802. See notes 20-22, 48-50 and accompanying text supra.
73. Id. at 807-08. Although Judge Weinstein would not go so far as to specifically disagree with Justice Daniel’s analysis of the various powers of the equity and ecclesiastical courts of England, many courts accepted Weinstein’s analysis over that of Justice Daniel. See note 78 and accompanying text infra.
74. 283 F. Supp. at 802. “Since the Supreme Court has spoken, its constructive view of history constitutes a form of judicial notice that the District Courts accept as true.” Id.
75. Id. at 803 (“Congress has had the power to overrule Barber if it wished to do so. That it has failed to take action is some evidence that the opinion eschewing power to grant divorces... in diversity cases is consonant with national legislative policy.”).
76. Id. at 806. The court pointed out:

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. ... This broad interpretation is unwarranted by the Constitution, any statute, holding of
After *Spindel*, some federal courts—especially in cases involving tort claims—began to take a hard look at the domestic relations exception. Many have agreed with Judge Weinstein—the exception was being used too often to restrict legitimate cases. Still, despite the logic of *Spindel*, courts have been reluctant to give Judge Weinstein’s analysis more than limited support. While acknowledging that the historical basis is probably lacking for the domestic relations exception, most courts have concluded that there are many considerations which override Judge Weinstein’s argument. Also, as Judge Weinstein pointed out, there has been

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77. Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir. 1980). The court noted:
The claims asserted could have arisen between strangers, and certainly between people with no marital relationship whatsoever. The structure of the asserted actions is such that they do not require the existence of any rule particularly marital in nature as a substantial ingredient to give them vitality . . . . So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart.

Id.


See also Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981) (“Regardless of the historical inaccuracies and the doctrinal distortions that mark the birth and early years of this exception to diversity jurisdiction . . . . the exception has endured too long for us to abandon it in the absence of contrary action by Congress or the Supreme Court.”); Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976) (despite addressing an action as not coming within the exception relating to matrimonial actions, a federal court declined jurisdiction, holding that the action was “on the verge” of the exception, and because there was no obstacle to a full and fair determination by the state court); Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975) (the federal court noted that the exception “has shifted from conceptions regarding the power of ancient ecclesiastical courts, to the modern view that the state courts have historically decided these matters and have developed both a well-known expertise in these cases and strong interest in disposing of them.”); Armstrong v. Armstrong, 508 F.2d 348, 349-50 (1st Cir. 1974) (The court acknowledged Judge Weinstein’s analysis in *Spindel* with favor, yet rejected it in light of the Second Circuit’s holding in *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973) (Judge Friendly chose not to focus upon the credibility of the historical basis of the exception, noting, “[i]t 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.”).

See also Cherry v. Cherry, 43 F. Supp. 88 (D. Md. 1977). The court held:
Although neither the Constitution nor the statutes governing federal jurisdiction mandate this refusal to entertain domestic relations cases, the reasoning underlying these decisions is clear and well-founded. Because state courts traditionally have adjudicated domestic relations cases, they have developed a proficiency and expertise in the area that is almost completely absent in the federal courts . . . . Furthermore, the Court is unwilling to increase the workload of this already overburdened Court by
tacit congressional acceptance of the domestic relations exception, leaving many courts to suggest that the broad limitations upon federal jurisdiction form an acceptable basis for federal deference to state expertise. Judge Bazelon's opinion in *Bennett v. Bennett* is a good example of how several courts interpret the restrictions of the exception.

**FACTS AND HOLDING**

In *Bennett*, the plaintiff-father and the defendant-mother are the parents of three minor children, Steven, Monique and Patrice. In 1974, Ms. Bennett obtained a divorce decree in Ohio in which she was also granted custody of the three children. In 1978, she informally, but allegedly voluntarily, turned custody of Steven and Monique over to Mr. Bennett. He took the children to his home in Washington, D.C., and sued for their formal custody in the Superior Court of the District of Columbia.

