Family Law: Congress's Authority to Legislate on Domestic Relations Questions

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February 2, 2009

Congressional Research Service
7-5700
www.crs.gov
RL31201

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Under the United States Constitution, Congress has little direct authority to legislate in the field of domestic relations. The primary authority and responsibility to legislate in the domestic relations arena lies with the individual states. The rationale behind this approach is the lack of overriding national considerations in the family law area. However, states' freedom to legislate has led to substantial variation between the individual states on many topics including incidents of marriage, divorce and child welfare. As such, Congress continues to utilize a number of indirect approaches to enact numerous federal laws which impact on family law questions. This report discusses the extent to which Congress is constitutionally authorized to legislate on family law questions, and includes examples of present laws utilizing the various approaches available in this area.

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Introduction

Under the United States Constitution,[1] Congress has little direct authority to legislate in the field of domestic relations. Generally, state policy guides these decisions. Despite the lack of direct authority to legislate domestic relations issues, Congress continues to utilize a number of indirect approaches to enact numerous federal laws which impact on family law questions.

The Constitution's framers felt that states, rather than the federal government, should maintain jurisdiction over most family law questions. Thus, the final document reflects that view. As summarized by the Supreme Court in *Hisquierdo v. Hisquierdo*:[2]

> Insofar as marriage is within temporal control, the States lay on the guiding hand. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." In *re Burrus*, 136 U.S. 586, 593-94 (1890).... On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law shall be preempted. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

Thus, the individual states have the primary authority and responsibility to legislate in the domestic relations arena, which includes incidents of marriage, divorce, and child welfare. The rationale behind this approach is the lack of overriding national considerations in the family law area. Therefore, states generally have the freedom to legislate as they see fit on these questions. However, states' freedom to legislate has led to substantial variation between the individual states on many of these topics, although more uniformity now exists than at any time in the past.[3] Thus, similarly situated spouses, parents and children may have different legal options depending on where they reside. For example, the community property concept of marital property adopted by nine states[4] is quite different from the common law property system in the other forty-one states. While all states have some form of no-fault divorce, based either on grounds such as "irreconcilable differences" or some period of separation, many authorize divorces based on fault or consider marital fault as a factor when awarding spousal support or dividing marital property. In addition, states have varying rules regarding the "who, what, when and where" of marriages and/or divorces.

Adoption is another area in which states have diverse regulations. For example, state statutes concerning the eligibility of homosexuals to adopt range from Florida's statutory prohibition[5] to

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[1] U.S. Const. art. VI, § , cl. 2 states "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." However, this language encompasses only those areas where Congress has authority to legislate; *see* discussion of the enumerated powers clause, *infra*.

[2] 439 U.S. 572, 581 (1979).

[3] For example, all states adopted the Uniform Interstate Family Support Act (UIFSA) under which states treat valid child support orders entered in another state as having been entered in their own state. States' adoption of uniformed laws such as UIFSA, Uniform Child Custody Jurisdiction Act (UCCJA) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) have aided in fostering consistency and efficiency in the enforcement of interstate child support and custody orders.

[4] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin (due to statutory changes initiated in 1986).

[5] Fla. Stat. Ann.§ 63.042. On January 28, 2004, the 11th Circuit Court of Appeals found that the statute does not violate (continued...)

Mississippi's statute barring adoption by same-sex couples[6] to Utah's prohibition on unmarried couples, heterosexual or homosexual, from adopting.[7] In addition, states have different statutes regarding the rights of adopted adults, birth parents, adoptive parents, birth siblings and birth relatives to gain access to identifying[8] and non-identifying[9] information about the adoptee or birth relatives. For example, a few states permit adoptees to gain access to their birth and/or adoption records,[10] but most require a court order issued for "good cause" (usually a medical crisis or some comparably serious situation) before unsealing such information. Although many states use similar procedures, the laws and processes surrounding access in any one state are unique.

During the first half of the twentieth century, numerous constitutional amendments were proposed which, if adopted would have authorized Congress to enact uniform national marriage and divorce laws. However, none of these proposals received the requisite two-thirds vote of each House of Congress necessitating submission to the states for ratification.[11] This approach now appears disfavored[12], in part due to a continuing view that the federal government should refrain from intervening in most family matters and in part because other approaches (all discussed *infra*) have led, or have the potential of leading, toward the same result in those areas where uniformity is thought desirable.

For example, the National Conference of Commissioners on Uniform State Laws (NCCUSL), a non-governmental entity, has proposed uniform laws on a number of family law topics, many of which have been widely adopted by the states. A more expansive view of congressional power to

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the Equal Protection or Due Process Clauses of the Fourteenth Amendment. *Lofton v. Sec. of the Dept. of Children and Family Services*, 358 F.3d 804, 816 (11th Cir. 2004). However, on August 29, 2008, a state court found this statute facially invalid under the state's constitution. Specifically, the court held that the statutory ban violated constitutional provisions pertaining to adoption, prohibiting bills of attainder and separation of powers. *In re Adoption of John Doe*, 2008 WL 5070056 (Fla. Cir. Ct. Aug. 29, 2008).

[6] Miss. Ann. Code. § 93-17-3(2).

[7] Utah Stat. § 78B-6-117. This statute does not expressly prohibit adoption by single people, nor does it ban same-sex couples from adopting from private agencies. On November 4, 2008, voters in Arkansas approved a similar citizen-initiated statute prohibiting unmarried sexual partners (both opposite-sex and same-sex couples) from adopting or serving as foster parents. For more information on same-sex adoptions, refer to CRS Report RS21191, *Same-Sex Adoptions*, by Alison M. Smith.

[8] Identifying information encompasses data which may lead to positively identifying an adopted adult, birth mother, or birth father such as names, addresses, and dates contained in court records or submitted to the State Department of Vital Statistics.

[9] Non-identifying information is generally restricted to details about the adopted adult and the adopted adult's birth relatives. Information can include any of the following: date and place of adopted adult's birth; age of the birth parents and a description of their general physical appearances; the race, ethnicity, religion, and medical history of the birth parents; type of termination; facts and circumstances relating to the adoptive placement; age and sex of children of the birth parents at the time of adoption; educational levels of the birth parents and their occupations, interests, skills; any supplemental information about the medical or social conditions of members of the birth family provided since the adoption's completion.

[10] Adopted adults 18 or older have automatic access to their original birth certificates only in Alaska, Kansas, and, in some cases Ohio, Tennessee, and Montana, depending upon which year the adoption was finalized.

[11] Article V of the U.S. Constitution provides two ways to propose amendments to the document and two ways to ratify them. Amendments may be proposed either by the Congress, by two-thirds vote of the House and the Senate (of those present and voting, provided a quorum is present), or by a convention called by Congress in response to applications from the legislatures of two-thirds (34) or more of the states.

[12] However, beginning in the 107th Congress, legislation proposing a constitutional amendment defining as or limiting marriage to the "union of a man and a woman." See, H.J.Res. 93, 107th Cong.; H.J.Res. 56, S.J.Res. 26, and S.J.Res. 30, 108th Cong.; S.J.Res. 1, S.J.Res. 13; H.J.Res. 39, 109th Cong. and H.J.Res. 22, 110th Cong.

legislate under its commerce clause authority has led to federal legislation such as the Parental Kidnapping Prevention Act (PKPA), which authorizes federal intervention into certain custodial interference cases where applicable state law classifies such action as a felony. Also, Congress has enacted legislation under the Full Faith and Credit Clause. Legislation under this clause directs sister states to give full faith and credit to child custody, child support and protection orders of other states. Congress passed the Defense of Marriage Act, which permits sister states to give no effect to the law of other states with respect to governing same-sex marriages. Congress has also established a number of funding programs whereby states must comply with detailed requirements in such areas as child abuse and the adoption of hard-to-place children before they can receive federal money to help deal with these problems.

This report discusses the extent to which Congress is constitutionally authorized to legislate on family law questions, and includes examples of present laws utilizing the various approaches available in this area.

General Constitutional Principles

There are generally applicable constitutional principles which limit the authority of all governmental entities (federal, state, and local) to legislate on family law questions.

Due Process

The Fourteenth Amendment's Due Process Clause[13] has a substantive component which "provides heightened protection against government interference with certain fundamental rights and liberty interests,"[14] including parents' fundamental rights to make decisions concerning the care, custody, and control of their children.[15] Although the Constitution does not specifically mention a fundamental right to privacy, courts recognize this right to encompass contraception, abortion, marriage, procreation, education (elementary level) and interpersonal relations.[16] These aspects broadly termed "private family life" are constitutionally protected against government interference. As such, a governmental entity must demonstrate a compelling interest to regulate or infringe on an individual's fundamental right. As summarized by the Supreme Court in *Moore v. City of East Cleveland*:[17]

> "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth

[13] The Fourteenth Amendment forbids any State to "deprive any person of life, liberty, or property, without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws."

[14] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

[15] *Id.*; see also *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

[16] In addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, ibid.; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

[17] 431 U.S. 494, 499 (1977).

> Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974). A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 300, 399-401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The *LaFleur* decision struck down various local maternity leave rules which required pregnant teachers to begin leave at specified stages of their pregnancies and not to return to work until some specified point in the school year after their children were born or attained a certain age. *Meyer* and *Pierce* invalidated statutes which were held to interfere with parents' right to educate their children as they see fit; the *Meyer* statute prohibited instruction in foreign languages before the eighth grade,[18] while the statute in *Pierce* required children to attend public schools.[19] *Moore* stuck down a local ordinance that specified which members of extended families could reside together in common households—in the particular household which formed the basis for the suit, two grandchildren could have legally resided with their grandmother under the ordinance were they siblings, but were prohibited from doing so because they were first cousins.[20] The Court noted that while the family is not beyond regulation, "when government intrudes [into family matters], this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulations."[21]

In *Griswold v. Connecticut*,[22] the Supreme Court recognized an additional tenet of privacy: the right of married couples to use contraceptives. The Court extended this right to minors, married or unmarried, in *Carey v. Population Services International*.[23] Also, In *Roe v. Wade*,[24] the Supreme Court substantially limited governmental authority to regulate abortions, holding that a mother's personal privacy right prevented a state from intervening at the first trimester of pregnancy, and permitted intervention during the second trimester only as needed to protect the mother's health. The Court reasoned that a state's interest fails to become compelling enough to justify extensive regulation until a fetus becomes viable, at approximately the end of the second trimester. This ruling was clarified, but retained in three companion cases decided in 1983: *Akron Center for Reproductive Health, Inc. v. City of Akron*[25]; *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft;*[26] and *Simopoulous v. Virginia*.[27] In 1992, the Supreme Court reaffirmed *Roe's* essential holding that before viability of the fetus, a woman has the right to choose to have an abortion and has the right to obtain an abortion without undue interference from the state.[28] In *Planned Parenthood of S.E. PA v. Casey*, the Court held that a statute requiring spousal notification before a woman could have an abortion constituted an undue burden, thus violating the due process clause of the Fourteenth Amendment.[29] However, the remaining four

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[18] *Meyer v. Nebraska*, 262 U.S. 300, 399-401 (1923).

[19] *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

[20] *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

[21] *Id.*

[22] 381 U.S. 479 (1965).

[23] 431 U.S. 678 (1977).

[24] 410 U.S. 113 (1973).

[25] 462 U.S. 416 (1983).

[26] 462 U.S. 476 (1983).

[27] 462 U.S. 506 (1983).

[28] *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. 833 (1992).

[29] *Id.*

challenged aspects of the Pennsylvania Abortion Control Act of 1982 were found to be constitutional and not undue burdens. The Court held valid: (1) the act's definition of a "medical emergency," a condition warranting exemption from the act's other limitations; (2) record keeping and reporting requirements imposed on facilities that perform abortions; (3) an informed consent and 24-hour waiting period requirement; and (4) a parental consent requirement, with the possibility for a judicial bypass.[30]

A right to marry has also been judicially accepted as a guarantee of due process. Thus, the Court struck down miscegenation statutes in *Loving v. Virginia*,[31] finding that the state lacked a compelling interest in prohibiting persons from marrying based solely on their race.

Equal Protection

The Equal Protection Clause[32] is another constitutional limitation on governmental entities' authority to legislate on domestic relations issues. When legislation or government policy discriminates between classes or deprives a group of a particular right, the level of scrutiny applied under an equal protection challenge turns on the nature of the group allegedly discriminated against. As a general rule, courts will uphold the challenged governmental action if the classification drawn by the statute is rationally related to a legitimate state interest.[33] For example, states can legislate to protect minors, prevent close relatives from marrying, require blood tests before marriage and impose other marriage restrictions so long as the restrictions are reasonably related to a valid state interest.

Where the statute targets a quasi-suspect class, namely those based upon gender or illegitimacy, a heightened level of scrutiny applies. Under this intermediate scrutiny test, the statute is presumed invalid unless it is substantially related to a sufficiently important governmental interest.[34] For example, in *Orr v. Orr*,[35] the Supreme Court applied this standard and found a statute which imposed alimony obligations on husbands, but not on wives unconstitutional as violative of the Equal Protection Clause. However, where a statute targets a suspect class, including race, alienage, or national origin or burdens a fundamental right, the statute in question will only be sustained if it is narrowly tailored to serve a compelling state interest. Under this standard, the Court has stuck down statutes in *Eisenstadt v. Baird*[36] and *Skinner v. Oklahoma*[37] as violative of

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[30] *Id.*

[31] 388 U.S. 1 (1967).

[32] The Fourteenth Amendment guarantees that "[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." While there is no corresponding provision applicable to the federal government, the Fifth Amendment Due Process Clause applies the same limitation to the federal government.

[33] *See e.g., Romer v. Evans*, 517 U.S. 620 (1996) (applying the rational basis test in analyzing the equal protection challenge to the state constitutional amendment which prohibited all governmental action designed to protect homosexuals from discrimination).

[34] *See generally, United States v. Virginia*, 518 U.S. 515 (1996) (stating that if gender-based governmental discrimination is to pass judicial muster, the state must demonstrate the existence of an "exceeding persuasive justification.").

[35] 440 U.S. 268 (1979); *see also Califano v. Goldfarb*, 430 U.S. 199 (1977)(finding unconstitutional a statute which imposed a one-half support requirement on widowers, but not on widows, in establishing surviving spouse benefits' entitlements).

[36] 405 U.S. 438 (1972)(finding unconstitutional a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons).

the Equal Protection Clause. Conversely, in *Nguyen v. INS*,[38] the Supreme Court found a statute which provided different rules for attainment of citizenship depending upon whether the one citizen parent was the father or mother, did not violate the Equal Protection Clause.[39]

One instance where these arguments have been unsuccessful involves adult adoptees seeking to obtain information on their birth parents. Such adoptees have advanced both personal privacy and equal protection claims when challenging closed records statutes. However, courts consistently ruled that the privacy rights of the birth parents, as well as the state's interest in maintaining a smoothly-functioning adoption system (parents might become reluctant to place children for adoption if they thought the children would later seek them out), justify these laws.[40] However, the Supreme Court has yet to rule on this question so the issue of closed records statutes remains unsettled.

Enumerated Powers

As opposed to the general constitutional restraints discussed above, Article I, Section 8, of the Constitution, the enumerated powers clause, limits congressional authority to act by specifying general subject categories where federal action is permissible. These categories encompass those topics the Constitution's framers thought could best be handled on the national level, such as war-making and defense, interstate and foreign commerce, coinage and currency, the post office, bankruptcies, copyrights, and the judicial system. Under this clause and the Tenth Amendment,[41] categories other than those enumerated are reserved for state action.

These enumerated powers do not readily encompass most family law questions. As such, federal legislation in this area is usually hinged on some other federal interest. For example, while states have the primary authority to legislate on adoption, alien children less than sixteen years of age adopted by unmarried United States citizens have been granted immigrant status.[42] Legislation such as the Indian Child Welfare Act[43] is based on congressional authority over Indian questions. States retain general authority over child pornography, but the federal government can regulate that portion which moves in interstate or foreign commerce, and/or which is shipped through the mail.[44]

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[37] 316 U.S. 535 (1942)(holding a law requiring sterilization of certain criminals violative of equal protection; but emphasizing the importance of marriage and procreation).

[38] 533 U.S. 52 (2001).

[39] *Id.* The Court found that two important governmental interests justified Congress's decision to impose different requirements: (1) the importance of assuring a biological parent-child relationship exists; and (2) the determination ensuring that the child and citizen parent have some demonstrated "opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent." *Id.*

[40] *See*, e.g. *ALMA Society v. Mellon*, 601 F.2d 1125 (2d Cir. 1979); *Yesterday's Children v. Kennedy*, 569 F.2d 431 (7th Cir. 1979).

[41] The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[42] 8 U.S.C. § 1101.

[43] P.L. 95-608, 92 Stat. 3069, codified at 25 U.S.C. §§ 1901-1963.

[44] 18 U.S.C. §§ 2251-2259,2423; 19 U.S.C. § 1305; See also, CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*, by Henry Cohen.

Where Congress has authority to act in a given area, it can exercise one of three options: Congress can (1) supersede all state action on the question; (2) defer entirely to individual state judgments; or (3) legislate somewhere between these two extremes. Congress's options can best be illustrated by looking at its handling of former spouses' entitlements to pensions paid under a federal retirement program. Under Social Security and the Railroad Retirement System,[45] a former spouse who meets specified conditions is entitled to 50% of the covered spouse's benefit,[46] while federal civil service and military pensions are divisible at the option of the individual state hearing the matter (i.e., states are authorized to treat civil service[47] and military retirement[48] payments the same way they treat other pensions for this purpose). The acts governing foreign service and Central Intelligence Agency pension division[49] are hybrids between these two approaches, as they suggest a pro rata division formula predicated on length of marriage/length of service, but permit deviation from this formula by court order or if the parties agree to some other arrangement.

Where congressional intent is unclear or ambiguous, as was the case pertaining to the possible division of military pensions in divorce cases for some time,[50] or where Congress fails to act in a certain area when it has the authority to do so, individual states are free to act and/or interpret the applicable federal statutes as they see fit, subject to the constitutional considerations discussed above. However, once Congress acts to clarify its intent, states are bound by this interpretation and are no longer free to vary their approaches.

