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Application and Constitutionality of the Revised Uniform Reciprocal Enforcement of Support Act

Divorce, coupled with the departure of the supporting spouse from the jurisdiction, creates the problem of obtaining and enforcing support orders in favor of the dependent spouse or child. Because of the increase of the incidence of divorce in the United States¹ and because of the increased mobility of Americans, the difficulties in obtaining and enforcing these support orders have gained wide recognition in recent years. A dependent spouse may have difficulty in obtaining and enforcing a support order or in enforcing a preexisting order because of the difficulty of acquiring jurisdiction over an obligor² who resides outside of the jurisdiction in which the dependent is present.³ Traditionally, the dependent spouse can utilize the U.S. legal system to enforce rights of support in two ways. One solution is for the obligee to hire an attorney in the jurisdiction where the obligor is present and to travel to that forum to bring the action. This tactic is often unavailable because the obligee lacks the necessary financial resources. Another remedy provided is criminal prosecution. The obligor can be extradited and tried on criminal charges of non-support. This, however, leads to what has been termed a "classic 'Catch-22 situation,'"⁴ because the convicted obligor cannot earn money while in jail and the stigma of the conviction may reduce the future employment opportunities. The probability that the obligee would receive

¹ See Norton & Glick, *Marital Instability in America: Past, Present, and Future*, in *DIVORCE AND SEPARATION* 6 (1979).

² The terms obligor and obligee will be used throughout the paper to indicate the two primary parties involved. The terms are defined by the REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1968), reprinted in 9A UNIFORM LAWS ANN. 643-746 (1979) [hereinafter cited as RUESA] as follows:

"Obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced.

RUESA § 2(g).

"Obligee" means a person including a State or political subdivision to whom a duty of support is owed or a person including a State or political subdivision that has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support order. It is immaterial if the person to whom a duty of support owed is a recipient of public assistance.

Id. § 2(f).

³ DeHart, *Child Support Enforcement: Reaching Across International Boundaries*, *FAM. ADVOCATE*, Fall 1979, at 26.

⁴ See Note, *Uniform Reciprocal Legislation to Enforce Familial Duties of Support*, 25 *DRAKE L. REV.* 206, 208 (1975).

future support payments is practically nonexistent.⁵ The limitations of these two methods have left many dependent spouses without a remedy.

In response to the need for an alternative effective and practical method of enforcing support orders against absent obligors, the National Conference of Commissioners on Uniform State Laws⁶ and the American Bar Association approved the Uniform Reciprocal Enforcement of Support Act (URESA) in 1950.⁷ The 1950 URESA procedures allowed the obligee to institute an action in her own domicile, the initiating state, that would then permit the court with jurisdiction in the obligor's domicile, the responding state, to obtain jurisdiction over him. After a *de novo* hearing conducted pursuant to the law of the responding state, an order of support could then be entered and enforced against the obligor in the responding state. The obligee was not required to retain counsel in the responding state or to appear at the hearing in order to obtain relief.⁸

In 1958, the URESA was amended⁹ to address the problem of enforcement of preexisting support orders.¹⁰ These amendments required the clerk of court to maintain a Registry of Foreign Support Orders for registration of support orders filed by a court of a state having URESA or similar legislation.¹¹ Jurisdiction over the obligor was obtained by usual civil procedures, and a hearing was held to resolve the matter. Upon confirmation of the order by the court of the responding state or upon the default of the obligor, which results in automatic confirmation, the foreign support order would be effective as if it had been originally entered in the court of the responding state.¹² This procedure is basically a simplified method of applying the full faith and credit doctrine to the support orders of a foreign state, with the hearing confined to examination of any defense which would be available to the defendant if the support order had been entered in the responding state.¹³

⁵ *Id.*

⁶ The National Conference of Commissioners on Uniform State Laws was formed to promote uniformity in state laws. It is composed of Commissioners from each state who are members of the legal profession. The Commissioners meet annually to discuss tentative drafts and approve and amend Uniform Acts. Acts approved by the National Conference are submitted to the American Bar Association for approval and are promulgated for adoption by the states. 9A UNIFORM LAWS ANN. III, IV (1979). William J. Brockelbank was a member and later Chairman of the Special Committee of the National Conference which drafted the URESA and its amendments, with much of the drafting being done by Brockelbank. *See* W. BROCKELBANK, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT (THE RUNAWAY PAPPY ACT) (2d ed. 1971).

⁷ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 123, 171 (1950) [hereinafter cited as HANDBOOK (1950)].

⁸ UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT §§ 7-20 (1950) [hereinafter cited as URESA (1950)]. The Act is set out in full in HANDBOOK (1950), *supra* note 7, at 175-80.

⁹ *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 241-52 (1958) [hereinafter cited as HANDBOOK (1958)].

¹⁰ *See* UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT §§ 33-38 (1958).

¹¹ *Id.* § 35.

¹² *Id.* §§ 37-38.

¹³ *Id.*

The URESA underwent a major revision in 1968, with seven new sections added and many changes made in the existing sections. The Act as amended was retitled the Revised Uniform Reciprocal Enforcement of Support Act (RURESA).¹⁴ One of the important changes was the provision for international enforcement of support orders. Section 2(m) of the Act defines "state" to include a "State, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect."¹⁵ This amendment was adopted in response to the increasing incidence of the "multinational family,"¹⁶ which occurs when members of what was originally a nuclear family separate and move to different countries. The typical situation involves a military man who fathers a child in another country and then returns to his native country.