The court found the Ohio child custody decree was not entitled to full faith and credit and, in the best interests of the children, custody should be granted to the father. Later in 1979, Ms. Bennett snatched the children from their father's home and returned with them to Ohio. Subsequently, Mr. Bennett snatched Monique and returned her to his home in Washington, D.C. After these occurrences, Mr. Bennett commenced a series of actions in the United States District Court for the District of Columbia, alleging that Ms. Bennett's taking of the children constituted the tort of child-enticement, and requesting the court to grant him

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80. 682 F.2d 1039 (D.C. Cir. 1982).
81. *Id.* at 1041.
82. *Id.*
83. *Id.*
84. *Id.* Ms. Bennett contested her ex-husband's attempt to gain custody of the children and urged the District of Columbia court to return custody of the children to her. *Id.*
85. *Id.* It must be noted that the District of Columbia Superior Court is a quasi-state court which is subject to the limitations of the full faith and credit clause of the Constitution.
86. 682 F.2d at 1041.
87. *Id.* Steven remained in the custody of his father.
88. *Id.* Mr. Bennett obtained a contempt and arrest order should his wife appear in the District of Columbia. The record is unclear, but he may have commenced proceedings in Ohio as well. *Id.*
89. *Id.* See generally *Restatement (Second) of Torts* § 700 comment c
monetary relief amounting to $525,000. He also sought injunctive relief, asking the court to prevent Ms. Bennett from interfering with his custody rights over Steven and Monique. After the filing of an amended complaint, which stated the court had in personam jurisdiction under the District of Columbia longarm statute, the district court, without explanation, denied Mr. Bennett's motion for reconsideration of his complaint. Mr. Bennett appealed to the District of Columbia Circuit.

Writing for the majority, Judge Bazelon stated that because of the domestic relations exception, the federal court could not hear Mr. Bennett's request for injunctive relief, as it would require the court to ultimately decide who would have custody over the children. However, he determined that the claim for damages resulting from the tort of child enticement was severable from the child custody issue, and that a federal court was competent to adjudicate the tort claim. Thus, by separating the custody issue from the tort claim, Judge Bazelon seemed to focus on the fact of possession of the child in determining whether an unlawful taking of the child had occurred. Under this analysis, it would seem to make little difference if the parent in possession had lawful custody of the child when the snatching occurred.

Judge Edwards dissented from that part of the majority's opinion concerning the court's lack of jurisdiction to decide the request for injunctive relief. He argued that what was being asked of the court was to determine the validity of the District of Columbia child custody decree in favor of Mr. Bennett.

**ANALYSIS**

In *Bennett*, Judge Bazelon opened his opinion with the statement: "This case is profoundly sad." This simple statement could refer to most of the cases which fall under the domestic rela-

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90. 682 F.2d at 1041.
91. Id.
92. Id. D.C. CODE ANN. § 13-423(a)(3) (1981) provides: "A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's . . . causing tortious injury in the District of Columbia by an act or omission in the District of Columbia."
93. 682 F.2d at 1041.
94. Id.
95. Id. at 1042.
96. Id. at 1044.
97. Id. at 1044-45. See notes 110-114 and accompanying text infra.
98. Id. at 1040.
INTERSTATE CHILD-SNATCHING

100. 136 U.S. 586 (1890).
102. 682 F.2d at 1043. See note 78 and accompanying text supra.
103. 682 F.2d at 1043.
105. 682 F.2d at 1043 ("We note that conspicuously absent from this comprehensive enactment is any provision creating or recognizing a direct role for the federal courts in determining child custody. Indeed, the legislative history of the Act makes clear that Congress deliberately and emphatically omitted such a role.").
106. Id.
tion should not be arbitrarily applied to all cases involving the marital relation. In analyzing whether the domestic relations exception should apply to the child enticement claim, Judge Bazelon concluded that the act of nonconsensual removal from possession sounded purely in tort.\footnote{107} He further pointed out that a federal court is competent to determine traditional tort issues such as the existence of a legal duty, breach of that duty, and damages arising from the breach.\footnote{108} He conceded, however, that this might require a federal court to determine the validity of conflicting state decrees at the time of the breach, but claimed such an issue was not beyond its competence.\footnote{109}