Overview of Federal Domestic Relations Legislation

Areas in Which Congress Has Direct Authority to Legislate

Federal Benefits

Congress has plenary legislative authority over federal salaries, pensions, and other benefits, including those aspects which touch on family law questions. The State of California advanced a strong argument in *McCarty v. McCarty*,[51] that its interest in its residents' well-being, along with general state authority over divorce law, was sufficient to confer upon its courts the authority to grant a divorced wife a share of her husband's military pension. The Supreme Court disagreed,

[45] 42 U.S.C. § 402(b) (Social Security); 45 U.S.C. § 231a (Railroad Retirement). These payments do not reduce the retired spouses' entitlements.

[46] Many of the laws cited in this report have exceptions or technicalities not covered by these general summaries. The texts of the particular statutes should be consulted if additional information is required.

[47] 5 U.S.C § 8345(j)(1).

[48] 10 U.S.C. § 1408.

[49] 22 U.S.C. § 4044 (foreign service); § 222 of the Central Intelligence Agency Retirement Act, (CIARA) codified as a note following 50 U.S.C. § 403.

[50] Although there is no federal statute directly on point, the Supreme Court examined a number of related statutes and congressional documents before deciding in *McCarty v. McCarty*, 453 U.S. 210 (1981), that Congress had not intended that military pensions be divisible in this context. At the time of this decision, all of the community property states and a number of equitable distribution states were dividing military pensions, but they could no longer do so after it was issued. The *McCarty* decision and subsequent legislative action to authorize such division is discussed in the next "Federal Benefits".

[51] 453 U.S. 210 (1981)(holding that federal law prevented state divisions of military pensions in divorce cases).

citing congressional power under Article I, Section 8, Clause 14 of the Constitution "[t]o make Rules for the Government and Regulation of the land and naval Forces." The military system was enacted pursuant to this grant of constitutional authority, and the Court found that the application of state community property law as envisioned by the lower court *McCarty* rulings (which divided the pension) could potentially frustrate the congressional objectives of providing for retired personnel and meeting the management needs of the active forces. However, the *McCarty* court recognized the serious plight of an ex-spouse of a retired service member,[52] and invited Congress to change the situation legislatively if so desired. Congress shortly thereafter enacted the Uniformed Services Former Spouses' Protection Act (FSPA),[53] which authorized states to divide, or not divide, these pensions in accordance with applicable state laws and precedents.

As discussed in the preceding section, Congress has for the most part deferred to state judgments in those divorce cases which involve pensions paid to federal employees. Of the pertinent statutes, only the Foreign Service Act and the CIA retirement Act contain suggested division formulas. These optional formulas take into account the particularly disadvantageous economic position of many of the wives whose husbands served in the Foreign Service or with the CIA. Under the Social Security Program, a former spouse who was married to an annuitant spouse with ten or more years of covered service[54] is entitled to 50% of the annuitant's pension at the time he or she reaches age 62, provided the former spouse has not remarried prior to that time.[55] This is a separate entitlement which does not reduce or affect the annuitant spouse's payment. Even in the absence of these statutes, voluntary division of annuities was possible if the parties so agreed. However, as might be imagined, such action occurred infrequently.[56]

Certain former spouses of Social Security,[57] Civil Service,[58] military,[59] railroad,[60] CIA,[61] and Foreign Service[62] annuitants are entitled to survivor annuities (annuities which continue after the annuitant spouse's death). Moreover, federal payments, including wages, pensions, tax refunds, and most other benefits, can be garnished for alimony and child support payments.[63]

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[52] 453 U.S. at 253.

[53] 10 U.S.C. § 1408.

[54] Periods of employment where the annuitant spouse paid into the Social Security System.

[55] 42 U.S.C. § 402(b).

[56] In the vast majority of divorce cases, the parties work out their financial arrangement without court assistance, and the court routinely incorporates this agreement as part of the final decree unless it is on its face grossly unfair to either party. Thus, there is no reason why an annuitant spouse cannot voluntarily agree to divide his or her annuity with the other spouse, presumably in return for some other consideration; and such agreements, once finalized by court order, are binding on the parties. However, the rationale behind legislatively sanctioning such division is that it is unlikely many annuitants will voluntarily agree to split a pension when there is no legal requirement to do so.

[57] 42 U.S.C. § 402(e), (f).

[58] 5 U.S.C. § 8341(h)(1).

[59] 10 U.S.C. § 1447.

[60] 45 U.S.C. § 231a.

[61] CIARA, § 204, codified as a note following 50 U.S.C. § 403.

[62] 22 U.S.C. § 4054.

[63] 42 U.S.C. §§ 659-662, 664

Taxation

Nearly every tax imposed by Congress has at least a tangential impact on family life, if only because it determines how much money the family might have available to it under specified circumstances. This topic is much too complex to provide more than a brief overview of possibly relevant provisions and approaches.

Congress frequently uses its taxing power to establish social policies, as shown in its determinations that people should be encouraged to adopt,[64] to contribute to charitable organizations,[65] or purchase their own homes.[66] To promote marriage neutrality,[67] Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001.[68] Another tax provision frequently thought to have major social policy implication involves tax deductions for certain child care expenditures.[69] However, these deductions may show congressional recognition that both parents often must work for financial reasons, or there is only one parent to support the family, rather than a congressional belief that both parents should necessarily be encouraged to work outside the home.

Furthermore, there are numerous tax provisions which become operable when couples divorce. Frequently those negotiating a financial settlement can choose among several options which can have a substantial impact on the amount of money available to each spouse following the divorce. Tax laws treat child support and alimony differently. For example, alimony or separate maintenance payments from one spouse to another are deductible by the person making the payments and treated as taxable income to the recipient, while child support payments are neither taxable income to the recipient nor deductible by the payer.[70]

There are also a number of tax laws which reference adoption. For the most part, these statutes provide that adopted children are to be treated the same as natural born children for whatever purpose is involved.[71]

Bankruptcy

Article I, Section 8, Clause 4 of the Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." As with taxation, the entire

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[64] P.L. 107-16, 115 Stat. 38 extends permanently the adoption credit for children other than special needs children. In addition, the act increases the maximum credit to $10,000 per eligible child, including special needs children. The act also extends permanently the exclusion from income for employer provided adoption assistance.

[65] 26 U.S.C. § 170 (deductions to qualified organizations tax exempt).

[66] 26 U.S.C. § 163 (mortgage interest tax exempt).

[67] Marriage neutrality means that the tax system should not influence the choice of individuals with regard to their marital status. For a discussion on the marriage tax penalty relief provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001, see CRS Report RS21000, *Marriage Tax Penalty Relief Provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001*, by Gregg A. Esenwein.

[68] P.L. 107-16, 115 Stat. 38. This act contains three marriage tax penalty relief provisions: (1) increases the standard deduction for joint returns to twice the amount of the standard deduction for single returns; (2) increase the width of the 15% marginal income tax bracket for joint returns to twice the width of the 15% tax bracket for single returns; and (3) increases the earned income credit phaseout start and end points for joint returns.

[69] 26 U.S.C. § 44.

[70] 26 U.S.C. §§ 71(a), 215.

[71] *See, e.g.*, 26 U.S.C. § 318 (constructive stock ownership); § 2613 (tax on generation skipping transfers).

Bankruptcy Code, codified as Title 11 of the United States Code, can have an effect on the family lives of those involved in personal or business-related bankruptcies. However, for family law purposes, the most important provision prohibits individuals from discharging alimony and/or child support payments.[72] Other provisions may affect such situations as the timing of a bankruptcy petition *vis a vis* the filing of a divorce suit, or interspousal transfers prior to the filing of a bankruptcy petition or while such a petition is pending.

Indians

Generally, Indian tribes have extensive power to regulate domestic relations among tribal members. As summarized in the authoritative text on this subject:

> Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members. Indian custom marriage has been specifically recognized by federal statute, so far as such recognition is necessary for purposes of inheritance. Indian custom marriage and divorce has been generally recognized by state and federal courts for all other purpose.... No law of the state controls the domestic relations of Indians living in tribal relationship, even though the Indians concerned are citizens of the state.... Property relations of husband and wife, or parent and child, are likewise governed by tribal law and custom.[73]

However, some tribes specifically defer to state authority in this area,[74] recognizing as valid marriages and divorces where pertinent state statutes have been followed. Federal law[75] permits states to assume jurisdiction over civil causes of action between Indians or to which Indians are parties, and which arise in Indian country, as long as the tribe occupying the particular Indian country specifically consents to the exercise of jurisdiction.[76] Once the tribe consents, this authority encompasses such civil actions as marriage, divorce, and adoption.[77]

These various approaches are recognized under 25 U.S.C. § 372a which states that "heirs by adoption" for purposes of certain probate matters shall include adoptions entered by a state court or an Indian court; those approved by the superintendent of the agency having jurisdiction over the tribe of either the adoptee or the adoptive parent; and adoptions handled in accordance with procedures established by the tribal authority of the tribe of either the adoptee or the adoptive parent. Rights of parties to marriages between Indians and non-Indians are set forth at 25 U.S.C. § 181-184.

The Indian Child Welfare Act (ICWA)[78] is a comprehensive measure designed to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and

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[72] 11 U.S.C. § 523(a)(5).

