

## Federal Jurisdiction In Domestic Relations Cases - Spindel v. Spindel

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Family Law Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

*Federal Jurisdiction In Domestic Relations Cases - Spindel v. Spindel*, 28 Md. L. Rev. 376 (1968)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol28/iss4/5>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## Federal Jurisdiction In Domestic Relations Cases

### *Spindel v. Spindel*<sup>1</sup>

In 1858, in the landmark case of *Barber v. Barber*,<sup>2</sup> the Supreme Court declared that the jurisdiction of the federal courts did not extend to the "subject of divorce." Later in the nineteenth century, the Court, in the case of *In re Burrus*,<sup>3</sup> proclaimed that all matters concerning "the domestic relations of husband and wife, parent and child"<sup>4</sup> were the exclusive province of state law. The lower federal courts have generally interpreted the *Burrus* language as an expansion of the *Barber* doctrine and have, for the most part, declined to exercise diversity jurisdiction over all domestic relations cases.<sup>5</sup> This judicially declared exception to federal jurisdiction has been often stated,<sup>6</sup> and occasionally applied,<sup>7</sup> but the rationale behind the exception has never been entirely clear. While some of the reasons employed to justify the *Barber* doctrine would exclude all federal jurisdiction over domestic relations, others would only preclude diversity jurisdiction. Some argue that there may be absolutely no federal jurisdiction over matrimonial cases because all questions of domestic relations are reserved to the states,<sup>8</sup> because federal equity jurisdiction as defined by Congress in the Judiciary Act of 1789 does not embrace domestic relations,<sup>9</sup> or because the federal judiciary has itself renounced any such jurisdiction.<sup>10</sup> The exercise of diversity jurisdiction in such cases has encountered additional objections; it has been argued in matrimonial cases that the wife can have no domicile apart from that of her husband<sup>11</sup> and that the required jurisdictional amount cannot be satisfied.<sup>12</sup> However, some courts, after duly repeating the *Barber* doctrine, have found it inapplicable for a variety of reasons. The most recent such case is *Spindel v. Spindel*.<sup>13</sup>

1. 283 F. Supp. 797 (E.D.N.Y. 1968).

2. 62 U.S. (21 How.) 582 (1858).

3. 136 U.S. 586 (1890).

4. *Id.* at 593-94 (dictum).

5. *E.g.*, Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (paternity and child support); *Hernstadt v. Hernstadt*, 373 F.2d 316 (2d Cir. 1967) (custody of children and visitation rights); *Albanese v. Richter*, 161 F.2d 688 (3d Cir.), *cert. denied*, 332 U.S. 782 (1947) (suit by illegitimate child against putative father for support and cost of education); *In re Barry*, 42 F. 113 (C.C.S.D.N.Y. 1844) (habeas corpus suit for the custody of an infant); *Bercovitch v. Tanburn*, 103 F. Supp. 62 (S.D.N.Y. 1952) (suit by mother-in-law against husband for wife's necessities).

6. *E.g.*, *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930); *De La Rama v. De La Rama*, 201 U.S. 303 (1906); *Simms v. Simms*, 175 U.S. 162 (1899); *Nowell v. Nowell*, 272 F. Supp. 298 (D. Conn. 1967); *Linscott v. Linscott*, 98 F. Supp. 802 (S.D. Iowa 1951).

7. *E.g.*, *Gullo v. Hirst*, 332 F.2d 178 (4th Cir. 1964); *Morris v. Morris*, 273 F.2d 678 (7th Cir. 1960); *Garberson v. Garberson*, 82 F. Supp. 706 (N.D. Iowa 1949).

8. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930); *Druen v. Druen*, 247 F. Supp. 754 (D. Colo. 1965).

9. *Barber v. Barber*, 62 U.S. (21 How.) 582, 604-05 (1858) (dissenting opinion).

10. *In re Freiberg*, 262 F. Supp. 482 (E.D. La. 1967).

11. *Barber v. Barber*, 62 U.S. (21 How.) 582, 600-01 (1858) (dissenting opinion); *Bowman v. Bowman*, 30 F. 849 (C.C.N.D. Ill. 1887) (alternative holding).

