UNIVERSITY OF OREGON
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M E M O R A N D U M

To Suzanne Reynolds, Reporter

From: Merle H. Weiner
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Re: Recognition and Enforcement of Canadian Domestic Violence Protection Orders

Date: March 19, 2014

I apologize for not being able to attend the upcoming meeting. I hope that these written comments will be of use to the Committee, nonetheless. I appreciate the Committee's hard work on this important uniform act.

General Issues

1. The references throughout the Act suggest that restraining orders only issue from provinces. That assumption may be incorrect. I am not an expert on Canadian law or procedure, but it is my understanding that the subject of divorce is one for the federal legislature, *see* CAN. CONST. art. VI, § 91(26), and that most divorce cases are heard in superior courts presided over by federal judges. These courts are not provincial/territorial courts. If these courts issue injunctions or restraining orders as part of divorce proceedings (which seems likely, although I am not certain), then the Act should be modified to ensure that these orders would receive recognition and enforcement too. For example, language limiting recognition and enforcement to protection orders of an "issuing Province" (see the new proposed definition for a Canadian civil protection order) may need to be broadened. Similarly, language like "law of the issuing Province," found on page 7, line 3, may need to be changed.

2. I don't see anything in the Act at present that would limit judicial or non-judicial enforcement of an order to the "no-contact" provisions, although the memorandum entitled "Issues for the March 21-22, 2014 Meeting" suggests that the drafting committee seeks this result. In my opinion, the new definition of "Canadian civil protection order" does not accomplish this objective. It defines an order as one that prohibits certain acts (same with "Protection order"), but it does not say that an "order" can only have those provisions, or that only those provisions of an order are enforceable. *See, e.g.,* Sec. 4(a). If it is the intent of the Committee to limit recognition and enforcement to the no-contact provisions, it would probably be a good idea to add wording to Article 3 and Article 4 to make the intent clear.

Wording Issues

1. Section 2. Definitions (new provisions). The following changes would improve the provision:

"Canadian civil protection order" means a judgment or a portion of a judgment, an injunction or other order issued by a court of Canada under the laws of the issuing Province that prohibits a specified person from
(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~~ being at or within a certain distance of a specified place or location; or
(D) ~~engaging in~~ molesting, annoying, harassing or threatening ~~conduct directed at~~ a specified person.

2. Article 3: Judicial Enforcement of Order

Page 7, line 6. A comma is missing between the words "has" and "had."

Page 7, lines 16-17. I recommend changing "(2) the court of the issuing Province made specific findings in favor of the respondent" to "(2) the court of the issuing Province made specific findings that the respondent was entitled to such relief." The court may have made specific findings in favor of the respondent, but may not have found that the person was entitled to relief. The Commentary is better at making clear that the court must find that the respondent was entitled to the requested relief (p. 8, line 35-37), but the Commentary is not always implemented with the Act.

Page 8, line 37. I'd change "against the protected individual" to "in favor of the respondent." There are several protected individuals in the mutual restraining order context.

Other Issues

1. Prefatory Note

Page 1, lines 15-25. I recommend adding a reference to 18 U.S.C. § 2265. This provision of VAWA is a very important part of the interstate enforcement scheme.

Page 2, line 5. I find the reference to "two" confusing since there are three acts mentioned in the prior sentence.

Page 2, line 9. I find "after the request for emergency relief has passed" unclear.

Page 2, line 22. I am a bit confused by the references to the UECJDA. I have found online something that is called the Uniform Enforcement of Canadian Judgments and Decrees Act at the Uniform Law Conference website, *see* http://ulcc.ca/en/home-en-gb-1/333-josetta-1-en-gb/uniform-actsa/enforcement-of-canadian-judgments-decrees-act/4-enforcement-of-canadian-judgments-and-decrees-act. That Act focuses on far more than the enforcement of restraining orders during emergencies in which one party threatens violence. The UECJDA governs the enforcement of custody orders too. *See* definition of Canadian judgment, (f). On the other hand, I have also found language defining and limiting enforcement of Canadian civil protection orders that matches what appears in the Act. This language appears in provincial legislation variously named, *e.g.,* The Enforcement of Canadian Judgments Act or The Canadian

Judgments (Enforcement) Act, but there are variations between the provinces' laws. The definition of Canadian judgment, for example, in the province of Manitoba differs from the definition of the same term in the law of the province of Prince Edwards Island. *Compare* https://web2.gov.mb.ca/laws/statutes/ccsm/e116e.php *with* http://www.gov.pe.ca/law/statutes/pdf/c-01_1.pdf. At this point, I am merely suggesting that the prefatory note be changed to clarify the Canadian acts that are being partially duplicated.