[73] Cohen, *Handbook of Federal Indian Law* 137 (4th ed. 1954), (footnotes and citations omitted).

[74] E.g. *State ex rel. Iron Bear v. District Court of Fifteenth Judicial District in and for Roosevelt County*, 162 Mont. 335, 512 P.2d 1292 (1972) (Assiniboine-Sioux Tribes); *Bad Horse v. Bad Horse*, 163 Mont. 445, 517 P.2d 893 (1974) (Cheyenne Tribe).

[75] 25 U.S.C. § 1322.

[76] Id.; *Kennerly v. District court of Ninth Judicial District of Montana*, 400 U.S. 423 (1972); *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974).

[77] E.g., *Nononka v. Hoskins*, 645 P.2d 507 (Okla. 1982); *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974).

[78] P.L. 95-608, 92 Stat. 3069, codified at 25 U.S.C. §§ 1901-1963.

families."[79] Establishment of minimal federal standards for the removal of Indian children from their homes and procedures for their foster or adoptive placement, and funding a variety of Indian child and family welfare programs help facilitate the act's goals. Indian tribes retain jurisdiction over custody proceedings involving Indian children unless they specifically decline to exercise it.[80]

Upon attaining age 18, Indian adoptees are entitled to receive information as to their birth parents' tribal affiliation and other information necessary to protect rights flowing from their tribal relations.[81] This is the only federal statute dealing with the confidentiality of adoption records.

Indirect Approaches

Congress utilizes indirect approaches in instances where it lacks direct authority to legislate in the domestic relations field. These indirect approaches include (1) the Commerce Clause; (2) a funding nexus or spending power; (3) Uniform State laws; (4) "Sense of Congress" resolutions; and (5) the Full, Faith & Credit Clause of the Constitution.

The Commerce Clause

Article I, Section 8, Clause 4 of the Constitution authorizes Congress "to regulate Commerce with foreign Nations, and among the several States." There are three categories of activities subject to congressional regulation under the commerce clause. Congress may regulate the use of the channels of interstate commerce, or persons or things in interstate commerce, although the threat may come only from intrastate activities. Finally, Congress may regulate those activities having a substantial relation to interstate commerce.[82] Thus, Congress can regulate interstate aspects of certain family law matters even in the absence of direct legislative authority in the area.

For example, the Federal Parent Locator Service, an office in the Department of Health and Human Services (HHS) helps states locate non-custodial parents who fail to make court-ordered child support payments, once states have exhausted their own efforts to locate these individuals.[83] Under the Parental Kidnapping Prevention Act of 1980 (PKPA),[84] this office also acts on requests from authorized persons to locate non-custodial parents who have abducted their children from custodial parents in violation of valid court orders.[85]

The PKPA also makes the Federal Fugitive Felon Act[86] applicable to cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable state felony statutes. This provision again defers to state judgments inasmuch as the provision fails to become operable unless the state where the violation occurred has classified such action as a felony.

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[79] 25 U.S.C. § 1902.

[80] 25 U.S.C. § 1911.

[81] 25 U.S.C. § 1917.

[82] *United States v. Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted).

[83] 42 U.S.C. § 653.

[84] 28 U.S.C. § 1738A.

[85] 18 U.S.C. § 663.

[86] 18 U.S.C. § 1073.

A parent whose child has been taken out of the country has greater difficulty in locating the child and arranging for his or her return than if the child remains in this country.[87] However, if the taking is classified as a felony, extradition treaties can sometimes be used to effectuate this result. The Hague Conference on Private International Law completed work on a Convention on the Civil Aspects of International Child Abduction, which the Senate consented to October 9, 1986. Congress adopted legislation to clarify how the Convention would be implemented in this country.[88]

The Commerce Clause also serves as the basis for federal regulation of child pornography that moves in interstate or foreign commerce.[89]

In 1992, Congress passed the Child Support Recovery Act (CSRA)[90] which created a federal criminal offense for any willful[91] failure to pay past child support obligations to a child who resides in a different state than the parent.[92] Appellate courts that have thus far heard appeals of the CSRA decisions have unanimously declared the CSRA a constitutional exercise of congressional authority, pursuant to the Commerce Clause.[93] The Second Circuit pointed to the fact that various state courts attempted to make the defendant pay his child support, but failed.[94] Because the Commerce Clause gives Congress the authority to pass legislation which aids the states in matters that are beyond their "limited territorial jurisdiction,"[95] the court concluded that

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[87] See generally Westbrook, "LAW AND TREATY RESPONSES TO INTERNATIONAL CHILD ABDUCTIONS," 20 Va. J. of Int'l L. 149 (1981).

[88] 42 U.S.C. §§ 11601-11607. The Hague Convention fails to provide for the recognition and/or enforcement of foreign custody decrees; rather, it requires restoration of the custody status quo that existed before the abduction. Thus, it denies the abductor any legal advantage in the country to which the child has been taken as courts in that country are under a treaty obligation to return the child to the country from which the child was abducted without conducting any proceedings on the merits of the underlying custody claim(s). For a discussion and analysis of the Convention, see "AMERICAN AND INTERNATIONAL RESPONSES TO INTERNATIONAL CHILD ABDUCTIONS," 16 N.Y.U.J. Int'l L. & Pol. 415 (1984).

[89] 18 U.S.C. §§ 2251-2259; *See also* CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*, by Henry Cohen.

[90] P.L. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. § 228).

[91] The original bill created a presumption that any nonpayment of child support was intentional. See 138 Cong. Rec. S 17131 (daily ed. October 7, 1992)(statement of Sen. Kohl). The bill which was actually enacted provided that the government must prove a willful failure to pay. See id. At least two lower courts have found the rebuttable mandatory presumption that the existence of a court support order indicated a defendant's ability to pay violated due process by shifting to the defendant the burden of persuasion of the crime's willfulness element. See, *United States v. Morrow*, 368 F.Supp.2d 863 (C.D. Ill. May 6, 2005); *United States v. Pillor*, 387 F.Supp.2d 1053 (N.D. Cal. May 12, 2005). While these courts found that the presumption (18 U.S.C. § 228(b)) violates due process, both found the section severable.

[92] See 18 U.S.C. § 228(a).

[93] *See United States v. Kukafka*, 478 F.3d 531 (3rd Cir. N.J. 2007); *United States v. Klinzing*, 315 F.3d 803 (7th Cir. Wis. 2003); *United States v. Faasse*, 265 F.3d 475 (6th Cir. Mich. 2001)(finding that the CRSA did not usurp state enforcement, as the act merely reinforced state laws which states were unable to enforce on an interstate basis); *United States v. Lewko*, 269 F.3d 64 (1st Cir. N.H. 2001); *United States v. Benton*, 2001 U.S. App. LEXIS 17385 (4th Cir. S.C. August 3, 2001); *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1997); *United States v. Parker*, 108 F.3d 28 (3rd Cir. 1997)(finding that CSRA falls within the cope of congressional authority under the Commerce Clause as a valid regulation of activity having a substantial effect upon interstate commerce); *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997); *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997); *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996)(holding that Congress possesses the power, under the Commerce Clause, to punish willful violations of child support orders); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996).

[94] *See Sage*, 92 F.3d at 103.

[95] *Id.* at 105.

Congress has the authority to intervene and help the states.[96] Further, it held that if Congress can use the Commerce Clause to promote interstate commerce, then "it surely has power to prevent the frustration of an obligation to engage in commerce."[97] Merely because the obligation comes from a court order, and not a contract, does not alter the outcome; the obligation is, nevertheless, a result of interstate economic activity among the states.[98] The Supreme Court has yet to rule on this question.

Funding Nexus

The public child welfare system is society's mechanism for protecting children whose families are unsafe or unable to care for them. States have the primary responsibility for administering child welfare services and establishing policy. However, the federal government plays a significant role in child welfare, by providing funds to states and attaching conditions to these funds. Provision of these funds is a valid exercise of Congress's spending power as Article 1, Section 8 of the Constitution authorizes Congress to use federal monies to provide for the common defense and the general welfare. These programs have been judged not to violate the Constitution due to the voluntary nature of states' participation. States and localities remain free to reject the federal monies; but if accepted, they are taken subject to the conditions imposed by Congress.

Most federal funds specifically targeted toward child welfare activities flow to the states through the Social Security Act, which authorizes capped grants for various child welfare services (Subparts 1 and 2 of Title IV-B), and open-ended entitlement funding for foster care maintenance and adoption assistance on behalf of children removed from their biological homes (Title IV-E). In addition, the freestanding Child Abuse Prevention and Treatment Act (CAPTA) authorizes formula grants to help states support their child protective services systems.[99] As such, the Federal Child Abuse Prevention and Treatment Act[100] imposes detailed requirements on state participants, including, *inter alia*, implementation of state programs which mandate the reporting of known or suspected instances of child abuse or neglect; investigation of such reports by properly constituted authorities; the provision of protective and treatment services to endangered children; immunity provisions for persons making good-faith reports of suspected instances of abuse and neglect; confidentiality of records, with criminal sanctions for those who illegally disseminate protected information; cooperation between agencies dealing with child abuse and neglect cases;[101] and other topics which would assist in identifying, preventing and treating child

[96] *Id.*

[97] *Id.* at 105-106.