It was this concession which Judge Edwards utilized in his dissent to argue that the domestic relations exception should not apply to either issue in Bennett. Judge Edwards reasoned that all the federal court was being asked to do was to enforce the valid District of Columbia custody decree.\footnote{110} Under his analysis, the court need only have determined the validity of that decree and did not have to inquire into the best interests of the children.\footnote{111} Judge Edwards aptly pointed out that the majority's decision could produce an ironic result, in that it allowed Ms. Bennett to kidnap her child and flaunt the law, assuming that she was willing and able to pay for retaining the child.\footnote{112} Judge Edwards concluded his dissent by agreeing with Judge Bazelon: “This case is profoundly sad.”\footnote{113}

Despite Judge Edwards' misgivings concerning the majority's analysis, his argument that the domestic relations exception should not apply, and the case law he cites to support it, are not directly applicable to the facts of the case. Judge Edwards is correct that federal courts do have the power to determine the validity of conflicting state decrees, but only those decrees which are final.\footnote{114} A child custody decree, by its nature, is not subject to final adjudication,\footnote{115} as state courts may reconsider which parent's cus-
tody will further the best interest of the child. Under the facts presented in Bennett, it is doubtful that a federal court could review the validity of the District of Columbia custody decree without taking into consideration the circumstances of the children at the time the decree was issued vis-a-vis the circumstances of the children at the time the case came to federal court.

The two Fourth Circuit cases Judge Edwards cited, Harrison v. Harrison and Keating v. Keating, were not child custody cases, but were concerned with a federal court's power to enforce future alimony payments which had not been reduced to a final judgment. It must be noted that this position is an isolated view, and is in conflict with the Supreme Court's analysis in Williams. Presently, no other federal court has been willing to interpret the full faith and credit clause so broadly as to hold that a federal court may enforce another court's decree which has not been reduced to a final judgment. It is not readily apparent how an isolated view which argues that a federal court may modify a state alimony decree is relevant to child custody issues. Judge Edwards, in citing these alimony cases, gave scant guidance for understanding the child custody issues presented in Bennett. Also, modification of a state decree which involves the payment of alimony raises a possible property question. As was noted previously, although the domestic relations exception has not been strictly applied in cases concerning property and tort claims, there has been little support, if any, that federal courts can adjudicate an issue involving status.

There has been at least one child custody case in which a federal court allowed jurisdiction. In Abdul-Rahman Omar Adra v. Clift, child custody was sought under title 28, section 1350 of the basis of their best interests. Subsequent changes may be made by the court after hearing on such notice as prescribed by the court."

118. 542 F.2d 910 (4th Cir. 1976).
119. Keating, 542 F.2d at 911-12; Harrison, 214 F.2d at 573-74.
120. See notes 51-55 and accompanying text supra.
121. Judge Weinstein, in Spindel, implied that federal courts could consider some status issue cases. 283 F. Supp. at 810. Yet other federal courts have neglected to address this proposition. See e.g., Bossom v. Bossum, 551 F.2d 474, 475 (2d Cir. 1977) (plaintiff petitioned for a modification of a divorce decree, i.e., status issues involving visitation rights, child custody and possession of the marital home); Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975) (plaintiff sought enforcement of a separation agreement issued prior to a divorce decree, yet neither decree resolved the issue of child custody); Armstrong v. Armstrong, 508 F.2d 348, 349 (1st Cir. 1974) (status issues involving child support and alimony payments).
United States Code,\textsuperscript{123} by a Lebanese father who claimed his daughter was being held illegally by her mother.\textsuperscript{124} The court pointed out that, unlike American law, where generally it is presumed that both parents are entitled to custody of the child,\textsuperscript{125} under Lebanese law, the father has sole custody of his daughter after she reaches the age of nine.\textsuperscript{126} The United States District Court for the District of Maryland concluded that the domestic relations exception should not be applied, stating that it was not being asked to determine a question of status.\textsuperscript{127} The court was asked to determine whether the mother's retention of the child constituted a tort under Lebanese law.\textsuperscript{128} Moreover, the court considered the international aspects of the case, and decided that the importance of foreign relations superseded a strict application of the domestic relations exception.\textsuperscript{129} However, after claiming jurisdiction, the court determined that the best interests of the child overrode the explicit language of Lebanese law, and decided that the child should remain in the custody of her mother.\textsuperscript{130}

