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Part One: Family, the Constitution, and Federalism
Travis Grant (Spring 2001)

THE DOMESTIC RELATIONS EXCEPTION TO DIVERSITY JURISDICTION: SPOUSAL SUPPORT ENFORCEMENT IN THE FEDERAL COURTS

Perhaps you join me in the belief that the scope of federal diversity jurisdiction has seemed clear, at least in litigation involving only one plaintiff and only one defendant, ever since your law-school Civil Procedure course. You need a "civil action" between citizens of different states, and you need good-faith allegations that the "matter in controversy" between them exceeds $75,000. [1] Then what about the scope of diversity jurisdiction when it comes to alimony awards? Lots of times every year, citizens of different states who happen to be each others' spouses or former spouses engage in "civil actions" over (or involving) alimony; and surely we are right in guessing that some of those disputes involve claims to alimony in excess of $75,000. Yet seldom if ever do we find these disputes reported on the dockets of the federal courts. How come?

The answer lies somewhere in an exception to federal diversity jurisdiction first recognized a century and a half ago in Barber v. Barber and followed by federal courts ever since. [2] Called the "domestic relations exception," it deprives federal courts of diversity jurisdiction over an indefinite range of noncriminal disputes related to marriage and divorce including child custody, child support, and alimony. [3] The Supreme Court last essayed the exception in Ankenbrandt v. Richards, which involved a dispute all Justices considered quite irrelevant to the exception's contours. [4]

***16** After summarizing Barber, the Ankenbrandt Court succumbed to the compulsion to explain. [5] The U.S. Constitution, it unanimously agreed, was not

the source of the constraining rule. Article III § 2, the provision that articulates the extent of and limitations on federal judicial power, "contains no limitation on subjects of a domestic relations nature." [6] The Court also agreed that Congress had authority to limit the original jurisdiction of the federal courts further than had the Constitution; and it noted that the original statute defining diversity jurisdiction limited that jurisdiction to "suits of a civil nature at common law or in equity." [7] A respectable argument could be made, and in fact had been made by the dissenters in Barber, that the phrase "common law or equity" operated to exclude actions for divorce, alimony, child support, and the like--all of which the English considered to lie within ecclesiastical, not common-law or chancery, jurisdiction. [8] But that was not the issue dividing the Barber majority and dissenters. Instead, the issue was whether federal courts could exercise diversity jurisdiction to enforce state-court alimony decrees; the Barber majority held they could, and the dissenters insisted they couldn't. [9]

***17** But the diversity statute had been revised in 1948 to substitute "all civil actions" for the reference to "common law" and "equity" actions; [10] and thus the argument to statutory text in support of the exception was lost. Here maxims of statutory interpretation came to the aid of the Ankenbrandt majority: Congress would be presumed to have revised the statute with full knowledge of preexisting court decisions interpreting it. At least so far as revisions to federal-court jurisdiction were concerned, "the Court has previously stated that 'no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed'." [11] No such intent was clearly expressed with respect to the domestic-relations exception to federal diversity jurisdiction.

The Ankenbrandt majority hinted that Congress, having adopted as its own this "long-standing and well-known construction of the diversity statute," could change the statute if it wished. [12] But then it provided reasons why the domestic-relations exception should remain:

> Not only is our conclusion rooted in respect for this long-held understanding, it is also supported by sound policy considerations. Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations

> dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the ***18** past century and a half in handling issues that arise in the granting of such decrees. [13]

Justice Blackmun concurred in the judgment, but disagreed with the majority's argument grounding the domestic relations exception in the terms of original the diversity-jurisdiction statute. The Barber Court did not pretend to construe the diversity-jurisdiction statute in creating the domestic-relations exception, [14] and later decisions of the Court grounded the exception on "the virtually exclusive primacy at that time of the States in the regulation of domestic relations." [15] If Congress had constitutional authority to authorize federal courts to exercise jurisdiction over domestic-relations disputes, then the current diversity-jurisdiction statute could not reasonably be understood to limit the exercise of that jurisdiction. [16]