Originally the goal of the Commissioners was to enable states to establish reciprocity with Canada,¹⁷ a favorite haven of fleeing obligors. States, however, are utilizing the provision to establish reciprocity with a number of countries.¹⁸ These reciprocal arrangements allow a dependent spouse to enforce a support order in his or her favor relatively simply, despite the fact that the obligor has fled the country.

The Commissioners considered and rejected the alternative of establishing a treaty between the United States and Canada to accomplish their purpose. This idea was rejected for two reasons: 1) the Commission did not want to facilitate the movement of the federal government into the area of domestic relations; and 2) it was believed that the State Department would reject the proposal since no national power was involved.¹⁹ Both reasons relate to the traditional view that domestic relations are the concern of the individual states with regulation power reserved to them by the tenth amendment. However, when matters of state concern take on an international scope, federal law may intervene

¹⁴ See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 223-37 (1968); 9A UNIFORM LAWS ANN. 643-746 (1979).

¹⁵ RURESA § 2(m). In 1975, North Carolina adopted the RURESA definition of "state" without change. N.C. GEN. STAT. § 52A-3(13) (1976). The wording of the definition of "state" in the earlier versions of URESA was as follows: "'state' includes any state, territory or possession of the United States and the District of Columbia in which this or a substantially similar reciprocal law has been enacted." URESA (1950) § 2(a).

¹⁶ DeHart, *supra* note 3, at 27.

¹⁷ See W. BROCKELBANK, *supra* note 6, at 98.

¹⁸ For example, California has established reciprocity with the Republic of South Africa, Australia, West Germany, and England, as well as with twelve Canadian provinces. DeHart, *supra* note 3, at 27-28.

¹⁹ W. J. BROCKELBANK, *supra* note 6, at 91. A United Nations treaty was adopted in 1956 which establishes a RURESA-type procedure for international enforcement of support orders. United Nations Convention on the Recovery Abroad of Maintenance, *done on* June 20, 1956, 268 U.N.T.S. 32. The United States has never ratified this treaty. DeHart, *supra* note 3, at 29. DeHart believes ratification of the treaty would be desirable because it would "enormously increase our capabilities for dealing with enforcement problems, since outside the Commonwealth system, there is no formal system of reciprocity based on comity." *Id.*

and preempt state law if the matter has become one involving foreign policy or other areas controlled by the federal government.²⁰ In the case of international reciprocal enforcement of support orders, the Commissioners felt the matter was still of primarily local concern which should be left under state control and believed it would be viewed as such by the federal government.²¹

North Carolina's Experience

RURESA was envisioned as a method of enforcing support orders which could be utilized by all obligees. Therefore, the procedure involved in RURESA actions is simple and basically clerical, as an examination of its use in North Carolina demonstrates. Both intrastate and interstate actions are governed by the same provisions. The action is initiated "by the issuance of summons in the form required for actions for alimony without divorce by the court having jurisdiction."²² A verified complaint must be filed stating the name and address of the defendant, if known, his circumstances, and the names of the dependents for whom support is sought.²³ The North Carolina statute also contains a non-obligatory suggestion that other information which could help locate and identify the defendant be included, such as photographs, social security numbers, and fingerprints.²⁴

The North Carolina court must certify the action for transfer to the court of another jurisdiction upon the finding of three requisite facts: 1) that the defendant is not presently in North Carolina; 2) that the allegations of the complaint state facts which would be sufficient for a finding that the defendant has a duty of support; and 3) that jurisdiction over the defendant could be obtained by the responding court.²⁵ If these three findings are made, the certification must be made and the North Carolina court has the duty to send three copies of the complaint, the court's certificate, and any other documents filed to the court or other responsible agency of the responding state.²⁶ Additionally a copy of North Carolina General Statute Chapter 52A, the URESA, must be provided.²⁷

One of the most important provisions of the North Carolina

²⁰ See text accompanying notes 77-108 *infra*.

²¹ DeHart states that this premise is no longer valid. DeHart, *supra* note 3, at 29. She points to the enactment of Title IV-D of the Social Security Act which provides funding for a program to aid in enforcement of support for both welfare and non-welfare obligees. The Office of Child Support Enforcement, an HEW agency, administers the program. *Id.*

²² N.C. GEN. STAT. § 52A-10 (1976).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* § 52A-11.

²⁷ *Id.* The duties required by this section are the responsibility of the clerk of superior court unless otherwise directed by the chief district court judge. *Id.*

URESAs is the provision for legal representation for the obligee in the responding state, which states:

- (i) It shall be the duty of the official who prosecutes criminal actions for the State in the court acquiring jurisdiction to appear on behalf of the obligee in proceedings under this Chapter. In the event of an appeal from a support order entered under this Chapter, the Attorney General shall represent the obligee.²⁸

Thus, the obligee, who is often without financial resources, is assured of having an attorney represent her at the hearing in the responding state. This provision greatly enhances the value of URESA since the lack of a legal representative in the responding state and the inability of the obligee to personally appear are the basic problems with other remedies. The 1975 amendment of the North Carolina URESA also allows the obligee to be represented by the prosecuting attorney in the state in the initial proceeding upon either the request of the initiating court or the request to the court by the county director of public services if the person or his family is receiving public assistance.²⁹

Under North Carolina's URESA, the effective enforcement of support orders³⁰ depends on the responding state. Thus, a resident of Ontario, a jurisdiction with substantially similar legislation, who seeks support from a North Carolina resident must rely upon the courts of North Carolina to enter an order of support if one has not been previously obtained, and to enforce it.³¹ For example, upon receipt of the documents described in section 52-11, the North Carolina court will set the cause for hearing, give notice to the prosecuting attorney who will represent the obligee, set a time and place for hearing, and take the necessary actions to obtain jurisdiction over the obligor.³² The responding state also has the duty of locating the obligor or his property. This duty must be fulfilled with diligence, requesting additional information from the initiating court if necessary.³³ If the prosecuting attorney finds that the obligor or his property are within another jurisdiction, he must forward all documents received to that jurisdiction.³⁴

²⁸ *Id.* § 52A-10.1.

