

Special Commission
on maintenance obligations

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TOWARD AN ACCOMMODATION OF DIVERGENT JURISDICTIONAL
STANDARDS FOR THE DETERMINATION OF MAINTENANCE
OBLIGATIONS IN PRIVATE INTERNATIONAL LAW

by

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Professor Duncan's excellent background paper on "The Desirability of Revising the Hague Convention on Maintenance Obligations" notes that the present situation is "extraordinarily complex with a mixture of multilateral, regional and bilateral arrangements...". Part of the complexity is due to the fact that the legal systems have different rules of jurisdiction to determine the existence of a maintenance obligation. Divergent jurisdictional rules between civil law countries, as illustrated in the 1958 and 1973 Hague Conventions on the Recognition of Maintenance Obligations, and many common law countries, such as the United States, create obstacles to the receipt of maintenance by deserving families and obfuscate multilateral and bilateral negotiations.

It is the thesis of this document that a new approach to the recognition of judgments, rather than direct or indirect jurisdictional rules, is the best way to harmonize divergent state practice. States should agree to recognize a maintenance judgment where the original determination was made under factual circumstances meeting the jurisdictional standards of the requested state. The issue therefore is whether on the facts of the case, the requested state could recognize the judgment based on a ground of jurisdiction acceptable under its law.

Adoption of this approach will result in the recognition of the vast majority of maintenance judgments, and eliminate a prolonged discussion of jurisdictional standards that may be unlikely to produce substantive agreement. There will be, however, a few judgments which will not be able to be recognized in the requested state. To address those situations, any new convention should establish procedures whereby the state of the maintenance creditor could request the state where the maintenance debtor is located to obtain a new maintenance order against the debtor. Thus, in every case, either a prior maintenance judgment can be recognized, or a new order obtained, thereby assuring that deserving families will not be deprived of necessary support.

A. The Current Divergent Jurisdictional Standards

1. The United States

In the United States family law cases are subject to three different jurisdictional standards. First, jurisdiction to enter a judgment of divorce or dissolution depends on whether one of the parties is domiciled in the forum. The United States does not recognize divorce jurisdiction based on nationality. Second, jurisdiction to take a measure with regard to the protection of minors, such as custody or access, depends on the length of time the minor has been habitually resident in the state. If the minor has been a resident of the state for six months, jurisdiction to determine the minor's custody and access is normally present. Third, jurisdiction to determine a maintenance obligation is governed by the same standards as jurisdiction to determine any other monetary award. The United States Supreme Court has not distinguished between jurisdiction to award a monetary judgment in a commercial case, a tort case, and a family maintenance obligation. The same standards are applicable to all cases involving monetary judgments.

In cases involving monetary awards, such as maintenance cases, the jurisdictional standards dictated by the Constitution are based on the relationship between the defendant-debtor, and the forum. Jurisdiction over a defendant who is a resident of the state is always permitted. The relationship required for a state to exercise jurisdiction over a nonresident defendant in family maintenance cases has been codified in the Uniform Interstate Family Support Act, which has been enacted in all fifty states of the United States. That Act provides that a state may exercise jurisdiction of a nonresident defendant in the following circumstances:

- (A) the individual is personally served with a legal citation within the state;
- (B) the individual submits to the jurisdiction of the state by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving the objection to the state's jurisdiction;
- (C) the individual resided with the child in the state;
- (D) the individual resided in the state and provided prenatal expenses or support for the child;
- (E) the child resided in the state as a result of the acts or directives of the individual;
- (F) the individual engaged in sexual intercourse in the state and the child may have been conceived by that act of intercourse;
- (G) the individual asserted parentage in the state's putative father registry.

All of these enumerated circumstances have been found to be in conformity with the Due Process Clause of the United States Constitution. Conspicuously absent from the list of enumerated circumstances is an exercise of jurisdiction based solely on the residence of the maintenance creditor. Under the Constitution, courts in the United States may not exercise jurisdiction over a

nonresident defendant if the defendant has no relationship to the forum. Therefore, the enumerated circumstances mentioned in the Uniform Interstate Family Support Act represent the furthest extent of the ability of any United States court to exercise jurisdiction over a nonresident defendant for the purpose of entering a maintenance order.

2. The Hague Conventions

Civil Law standards for the recognition and enforcement of maintenance are contained in Article 3 of the 1958 and Articles 7 and 8 of the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. These two conventions contain rules of indirect jurisdiction in that they require recognition of maintenance obligations if:

- (A) the maintenance creditor or debtor had his habitual residence in the State where the decision was rendered at the time when the proceedings were instituted;
- (B) the maintenance debtor and the maintenance creditor were nationals of the state at the time the proceedings were instituted;
- (C) the defendant submitted to the jurisdiction either expressly or by presenting his case on the merits;
- (D) the decision was part of a divorce, legal separation, or annulment by an authority of a State recognized as having jurisdiction in such matters.

B. The Incompatibility of the Jurisdictional Standards

Some of these jurisdictional rules are compatible. For example, both systems agree that jurisdiction is appropriate when the state is the residence of the maintenance debtor or when the debtor consents.

However, some of the formulated jurisdictional rules are, on their face, incompatible with each other. The indirect jurisdictional rules of Articles 7 and 8 of the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations would be unconstitutional in the United States. The United States requires that, if the maintenance debtor is not a resident of the state, there must be an adequate relationship between the debtor and the forum to justify the forum in assuming jurisdiction. The habitual residence of the maintenance creditor is not such an adequate relationship.

