Recognition of Canadian Domestic Violence Protection Orders

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The committee begins its work on recognition of Canadian domestic violence protection orders with the benefit of years of significant work on cross-jurisdiction recognition. In 1994, Congress passed the Violence Against Women Act, or VAWA,[1] providing in § 2265 for the recognition and enforcement of valid protection orders among all states under the full faith and credit provision.[2] Many states enacted legislation requiring the recognition of the domestic violence orders of sister states[3]; and in 2002, the Uniform Law Commission (ULC) adopted the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act (IEDVPOA), encouraging states to recognize and enforce the domestic violence orders of other states.[4] In 2009, the Uniform Law Conference of Canada (ULCC) initiated a project to draft provisions which would allow for enforcement of domestic violence protection orders from other countries. In 2011, the ULCC adopted the Enforcement of Canadian Judgments and Decrees Amendment Act (ECJDAA), which provides for the recognition of foreign protection orders unless the foreign state of origin has been expressly excluded from the provisions of the act.

The Hague Conference on Private International Law has also studied cross-jurisdiction recognition of domestic violence protection orders. In March, 2012, the Conference issued the *Recognition and Enforcement of Foreign Civil Protection Orders: A Preliminary Note*. Through case studies based on actual incidents, the work explains and illustrates the problems and dangers created in a world without cross-border recognition of domestic violence protection orders. The note also summarizes national protection order regimes and describes proposed and existing models of cross-border recognition, including VAWA, the IEDVPOA, and the ECJDAA. Since this note, the Conference has released the responses to its *Questionnaire on the Recognition of Foreign Civil Protection Orders* in a *Summary of Member Responses and Possible Ways Forward*.

While the committee has the benefit of all this work, the charge to this committee in its final form is narrow - to draft a statute which will facilitate the recognition of Canadian domestic violence protection orders. The scope of the charge to this committee has not always been so narrow. Initially the Joint Editorial Board on Uniform Family Law asked the Scope and Program Committee to establish a study committee on the recognition and enforcement of foreign domestic violence protection orders, without limiting the scope to Canadian orders. The Board named Commissioner Gail Hagerty as the chair of that committee. After some deliberation, at a meeting in December, 2011, the Board passed a resolution with a more narrow focus and requested the formation of a study committee to address recognition and enforcement only of Canadian domestic violence protection orders. The Scope and Program Committee initially broadened the Study Committee's charge, asking it also to consider the work of the State

[1] Pub. L. No. 103-322, 108 Stat. 1902-55 (codified at various Sections of 8 U.S.C., 18 U.S.C. and 42 U.S.C.).
[2] 18 U.S.C § 2265.
[3] For a discussion of the various features of these statutes, *see* E. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and the Interstate Enforcement of Protection Orders*, 98 Northwestern U. L. Rev. 827, 841-45 (Spring 2004).
[4] Unif. Interstate Enforcement of Domestic Violence Prot. Orders Act (amended 2002), 9 U.L.A. 28 (Supp. 2003) [hereinafter IEDVPOA].

Department and others, including the Hague Conference, relating to enforcement of foreign domestic violence protection orders without limiting the scope to Canada. The final charge from Scope and Program, however, returned to the narrow focus. In its letter to Commissioner Hagerty on January 29, 2013, the Committee on Scope and Program recommended a drafting committee on Recognition of Canadian Domestic Violence Protection Orders.

Even with this narrow charge, the reporter believes that the committee should address a number of issues before the drafting begins. At a minimum, the reporter asks the drafting committee to deliberate and resolve the following issues:

1. Should the act amend the IEDVPOA or exist as a separate act?
2. Should the act cover only *civil* domestic violence orders issued by Canadian courts?
3. Should the act distinguish among the types of courts from which the order issued?
4. Should the act recognize only the no-contact provisions of Canadian domestic violence protection orders?
5. What, if anything, should the act provide on challenges to the Canadian domestic violence protection orders that it recognizes?
6. Should the title of the act include the "enforcement" of Canadian domestic violence protection orders?

1. Should the act amend the IEDVPOA or exist as a separate act?

For many reasons, amending the IEDVPOA to include the recognition of Canadian domestic violence protection orders seems preferable to drafting a free-standing act. Since the charge to the committee is to provide for the recognition only of Canadian orders, it seems that the committee should look to the ECJDAA as a model for this work. A comparison of the IEDVPOA and ECJDAA shows that the two have very similar approaches. Both acts provide for recognition without registration and for registration at the option of the party seeking protection. Both acts provide that a court or law enforcement agency should respect a facially valid order until successfully challenged after the request for emergency relief has passed. Since both acts resolve important policy considerations similarly, it seems that it will take relatively few revisions to the IEDVPOA to provide for recognizing Canadian orders.