²⁹ *Id.* § 52A-10.3. The statute also provides that, in counties having a special county attorney for social services, he or she shall represent the obligee. *Id.* The wording of this section is different from the analogous RURESAs provision. *See* RURESAs § 12.

The constitutionality of this section can be questioned on two grounds. First, as a denial of equal protection because the same right to free legal service is denied in actions where both obligor and obligee are in the same state, and second, as an invalid use of public funds for the benefit of a private individual. One court has rejected these contentions on the basis of the underlying public policy purposes of a similar provision of the former Uniform Support of Dependents Act. *See* *Duncan v. Smith*, 262 S.W.2d 373, 378 (Ky. 1953).

³⁰ The phrase "enforcement of support orders" as used throughout this article, unless otherwise indicated, applies to both the procedure of obtaining and enforcing a support order in the responding court and to the enforcement of a preexisting order, obtained in another jurisdiction, in the responding court.

³¹ N.C. GEN. STAT. §§ 52A-12 to -16 (1976).

³² *Id.* § 52A-12.

³³ *Id.* § 52A-12.1(a).

³⁴ *Id.* § 52A-12.1(b).

The petitioner in a URESA action is required to prove by legally permissible evidence that the respondent has a duty of support.³⁵ Section 12.2 of the North Carolina Act provides for continuance of the hearing for the submission of additional evidence if the obligee does not appear and the obligor denies the allegations or if the obligor presents evidence in his defense. The statute provides that the evidence may be presented by deposition or personal testimony.³⁶ The husband-wife privilege is made specifically inapplicable to URESA actions.³⁷ Evidence in URESA actions, unlike usual civil proceedings, consists primarily of such secondary evidence as depositions and interrogatories.³⁸ After hearing all the evidence the court of the responding state determines whether the defendant has a duty of support. If it finds in the affirmative, "it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order."³⁹ Copies of the support order are then sent to the initiating court.⁴⁰ The initiating court has the duty to receive and disburse all payments received from the defendant or the responding court.⁴¹

The North Carolina URESA has an important provision designed to facilitate the effective use of the Act. Section 24 designates the State Division of Social Services as the state information agency under URESA. The state information agency is required to compile a list of all courts and their addresses in North Carolina which have jurisdiction under URESA and provide the information to the information agencies of states who have adopted URESA or a substantially similar act.⁴² The agency is likewise required to receive all such lists submitted from other states and transmit copies of them to all North Carolina courts with jurisdiction under URESA.⁴³ Finally, the state information agency must forward to any North Carolina court with jurisdiction over an obligor complaints, petitions, certificates, and copies of other acts it receives from the information agencies or courts of other states.⁴⁴

The basic RURESAs rules and procedures apply to the international enforcement of support orders. By adopting the RURESAs definition of "state" the state legislature goes beyond the concept of comity, which is a discretionary recognition and enforcement of foreign judgments and

³⁵ See *Carpenter v. Carpenter*, 231 La. 638, 92 So. 2d 393 (1956).

³⁶ N.C. GEN. STAT. § 52A-12.2 (1976).

³⁷ *Id.* at § 52A-18.

³⁸ Note, *The Uniform Reciprocal Enforcement of Support Act: Procedural Problems and a Technological Solution*, 41 TEMP. L.Q. 325, 327 (1968). The author argues that the secondary evidence presently used is inadequate for proper adjudication of support matters. He suggests that by using modern technology, such as videotaping, the effectiveness of URESA actions could be enhanced. *Id.* at 327, 333.

³⁹ N.C. GEN. STAT. § 52A-13 (1976).

⁴⁰ *Id.* § 52A-14.

⁴¹ *Id.* § 52A-17.

⁴² *Id.* § 52A-24(1).

⁴³ *Id.* § 52A-24(2).

⁴⁴ *Id.* § 52A-24(3).

claims by domestic courts, to provide access to the courts of North Carolina for foreign residents to obtain and enforce support orders pursuant to the statute.⁴⁵ However, the establishment of reciprocity between a state and a foreign country and the actual working of the procedure are more difficult in practice than the simple wording of the RURESA provision suggests. There are three significant matters that must be resolved before RURESA can apply: 1) it must be established that the support laws of the foreign country are substantially similar to RURESA; 2) accommodations for insubstantial differences between the two procedures must be worked out; and, 3) a procedure for handling the international cases, including designation of the officials who will process the necessary actions, must be established.

The North Carolina experience with RURESA in the international context provides an example of typical problems encountered in the area. Currently North Carolina enjoys reciprocity with two jurisdictions—Ontario, Canada and West Germany.⁴⁶ Pursuant to these “loose working arrangements,”⁴⁷ North Carolina residents may obtain and enforce support decrees in the courts of these jurisdictions. Likewise, West Germans and residents of Ontario may utilize the courts of North Carolina to reach obligors present in the state.⁴⁸ Although the laws of North Carolina and these two foreign jurisdictions have been declared substantially similar as required by RURESA, there are differences in concepts and procedures which remain.

The first difference between North Carolina and Ontario laws concerns the underlying concept of support legislation. Under U.S. theory, RURESA is used to enforce an obligation of duty to support, whereas in Canada the Reciprocal Enforcement of Maintenance Act (REMOA)⁴⁹ is used to enforce a provisional support order.⁵⁰ In actions not concerned

⁴⁵ *Id.* § 52A-3(13).