Page 2, line 36. The phrase "no contact" should be expanded to include "or molestation" (or something similar). Sometimes parties seek restraining orders that permit contact, but prohibit the other party from threatening harm or engaging in other criminal behavior. The prefatory note should be clear that this Act would permit the enforcement of those provisions in a restraining order that permitted contact.

2. Section 4: Non Judicial Enforcement of Order

Page 9, lines 9-13. I imagine the Committee may have already considered requiring the police officer to return a proof of service. Having a memorialization of service would be very helpful if the respondent continues to violate the order.

3. Section 5: Registration of Order

Page 10, lines 27-33. There is nothing in the Act directing the agency that is designated by the State to receive an order, to then transfer it to the agency responsible for the registration of the order. The Act does require the agency that is responsible for registration to register it (p. 10, lines 30-33), but the other agency involved has no obligation to do anything at present.

Page 11, line 8. I recommend changing the word "may" to "shall." As the Commentary notes, a registry allows law enforcement to have information about the existence of the order quickly. However, this advantage will only materialize if the order is in the system checked by the police.

Page 11, line 33. I would remove "with custody arrangements." Since the Act does not affect the enforcement of custody arrangements, this reference is confusing.

Larger Issues Regarding Scope

I have three concerns that relate to the scope of the Act: 1) this Act only applies to civil, not criminal, orders, 2) this Act does not cover the custody provisions of a restraining order; 3) and, this Act allows a respondent to defeat enforcement if the issuing court lacked subject matter jurisdiction. The Act's position on these issues is potentially problematic for domestic violence victims, and I want to call to the Committee's attention the problems as I see them. I apologize for raising issues that the Committee already addressed at its October 25-26 meeting, but I was not privy to those conversations and I do not know if the specific points made below were considered. In case they were not considered, I raise them here because they are weighty.

1) Domestic violence victims sometimes do not seek a civil protection order because the prosecutor has obtained a criminal stay away order as a condition of bail or the criminal court imposes a stay away order as a condition of probation. While a well-advised victim would obtain a civil restraining order too, some don't. The question is whether a victim should be able to depend upon police in the U.S. to enforce her criminal stay away order when it is violated. I am not familiar with the limits of enforcing criminal orders from another country (mentioned in passing on p. 2, line 42) and whether the scope of this Act was limited for a weighty reason or merely because the Committee wanted to follow Canada's lead on this point (the prefatory note says it is "follow[ing] the UECJDA and its more limited approach"). It is notable that one of the two Canadian provinces whose law I examined includes criminal orders as part of the definition of Canadian judgment for purposes of enforcement. *See* Prince Edwards Island, Canadian Judgments (Enforcement) Act, § 1(a.1),[1] available at http://www.gov.pe.ca/law/statutes/pdf/c-01_1.pdf. Moreover, VAWA also includes criminal orders in its definition of protection orders entitled to interstate enforcement. *See* 18 U.S.C. § 2266. Even the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act, §2(5), explicitly permits the enforcement of some criminal orders, such as those issued under anti-stalking statutes of the issuing State. *See* Section 2, cmt. Since the central goal of this Act is to authorize "law enforcement to separate the parties who are the subjects of a protection order" (Memo for March 21-22 meeting, p. 2), it seems unduly restrictive to limit recognition and enforcement to civil protection orders.

2) Another concern relates to the exclusion of the custody provision of an order from the Act's provisions on enforcement. Neither the present version of the UCCJEA, the proposed amended version of the UCCJEA (to implement the Hague Convention on the Protection of Children), nor the Hague Child Abduction Convention address some emergencies that can place a domestic violence victim's child in danger. I am imagining a situation in which the respondent comes and picks up the child from school, or from the front yard, in order to terrify his victim and potentially harm the child. He may not be in violation of any other part of her restraining order other than its custody provision. While the victim may have a remedy under the UCCJEA if she goes into court to enforce the custody provision in her restraining order, she is in need of emergency enforcement of her order and the immediate return of the child to her custody. The Hague Convention on the Protection of Children, which would be implemented in the U.S. through the amended UCCJEA, does not provide a remedy in this context. While Article IV of the Act would permit a custody provision in a restraining order to be recognized and enforced under sections 308 through 312 of the Act, *see* section 424(b), and through other available remedies available to the court, *see* section 424(e), all of these remedies require judicial intervention. What is essential in this scenario, and in the restraining order context generally, is to have the availability of non-judicial enforcement. Moreover, it may be many years before the U.S. ratifies the Hague Convention on the Protection of Children, or adopts the amendments to the UCCJEA.