12. *Bowman v. Bowman*, 30 F. 849 (C.C.N.D. Ill. 1887) (alternative holding); *Chappell v. Chappell*, 86 Md. 532, 39 A. 984 (1898) (dictum).

13. 283 F. Supp. 797 (E.D.N.Y. 1968).

In *Spindel*, the plaintiff, a resident of New Mexico, sought a declaratory judgment in a New York federal district court that the Mexican divorce her husband had procured was invalid. She alleged that her consent to the proceedings had been obtained by coercion, that her husband had induced her to vest a power of attorney in a Mexican attorney, and that she had withdrawn the power of attorney before the Mexican lawyer had "represented" her at the divorce hearing. In addition, the plaintiff sought \$500,000 in tort damages, contending that the defendant had fraudulently induced her to marry him and had fraudulently divorced her. The sole basis for jurisdiction was diversity of citizenship. Defendant moved to dismiss, contending, *inter alia*, that there could be no federal jurisdiction since the dispute concerned divorce. Overruling the defendant's motion, the court held that, since the plaintiff was not seeking a divorce but rather "a determination of the invalidity of a divorce,"<sup>14</sup> the *Barber* doctrine did not apply.

#### CONTOURS OF THE *Barber* DOCTRINE

All discussion of the domestic relations exception to federal diversity jurisdiction must begin with the decision of the United States Supreme Court in *Barber v. Barber*.<sup>15</sup> Appropriately perhaps, the *Barber* doctrine was spawned of dictum. The Court held that a wife *could* enforce a valid state alimony decree in a diversity action in federal court, but prefaced its opinion with the following statement:

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

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo* or to one from bed and board.<sup>16</sup>

Practical considerations, however, have necessitated rejection of the *Barber* dictum in some non-diversity situations. For example, the Supreme Court has held that although a federal court has no jurisdiction over domestic relations while sitting as a constitutional court, it does have jurisdiction when sitting as a territorial court. In *Simms v. Simms*,<sup>17</sup> the Supreme Court accepted an appeal in a divorce case from the territorial supreme court of Arizona;<sup>18</sup> in *De La Rama v. De La Rama*,<sup>19</sup> the Court granted an appeal in a marital action from

14. *Id.* at 799.

15. 62 U.S. (21 How.) 582 (1858).

16. *Id.* at 584.

17. 175 U.S. 162 (1899).

18. The appeal was granted on the curious ground that the decree for alimony and counsel fees was severable from the suit for divorce, and therefore appealable. *Id.* at 169.

19. 201 U.S. 303 (1906).

the supreme court of the Philippines. In both cases the Court approved the *Barber* rule as a sound general proposition, but distinguished it as being applicable only to cases arising under state law.

Another exception to the *Barber* doctrine has been dictated by necessity. In 1858 the federal judiciary could disclaim domestic relations jurisdiction with little practical consequence, since the federal government had no direct interest in that sphere. Today, however, the federal courts, as the interpreters of federal income tax and social security legislation, must decide cases involving domestic relations. In *Wolf v. Gardner*,<sup>20</sup> a social security case, the Court of Appeals for the Sixth Circuit determined the status of a common law wife under Ohio law. In *Estate of Borax v. Commissioner*,<sup>21</sup> the Court of Appeals for the Second Circuit held that a divorce declared invalid by the state might still be valid for tax purposes.

Of course, a federal court may also accept jurisdiction over a domestic relations case where the constitutionality of the state's action is attacked.<sup>22</sup> In *Williams v. North Carolina*,<sup>23</sup> the Supreme Court considered the extent to which one state must recognize the divorce decrees of another state to satisfy the full faith and credit clause. A federal district court, in *Davis v. Gately*,<sup>24</sup> struck down a Delaware statute prohibiting marriage between whites and blacks as violative of the fourteenth amendment. A New York federal district court has recently held, in *Rosenstiel v. Rosenstiel*,<sup>25</sup> that diversity jurisdiction cannot be granted in a divorce case unless the case presents a constitutional issue. The *Rosenstiel* court disregarded the distinction, later to be drawn in *Spindel*, between actions for divorce and suits involving the validity of a divorce:

An action to determine the validity of a divorce decree is not technically a divorce action although, in effect, it determines the marital relationship of the parties involved. . . . However, in order for the federal district courts to assume jurisdiction of such a domestic relations dispute, there must be present the requisite

---

20. 386 F.2d 295 (6th Cir. 1967). *Accord*, *Rocker v. Celebrezze*, 358 F.2d 119 (2d Cir. 1966). *But see* *Calhoun v. Lange*, 40 F. Supp. 264 (D. Md. 1941).