⁴⁶ Interview with Henry Burgwyn, Associate Attorney General for the State of North Carolina, in Raleigh, North Carolina (Feb. 22, 1980) [hereinafter cited as Burgwyn Interview]. This seemingly odd combination is more a result of the desire of those two jurisdictions to establish reciprocity with states in the United States than a singling out of them by North Carolina. Negotiations with other sovereigns, such as England and the Canadian provinces of Manitoba and New Brunswick, are in progress. *Id.*

⁴⁷ This is the terminology used by Mr. Burgwyn to avoid suggestion of the constitutional problems encountered by use of the term “agreement.” *Id.* See text accompanying notes 77-108 *infra*.

⁴⁸ During the three years in which North Carolina has had reciprocity with Ontario, only six cases have been transmitted from North Carolina to Ontario and very few have been transmitted from Ontario to North Carolina. It is anticipated, however, that the North Carolina-West Germany arrangement will be used much more extensively. West Germany sent five cases to North Carolina even before reciprocity was declared. Burgwyn Interview, *supra* note 46.

⁴⁹ RECIPROCAL ENFORCEMENT OF MAINTENANCE ACT §§ 1-14 (Ontario 1959), *reprinted in* W. BROCKELBANK, *supra* note 6, at 167-74 [hereinafter cited as REMOA].

⁵⁰ Memorandum to the Honorable L.R. McTavish, Q.C., Uniform Law Commission for the Province of Ontario, from W.J. Brockelbank, Uniform Law Commissioner for the State of Idaho, Chairman of the Special Committee on the Uniform Reciprocal Enforcement of Support Act for the National Conference of Commissioners on Uniform State Laws (Aug. 20, 1963) [hereinafter cited as Memorandum].

with preexisting orders, the initiating court in North Carolina in effect certifies that the petitioner has a valid complaint and transmits the action to the attorney general in Canada who then forwards it to the proper officer of the Canadian court.⁵¹ Section 12 of REMOA allows the court to treat the URESA petition as a provisional order. The Canadian court then issues a summons against the obligor, holds a hearing on the evidence if the defendant appears, then enters an order of confirmation, which is the enforceable order of support.⁵² In contrast to this procedure, the initiating court in Ontario actually issues a provisional order which is forwarded to the responding court for confirmation and enforcement.⁵³ The responding court in North Carolina then proceeds as if the provisional order was a standard URESA complaint.⁵⁴ Therefore, practically speaking, the effect of each procedure is identical.

A second difference lies in the Canadian and American provisions for determining what law will be applied at the hearing in the court of the responding state. The North Carolina URESA provides:

Duties of support applicable under this Chapter are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.⁵⁵

Thus, North Carolina law will apply to actions transmitted by the

⁵¹ REMOA § 2.

⁵² *Id.* § 5(1)-(3). The action may be remitted to the initiating court for the taking of further evidence. *Id.* § 5(4). Section 12 of REMOA provides:

Where a maintenance order sought to be registered in a court in Ontario or a provisional order sought to be confirmed by the court in Ontario under this Act, or any accompanying document uses terminology different from the terminology used in Ontario, the difference shall not vitiate any proceeding under this Act.

RURESAs does not contain an analogous provision, although Brockelbank has stated such an amendment should be adopted. Memorandum, note 50 *supra*.

⁵³ Section 4(1) of REMOA states:

Where an application is made to a court in Ontario for a maintenance order and it is proved to the court in Ontario that the person against whom the order was made is resident in a reciprocating state, the court in Ontario may, in the absence of that person and without service of notice on him, if after hearing the evidence it is satisfied of the justice of the application, make any maintenance order that it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, *but an order so made is provisional only and has no effect until it is confirmed by a court in the reciprocating state* (emphasis added).

⁵⁴ There is no constitutional problem with the North Carolina courts recognizing the provisional order and treating it as a complaint since it is not an order in the sense of having force and finality. Brockelbank has suggested that REMOA be amended to provide a definition of "provisional order" to facilitate reciprocity between the United States and Canada. He has offered the following as an example of what is needed:

In this Act, 'provisional order' means a statement issued by a court of the province where complaint has been made to the effect that the defendant named in the complaint is ordered to pay to the plaintiff a certain amount but with a statement that this order shall have no force and effect until confirmed by a court of competent jurisdiction where the defendant is residing.

Memorandum, note 50 *supra*. This suggestion has not yet been followed by the Canadian legislature.

⁵⁵ N.C. GEN. STAT. § 52A-8 (1976).

Canadian court to the responding North Carolina court. The Canadian Act, however, applies the law of the initiating state.⁵⁶ As one authority notes, this may give the obligor some room to maneuver in instances where the jurisdictions differ on matters such as recognizing different ages of majority which cut off the right to support.⁵⁷ The provision thus produces a circular effect: Ontario as respondent applies North Carolina law which in turn applies the law of the responding state, Ontario. A suggested solution to this problem is applying the choice of law provisions only to substantive laws, not conflicts of laws provisions.⁵⁸

Ontario's application of the law of the initiating state leads to a second conceptual difficulty.⁵⁹ REMOA requires that the court of the initiating state provide a list of the defenses to the action which the defendant could have raised if the respondent had been a party to the action in the initiating state.⁶⁰ The obvious problem with this procedure is that the defendant must rely on the initiating court to do a thorough job of stating his defenses because he has no opportunity under REMOA to proffer alternate viable defenses.⁶¹ However, in practice this requirement has not been a problem. Standardized forms stating all defenses available under North Carolina law are typically used, eliminating the prejudice to the defendant of an incomplete or poorly drafted list.⁶² Additionally, the Canadian judge may allow the defendant to offer defenses not on the list.⁶³

An entirely different problem arises in dealing with West Germany. There is a basic impediment to reciprocity in West Germany's lack of reciprocal enforcement of support act.⁶⁴ The applicable German stat-

⁵⁶ REMOA § 5(2).