[98] *Id.* at 106.

[99] Child protective services include investigation of child abuse and neglect reports and removal of children from home if necessary for their protection. Child welfare services include various home-based services to strengthen and improve family functioning, other supportive services to maintain children in their own homes, financial support and services for children while they are in foster care, services to reunite children with their families if possible, and adoption assistance or other permanency planning services for children if family reunification is not feasible.

[100] 42 U.S.C. §§ 5101-5115.

[101] This situation can pose a particular problem due to the interests of law enforcement personnel who wish to prosecute offenders may run counter to those of social workers, who want to minimize the child's traumatic experience, and if possible, return him or her to the household at an early date. These goals are made more difficult if a member of the household is charged with abuse and/or the child is called upon to discuss the abuse with law enforcement officers or in court.

abuse and neglect.[102] This law is not aimed at those guilty of the abuse; but, rather is intended to help discover, treat and prevent as many child abuse cases as possible.

In the case of the Federal Child Support Enforcement Program (CSE),[103] the federal nexuses are the federal matching funds obtained by the states. All fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands operate CSE programs and they are entitled to the matching federal funds. This program provides seven major services on behalf of children: (1) parent location, (2) paternity establishment, (3) establishment of child support orders, (4) review and modifications of support orders, (5) collection of support payments, (6) distribution of support payments and establishment and enforcement of medical support.

To provide these services to children, requirements are put upon the states and participants alike. State requirements include automated registries of child support orders along with a centralized automated state collection and disbursement unit. Likewise, applicants and recipients are required to cooperate in establishing paternity or obtaining support payments or risk penalties for noncompliance. If a determination is made that an individual is uncooperative without any good cause or other exception, then the state must reduce the family's benefit by at least 25% and may even remove the family from the program.

Collection methods used by CSE agencies include income withholding, intercepts of federal and state income tax refunds, intercepts of unemployment compensation, liens against property, security bonds, and reporting child support obligations to credit bureaus. Moreover, all jurisdictions have civil or criminal contempt-of-court procedures and criminal non-support laws. P.L. 105-187, the Deadbeat Parents Punishment Act of 1998, established two new federal criminal offenses (subject to a two-year maximum prison term) with respect to non- custodial parents who repeatedly fail to financially support children who reside with custodial parents in another state or who flee across state lines to avoid supporting them.[104] Furthermore, P.L. 104-193, officially known as the Personal Responsibility and Work Reconciliation Act of 1996, required states to implement expedited procedures to allow them to secure assets to satisfy arrearages by intercepting or seizing periodic or lump sum payments (such as unemployment and worker's compensation), lottery winning, awards, judgments, or settlements, and assets of the debtor parent held by public or private retirement funds, and financial institutions.[105] In addition, the law required states to implement procedures under which the state would have authority to withhold, suspend or restrict use of driver's licenses, professional and occupational licenses, and recreational and sporting licenses of persons who owe past-due support or who fail to comply with subpoenas or warrants relating to paternity or child support proceedings.[106]

Uniform State Laws

The National Conference of Commissioners on Uniform State Laws is a non-governmental entity formed in 1982 "to promote uniformity in state laws on all subjects where uniformity is deemed

[102] See CRS Report RL31082, *Child Welfare Financing: Issues and Options*, by Karen Spar and Christine M. Devere.

[103] 42 U.S.C. §§ 651-66.

[104] P.L. 105-187, 112 Stat. 618 amending 18 U.S.C. § 228.

[105] P.L. 104-193, 110 Stat. 2105.

[106] Also, passports may be denied, revoked or restricted for individuals certified by a state agency as owing more than $2,500 in past due support. 42 U.S.C. 652(k) and 22 C.F.R §§ 51.70(a)(8), 51.72(a) and 51.80(a)(2). The Deficit Reduction Act of 2005 (P.L. 109-171) reduced the arrearage amount from $5,000 to $2,500.

desirable and practical."[107] Since the entity's inception, it has drafted and approved several uniform acts, which have met with varying degrees of success in terms of enactment by state legislatures. Three uniform domestic relations acts which have gained widespread acceptance deal with the enforcement of child support orders (UIFSA) and recognition of child custody decrees (UCCJEA and UCCJA) entered in other states. All states adopted the Uniform Interstate Family Support Act (UIFSA) under which state courts basically treat valid child support orders entered in another state as having been entered in their own state (the state which has jurisdiction over the person required to pay the support) for enforcement purposes.[108] The states' adoption of the UIFSA was due to Congress's enactment of welfare reform, officially known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[109] In this act, Congress mandated enactment of UIFSA for a state to remain eligible for the federal funding of child support enforcement.[110]

UIFSA provides procedural and jurisdictional rules for essentially three types of interstate[111] child support proceedings: (1) a proceeding to establish a child support order; (2) a proceeding to enforce a child support order and (3) a proceeding to modify a child support order. UIFSA implements the "one-order system." This means that only one state's order governs, at any given time, an obligor's support obligation to any child. Further, only one state has continuing jurisdiction to modify a child support order. This requires all other states to recognize the order and to refrain from modifying it unless the first state has lost jurisdiction.

UIFSA only governs jurisdiction to hear interstate child support proceedings. The Uniform Child Custody Jurisdiction Act (UCCJA)[112] (or the Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA])[113] and the Parental Kidnapping Prevention Act (PKPA)[114] govern jurisdiction to hear custody proceedings. Thus, the forwarding of a UIFSA proceeding to a state that would not normally have jurisdiction over custody issues[115] does not subject the petitioner to custody claims the respondent might make. Further, a court properly hearing a UIFSA proceeding "may not condition the payment of a support order issued under (UIFSA) upon compliance by a party with provisions for visitation."[116]

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[107] National Conference of Commissioners on Uniform State Laws' Constitution, § 1.2.

[108] Unif. Interstate Family Support Act, 9 (pt. IB) U.L.A. 306 (1999). *See also* discussion of the Federal Child Support Enforcement Act *infra* at 148.

[109] 42 U.S.C. § 666.

[110] 42 U.S.C. § 666(f). *See Kansas v. United States*, 24 F.Supp.2d 1192 (D. Kan. 1998)(upholding Title III of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and its requirement of states to pass UIFSA against the Spending Clause and Tenth Amendment challenges).

[111] The word "interstate" is used here to mean that one or both parents have left the state in which they were married or maintained a relationship.

[112] 9 (pt IB) U.L.A. 261 (1999). Before the adoption of the UCCJEA in 1997, all fifty states and the District of Columbia had adopted the UCCJA.

[113] The National Conference of Commissioners on Uniform State Laws adopted the UCCJEA in 1997 as a replacement for the UCCJA.

[114] 28 U.S.C. § 1738A (1994).

[115] Under the PKPA, the UCCJEA, and, to a lesser extent, the UCCJA, the child's home state is favored for jurisdiction over custody issue.

[116] UIFSA § 305(d), 9 (pt. IB) U.L.A. 306 (1999). See id. Prefatory Note, 9 (pt.IB) U.L.A. 241, Part II.B.2.b (1999) ("Visitation issues cannot be raised in child support proceedings."). See, e.g., *Office of Child Support Enforcement v. Clemmons*, 984 S.W.2d 837 (Ark. Ct. App. 1999).

One would think that a final domestic relations decree entered in one state should be uniformly recognized and enforced throughout the other states. However, this was frequently not the case, because in many instances a second state would assert its own jurisdiction to modify the original decree or enter a new decree which in its view supersedes the original one.[117] That is why, for example, the UCCJA, as discussed above, failed, despite its widespread adoption by the states, to result in the broad national recognition of child custody decrees its sponsors anticipated and desired. Rather, non-custodial parents would take the child to another state, and that state, by virtue of its jurisdiction over the party seeking the modification, would enter a new decree changing the custody arrangement because circumstances changed since the entering of the original decree.[118] This meant that the child's mother could have a valid decree in one state, granting her custody, while the father had an equally valid decree in another state, granting him custody—with concomitant frustration and expenditures of time and/or money by both parents, yielding unfortunate results to the child. The Parental Kidnapping Prevention Act of 1980 (PKPA)[119] has now largely taken care of the problem.

However, it must be noted that the PKPA does not confer jurisdiction on the federal courts. This act merely delineates which jurisdiction may modify child support and custody orders. As such, the PKPA is inapplicable to instate disputes and only relevant in interstate disputes when the jurisdictions have conflicting laws. Under the Supremacy Clause, the jurisdictional guidelines set forth in the PKPA supersede any conflicting state law. As such, parents are bound by state court decisions regarding custody, visitation and support.

"Uniform acts" such as UIFSA, UCCJA, UCCJEA fail to specify what court orders must contain or what courts must consider when drafting them, but deal exclusively with their enforcement once finalized. Other proposals, such as the Uniform Marriage and Divorce Act (UMDA) and the Uniform Adoption Act, include specific guidelines for courts to follow in drafting these various orders.