Instead, Justice Blackmun opined that abstention doctrine forms the base of the domestic-relations exception. He agreed that, at least for most disputes (indeed, whole areas of law) falling within the jurisdiction of the federal courts, abstention was only rarely to be invoked. [17] But domestic relations provided unique justifications for federal-court abstention. Even though the federal government in recent years had expanded considerably into the regulation of domestic relations, the historic refusal of federal courts to exercise their diversity jurisdiction in that field--during which time the states had developed specialized courts and other agencies to deal with domestic matters --" provides the very rare justification for continuing to do so." [18] Thus, "[a]bsent a contrary command of Congress, the federal courts properly should ***19** abstain, at least from diversity actions traditionally excluded from the federal courts, such as those seeking divorce, alimony, and child custody." [19]

Just as Justice Blackmun had exposed the weaknesses in the Ankenbrandt majority's argument to "jurisdiction," the majority exposed the problems with his argument to "abstention." First, the Supreme Court's abstention doctrines originated in 1941, 82 years after Barber was decided. [20] Second, as Justice

Blackmun had conceded,[21] the precedents had spoken of the domestic-relations exception in jurisdictional terms. Third, the argument to abstention as the basis had no visible means of authoritative support.[22]

Thus the rationales in support of the domestic-relations exception to diversity jurisdiction have their definite shortcomings, but the exception is unlikely to be removed from the door-closing doctrine of the federal courts, either by Congress or by the courts themselves. As both the Ankenbrandt majority and Justice Blackmun point out, the federal system lacks the elaborate legal infrastructure, the expertise, and the means of enforcement to intervene in matters of divorce, alimony, and child custody and support. Congress seems to have recognized as much in limiting its domestic-relations legislation to enforcement measures that would promote cooperation and uniformity among the states.[23]

***20** In conclusion, the nature of the "domestic relations exception" is hazy, but its ramifications are not. The Ankenbrandt Court has clearly limited the exercise of federal diversity jurisdiction over domestic-relations matters to the enforcement of state-court support judgments and to claims that are peripheral to domestic relationships. The question still remains: Why do we see so few federal-court enforcement of alimony arrearages in the exercise of diversity jurisdiction?

Additional reading:

• Note (Maryellen Murphy), Domestic Relations Exception to Diversity Jurisdiction: Ankenbrandt v. Richards, 28 New England Law Review 577 (1993).

• Note (Thomas H. Dobbs), The Domestic Relations Exception Is Narrowed After Ankenbrandt v. Richards, 28 Wake Forest Law Review 1137 (1993).

Footnotes

1 28 U.S.C. § 1332(a) (circa 2001).

2 Barber v. Barber, 21 How. (62 U.S.) 582, 599-600 (1858).

3 See Annotation (Francis M. Dougherty), "Domestic Relations" Exception to Jurisdiction of Federal Courts Under Diversity of Citizenship Provisions of 28 U.S.C.S. § 1332(a), 100 ALR Fed 700, esp. §§ 12-13 (1990).

4 "[W]hatever belief one holds as to the existence, origin, or scope of a 'domestic relations exception,' the exception does not apply here." Ankenbrandt v. Richards, 504 U.S. 689, 717 (1992) (Stevens, J., concurring in judgment). The case involved a tort action for physical and sexual child abuse, brought by a custodial ex-spouse on behalf of the children against the noncustodial ex-spouse and his girlfriend. Id. at 691.

5 "Because we are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction." Id. at 694-95.

6 Id. at 695 [citing U.S. Constitution, art. III § 2].

7 Id. at 698 [quoting the Judiciary Act of 1789, § 11, 1 Stat. 78, which reads as follows: "The circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where in dispute exceeds, exclusive costs, the sum or value of five hundred dollars, and... an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State"].

8 Id. at 698-700 [discussing at length the dissent in Barber, with which on this point the Barber majority "did not disagree." Id. at 699.]

9 Id. at 693-94. Thus, Barber indicates that the third of Justice Blackmun's four categories of "domestic relations cases" are not within the exception:
"Domestic relations" actions are loosely classifiable into four categories. The first, or "core," category involves declarations of status, e.g., marriage, annulment, divorce, custody, and paternity. The second, or "semicore," category involves declarations of rights or obligations arising from status (or former status), e.g., alimony, child support, and division of property. The third category consists of secondary suits to enforce declarations of status, rights, or obligations. The final, catchall category covers the suits not directly involving status or obligations arising from status but that nonetheless generally relate to domestic relations matters, e.g., tort suits between family or former family members for sexual abuse, battering, or intentional infliction of emotional distress.
Id. at 716 (Blackmun, J., concurring). And Ankenbrandt confirms that most or all of the fourth Blackmun category lies outside the exception.