⁵⁷ W.J. BROCKELBANK, *supra* note 6, at 96-97. For example, if minority ended at age eighteen in Ontario, and at age twenty-one in the American state, a petitioner in Ontario would be unsuccessful in obtaining a provisional order of support because no duty would exist, but the petitioner in the United States would be able to obtain support from a respondent in Ontario for three additional years with the help of the Canadian court. *Id.*

⁵⁸ *Id.* at 98.

⁵⁹ Memorandum, note 50 *supra*.

⁶⁰ REMOA § 4(1)(i).

⁶¹ Memorandum, note 50 *supra*.

⁶² The standard North Carolina form lists possible defenses to a support action in a North Carolina court as:

1. The Court has no jurisdiction to make the order; or
2. The matter of the Complaint is not true; or
3. There is no valid marriage subsisting between the Petitioner and the Respondent (inapplicable if Petitioner is not the wife of Respondent); or
4. Under a decree or order of a competent Court, the Petitioner is already entitled to maintenance for the dependent(s), and such decree is being complied with; or
5. The Respondent is not of sufficient means or ability to maintain the dependent child(ren); or
6. The child(ren) being over the age of ___ and not being engaged in a course of education or training, no provision in respect of the child(ren) can be included in the Order.

⁶³ Brockelbank reports that all Canadian judges he had spoken with would allow the defendant to prove any valid defense even if it was not on the list. Memorandum, note 50 *supra*.

⁶⁴ DeHart, *supra* note 3, at 29.

utes are scattered throughout the Civil Code, the Code of Civil Procedure, and the Criminal Code.⁶⁵ This was the apparent reason a Minnesota district court, in *Nicol v. Tanner*,⁶⁶ concluded that West Germany did not have a law substantially similar to RURESA. In *Nicol* the plaintiff was a German resident and the defendant was a U.S. citizen who had been a serviceman stationed in West Germany. The plaintiff obtained a default judgment against the defendant in Germany from a court with jurisdiction over him, establishing paternity and imposing a duty of support.⁶⁷ No payments were ever made by the defendant, who subsequently returned to the United States, where the plaintiff brought suit to enforce judgment. The district court held that no reciprocity with West Germany existed and that reciprocity was a prerequisite to recognition of a foreign judgment. The case was appealed to the Minnesota Supreme Court which reversed, not on the ground that there was reciprocity, but because it was not a requirement for recognition of the judgment.⁶⁸ It is unclear from the opinion whether the lower court action was brought under RURESA originally, but the Minnesota court noted that the parties did not address the applicability of RURESA and that "it appears to be inapplicable."⁶⁹ The court then stated that

if the Federal Republic of Germany had such a substantially similar law, then it might be required to enforce the contested judgment pursuant to the Minnesota Reciprocal Enforcement of Support Act. However, research has not disclosed any such reciprocal law in the Federal Republic (Fred B. Rotham & Co. trans. Forrester, Ilgen and Goren 1972).⁷⁰

The court also stated the judgment could be enforced under the doctrine of *res judicata* and adopted the test of enforcing a foreign judgment if the defendant could and should have appeared and litigated the issues in the foreign court.⁷¹ Therefore, the action was remanded to the district court to determine if the circumstances of the judgment justified its enforcement by the U.S. court.⁷²

Although the *Nicol* court held the judgment potentially enforceable, the many practical problems, such as lengthy procedures, dual hearings, and the expense of hiring counsel for enforcement proceedings, left many foreign obligees without a realistic method of redress in Minnesota. An examination of the German statutes coupled with knowledge of West

⁶⁵ Certified translation of West German support provisions transmitted to Gloria F. DeHart, Deputy Attorney General, State of California, from Dr. Bohmer, Ministerialrat, Federal Ministry of Justice of West Germany, (November 23, 1979) [hereinafter cited as Translation]. A summary of the German law and procedures was sent to all IV-D directors and state information agents in all states. DeHart, *supra* note 3, at 29.

⁶⁶ 256 N.W.2d 796 (Minn. 1976).

⁶⁷ *Id.*

⁶⁸ *Id.* at 803.

⁶⁹ *Id.* at 797 n.1.

⁷⁰ *Id.*

⁷¹ *Id.* at 803 (citing Peterson, *Foreign Country Judgments and the Second Restatement of Conflicts of Laws*, 72 COL. L. REV. 221, 245 (1972)).

⁷² *Id.*

Germany's interest in the area compels the conclusion that RURESA should have been applied to the action. Whereas the West German Code of Civil Procedure lists several bases for refusing recognition of a foreign judgment,⁷³ the applicable exclusion for most RURESA actions is the absence of guaranteed reciprocity.⁷⁴ Minnesota had adopted the RURESA definition of states, which extends its coverage to obligees in jurisdictions in which "a substantially similar law is in effect." The provisions of the West German law impose duties of support similar to those imposed by U.S. states. The North Carolina Attorney General reached this conclusion in an opinion which stated,

the support laws there are substantially similar to those which exist in North Carolina, in fact often are broader than our own The amount of support is determined by financial need of the child and the ability of the parent to pay. Foreign orders establishing paternity and/or support are recognized and can be enforced in Germany or, if no judgment exists, a standard URESA petition may be sent to the German authorities who will seek to have a suitable order entered in Germany.⁷⁵

If the laws differ on the duty to support in minor respects, then reciprocity is absent only for support orders based on those differences.⁷⁶

Although differences between foreign support laws and RURESA exist, the laws are substantially similar, and accommodations for the differences can be made. Obligees who formerly had no practical method of recovering support are now afforded a relatively quick and easy way of obtaining and enforcing support orders.