21. 349 F.2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966). *Accord*, *Wendel v. Commissioner*, 350 F.2d 339 (2d Cir. 1965).

22. This practice has developed in spite of the fact that the Supreme Court, in dictum, had indicated that the *Barber* prohibition extended to *all* matters concerning "the domestic relations of husband and wife, parent and child. . ." *In re Burrus*, 136 U.S. 586, 593-94 (1890).

23. 325 U.S. 226 (1945). Justice Frankfurter, writing for the Court, disclaimed any intent to abandon the *Barber* doctrine:

The problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudications with due regard for another most important aspect of our federalism whereby "the domestic relations of husband and wife . . . were matters reserved to the States." . . . 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 the 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.

*Id.* at 232-33.

24. 269 F. Supp. 996 (D. Del. 1967).

25. 278 F. Supp. 794 (S.D.N.Y. 1967).

diversity of citizenship and satisfaction of the monetary requirement imposed by 28 U.S.C. § 1332(a), and a constitutional claim which is not frivolous.<sup>26</sup>

The theory, if not the holding, of *Rosenstiel* is directly opposed to *Spindel*. *Rosenstiel* requires the existence of a constitutional issue before an action may be brought to determine the validity of a divorce; *Spindel* requires only diversity of citizenship and an amount in controversy in excess of the statutory requirement.<sup>27</sup>

Some district courts have accepted diversity jurisdiction over civil actions which collaterally involve domestic relations, but which do not require a determination of marital or parental status. For example, in *Daily v. Parker*,<sup>28</sup> the Seventh Circuit, in a militantly progressive opinion, recognized the right of the children of a man lured away by another woman to bring a tort action against that temptress in federal court.

Most district courts, however, have enforced the *Barber* doctrine in diversity cases. Some have even increased its scope.<sup>29</sup> Thus, although the Supreme Court apparently limited application of the rule to cases where a declaration of the marital status was sought,<sup>30</sup> in *Linscott v. Linscott*,<sup>31</sup> a district court refused jurisdiction where the plaintiff sought only to attack the legitimacy of a property settlement made pursuant to a separation agreement. Similarly, in *Bercovitch v. Tanburn*,<sup>32</sup> where a mother-in-law attempted to recover from her son-in-law sums allegedly expended by her to provide his wife with necessaries, the district court refused jurisdiction, holding that this was a prohibited domestic relations case. In *Garberson v. Garberson*,<sup>33</sup> a district court refused jurisdiction in an action for separate maintenance, despite the fact that it is not certain that the English chancery courts of 1789, the theoretical models for federal equity jurisdiction,<sup>34</sup> lacked jurisdiction to decree separate maintenance,<sup>35</sup> and in spite of the existence of a prior declaration by the state supreme court that the power to grant separate maintenance was a power inherent in a court of equity.<sup>36</sup>

26. *Id.* at 799 (emphasis added).

27. 283 F. Supp. at 799.

28. 152 F.2d 174 (7th Cir. 1945).

29. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 214 (Wright ed. 1960): "The lower courts have applied the principle more broadly, however, and will not take jurisdiction of cases which can be labeled as 'domestic relations' cases even where only property rights are involved. . . ."

30. *De La Rama v. De La Rama*, 201 U.S. 303 (1906); *Walterman v. Taylor*, 168 F.2d 413 (2d Cir. 1948). See *Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1 (1956). The status-property rights distinction has been criticized as unworkable and arbitrary. *Brandtschheit v. Britton*, 239 F. Supp. 652, 654 (N.D. Cal. 1965).

31. 98 F. Supp. 802 (S.D. Iowa 1951).

32. 103 F. Supp. 63 (S.D.N.Y. 1952).

33. 82 F. Supp. 706 (N.D. Iowa 1949).