Even when domestic relations laws are drafted with great specificity, they fail to yield comparable results in seemingly comparable cases. Each domestic relations case presents a unique fact pattern which gives judges and hearing examiners wide discretion in determining an equitable ruling in each case. Thus, it is difficult, if not impossible to talk in terms of "average" alimony awards or predict with any degree of accuracy what custodial arrangement a judge will order in a particular divorce case. Generally, a party who receives an adverse ruling can only appeal on an "abuse of discretion" ground, an extremely difficult standard to meet. For this reason, reported domestic relations cases[120] have little precedential value except when cited for general policy considerations. However, courts can modify alimony, child support and/or child custody (not marital property division)[121] provisions, upon a showing of changed circumstances.

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[117] In addition, most custody decrees are not final for purposes of the full faith and credit clause, as the issuing state may modify. Thus, the doctrine of *res judicata*, which holds that upon a finally adjudication a matter cannot be reopened or collaterally attacked in the original state or elsewhere, fails to apply in child custody decrees. See, e.g. *Kovacs v. Brewer*, 356 U.S. 604 (1958); *Ford v. Ford*, 371 U.S. 187 (1962).

[118] In many instances the only change was the fact that the child was not living with the other parent and sufficient time elapsed so that the court in the new state felt the best decision was to assure this new continuity of care for the child.

[119] P.L. 96-611, §§ 6-10, 94 Stat. 3566,3567; codified at 28 U.S.C. § 1738A.

[120] The only cases available for research purposes are those appealed. The appeal results in a written decision reprinted in various court reporting services.

[121] Marital property settlements are usually only modified upon a showing of fraud or coercion at the time the settlement was approved by the parties or imposed by the court.

Adoption of uniformed laws such as UIFSA, UCCJEA and UCCJA has aided in fostering consistency and efficiency in the enforcement of interstate child support and custody orders.

"Sense of the Congress" Resolutions

Another indirect approach which Congress utilizes to obtain desired results are "Sense of the Congress" resolutions. These resolutions lack any legally binding force or effect, but are introduced in the hope that if Congress goes on record as favoring a certain policy, the individual states will be encouraged to adopt legislation advancing that policy.

For example, H.Con.Res. 67 expressed the sense of the Congress that:

> [A] uniform State act should be developed and adopted which provides grandparents with adequate rights to petition State courts for privileges to visit their grandchildren following the dissolution because of divorce, separation, or death of the marriage of such grandchildren's parents, and for other purposes.

This resolution passed the House of Representatives on April 22, 1985, and passed the Senate on September 29, 1986.[122] Consequently, some states have enacted specific grandparent visitation statutes, while others include grandparents within a broader third-party visitation statute.

The content of these visitation laws varies greatly.[123] Several states limit visitation to cases involving deceased parents.[124] Others specifically extend the right to cases of divorce, annulment or separation. A few states allow grandparent visitation even over the objections of both parents in

[122] 132 Cong. Rec. S26904 (daily ed. September 29, 1986).

[123] The following is a list of state statutes governing third-party visitation. Alabama (Ala. Code § 30-3-4); Alaska (Alaska Stat. §§25.20.060, 25.20.065); Arizona (Ariz Rev. Stat.Ann. §25-409); Arkansas (Ark.Stat. Ann. §§9-13-102 and 9-13-103); California (Cal. Fam. Code §§ 3102-3104); Colorado (Colo. Rev. Stat. §§ 19-1-117 and 19-1-117.5); Connecticut (Conn. Gen. Stat. §§ 46b-56(a), 46b-57, 46b-59 and 46b-129); Delaware (Del. Code. Ann. Tit. 10 § 1031(7)); Florida (Fla. Stat. § 752.01); Georgia (Ga. Code § 19-7-3); Hawaii (Hawaii Rev. Stat §§ 571-46(7) and 571.46.3); Idaho (Idaho Code § 32-719); Illinois (Ill. Rev. Stat. Ch. 750 and 5/607); Indiana (Ind. Code §§ 31-17-5-1 thru 31-17-5-2); Iowa (Iowa Code § 598.35); Kansas (Kan. Stat. Ann. §§ 60-1616 and 38-129); Kentucky (Ky. Rev. Stat. § 405.021); Louisiana (La. Rev. Stat. Civ Code Ancillaries § 9:344 and Children's Code § 1264); Maine (Me. Rev. Stat. Ann. Title 19-A §§ 1653(2)(B) and 1801 through 1805); Maryland (Md. Fam. Law Code § 9-102); Massachusetts (Mass. Gen. Laws Ann. § 119-39D); Michigan (Mich. Comp. Laws §§ 722.27(b), 722.27b and 722.26c); Minnesota (Minn. Stat. §§ 257.022, 257c.08 and 518.1752); Mississippi (Miss. Code. Ann. §§ 93-16-1 and 93-16-7); Missouri (Mo. Rev. Stat. § 452.402); Montana (Mont. Code Ann. § 40-9-102); Nebraska (Neb. Rev. Stat. §§ 43-1801 thru 43-1803); Nevada (Nev. Rev. Stat. §§ 125A.330 and 125A.340); New Hampshire (N.H. Rev. Stat. Ann. §§ 458:17d); New Jersey (N.J. Rev. Stat. § 9:2-7.1); New Mexico (N.M. Stat. Ann. §§ 40-9-1 thru 40-9-4); New York (N.Y. Dom. Rel. Law §§ 71 thru 72 and 240(1)); North Carolina (N.C. Gen. Stat. § 40-13.2); North Dakota (N.D. Cent. Code § 14-09-05.1; Ohio (Ohio Rev. Code Ann. § 3109.051); Oklahoma (Okla. Stat. Tit. 10 § 5); Oregon (Or. Rev. Stat. § 109.119); Pennsylvania (Pa. Cons. Stat. Tit. 23 §§ 5311 thru 5314); Rhode Island (R.I. Gen. Laws §§ 15-5-24.1 thru 15-5-24.4); South Carolina (S.C. Code Ann. § 20-7-420(33)); South Dakota (S.D. Codified Laws Ann. §§ 25-4-52 thru 25-4-54, and 25-5-29 thru 25-5-34); Tennessee (Tenn. Code Ann. §§ 36-6-302 thru 36-6-303); Texas (Tex. Fam. Code Ann. §§ 154.432 thru 153.434); Utah (Utah Code Ann. §§ 30-3-5-5(a) and 30-5-2); Vermont (Vt. Stat. Ann. Tit. 15 §§ 1011 thru 1016); Virginia (Va. Code §§ 20-124.1 thru 20-124.2); Washington (Wash. Rev. Code Ann. § 26.09.240); West Virginia (W. Va. Code Chapter 48, article 10); Wisconsin (Wis. Stat. Ann. § 767.245); Wyoming (Wyo. Stat. § 20-7-101).

[124] *See e.g. Hiller v. Fausey*, 904 A.2d 875 (PA 2006)(holding that application of state statute allowing visitation or partial custody to grandparents upon the death of a child's parent did not violate the father's due process right to direct the care, custody, and control of his child); *see also, In re estate of Thurgood*, No. 20040796, 2006 WL 2457822 (Utah August 26, 2006)(finding that grandparent visitation statute did not unconstitutionally infringe upon a parent's right to the care, custody, and control of his or her children).

an ongoing family,[125] and even against the argument that parents have the constitutional right to raise their child as they see fit.[126] Most states, however, hold by statute or court decision that the ongoing family is not subject to enforced intrusion by grandparents, if both parents are fit and object.[127]

Implementation of the Full Faith and Credit Clause

Article, Section 1 of the Constitution, the Full Faith and Credit Clause, states:

> "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the effect thereof."

This clause applies principally to the interstate recognition and enforcement of judgments. It is settled law that final judgments are entitled to full faith and credit, regardless of other states' public policies,[128] provided the issuing state had jurisdiction over the parties and the subject matter.[129] Judgments subject to future modification, such as child support and child custody orders, are not considered final. Therefore, they are not entitled to full faith and credit.[130] As discussed below, however, Congress enacted the PKPA and the Full Faith and Credit for Child Support Act to accord full faith and credit to child custody and support orders.[131] The Full Faith and Credit Clause has rarely been used by courts to validate marriages because marriages are not "legal judgments." However, courts routinely recognize out-of-state-marriages.

Questions concerning the validity of an out-of-state marriage are generally resolved without reference to the Full Faith and Credit Clause. As previously discussed, marriages are not regarded as judgments. In the legal sense, marriage is a "civil contract" created by the States which

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[125] *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674 (W. Va. 2001)(finding Grandparent Visitation Act does not violate parents' substantive due process right of liberty in connection with the care, custody, and control of children without undue interference from the state because the act requires an affirmative determination that visitation would not substantially interfere with the parent-child relationship and places the burden of proof on grandparents to show that visitation is in the child's best interest); *but see Troxel v. Granville*, 530 U.S. 57 (2000)(finding unconstitutional a Washington statute allowing "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child as applied to an order requiring a fit parent to allow her child's grandparents more extensive visitation than the parent wished).

[126] *Id.;Lily v. Lily*, 43 S.W.3d 703 (Tex. App. 2001)(finding Grandparent visitation statute did not violate due process on its face, as statute allowed only grandparents under particular circumstance to petition for visitation, and provided that it was in child's best interests).