The Constitutionality of RURESA

The Revised Uniform Reciprocal Enforcement of Support Act is the law only of those states which have adopted it and is not a federal statute. Proponents of RURESA are always careful to note that it is constitutional and, specifically, that it does not violate article 1, section 10, clause 3 of the U.S. Constitution which states, "(n)o state shall, without

⁷³ The bases for refusing to recognize a foreign judgment are:

1. if the courts of the State to which the foreign court belongs have no jurisdiction according to German law;
2. if the unsuccessful defendant is a German who did not enter an appearance in the suit unless the writ of summons commencing the proceedings was served on him either in person in the State of the court concerned or as the result of assistance afforded by German authorities;
3. if the judgment was passed to the detriment of a German party in derogation of the (relevant provisions of the German law dealing with missing persons, judicial presumption of death, etc.);
4. if the recognition of the judgment would be *contra bonos mores* or contrary to the purpose of a German law;
5. if reciprocity is not guaranteed.

CODE OF CIVIL PROCEDURE § 328(1)-(5), Translation, *supra* note 65, at 15.

⁷⁴ *Id.* § 328(5).

⁷⁵ Opinion of the Attorney General of North Carolina, Rufus Edmisten to Robert H. Ward, Director of the Social Service Division of the North Carolina Department of Human Resources (July 31, 1979).

⁷⁶ *Id.*

the consent of Congress . . . enter any Agreement or Compact with another State or with a foreign power." Although other possible grounds for unconstitutionality exist, such as interference with Congress' power to make federal policy or federal preemption of the area, this one clause has been the focus of academic comment on the constitutionality of URESA and similar laws.⁷⁷ The U.S. Supreme Court has never addressed the constitutionality of RURESA, although it has rendered decisions in cases involving reciprocal legislation, so the question of the constitutionality of RURESA remains.⁷⁸

Two issues emerge in considering whether a statute is constitutional under clause 3: 1) what are the meanings of the terms "agreement" and "compact" as used in clause 3; and 2) does the statute constitute such an agreement or compact which requires the consent of Congress to be valid. If the second issue is answered in the negative, the question of status of the reciprocal legislation arises. The resolution of the first two issues will be explored by examining the views of U.S. legal commentators on the meaning of clause 3 in general and specifically as it relates to RURESA. Opinions of both U.S. and Canadian courts will be analyzed to determine the judicial view of RURESA's constitutional status.

The first issue is whether RURESA is an agreement or compact within the meaning of clause 3.⁷⁹ Bouvier's Law Dictionary includes compact within the definition of agreement.⁸⁰ Additionally, it should be kept in mind that the use of the word "agreement" by the courts, legal commentators, and the officers of the state does not necessarily imply that the Act is an agreement within the meaning of clause 3.

Several factors have been isolated as determinative of whether an arrangement is an agreement within the meaning of clause 3. The first of these factors is whether the provisions of the arrangement are binding on the parties. In discussing the legal effect of agreements between Canadian Provinces and American states, Di Marzo has concluded that reciprocity of enforcement of support orders does not constitute an agreement since the "orders are akin to unilateral acts and, although binding on the party making them, they do not seem to involve the recognition of

⁷⁷ See generally, C. OKEKE, *CONTROVERSIAL SUBJECTS OF INTERNATIONAL LAW* (1974); Curtis, *The Treaty Power and Family Law*, 7 GA. L. REV. 55 (1972); Di Marzo, *The Legal Status of Agreements Concluded by Component Units of Federal States with Foreign Entities*, 16 CAN. Y.B. INT'L L. 197 (1978); Naujoks, *Compacts and Agreements between States and between States and a Foreign Power*, 36 MARQ. L. REV. 219 (1952); Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021 (1967).

⁷⁸ See *Zschernig v. Miller*, 389 U.S. 429 (1968); *Clark v. Allen*, 331 U.S. 503, 516-17 (1947); *Gorun v. Fall*, 287 F. Supp. 725 (D. Mont. 1968), *aff'd*, 393 U.S. 398 (1969).

⁷⁹ The U.S. Senate published a report of a study of the Constitution which concluded:

The terms "compact" and "agreement" . . . do not apply to every possible compact or agreement . . . but the prohibition is directed to the formation of any combination tending to increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States.

S. DOC. NO. 232, 74th Cong., 2d Sess. 366, 368 (quoted in Rodgers, *supra* note 77, at 1024).

⁸⁰ BOUVIER'S LAW DICTIONARY 571 (3d rev. ed. 1914).

mutual rights and obligations which is a precondition for the existence of an agreement."⁸¹ Although the state and foreign entity may conduct extensive negotiations and exchange of correspondence, the result is the enactment of legislation or a declaration of reciprocity at the option of the officials of the jurisdiction. It is not the prior negotiations which create rights in the other party, but the terms of the state legislation. Either state can amend its legislation at any time without restraint or recourse by the other party, thereby destroying reciprocity of enforcement of support orders. The amendment of the legislation violates no agreement and gives rise to no remedy. The enactment of reciprocal acts, however, has been termed by one commentator as "[t]he making of a compact by the method of reciprocal legislation"⁸² which is subject to the consent of Congress.