34. Note 40 *infra* and accompanying text.

35. *Helms v. Franciscus*, 2 Bland Ch. 544 (Md. 1830). See generally Annot., 141 A.L.R. 399 (1942).

36. *Graves v. Graves*, 36 Iowa 310 (1873); *Avery v. Avery*, 236 Iowa 9, 17 N.W.2d 820 (1945).

THE RATIONALE UNDERLYING THE *Barber* DOCTRINE

Perhaps the primary reason why the federal courts have been so unwilling to accept jurisdiction in domestic relations cases even when, as in *Garberson*, they arguably might have done so is that they have been shown no compelling reason for doing so. Their dockets are already overcrowded; the state courts are readily available and have developed expertise in the area.<sup>37</sup> Thus, the *Barber* doctrine has often been applied where the courts have found it convenient to do so, and has not been applied where its application would lead to unacceptable results.<sup>38</sup>

Although application of the doctrine appears elastic, some of the reasons cited in its support leave no room for such elasticity. The most formidable argument against federal jurisdiction in matrimonial cases is based on the Federal Judiciary Act of 1789,<sup>39</sup> which has been interpreted as limiting the federal courts' equity powers to those exercised by the English chancery courts in 1789.<sup>40</sup> Accordingly, the argument goes, federal courts have no jurisdiction in divorce cases because, in 1789, matters of divorce in England were monopolized by the ecclesiastical courts.<sup>41</sup> However, a study of the old English cases does show some overlap in divorce jurisdiction between chancery and the ecclesiastical courts, particularly where the determination of the marital status was only a collateral issue.<sup>42</sup> It has also been suggested that the retention of divorce jurisdiction in the ecclesiastical courts after the Reformation was at least partly accidental.<sup>43</sup> In any event, it is illogical to contend that the extent of federal jurisdiction should be determined by the niceties of eighteenth century chancery jurisdiction. The Congress which passed the Judiciary Act was not primarily concerned with mimicking English jurisdictional schemes,<sup>44</sup> but was

37. See *Buechold v. Ortiz*, 37 U.S.L.W. 2213 (9th Cir. Oct. 1, 1968).

38. See pp. 377-79 *supra*.

39. Act of Sept. 24, 1789, ch. 20, §§ 1-35, 1 Stat. 73-93 (now codified in scattered sections of 28 U.S.C.).

40. *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858); *Fountain v. Ravenal*, 58 U.S. (17 How.) 369 (1854); *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 126 (1844); *Livingston v. Story*, 34 U.S. (9 Pet.) 632 (1835).

41. See *Barber v. Barber*, 62 U.S. (21 How.) 582, 597 (1858). Only Parliament had the power to grant a divorce *a vinculo*. The ecclesiastical courts, however, could only grant a divorce *a mensa*. See *Maynard v. Hill*, 125 U.S. 190, 206 (1887).

42. See *Spindel v. Spindel*, 283 F. Supp. 797, 806-09 (E.D.N.Y. 1968).

43. See O. MCGREGOR, *DIVORCE IN ENGLAND* 9-10 (1957).

44. The ecclesiastical courts probably did not inspire imitation. "To pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit." J. BRYCE, *MARRIAGE AND DIVORCE* 32 (1905).

In England, before the passage of the Divorce Act of 1858, a divorce *a vinculo* could be obtained only by procuring the passage of a private act in Parliament, in addition to the appropriate decrees from both the ecclesiastical and civil courts. The address of Mr. Justice Maule, delivered in 1845 to a convicted bigamist, has become classic:

You should have brought an action and obtained damages, which the other side would probably not have been able to pay, and you would have had to pay your own costs, perhaps a hundred or a hundred and fifty pounds. You should then have gone to the ecclesiastical courts, and obtained a divorce *a mensa et thoro*, and then to the House of Lords, where, having proved that these preliminaries had been complied with, you would have been enabled to marry again. The expense might amount to five or six hundred or perhaps a thousand pounds.

concerned rather with America's particular problems and needs.<sup>45</sup> The Judiciary Act balanced the need for a competent, impartial federal judiciary<sup>46</sup> against the fear that the state judiciaries would be submerged.<sup>47</sup> The result was a compromise, born of political practicality, that pleased no one.<sup>48</sup> It could perhaps be argued that the scope of the equity jurisdiction of the federal courts is ultimately determined not by the Judiciary Act, with its limitation of equity power to that exercised by English chancery, but by the Constitution itself, which is subject to no such restriction. This theory is, however, undermined by the prevailing precepts of the law of federal jurisdiction. As Justice Chase observed in *Turner v. Bank of North America*:<sup>49</sup>

The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject in every form, which the constitution might warrant.<sup>50</sup>

---

You say you are a poor man. But I must tell you that there is not one law for the rich and another for the poor.