[1] "'Canadian judgment' means….(iii) an order that is made under section 725 or 726 of the Criminal Code (Canada) by a court of a province of Canada other than Prince Edward Island and that is entered as a judgment in the superior court of unlimited trial jurisdiction of the province where the order was made."

In my opinion, it is essential that the custody provision of the restraining order be immediately enforceable by the police. The scenario in the prior paragraph matches, in essence, the facts of *Town of Castlerock v. Gonzales*, 545 U.S. 748 (2005). That case serves as a grim reminder that the failure of the police to take action to enforce the custody provisions of an order can lead to lethal harm to children.

The importance of making the custody provisions of a restraining order enforceable was evident to the federal government when it amended VAWA in 2005 to include a custody provision in its definition of protection order. *See* 18 U.S.C. 2266.[2] It was also evident to the drafters of the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act, which allows judicial enforcement of the custody and visitation provisions of a restrainingorder (section 3(c) and imposes no limitations on law enforcement officers enforcement of the order. *See* Section 4. The obvious potential downside to making the custody provision enforceable relates to the potential risk that batterers will obtain an ex parte restraining order with a custody provision and then try to enforce it when the victim and child are in the U.S. Domestic violence advocates should be able to give advice on which one of the two scenarios poses a greater danger to victims and their children.

Finally, I question whether a defendant should be able to attack a restraining order in a judicial enforcement proceeding based upon the argument that the issuing court lacked subject matter jurisdiction. *See* Section 3(b)(3), (d). I realize that I may be on the losing side of history on this issue, since the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act, section 3(d)(3), has similar language. However, it is not a foregone conclusion that such an approach must be perpetuated. First, Canada does not take this approach. The Uniform Enforcement of Canadian Judgments and Decrees Act expressly rejects the absence of subject matter jurisdiction as a reason to limit enforcement, *see* section (3), and makes a strong case that any problem of this sort should be addressed in the place where the judgment was entered, either through appeal or further application to the court that made the order. One sees similar language in the provincial legislation that addresses restraining orders. *See, e.g.*, Prince Edwards Island, Canadian Judgments (Enforcement Act), § 7(2)(a); Manitoba, The Enforcements of Canadian Judgments Act § 6(3). Second, the new Article 4 of the UCCJEA (not yet enacted) has a strong

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[2] 18 U.S.C. 2266(5) ("Protection order.— The term 'protection order' includes—
(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and
(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.").

provision regarding res judicata. Section 424(d) states, "A court of this state is bound by the findings of fact on which the authority of a convention country based its jurisdiction."

In my opinion, a party should not be permitted to challenge subject matter jurisdiction in an enforcement proceeding. If the order was issued after an adjudication in which the respondent participated, the policy behind res judicata cautions against relitigation. Even if an order were issued by default, the party against whom enforcement is now sought should be precluded from challenging subject matter jurisdiction if that person was subject to personal jurisdiction and received notice and an opportunity to be heard. Permitting a collateral attack seems misguided because many subject matter determinations in the restraining order context will turn on factual issues (*e.g.*, did the parties have the requisite relationship). These issues should be litigated in the place that is closest to the relevant evidence. In addition, it will often be a complicated matter for a U.S. court to determine whether a Canadian court lacked jurisdiction under Canadian law. Nor is there an overriding policy that the U.S. has to vindicate by allowing a collateral attack on subject matter jurisdiction (like when a court might uphold an important federal policy by not enforcing a bankruptcy judgment from a state court that clearly did not have jurisdiction). *See generally* Restatement (First) of Judgments § 10 (1942); Restatement (Second) of Conflict of Laws § 97, 98 (1971, rev. 1988). It is far more efficient for a party to raise the issue before the court who knows the limits of its own subject matter jurisdiction. Finally, this is the better policy in this context because batterers can be very litigious as part of their abuse, and it is best to limit the possible defenses at the time of enforcement. It is obviously more debatable whether this analysis should extend to the enforcement of an ex parte order before the respondent has had an opportunity to challenge it.

Please let me know if I can be of any assistance in the future. Thank you for considering my views.