Under the present state of the law, the remedy fashioned by the court in \textit{Bennett} seems to be appropriate. The more difficult question is whether the remedy was sufficient. A cursory examination of certain aspects of the case discloses reasons why the plaintiff sought relief in federal court, and more important, why

\textsuperscript{123} \textit{Id.} at 859. 28 U.S.C. § 1350 (1976); provides: The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

\textsuperscript{124} 195 F. Supp. at 860. Article 391 of the Lebanese Code provides:

The period of infant custody [boy's custody] ends and shall not require care by a woman when he attains the following condition: when he becomes seven years old. As to the girl's custody as above, the period of custody and care by a woman ends when she attains nine years of age. The father has then the right to take them out of such custody. And should he not ask for them he shall be compelled to take them by law.

\textit{Id.}

\textsuperscript{125} \textit{Id.} at 862-63.

\textsuperscript{126} \textit{Id.} at 860.

\textsuperscript{127} \textit{Id.} at 862. "The unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody is a tort." \textit{Id.}

\textsuperscript{128} \textit{Id.} at 862-63.

\textsuperscript{129} \textit{Id.} at 865. The court noted:

\"[T]his case involves, among other questions, those of nationality and entry into the United States, with which federal courts are familiar. Plaintiff is a citizen of a friendly nation, with which the United States has long had cultural contacts. An alien, understandably though unjustifiably, may prefer to bring an action for a tort in a federal court rather than in a local court, and Congress has authorized him to do so in a limited class of cases. The importance of foreign relations to our country today cautions federal courts to give weight to such considerations and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations.\"

\textit{Id.} \textbf{Cf.} Justice Holmes's analysis in \textit{Popovici}, discussed at note 50 \textit{supra.}

\textsuperscript{130} \textit{Id.} at 866-67.
cases such as Bennett may appear with greater frequency in the future.

Bennett ultimately involved child-snatching, a highly emotional subject which both state and federal legislation have attempted to combat. The problem has reached such proportions that forty-nine states have passed some form of the Uniform Child Custody Jurisdiction Act (UCCJA), and Congress has passed the Parental Kidnapping Prevention Act (PKPA). The central purpose of the UCCJA was to prevent a divorced or separated, noncustodial parent from snatching a child from the custodial parent, removing the child to another state, establishing residency and then obtaining lawful custody of the child. An essential element in curtailing this practice was to require states to give full faith and credit to the custody decrees of sister states. By eliminating available forums to the child-snatching parent, it was hoped the problem would be eliminated. Unfortunately, a few jurisdictions, including the District of Columbia, failed to enact the UCCJA. To prevent these forums from becoming child-snatching havens, Congress enacted the PKPA, requiring states to give full faith and credit to custody decrees.

In theory, the UCCJA and PKPA, working in tandem, should
make it more difficult to legitimize child-snatching. Child custody—especially in the eyes of the principals involved—is a highly emotional subject, and it is difficult to determine how much deterrence this legislation will have on the problem. Quite possibly, instead of bringing about a reduction in litigation, parents in growing numbers will look to the federal courts when refused adjudication at the state level. Thus a colorable argument can be made that federal legislation has opened the door to federal adjudication of child custody issues.\textsuperscript{137} In fact, parents have presented a multitude of theories to the federal courts in hopes of overcoming the domestic relations exception, including alleged violation of civil rights;\textsuperscript{138} false imprisonment;\textsuperscript{139} seeking a writ of habeas corpus claiming unlawful detention of the child;\textsuperscript{140} claims of conspiracy under sections 1983 and 1985 of title 42 of the United States Code;\textsuperscript{141} and a

\textsuperscript{137} This notion was rejected by Judge Bazelon in his interpretation of the legislative history of the PKPA. \textit{Bennett}, 682 F.2d at 1043. \textit{See PKPA Hearings}, supra note 104, at 20, 71, 73. \textit{See also Hoff, Child Custody}, supra note 11, at 8-35-36. Hoff, after concluding that Judge Bazelon correctly interpreted the legislative history of the PKPA, noted that “[u]ltimately the determination of whether federal courts are obligated by the Parental Kidnapping Prevention Act to enforce or refrain from modifying custody decrees entitled to such treatment under that Act, or to enjoin simultaneous proceedings in state courts, may be made by the federal courts themselves if presented squarely with such questions.” \textit{Id.} at 8-36.