The second issue, whether URESA is a compact which is void due to lack of consent of Congress, was advanced by the defendant in *Blouin v. Dembitz*⁸³ in the court for the Southern District of New York. The New York statute involved allowed the New York Family Court to enforce orders against respondents present in New York in support proceedings which had been initiated in Canada. The court rejected the defendant's contention that this constituted a compact between a state and foreign entity within the prohibition of the Constitution. Although the court stated the reciprocal legislation was "not a compact with a foreign country,"⁸⁴ it did not give any explanation for its conclusion. The case was appealed, but the constitutionality of the statute was not discussed by the appellate court.⁸⁵

The importance of the non-binding nature of the reciprocal legislation has been stressed as a factor which makes clause 3 inapplicable to URESA. The establishment of reciprocity of enforcement of support orders is seen as a symbolic act in an area of little interest to the federal government. Additionally, the legislation is not a contract which binds the state from rescinding or amending it, and further, RURESA would be subject to preemption by any action of the federal government within the area of concern. As one Canadian commentator stated, "the essence of such agreements is that they rest on good will, and mutual, reciprocal benefit, for their effectiveness: one does not go to law over them."⁸⁶

The Canadian Supreme Court adopted this view in *Ontario v. Scott*,⁸⁷ a case involving an attack on Ontario's Reciprocal Enforcement of

⁸¹ Di Marzo, *supra* note 77, at 206.

⁸² Naujoks, *supra* note 77, at 236 (quoting Dodd, *Interstate Compacts*, 70 U.S.L. REV. 557 (1936)).

⁸³ 367 F. Supp. 415 (S.D.N.Y. 1973).

⁸⁴ *Id.* at 417.

⁸⁵ *Blouin v. Dembitz*, 489 F.2d 488 (2d Cir. 1973).

⁸⁶ Di Marzo, *supra* note 77, at 211 (quoting McWhinney, *The Constitutional Competence within Federal Systems for International Agreements*, in ONTARIO ADVISORY COMMITTEE ON CONFEDERATION 154 (1967)).

⁸⁷ [1956] Can. S. Ct. 137.

Maintenance Orders Act (REMOA). Although of no legal precedent in the United States, this case is of interest since the Canadian reciprocal support legislation is substantially similar to RURESA and the issues discussed by the Canadian Supreme Court are basically the same as those under consideration. The issue before the Canadian Supreme Court was whether REMOA was illegal since it involved matters of international comity and treaty, matters traditionally reserved for the Parliament.⁸⁸

In *Scott*, the petitioner had instituted proceedings under REMOA in England and sought to enforce an order of support against the respondent present in Ontario. The respondent moved that the action be dismissed on the grounds that REMOA was *ultra vires*. The trial court denied the motion, but the court of appeals reversed, stating that REMOA was *ultra vires* since it was an improper delegation of legislative authority to the court and outside the jurisdiction of the legislature since it delegated authority to an inferior court. The Canadian Supreme Court upheld the decision of the trial court, holding that the legislation was valid.⁸⁹

In rejecting the respondent's argument that REMOA concerned the parliamentary matters of international comity and treaty, the court noted that the essential element of a treaty, its binding nature, was absent. The court explained that "[t]he enactments of the two legislatures are complementary but voluntary; the application of each is dependent on that of the other: each is the condition of the other; but that condition possesses nothing binding to its continuance."⁹⁰ The court viewed the arrangement as a method of extending the powers of the Canadian courts in adducing evidence by allowing the courts of England to take depositions which, along with the magistrate's statement, would be used as evidence in the Ontario proceedings. Noting that the procedure involved a Canadian statute, court, and respondent, the court found the utilization of REMOA was within the power of the Canadian provinces.⁹¹

The court in *Ontario v. Scott* also discussed a second reason which is often proffered in arguing that reciprocal support agreements are not unconstitutional: the subject matter involved is outside the concern of the federal government and thus implicitly excluded by clause 3.⁹² The court stated, "[n]o other part of the country nor any other of the several governments has the slightest interest in such a controversy and it concerns ultimately property, actual or potential, within Ontario in a local sense."⁹³ An American writer has noted a tradition in the United States

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 142 (Rand, J.).

⁹¹ *Id.* at 141 (Rand, J.), 150-54 (Locke, J.).

⁹² See Naujoks, *supra* note 77, at 235; Rodgers, *supra* note 77, at 1023.

⁹³ [1956] Can. S. Ct. at 141 (Rand, J.).

of recognizing domestic relations as an area reserved for state regulation.⁹⁴ Geographical strictures involved in domestic relations are emphasized, and "[o]nly in rare instances do family law matters acquire international significance."⁹⁵ Under this theory, clause 3 would not invalidate international arrangements entered into by states within the limitation that the subject matter be of purely local concern.