10 1948 Judicial Code and Judiciary Act, 62 Stat. 930. The pertinent language has been continued to this day in 28 U.S.C. § 1332(a) (emphasis added): "The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between--(1) citizens of different states;..."

11 Ankenbrandt, 504 U.S. at 700 [quoting Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 22, 227 (1957)]. To this system of presumptions Justice Blackmun retorted: "I do not see how a language change that, if anything, expands the jurisdictional scope of the statute can be said to constitute evidence of approval of a prior narrow construction. Any inaction on the part of Congress in 1948 in failing expressly to mention domestic relations matters in the diversity statute reflects the fact... that Congress likely had no idea until the Court's decision today that the diversity statute contained an exception for domestic relations matters." Ankenbrandt, 524 U.S. at 708-09 (Blackmun, J., concurring).

12 Id. at 700.

13 Id. at 703-04.

14 Id. at 709 (Blackmun, J., concurring in judgment).

15 Id. at 714. "My point today is that no coherent 'jurisdictional' explanation for [the domestic-relations exception] emerges from our line of such cases, and it is unreasonable to presume that Congress divined and accepted one from these cases." Id.

16 Id. And since federal diversity jurisdiction over domestic-relations cases depended on constitutional not statutory interpretation, Justice Blackmun expressed concern over the majority's attempts to deal with the domestic-relations exception in jurisdictional terms: "Like the diversity statute, the federal-question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal-question cases to 'Cases, in Law and Equity.' Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer

federal-question jurisdiction (as under 28 U.S.C. § 1331) on the federal courts in any matters involving divorces, alimony, and child custody." Id. at 715 n. 8.

17 Id. at 715 [referencing the majority's remark that "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation... to exercise the jurisdiction given them'," Id. at 705 (citation omitted)].

18 Ankenbrandt, 504 U.S. at 715 (Blackmun, concurring in judgment).

19 Id.

20 Id. at 706 n.8 [citing Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)]. See Burford v. Sun Oil Co., 319 U.S. 315, 317-18 (1943): "Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the grounds of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudiced to the public interest' for it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."

21 Ankenbrandt, 504 U.S. at 713-16 (Blackmun, J., concurring in judgment).

22 "Justice Blackmun offers no authoritative support for where such an abstention doctrine might be found, no principled reason why we should retroactively concoct an abstention doctrine out of whole cloth to account for federal court practice in existence for 82 years prior to the announcement of the first abstention doctrine... and no persuasive reason why articulation of such an abstention doctrine offers a sounder way of achieving the same result than our construction of the [diversity] statute." Id. at 706 n.8 (majority opinion).

23 Of course, any decree for alimony in one state should be upheld in another to the extent demanded by the Full Faith and Credit Clause. And Congress can implement its own ideas about enforcement of support obligations and then then coercing the states into adopting them by withholding federal funds under the Spending Power. See, e.g., State of Kansas v. United States, 24 F. Supp.2d 1192 (D. Kan. 1998). Congress may also, under the commerce clause, punish "deadbeat dads" whose failure to pay child support crosses state lines. See, e.g., United States v. Collins, 921 F. Supp. 1028, 1033 (W.D.N.Y. 1996): "Under diversity jurisdiction, federal courts will not entertain civil actions to enforce state court child support orders where such orders are subject to modification.... However, whether in a federal civil case, a federal court may, under diversity jurisdiction, decline exercise of jurisdiction over a child support order enforcement action based either upon the so-called domestic-relations exception to diversity jurisdiction or upon the abstention doctrine [citing Ankenbrandt], the court finds that neither principle is applicable to a federal criminal prosecution." See also Martha Waltz, Does the Child Support Recovery Act Violate Due Process and the Right to Travel?, 11 J. Contemp. Legal Issues 450 (2000), and authorities cited there.

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