Also, the experience of the committee on the implementation of the Hague Convention on the Protection of Children suggests that the ultimate conclusion will be to revise the IEDVPOA rather than to draft a new act. While the protection committee initially vacillated, it ultimately decided it would be preferable to amend the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) rather than draft a free-standing act. The UCCJEA was not as closely related to the Hague Convention on the Protection of Children as the IEDVPOA is to the ECJDAA. If we conclude that we should look to the ECJDAA as our model, it seems safe to assume that ultimately, amendments to the IEDVPOA will make more sense.

Certainly, there are other considerations that support a free-standing act. The IEDVPOA has its share of critics.[5] Also, by the standard for family law statutes, the IEDVPOA is relatively "old."

[5] *See, e.g.*, Sack, *supra* note 3, at 846-47.

The committee is not authorized, however, to draft amendments to the IEDVPOA other than ones relating to the recognition of Canadian protection orders. Therefore, including our work in the IEDVPOA, which has attracted strong critics and is now over 10 years old, may threaten enactability. In addition, the IEDVPOA has been adopted in only 19 states (AL, CA, DE, DC, ID, IN, KS, MS, MT, NE, ND, OK, RI, SC, SD, TX, USVI, UT & WV), whereas the UCCJEA has been adopted in 51 states.

It might be useful to focus on preparing amendments to the IEDVOPA, but later in the process, consider also drafting a free-standing act, which might be more attractive to states that have not adopted the Uniform Act. On the other hand, it might be unlikely that a state would want to enact legislation enforcing Canadian domestic violence protection orders if it did not also have legislation enforcing such orders of other states in the U.S.

2. Should the act cover only *civil* domestic violence orders issued by Canadian *courts*?

The letter from the Scope and Program Committee to Commissioner Hagerty charges the committee with the recognition of Canadian domestic violence protection orders, without limiting that recognition to "civil" orders or orders from "courts." On the first point, many jurisdictions include criminal statutes in their regimes for protection against domestic violence. Criminal domestic violence statutes, for example, may impose conditions similar to the terms of civil domestic violence orders.[6] Likewise, many states have passed criminal stalking statutes, in part to enhance the protections afforded to victims of domestic violence.[7] For this reason, the IEDVPOA is not limited to the interstate recognition of *civil* protection orders. In fact, the IEDVPOA specifically includes interstate recognition of criminal orders that enjoin the defendant from stalking the prosecuting witness.[8] Likewise, the reports of the Hague Conference on proposed and existing models of cross-border recognition describe regimes that enforce the criminal orders of foreign states.[9]

Several reasons suggest, however, that the committee should provide for the recognition only of *civil* protection orders from Canada. The ECJDAA itself recognizes only *civil* foreign protection orders. Moreover, Commissioner Battle Robinson, who served as an observer during the work on the ECJDAA, reports that from the outset of the discussions that led to the forming of this drafting committee, the scope was limited to the recognition of foreign *civil* protection orders.

On the second point, whether to limit the recognition of Canadian protection orders to those orders that issue from courts, the approaches of the IEDVPOA and the ECJDAA differ. The IEDVPOA does not limit interstate recognition to orders issued by *courts*, but also recognizes orders issuing from *tribunals*, including an "agency…or other entity authorized by law to issue or modify a protection order."[10] The ECJDAA provides for narrower recognition. The ECJDAA

[6] *Cf., e.g.*, N.C. Gen. Stat. §14-33(d), enhancing the criminal penalties for assaulting a person with whom the defendant has a "personal relationship," with N.C. Gen. Stat. § 50B-1, providing civil relief for assaults by a person with whom the complainant has a "personal relationship."
[7] *See, e.g.*, the Illinois criminal stalking statute at § 720 ILCS 5/12-7.3.
[8] IEDVPOA, § 2(5), recognizing anti-stalking laws in the definition of a protection order.
[9] *Recognition and Enforcement of Foreign Civil protection Orders: A Preliminary Note*, Annex II [hereinafter *Preliminary Note*].
[10] IEDVPOA, § 2 (8).

limits the recognition of foreign orders to orders issued by *courts* and does not recognize foreign orders that issued from administrative agencies.[11] The committee will need to decide whether to follow the IEDVPOA model and recognize orders that issue from administrative agencies or the narrower model of the ECJDAA and recognize only those Canadian orders that issue from courts.