An analogy can be drawn between this theory as applied to URESA and U.S. Supreme Court decisions in the area of reciprocity of inheritance laws between a state and a foreign entity. The leading Supreme Court case, *Clark v. Allen*,⁹⁶ involved a California statute⁹⁷ which allowed a nonresident alien to inherit personal property from a decedent who had resided in California. A treaty to which the United States was a party existed governing the inheritance of real property by nonresident aliens. The plaintiff alleged that the statute impermissibly intruded into the field of foreign affairs since the right of inheritance by the nonresident alien depended on the right of the California resident to inherit under the foreign law.⁹⁸ Labelling this argument "farfetched,"⁹⁹ the Court noted that inheritance laws are local matters in which state policy yields only to an established conflicting federal policy. The Court specifically stated that reciprocal inheritance legislation did not constitute negotiation or a compact with a foreign country. Although the Court recognized that the California statutes would have "some incidental or direct effect in foreign countries,"¹⁰⁰ it stated that this was also true of other state laws whose constitutionality was unquestioned.¹⁰¹

The Court again examined the question of the constitutionality of reciprocal inheritance laws with regard to an Oregon statute in *Zschernig v. Miller*,¹⁰² this time finding the statute unconstitutional.¹⁰³ The facts in *Zschernig*, however, distinguish it from the principle promulgated in *Clark*. The Oregon statute provided that a nonresident alien could inherit from an Oregon decedent if reciprocal rights were given to U.S. citizens.¹⁰⁴ Unlike the California statute involved in *Clark*, however, the Oregon statute as applied allowed the courts, in determining whether the nonresident alien could inherit the property, to decide as a precondition if the nonresident alien would actually receive the property or whether it would be confiscated by the foreign government.¹⁰⁵ The Court foresaw

⁹⁴ Curtis, *supra* note 77, at 76.

⁹⁵ *Id.* at 85-86.

⁹⁶ 331 U.S. 503 (1947).

⁹⁷ CAL. PROB. CODE § 259 (West 1956) (repealed 1974).

⁹⁸ 331 U.S. at 516.

⁹⁹ *Id.* at 517.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 389 U.S. 429 (1968).

¹⁰³ *Id.* at 432.

¹⁰⁴ 1951 Or. Laws ch. 519, § 1 (OR. REV. STAT. § 111.070) (repealed 1969).

¹⁰⁵ 389 U.S. at 434-35.

in this situation potential for an impermissible effect on matters involving international politics and diplomacy. The conflict with these areas of federal concern was held to outweigh the state's interest in the regulation or distribution of property of its residents and the statute was declared unconstitutional. Thus, the statute was unconstitutional not because it was an agreement or compact within the meaning of clause 3, but because it invaded Congress' control of foreign policy.¹⁰⁶

In discussing *Clark* and *Zschemig*, the court for the District of Montana noted that reciprocal inheritance laws were not unconstitutional per se and devised a test drawn from the two cases which is equally applicable to the URESA legislation.¹⁰⁷ As simply stated by the district court, "if a state reciprocal statute requires that state courts do no more than read the law of a foreign nation to determine whether reciprocity exists, then the law does not infringe upon the prerogatives of the federal government."¹⁰⁸ Thus, the test of the constitutionality of the reciprocal legislation assumes there is no agreement within the meaning of clause 3 and looks instead to whether reciprocity rests on the express terms of the foreign legislation or on the court's analysis of factors involving foreign policy.

Addressing the two issues outlined in the beginning of this section, the first issue can be answered that the terms "agreement" and "compact" as used in clause 3 mean an agreement or compact with a foreign entity which is either 1) of a binding nature over the parties involved, or 2) concerned with an area of foreign policy reserved to the federal government. The second issue, whether such an agreement or compact requires the consent of Congress to be valid, can be answered in the negative since the URESA legislation is not enforceable against the entities involved, is subject to change by the unilateral act of either, and concerns the subject of domestic relations, long recognized as an area of state interest and control. This conclusion leaves the question of the effect and status of the URESA to be resolved.

As previously discussed, the negotiations and resulting arrangements between entities such as the State of North Carolina and West Germany are not binding agreements or treaties.¹⁰⁹ Despite the often extensive correspondence, international travel, and discussion preceding the declaration of reciprocity, the URESA rises no higher than the status of any other state law.¹¹⁰ It gives rights to certain citizens of foreign countries which may be taken away arbitrarily by the act of either party. For example, North Carolina could amend its definition of "state" in section 3(13) of the North Carolina General Statutes to exclude residents of foreign jurisdictions from its effect entirely. On the other hand, West Ger-

¹⁰⁶ *Id.* at 441.

¹⁰⁷ *Gouin v. Fall*, 287 F. Supp. 725 (D. Mont. 1968).

¹⁰⁸ *Id.* at 728.

¹⁰⁹ See text accompanying notes 77-108 *supra*.

¹¹⁰ See *Di Marzo*, *supra* note 77, at 206.

many could amend its laws so drastically it would effectively destroy rights of North Carolina residents to enforce support orders in West Germany. In that event, however, West Germany would be placed outside the current definition of "state" because it would be a nonreciprocating jurisdiction. Therefore, URESA is a state law which is concerned with international matters but is within the constitutional limits outlined by the Supreme Court in analogous cases.

Conclusion

The Revised Uniform Reciprocal Enforcement of Support Act is an important tool in the process of obtaining and enforcing support orders. The RURESA gives validity to foreign orders by statute and provides obligees outside the jurisdiction with a means of obtaining and enforcing orders inexpensively. By establishing procedures and the personnel to implement them, RURESA represents the only practical remedy open to obligees attempting to reach an obligor outside the country. Reciprocity of support laws is the key factor although there may be minor differences in the laws of different countries which must be overcome. North Carolina's arrangements with West Germany and Ontario, Canada illustrate some of the differences existing between RURESA and the support laws of foreign jurisdictions interested in reciprocity.

Although RURESA's provisions regarding international enforcement of support orders were adopted in 1969, questions as to the constitutionality of the reciprocal agreements entered into between states and foreign countries still exist. Until the Supreme Court directly addresses the issue of RURESA's constitutionality, the debate surrounding states enacting these reciprocal arrangements will continue. It appears, however, that such state legislation, which constitutes merely a working relationship and not a binding contract, would be upheld despite the absence of congressional consent.

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