7 ENCYCLOPEDIA BRITANNICA, *Divorce*, 260, 262 n.1 (9th ed., Am. Rep. 1878).

45. Indicative of Congress' pragmatic approach is the manner in which the jurisdictional amount for diversity cases was determined. According to Charles Warren:

It is to be noted that the Circuit Courts were to have no jurisdiction, if the sum involved did not exceed five hundred dollars. The reason for the fixing of this particular sum is probably that which was given by a Virginia Representative in opposition to a change proposed in the Circuit Court Act of 1801, reducing the sum to four hundred dollars:

"He stated that the estate of Lord Fairfax, with the quit rents due thereon, had been confiscated during the Revolution by the State of Virginia; notwithstanding the confiscation, the heirs of Lord Fairfax had sold all their rights, which the assignees contended remained unimpaired. It might be their wish to prosecute in a Federal Court, expecting to gain advantages in it which could not be had from the Courts of Virginia. His object was to defeat the purpose by limiting the jurisdiction of the Circuit Courts to sums beyond the amount of quit rents alleged to be due by an individual."

Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 78 (1923).

46. See Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928). See generally Frank, *Historical Bases of the Federal Judiciary System*, 13 LAW & CONTEMP. PROB. 1 (1948).

47. See 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 172, 220-21 (rev. ed. 1966). See generally Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

48. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 53 (1923).

49. 4 U.S. (4 Dall.) 6 (1799).

50. *Id.* at 9. But see White v. Fenner, 29 F. Cas. 1015, 1015-16 (No. 17,547) (C.C.R.I. 1818) (Story, J.):

The constitution declares, that it is mandatory to the legislature, that the judicial power of the United States shall extend to controversies "between the citizens of different states"; and it is somewhat singular, that the jurisdiction actually conferred on the courts of the United States should have stopped so far short of the constitutional extent. That serious mischiefs have already arisen,

The fact remains, however, that it is totally unreasonable to exclude federal courts from jurisdiction over all cases involving divorce solely because in eighteenth century England such cases were reserved for a forum other than chancery.<sup>51</sup> A more realistic approach was suggested by Chief Justice Taney in his concurring opinion in *Fountain v. Ravenal*.<sup>52</sup>

It is true that the courts of chancery of the United States, in administering the law of a State, may sometimes be called on to exercise powers which do not belong to courts of equity in England. And in such cases, if the power is judicial in its character, and capable of being regulated by the established rules and principles of a court of equity, there can be no good objection to its exercise. It falls within the just interpretation of the grant in the constitution.<sup>53</sup>

An alternative argument against the availability of federal jurisdiction in domestic relations cases is that domestic relations are peculiarly a state concern.<sup>54</sup> Even if this is true, it does not follow that diversity jurisdiction should be excluded. Diversity jurisdiction has never been restricted only to the consideration of federal questions. Since *Erie Railroad Co. v. Tompkins*<sup>55</sup> guarantees that the federal courts will decide diversity cases in accordance with state law, it is difficult to see how federal diversity jurisdiction could usurp any state policy-making prerogative in domestic relations cases.

Another argument is raised by the recent case of *In re Freiberg*,<sup>56</sup> in which the court held that although the federal courts have the power to act in matters concerning domestic relations, they "have consistently refused to hear any action seeking a determination of marital and parental status."<sup>57</sup> *Freiberg* was not a case in which the court could contend that its jurisdiction was precluded by the Judiciary Act; it was a child custody case, within the traditional jurisdiction of chancery.<sup>58</sup> Giving no real reason other than a citation to *In re Burrus*,<sup>59</sup> the court exercised its equitable discretion to refuse to hear the case. In *Burrus*, the Supreme Court, by way of dictum,<sup>60</sup> stated that: "The whole subject of the domestic relations of husband and

---

and must continually arise from the present very limited jurisdiction of these courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them.