[127] *See e.g. Troxel v. Granville*, 530 U.S. 57; *see also, Linder v. Linder*, No. 01-380, 2002 WL 723898, *1 (Ark. April 25, 2002) (holding state's grandparent visitation law invalid as applied to an otherwise fit mother who rebuffed the visitation requests of her deceased husband's parents); *Wickham v. Byrne*, No. 92048, 2002 WL 595036, *1 (Ill. April 4, 2002) (finding Illinois grandparent visitation law facially invalid because it places a fit parent on equal footing with the parent seeking visitation); *State ex rel. Brandon L. v. Moats*, 551 S.E. 2d 674 (W. Va. 2001).

[128] In *Fauntelroy v. Lum*, 210 U.S. 230 (1908) the Supreme Court required Mississippi to give full faith and credit to a Missouri judgment, even though the judgment was based upon a "futures" contract, a transaction which Mississippi had outlawed as against its public policy.

[129] *Restatement (Second) of Conflict of Laws* § 107.

[130] *Restatement (Second) of Conflict of Laws* § 109.

[131] 28 U.S.C. 1738A.

establishes certain duties and confers certain benefits.[132] Validly entering the contract creates the marital status; the duties and benefits attached by a State are incidents of that status.[133]

The general rule of validation for marriage is to look to the law of the place where the marriage was celebrated, *lex celebrationis*. A marriage satisfying the contracting state's requirements will usually be held valid everywhere.[134] Many states provide by statute that a marriage validly contracted elsewhere is valid within the state. At least twenty-three states have adopted language substantially similar to the Uniform Marriage and Divorce Act (UMDA),[135] which states: "All marriages contracted ... outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted ... are valid in this State."[136] Several states provide an exception to this general rule by declaring out-of-state marriages void if against the state's public policy or if entered into with the intent to evade the law of the state. As such, eleven states have passed legislation prohibiting recognition of out-of-state same-sex marriage.[137] Moreover, Congress passed the Defense of Marriage Act (DOMA),[138] which prohibits the federal recognition of same-sex marriages and allows individual states to refuse to recognize such marriages performed or recognized in other states.[139]

The Full Faith & Credit clause is applicable to divorces. In two related cases known as *Williams I* [140] and *Williams II*, [141] the Supreme Court articulated the extent to which the Full Faith and Credit Clause applies in divorce cases. Both cases arose out of the following scenario: a man and a woman, both domiciliaries (permanent residents) of North Carolina and married to other people, moved to Nevada. They lived there for six weeks to satisfy the Nevada durational residency requirement for divorce, at which time they obtained divorces upon substituted service (i.e. their spouses were notified by publication only and failed to participate in the proceedings), married each other, and returned to North Carolina. North Carolina then began prosecution under its bigamous cohabitation statute.

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[132] On the state level, common examples of nonnegotiable marital rights and obligations include distinct income tax filing status; public assistance such as health and welfare benefits; default rules concerning community property distribution and control; dower, curtesy and inheritance rights; child custody, support agreements; name change rights; spouse and marital communications privileges in legal proceedings; and the right to bring wrongful death, and certain other, legal actions.

[133] On the federal level, marriage results in: distinct housing entitlements; federal income tax rates; Medicare, Medicaid, and veterans' benefits; and immigration and citizenship rights.

[134] See, Annotation, 71 A.L.R. 687 (1960).

[135] Arizona, Arkansas, California, Colorado, Connecticut, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, Virginia, Wyoming.

[136] Unif. Marriage and Divorce Act § 210, 9A U.L.A. 147.

[137] Alaska, Arizona, Georgia, Idaho, Illinois, Kansas, Oklahoma, South Carolina, South Dakota, Tennessee, Utah. For a discussion of same-sex marriages, refer to CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

[138] P.L. 104-199, 110 Stat. 2419, codified at 28 U.S.C. § 1738C.

[139] Id. Legislation was introduced in the 108th Congress to repeal the provisions of DOMA codified in Title 1. H.R. 2677, the "State Regulation of Marriage is Appropriate Act," was introduced by Congressman Barney Frank on July 9, 2003. The bill was referred to the House Committee on the Judiciary on July 9, 2003 and was referred to the Subcommittee on the Constitution on September 4, 2003. No further action has been taken on this bill.

[140] *Williams v. North Carolina*, 317 U.S. 287 (1942).

[141] *Williams v. North Carolina*, 325 U.S. 226 (1945).

In *Williams I*, the Supreme Court held that in granting the divorce, Nevada was justified in assuming that the parties were bona fide Nevada domiciliaries (a jurisdictional requirement). Thus, the divorce was valid and warranted recognition as such by the other states including North Carolina. However, in *Williams II*, the Court held that a divorce decree issued in one state could be collaterally impeached in another by proof that the court which tendered the decree lacked jurisdiction. In this particular case, the fact that the new Mr. and Mrs. Williams returned to North Carolina immediately following their marriage was sufficient to justify the North Carolina court's conclusion that the couple was not domiciled in Nevada at the time their divorce was granted. As such, the divorce was void because the issuing court lacked proper jurisdiction.

In *Williams II*, the rule remains in effect today, as modified by the Supreme Court's holding in *Sherrer v. Sherrer*[142] that a divorce cannot be subsequently attacked by a spouse for lack of jurisdiction if the spouse participated in the divorce proceeding and the divorce court specifically ruled that it had jurisdiction.[143] Under this ruling, if both parties participate in a divorce proceeding and/or consent to the court's jurisdiction (i.e., obtain a "bilateral" divorce, neither party can attack the decree for lack of jurisdiction).[144]

Due to the increased uniformity of divorce laws, states' adoption of no-fault divorce statutes and shorter durational residency requirements situations such as the ones mentioned above continue to decrease. These reasons reduce a party's need to seek out what may be viewed as a more favorable divorce jurisdiction. While the situation has minimized with domestic divorce decrees, a comparable situation now exists regarding certain foreign divorce decrees (e.g., those where only one party appears briefly in the issuing jurisdiction).[145]

The Full Faith and Credit Clause does not govern the domestic validity of divorce judgments from foreign countries. The rule of comity, which generally provides for recognition of foreign decrees issued by courts of competent jurisdiction, governs. However, the jurisdictional tests applied are usually those of the United States,[146] rather than the divorcing country. As such, a divorce obtained in a foreign country will be invalid in the United States if neither spouse was domiciled in that country, even if domicile is not required for jurisdiction under its law. New York is the only state which recognizes bilateral foreign divorces (where both parties participate) even where its own jurisdictional requirements are not satisfied.[147] No state recognizes such unilateral divorces (where only one party appears).

Justice Frankfurter, in a concurring opinion in *Williams I*, noted that Congress had the authority under the Full Faith and Credit Clause to require national recognition of divorce decrees, but had not yet chosen to exercise such authority:

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[142] 334 U.S. 343 (1948).

[143] When "[i]t is clear that respondent was afforded his day in court with respect to every issue involved in the litigation ... there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional fact." 334 U.S. at 348 (citations omitted).

[144] The Court further held in *Johnson v. Muelberger*, 340 U.S. 581(1951), that a child could not collaterally attack her parents' divorce where both parties participated in the proceeding.

[145] Such divorces are commonly known as "Mexican divorces," even though Mexico tightened its residency requirements in 1971 so that few American now qualify for a divorce in that country. However, several Caribbean countries continue this practice.

[146] State jurisdictional requirements ordinarily include some formal residency requirement (usually six months or a year) and proper notice to the opposing party.

[147] *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709 (1965).

> ...[I]t is clearly settled that if a judgment is binding in the state where it was rendered, it is equally binding in every state. This rule of law was not created by the federal courts. It comes from the Constitution and the Act of May 26, 1790, c. 11, 1 Stat. 122. Congress has not exercised its power under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees. There will be time enough to consider the scope of its power in this regard when Congress chooses to exercise it. 317 U.S. at 306.

In response to this dicta, Senator Pat McCarran introduced bills in the 80th through the 83rd Congresses[148] which, if enacted would have required all states to recognize divorce decrees where: (1) the decree was final as to the issue of divorce; (2) the decree was valid in the state where rendered; (3) the decree stated that the jurisdictional prerequisites of the issuing stated had been met; and (4) the issuing state was the last state where the spouses were domiciled together as husband and wife; or the defendant was personally subject to jurisdiction in that state, or appeared generally in the divorce proceedings. The only exceptions included fraud of the successful party which misled the defeated party. Two of these bills passed the Senate, in 1952 and 1953,[149] but neither became law and no such measure is presently pending.

Congressional action under the Full Faith and Credit Clause has been minimal, "[i]ndeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the full faith and credit clause."[150] Only on five occasions has Congress enacted legislation to require States to give full faith and credit to certain types of acts, records and proceedings. Three of the enactments pertain to family law concerns.

To date, the major legislative initiative in this area is 28 U.S.C. § 1738A, a provision of the PKPA which requires states to give full faith and credit to child custody decrees entered in other states unless the state asked to modify the original order has jurisdiction to do so, and the state which issued the original order lacks jurisdiction to modify the order or declines to exercise its jurisdiction.[151] In addition, under 42 U.S.C. § 666(a), states must grant full faith and credit to each other's child support orders, to the extent of not modifying them retroactively.[152]

In 1994, the 103rd Congress passed the Full Faith and Credit for Child Support Orders Act,[153] requiring each state to enforce child support orders issued by the child's home state if done in compliance with the act's provisions. The law was designed so that a person with a valid child support order in one state would not have to obtain a second order in another state should the debtor parent move from the issuing court's jurisdiction. Rather, the second state must recognize the first state's order as valid, but can modify it only when the child and the custodial parent have moved to the state where the modification is sought or have agreed to the modification.