\textsuperscript{138} \textit{Sutter v. Pitts}, 639 F.2d 842, 844 (1st Cir. 1981) (“Although Sutter has clothed her complaint in the garb of a civil rights action, we agree with the district court that her claim boils down to a demand for custody of the child.”).

\textsuperscript{139} \textit{See Kilduff v. Kilduff}, 473 F. Supp. 873, 874 (S.D.N.Y. 1979). Where the court noted:

Were the labeling of a cause of action as being one for ‘false imprisonment’ to suffice to remove the case from the category of custody disputes (an area which the federal courts have steadfastly refused to enter) . . . it would require little imagination on the part of the draftsman of the complaint to gain access to the federal court in all custody disputes where there is diversity of citizenship.

\textit{Id.} at 874-75.

\textsuperscript{140} \textit{Doe v. Doe}, 660 F.2d 101, 106 (4th Cir. 1981). Where the court stated:

Reason and precedent both dictate that in this, a purely custodial case between private parties, the federal courts not intervene. The policy that the federal courts not entertain the case so strong that any exercise of jurisdiction by the district court would amount to exercise of power it did not possess.

\textit{Id.}

\textsuperscript{141} \textit{See Harris v. Turner}, 329 F.2d 918, 923 (6th Cir. 1964), where the court stated:

Appellant undertakes to bring this action within the scope of federal jurisdiction by making general allegations of conspiracy to violate her civil rights within the purview of 42 U.S.C. 1983 and 1985 . . . We agree with the District Judge there is no showing in this case of any conspiracy for the purpose of depriving appellant of the equal protection of the laws or any other constitutional rights.

\textit{Id.}
claim that a child's constitutional right to remain in the United States was being violated.142

Desperate parents and imaginative lawyers will advance any plausible argument to obtain a federal forum. Bennett falls within this category, as Mr. Bennett apparently believed that he could not obtain custody of his child in the Ohio courts.143 By asking for injunctive relief, he may have hoped that a sympathetic federal court would disregard the domestic relations exception and adjudicate his claim. Such an approach, however, cuts both ways. If it is argued that Mr. Bennett is unable to adjudicate his claim in the Ohio courts, an equally plausible argument can be made that Ms. Bennett could not obtain relief in the District of Columbia courts.144

CONCLUSION

The underlying problem in Bennett was child-snatching and, because of the domestic relations exception, the Court of Appeals for the District of Columbia offered a remedy which was inadequate and failed to satisfy all the judicial needs of the parties involved. While a plaintiff who seeks federal review of a status question will be denied jurisdiction, the tort of interstate child-snatching, which is severable from the status question and only touches upon the marital relation, is not beyond the competence of a federal court. If and when more parents find themselves in a similar situation, the federal courts may find they have a problem on their hands which they had assumed had been delegated to the special expertise of the state courts.

Donald J. Pavelka—'84

142. Bergstrom v. Bergstrom, 623 F.2d 517, 520 (8th Cir. 1980) ("Where a constitutional issue arises out of a custody dispute, and the initial determination involves a reexamination of the custody arrangement, the proper course is to dismiss the case and remand to the state court.").
143. 682 F.2d at 1043.
144. It is hoped that the PKPA will clear up the confusion as to when states are required to give full faith and credit to sister state decrees and when they can claim jurisdiction in a child custody dispute. See 28 U.S.C. § 1738A (Supp. IV 1980). Section 1738A provides:

Full faith and credit given to child custody determinations. The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.
See also notes 128-133 and accompanying text supra.