See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.).

51. See *Cotter v. Cotter*, 225 F. 471 (9th Cir. 1915); *Hodges v. Hodges*, 22 N.M. 192, 159 P. 1007 (1916).

52. 58 U.S. (17 How.) 369 (1855).

53. *Id.* at 393.

54. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930); *In re Burrus*, 136 U.S. 586 (1890); *Druen v. Druen*, 247 F. Supp. 754 (D. Colo. 1965).

55. 304 U.S. 64 (1938).

56. 262 F. Supp. 482 (E.D. La. 1967).

57. *Id.* at 484.

58. See, e.g., *In re Morgan*, 117 Mo. 249, 21 S.W. 1122 (1893).

59. 136 U.S. 586 (1890).

60. *Burrus* held only that a district court might not issue a writ of habeas corpus in a child custody case, absent a constitutional question.

wife, parent and child, belongs to the laws of the States and not to the laws of the United States."<sup>61</sup> The relevance of that statement to a post-*Erie* diversity case appears slight. A district court may refuse to exercise its equity jurisdiction<sup>62</sup> or its declaratory judgment power,<sup>63</sup> but it is submitted that such refusal should be justified by the circumstances of the particular case, rather than by a mere recital of stale precedent.

The arguments directed solely against diversity jurisdiction are of little weight, especially in situations such as that presented in *Spindel*. The argument that the wife can have no domicile apart from that of the husband is of ancient vintage.<sup>64</sup> It was rejected as early as *Barber v. Barber*,<sup>65</sup> and has been almost uniformly disregarded since then.<sup>66</sup> The argument that it is impossible to fulfill the jurisdictional amount in marital cases is slightly more persuasive.<sup>67</sup> However, property settlements and alimony awards frequently exceed the required jurisdictional amount. Moreover, a showing of the necessary amount is not difficult where the validity of a pre-existing divorce decree is at issue. For example, a district court granted jurisdiction in a suit challenging the validity of a divorce decree affecting title to realty held by the parties as tenants by the entireties, where the parties had a net equity in the property well in excess of the jurisdictional amount.<sup>68</sup>

#### SHOULD DIVERSITY JURISDICTION EXTEND TO DOMESTIC RELATIONS CASES?

The arguments traditionally advanced to justify the refusal to extend federal diversity jurisdiction to domestic relations cases are largely unconvincing. It does not follow, however, that federal jurisdiction should be extended to divorce. No federal court has gone so far as to issue a divorce decree in a diversity case, nor is one likely to do so. The break with the past would be too radical, the prospective increase in federal litigation too great. These factors do not, however, militate against the granting of diversity jurisdiction in cases where the issuance of a divorce decree is not directly involved, such as cases testing the validity of a divorce decree or a separation agreement.

The extent of federal jurisdiction has historically been determined by practical necessity, dependent on such factors as the competence

61. 136 U.S. at 593-94.

62. "[F]ederal courts will not take jurisdiction of domestic relations requiring exercise of equitable discretion." *Forbes v. Galway*, 266 F. Supp. 762, 763 (S.D.N.Y. 1967). See also *Morris v. Morris*, 273 F.2d 678 (7th Cir. 1960).

63. See *Walker v. Felmont Oil Corp.*, 262 F.2d 163 (6th Cir. 1958), cert. denied, 361 U.S. 840 (1959); *D.A. Foster Equip. Corp. v. Fidelity & Cas. Co.*, 262 F. Supp. 278 (D. Md. 1966).

64. *Barber v. Barber*, 62 U.S. (21 How.) 582, 600-02 (1858) (dissenting opinion).

65. *Id.* at 592-99.

66. *E.g.*, *Garberson v. Garberson*, 82 F. Supp. 706 (N.D. Iowa 1949). But see *Bowman v. Bowman*, 30 F. 849 (C.C.N.D. Ill. 1887); *Shepard v. Ward*, 5 N.J. 92, 74 A.2d 279 (1950).