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[148] S. 1960, 80th Cong., 2d Sess. (1948); S. 3, 81st Cong., 1st Sess. (1940); S. 1331, 82d Cong., 1st Sess. (1951); and S. 39,83d Cong., 1st Sess. (1953).

[149] S. 1331, 82d Cong., passed the Senate on June 21, 1952, 98 Cong. Rec. 7773; S. 39, 83d Cong., passed the Senate on May 6, 1953, 99 Cong. Rec. 4575.

[150] Constitution of the United States of America: Analysis and Interpretation 970 (1992).

[151] For specific jurisdictional requirements, see 28 U.S.C. § 1738A(c). Under this language, a state court retains jurisdiction over a child for six months after the child leaves the state, as long as the custodial parent continues to reside in that state.

[152] This provision was added as part of the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, Title X, § 9103(a), 100 Stat. 1973.

[153] P.L. 103-383, 108 Stat. 4064, codified at 28 U.S.C. § 1738B.

Retroactive modification is prohibited, and prospective modification is authorized if the court finds that circumstances exist which justify a change.[154]

Also in 1994, Congress passed the Safe Homes for Women Act of 1994,[155] requiring states to recognize domestic violence protection orders issued by sister states. Any protection order issued by one state or tribe shall be treated and enforced as if it were an order of the enforcing state. The act extends to permanent, temporary, and ex parte protection orders. Full faith and credit is afforded during the period of time in which the order remains valid in the issuing state. Protection orders are only afforded full faith and credit if the due process requirements of the issuing state were met.

In the previous instances, Congress's exercise of its full faith and credit enforcement power was necessitated by the failure of sister state courts to give full faith and credit to orders not regarded as final judgments. Congress directed sister states to give full faith and credit to child custody, child support, and protection orders from other states. In effect, Congress required each state to give the child custody, child support, and protection orders of other states the same faith and credit it gives its own such orders.

Conversely, in 1996, Congress passed the Defense of Marriage Act (DOMA).[156] This act differs in one critical aspect from the other legislative enactments passed by Congress under its full faith and credit power: the DOMA permits sister states to give no effect to the law of other states.[157] Congress enacted DOMA in response to claims by advocates of same-sex marriage that, if any state legalizes same-sex marriage, all states and federal agencies will have to recognize as valid all same-sex marriages performed in that same-sex-marriage-permitting state.[158] Congress recognized that the legalization of same-sex marriage in any jurisdiction would have far-reaching potential effects upon all people and upon a wide spectrum of laws in the jurisdiction, ranging from marriage law to public school curricula, from custody law to public finances, from adoption to insurance issues, from alimony and property division to employment regulations.[159] Moreover,

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[154] 42 U.S.C. § 666(a).

[155] P.L. 103-322, title IV, § 40221(a), 108 Stat. 1930, codified at 18 U.S.C. § 2265.

[156] P.L. 104-199, 110 Stat. 2419, codified at 28 U.S.C. § 1738C.

[157] 28 U.S.C. § 1738C states: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

[158] The first step in this direction was taken by the Hawaii Supreme Court in *Baehr v. Levin*, 852 P.2d 44 (Haw. 1993). The *Baehr* court held that while there is no fundamental right for same-sex couples to marry, the state statute restricting marriage to opposite-sex couples established a sex-based classification subject to strict scrutiny for the purposes of an equal protection challenge. The court held that the statute amounted to sex discrimination when analyzed under this standard. Following this decision, the Hawaii state legislature amended the state constitution in 1998 to bar recognition of same-sex marriages and the state supreme court found that "the marriage amendment validated" the statute in question in *Baehr*.

[159] See H.R. Rep. No. 104-664, at 10-11 (1996)(discussing the interstate and federal implications of the legalization of same-sex marriages in any jurisdiction). In *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), the Vermont Supreme Court held that it was a violation of the state constitution to deny same-sex couples the benefits and protections afforded opposite-sex married couples. The plaintiffs in *Baker* were three same-sex couples in committed relationships ranging from four to twenty-five years; two of the couples had children they had raised as a family. The couples applied for marriage licenses and were rejected, and brought suit challenging the validity of the statute under which they were denied licenses. The trial court found in favor of the defendants, finding that limiting marriage to opposite-sex couples "rationally furthered the State's interest in promoting 'the link between procreation and child rearing."' Recharacterizing the issue as one of equal protection, the Vermont Supreme Court held that same-sex couples must be (continued...)

these potential effects involved a policy issue of great importance to the people of each jurisdiction warranting decision by each jurisdiction.

Proposed Constitutional Amendments

Between 1917 and 2001, 33 constitutional amendments were proposed to give Congress authority to legislate on marriage and divorce questions.[160] In addition, 12 bills were introduced during this period to provide for uniform marriage and divorce laws throughout the United States, presumably in anticipation that such a constitutional amendment would be ratified.[161]

Eleven of the proposed constitutional amendments[162] and all of the implementing bills introduced in the Senate were sponsored by Senator Arthur Caper. The text of his proposed amendments uniformly stated:

> The Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimization of children, and the care and custody of children affected by annulment of marriage or by divorce.

However, none of these proposed amendments ever received congressional action. Beginning in the 107th Congress, legislation has been introduced proposing a constitutional amendment to define marriage as the "union of a man and a woman."[163]

Conclusion

In the absence of a constitutional amendment providing general authority for Congress to legislate in the field of domestic relations, its direct authority is limited to those areas specifically reserved for congressional action under Article I, Section 8, of the Constitution. However, various indirect approaches, most notably those tied to congressional authority under the commerce clause and Congress's appropriations powers, have resulted in significant federal impact on a myriad of family law questions.

(...continued)

afforded privileges and responsibilities under state law equal to those enjoyed by opposite-sex couples that are married. The holding does not mandate that same-sex couples be allowed to marry; instead, the Court left the exact procedure for effecting the change to the legislature. The Vermont state senate passed the mandated bill in April 2000, allowing same-sex couples to form civil unions. While not labeled "marriages," these unions entitle the couples to all the state benefits of marriage.

[160] S.J.Res. 34, H.J.Res. 55, and H.J.Res. 187, 65th Cong., S.J.Res. 55, H.J.Res. 75, and H.J.Res. 108, 66th Cong.; S.J.Res. 31, S.J.Res. 273, H.J.Res. 83, and H.J.Res. 426, 67th Cong., S.J.Res. 5, S.J.Res. 53, H.J.Res. 6, H.J.Res. 9, H.J.Res. 40, and H.J.Res. 109, 68th Cong., S.J.Res. 31, H.J.Res. 30, H.J.Res. 58, and H.J.Res. 110, 69th Cong.; S.J.Res. 40, H.J.Res. 35, and H.J.Res. 162, 70th Cong.; S.J.Res. 123, 71st Cong.; S.J.Res. 234 and H.J.Res. 558, 7th Cong.; and S.J.Res. 28, 80th Cong.

[161] S. 4394 and H.R. 13976, 67th Cong.; S. 1751, 69th Cong.; S. 1707, 70th Cong.; S. 3147, 71st Cong.; S. 3098 and H.R. 8908, 75th Cong.; S. 791, 76th Cong.; S. 810, 77th Cong.; S. 460, 78th Cong.; S. 726, 79th Cong.; S. 198, 80th Cong.

[162] S.J.Res. 273, 67th Cong.; S.J. Res.5, 68th Cong.; S.J. Res.31, 69th Cong.; S.J.Res. 40, 70th Cong.; S.J.Res. 123, 71st Cong.; S.J.Res. 234, 75th Cong.; S.J.Res. 44, 76th Cong.; S.J.Res. 36, 77th Cong., S.J.Res. 24, 78th Cong.; S. J. Res. 47, 79th Cong.; and S.J.Res. 28, 80th Cong.

[163] H.J.Res. 93, 107th Cong.; H.J.Res. 56, S.J.Res. 26, and S.J.Res. 30, 108th Cong.; S.J.Res. 1, S.J.Res. 13, H.J.Res. 39, H.J.Res. 88; H.J.Res. 91, 109th Cong. and H.J.Res. 22, 110th Cong.

Currently, there appears to be little sentiment in favor of a national marriage and divorce law, at least one which would be imposed involuntarily by Congress on the states. However, it is probable that federal involvement will continue or be forthcoming in those areas where it is argued that federal resources can be utilized more efficiently and effectively than those available at the state or local level, such as tracking down parental kidnappers or establishing and enforcing child support orders. The spending power can be used to shape state approaches to a given situation, although this option involves expenditures of federal funds; the higher the funding level, the more likely a state is to comply with the federal directive.

The nature of family law cases is such that an individualized approach to each particular case will undoubtedly continue. However, state domestic relations laws have become more uniform in recent years, and even without federal intervention this trend is likely to continue. Thus, it is possible that some of the national uniformity envisioned by proponents of adopting a constitutional amendment for this purpose will be realized, although states retain primary authority to legislate in this area.

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