3. Should the act distinguish among the types of statutes from which the order issued?

Critics of the IEDVPOA insist that the act makes the interstate recognition of protection orders unnecessarily complex by limiting recognition to orders "issued… under the domestic-violence [or] family-violence… laws" of the state that issued the order.[12] In this way, the act excludes orders that issue under more general statutes. The ECJDAA has no such limitation, providing for the recognition of foreign orders "made by a court of a foreign state" that provides for no-contact.[13] The ECJDAA extends the presumptive recognition of the foreign order regardless of the type of statute under which the civil court issued the order.

If we follow the approach of the ECJDAA, the recognition of Canadian orders will be broader than the recognition of sister state orders under the IEDVPOA, certainly an anomalous result. This might be awkward, but the criticism of the IEDVPOA recommends the ECJDAA approach. The IEDVOPOA approach requires that the enforcing state determine under what kind of statute the Canadian court issued the protection order. In light of the emergency setting in which enforcement questions arise, this complicated determination of Canadian statutory authority is especially troubling.

4. Should the act recognize only the no-contact provisions of Canadian domestic violence protection orders?

The IEDVPOA and the EDJDAA diverge significantly also on how much of a foreign order to recognize. The IEDVPOA provides for recognition of all parts of the protection order, including parts of the order relating to custody and visitation.[14] The ECJDAA provides more narrowly for the recognition only of those parts of a foreign order that deal with

> (a) being in physical proximity to a specified person or following a specified person from place to place;
> (b) contacting or communicating with, either directly or indirectly, a specified person;
> (c) attending at or with a certain distance of a specified place or location; or
> (d) engaging in molesting, annoying, harassing or threatening conduct directed at a specified person.[15]

[11] Unif. Enforcement of Canadian Decrees and Judgments Act, § 9.1 [hereinafter ECJDAA].
[12] IEDVPOA, § 2 (5). For some of the criticism, *see* Sacks, *supra* note 3, at p. 846.
[13] ECJDAA, § 9.1.
[14] IEDVPOA, Introduction. The IEDVPOA does not enforce provisions related to support, however. *Id*.
[15] ECJDAA, § 9.1.

This difference in approach presents the opposite scenario from the one described in question 4: if we follow the approach of the ECJDAA, the recognition of Canadian orders will be more circumscribed than the recognition of sister state orders. Since this is the Conference's first work on recognizing protection orders from foreign countries, it seems that the more limited approach – recognizing only those parts of a Canadian order dealing with no-contact – is prudent. Indeed, the Hague's report on models from other countries includes a number of models recognizing provisions only for no-contact.[16] But would this approach make drafting more cumbersome?

5. What, if anything, should the act provide on challenges to the Canadian domestic violence protection orders that it recognizes?

Neither the IEDVPOA nor the ECJDAA provide for the procedure to challenge the foreign order. Rather, both acts assume that the challenger will use process other the process provided by the act.

The committee needs to decide if this act should include process for challenging the Canadian order. The most intense debate over implementing the Hague Convention on the Protection of Children focused on the procedures for challenge, and in the interests of enactability, the committee may decide that recognition of Canadian orders should also include the procedures to challenge them.

6. Should the act address not only "recognition" but also "enforcement" of Canadian domestic violence protection orders?

While the charge from Scope and Program refers only to the "recognition" of Canadian orders, I assume the committee will also address "enforcement." As noted by the Hague Conference, "enforcement" is "normally … implied in any mechanisms with respect to the recognition of protection orders." [17] In fact, neither the IEDVPOA nor the ECJDAA specifically address "recognition" of domestic violence protection orders, only "enforcement." While both acts provide for *registration* of orders from other jurisdictions, registration is optional under both acts, further underscoring that recognizing an order from another jurisdiction is important only for its relationship to enforcement.

The committee has a number of important issues to address at its meeting later this month. The answers to these questions will certainly facilitate the drafting process. For help in these deliberations, I have attached the IEDVPOA and the ECJDAA, and from the Hague Conference, *Recognition and Enforcement of Foreign Civil Protection Orders: A Preliminary Note* and *Questionnaire on the Recognition of Foreign Civil Protection Orders*: *Summary of Member Responses and Possible Ways Forward*.

[16] *See Preliminary Note*, Annex II.
[17] *Preliminary Note*, p. 3, at n. 6.