67. See *Bowman v. Bowman*, 30 F. 849 (C.C.N.D. Ill. 1887); *Chappell v. Chappell*, 86 Md. 532, 39 A. 984 (1898).

68. *Rapoport v. Rapoport*, 273 F. Supp. 482 (D. Nev. 1967).

of the state judiciaries and the needs of individual litigants.<sup>69</sup> This is especially true where, as in most domestic relations cases, appeal is made to the court's discretionary equity or declaratory judgment power.<sup>70</sup> To what extent do such practical considerations militate against federal jurisdiction in cases not directly involving the issuance of a divorce decree? The issues presented in such cases may be vexatious, time consuming and of limited importance. The state statute to be interpreted may be ambiguous.<sup>71</sup> A convenient and impartial<sup>72</sup> state forum may be readily available. An illustrative case, ultimately decided by the Supreme Court, is *Sutton v. Lieb*.<sup>73</sup> In that case an Illinois court awarded the wife alimony until she should remarry. She subsequently remarried in Nevada, but, after having that marriage annulled in New York, she remarried again in New York and sought to recover alimony accruing between her remarriages. The controlling Illinois statute was unclear and uninterpreted; the state court was readily available. In short, the case illustrated, as Justice Frankfurter asserted in his concurring opinion, that "little excuse is left for diversity jurisdiction."<sup>74</sup> The *Erie* rule may also discourage the extension of federal diversity jurisdiction to domestic relations. That case has complicated the role of the federal courts in deciding diversity actions. The addition of the technical field of domestic relations to this already complex jurisdictional area may be undesirable. As former Assistant Attorney General George Cochran Doub observed:

The consequence [of *Erie v. Tompkins*] is that the federal court may neither exercise its own judgment as to what the law

69. As then Professor Felix Frankfurter stated:

Not inherent reasons, then, but practical justifications explain the past judiciary acts and must vindicate existing jurisdiction. The force and dangers of parochial attachments, the effectiveness and limitations of a centralized judiciary administering law over a continent, the dependability of state courts, the convenience of suitors, shifting economic and political sentiments, — such influences, with varying incidence, have shaped the accommodations of authority distributed between the national judiciary and the state courts. The present jurisdiction cannot rely on tradition. Always have the accommodations been temporary. The only enduring tradition represented by the voluminous body of congressional enactments governing the federal judiciary is the tradition of questioning and compromise, of contemporary adequacy and timely fitness.

Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 514-15 (1928).

70. See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 169-77 (1963).

71. E.g., MD. ANN. CODE art. 16, § 26A (1966): "In no action for divorce instituted in this State after June 1, 1965, shall an offer of reconciliation or an attempt to reconcile by one spouse without the concurrence of the other spouse be available as a defense to a divorce nor in and of itself be a bar to a divorce." Professor John Ester of the University of Maryland School of Law criticized the statute as "poorly worded" and suggested a number of hypotheses where its operation would be, at best, unclear. J. ESTER, MARYLAND CASES AND MATERIALS ON DOMESTIC RELATIONS 103-04 (1966). *Jester v. Jester*, 246 Md. 162, 228 A.2d 830 (1967), interpreting that statute, provided little help in solving these problems. § 26A was amended in 1968.

72. Perhaps the greatest practical advantage of invoking federal diversity jurisdiction is that the aggrieved party does not have to seek justice in the courts of his adversary's state. See Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U.L. REV. 407 (1956).

73. 342 U.S. 402 (1952).

74. *Id.* at 412.

should be nor find any reliable state guides to what it is, but must conjecture as to what a state court would do. Its inquiries must be: Would the highest state court overrule an old and much-criticized decision? Would it follow a lower court holding? What would it do when there is no case in point?<sup>75</sup>

However, this argument may be double edged. The *Erie* doctrine guarantees that state substantive law will be applied in diversity cases; federal jurisdiction thus would not interfere with state control over the domestic relations of its citizens.

Furthermore, in situations where jurisdiction over both parties is required,<sup>76</sup> modern "long arm" statutes have to a certain extent obviated the need for diversity jurisdiction by enabling a wronged party to institute suit in his home state. The Maryland Court of Appeals, in interpreting the New York "long arm" statute in *Van Wagenberg v. Van Wagenberg*,<sup>77</sup> held that a non-domiciliary who negotiated and executed a settlement agreement in New York, and who had business contacts in that state, had subjected himself to the jurisdiction of the New York courts in an action to enforce that agreement. Maryland's "long arm" statute is very similar to that of New York.<sup>78</sup> Another provision of Maryland's statute may also enable a resident, fraudulently induced into marriage or divorce by a spouse who has since fled the jurisdiction, to institute suit against the offending spouse in the Maryland courts.<sup>79</sup> To the extent that the use of "long arm" statutes may not afford the non-resident defendant the same degree of impartiality as would a resort to the federal courts, the statutes may not completely remove the need for diversity jurisdiction. However, it is submitted that state courts today are not hopelessly prejudiced against the non-resident.<sup>80</sup> If substantial prejudice

75. Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243, 246 (1958). *But cf.* Parker, *Dual Sovereignty and the Federal Courts*, 51 Nw. U.L. REV. 407 (1956).

76. Personal jurisdiction over both parties is typically not required in actions for divorce. *E.g.*, MD. ANN. CODE art. 16, §§ 22, 30 (1966). However, such jurisdiction may be required in other civil actions between spouses springing out of the marital relationship. *E.g.*, *Van Wagenberg v. Van Wagenberg*, 241 Md. 154, 215 A.2d 812, *cert. denied*, 385 U.S. 833 (1966).

77. 241 Md. 154, 215 A.2d 812, *cert. denied*, 385 U.S. 833 (1966) (suit to enforce separation agreement).

78. *Hardy v. Rekab, Inc.*, 266 F. Supp. 508, 514 n.12 (D. Md. 1967): "Section 96(a)(1) [MD. ANN. CODE art. 75] of the Maryland Act is verbatim the same as section 1.03(a)(1) of the Uniform Act, which, in turn, is derived from the Illinois Act. . . . The New York provision is substantially the same. N.Y. Civ. Prac. Law & Rules § 302(a)(1) (McKinney 1966 Supp.)."

79. MD. ANN. CODE art. 75, § 96(a)(3) (1965).

80. Doub, *Time For Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243, 245 (1958):

The assumption that a non-resident will be treated unfairly in state courts now seems to many an unworthy reproach and reflection upon our well-organized state judicial systems. Our national feelings, the mobility of modern life, interstate media of communication and our foreign wars all have diluted our state attachments. Congress has manifested its confidence in state courts not only by providing for concurrent jurisdiction of federal question cases involving more than \$3,000 and exclusive state court jurisdiction of federal question cases involving less than \$3,000, but even more emphatically by prohibiting removal of Federal Employers' Liability Act and Jones Act cases where the plaintiff has chosen the state court.

does exist, such prejudice should be grounds for removal to the federal district court.<sup>81</sup>

In conclusion, it seems that neither the Federal Judiciary Act, nor the theory that domestic relations are peculiarly a state concern, nor the concept of a judicially created exception, bars federal courts from accepting diversity jurisdiction over domestic relations cases. The real considerations are pragmatic. State courts are more familiar with local domestic relations legislation and case law; federal courts could not handle the increased workload of divorce litigation. However, time has seemingly transformed the *Barber* doctrine into absolute fiat: there shall be no federal diversity jurisdiction over cases involving domestic relations.<sup>82</sup> This apparent rigidity may prevent a district court from accepting jurisdiction even where such jurisdiction would be beneficial.<sup>83</sup> Acceptance of the approach espoused in *Spindel* would contribute badly needed flexibility to the operation of the *Barber* doctrine.

---

---

81. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 235 (1948). Some federal judges would abolish diversity jurisdiction except for removal to a federal court by a non-resident defendant upon a showing that "from prejudice or local influence he will not be able to obtain justice in such State courts." *Id.* at 236 n.98.

82. *But see* notes 17-24 *supra* and accompanying text.

83. In one case, for example, the plaintiff contended unsuccessfully that the cost of bringing suit in the state courts was "prohibitive." *Brandtscheit v. Britton*, 239 F. Supp. 652, 655 (N.D. Cal. 1965).