In addition, the common nationality of the maintenance creditor and debtor is not, by itself, a constitutionally sufficient relationship since nationality does not require that there be substantial contacts between the debtor and the forum. Jurisdiction based solely on nationality, as opposed to residence or domicile, is not recognized in the United States, regardless of whether the issue is one of divorce, custody and access or maintenance. Therefore, Article 8 of the 1973 Hague Convention would also be unconstitutional in the United States if the divorce, annulment or legal separation was performed by the state of the parties' nationality without the maintenance debtor being domiciled in the state or having some other adequate relationship to the state.

There have been a number advocates for the establishment in the United States of a child-centered standard of jurisdiction in maintenance cases which would allow the state where the child was a resident to determine the amount and duration of child support. Professor Duncan expresses the hope that the constitutional difficulties that such a rule would present for the United States would not be an insuperable obstacle to agreement.

Unfortunately, the United States has recently reconsidered the issue of child-centered jurisdiction during the process of studying the interstate child support system. After a long and serious debate, the United States Commission on Interstate Child Support and the drafters of the Uniform Interstate Family Support Act determined that any attempt to base jurisdiction on the residence of the maintenance creditor or the child would be unconstitutional under the United States Supreme Court's interpretation of the Due Process Clause as applied to the exercise of jurisdiction by state courts in maintenance cases. Thus, the Uniform Act expands those actions of a maintenance debtor that would subject him to jurisdiction to the limits allowed by the Supreme Court but does not attempt to base jurisdiction on the habitual residence of the maintenance creditor or of the child.

Some of the jurisdictional bases of the Uniform Interstate Family Support Act would probably be unacceptable to the states that are parties to the 1973 Hague Convention. The Uniform Act authorizes a state to exercise jurisdiction when the defendant is served with a citation in the jurisdiction. This is a form of "Atag" jurisdiction, which although common and accepted in the United States, is not generally accepted in civil law countries. The same may be true of jurisdiction based on the fact that sexual relations took place in the state which may have resulted in the conception of the child. This could result in taking jurisdiction when neither the maintenance creditor or debtor were habitually resident in the state.

C. Toward an Accommodation

When states have jurisdictional rules that are this divergent, it is very difficult to draft a mutually acceptable convention on jurisdiction. The current experience with the attempt to agree on rules of jurisdiction with respect to the proposed convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matter is illustrative of the difficulties. The success of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children is due to the fact that the jurisdictional rules of both the common law and the civil law countries for measures dealing with the protection of minors are based on the relationship between the child and the state which is taking the measure. Therefore, agreement on the use of the habitual residence of the child as the primary jurisdictional standard was easy to obtain. However, because the rules on jurisdiction in maintenance cases are so diverse, it is very unlikely that rules of jurisdiction could be drafted which would be acceptable on a global basis.

A more productive approach would be to focus the discussion on standards for the recognition of judgments. It is possible to agree on which judgments should be recognized without agreeing on rules of jurisdiction. This can be accomplished by granting recognition to all maintenance judgments which were rendered on a factual basis which would satisfy the jurisdictional rules of the

state that is requested to recognize the judgment. Under this principle, it would not matter what jurisdictional basis the requesting state's court articulated when it rendered the judgment. The crucial question is whether, regardless of the reasons stated by the court of the requesting state, the facts of the case would support jurisdiction under the rules of the requested state. If so, the judgment should be recognized.

Under this proposal, a maintenance judgment from another state would be recognized by a party to the 1973 Hague Convention so long as the facts of the case indicated that it was rendered by a state that was the habitual residence of the maintenance creditor or debtor, was by the court of a state recognized as having jurisdiction over the divorce, legal separation or annulment of the parties, was the place of common nationality of the parties, or was the jurisdiction to which the maintenance debtor submitted. The United States would recognize a maintenance judgment of another state so long as the facts of the case indicated that jurisdiction could have been predicated on any of the grounds specified in the Uniform Interstate Family Support Act.

This proposal will result in the recognition of most maintenance judgments. There will be a few cases where recognition will not be possible. In those cases there should be an agreement that the non-recognizing country will obtain a new order against the maintenance debtor. Any proposed convention should include procedures for a state to request the establishment of a maintenance order in another state, particularly where the requested state can not recognize the first state's maintenance judgment.

Examples, Recognition Possible:

1. A United States citizen fathers a child out of wedlock with a Dutch mother in the Netherlands and returns to the United States. A Netherlands' court enters a maintenance order against the father. The court in the Netherlands bases its jurisdiction on the habitual residence of the maintenance creditor. The United States would recognize the order because the child was conceived in the Netherlands, which is a permissible basis for jurisdiction under the Uniform Interstate Family Support Act.

2. Two Dutch nationals residing in Brazil are divorced in the Netherlands. The father is required to pay maintenance to the mother. The father moves to the United States. The jurisdictional basis of the Netherlands' maintenance order is that the parties are Dutch nationals. The United States would recognize the order if the maintenance debtor submitted to the Netherlands' jurisdiction which is a permissible basis for jurisdiction under the Uniform Interstate Family Support Act. If, however, the Netherlands' divorce was ex parte, and the facts did not indicate that jurisdiction would exist under any other grounds specified in the Uniform Interstate Family Support Act, the United States would be precluded from recognizing the judgment. If the United States could not recognize the judgment, it would obtain a new support order against the maintenance debtor.

3. A Dutch father and an American mother have a child out of wedlock in the United States. After two years of living together, the father moves back to the Netherlands. A tribunal in the United States enters a maintenance order. The jurisdictional basis in the United States is that the father resided in the state with the child. The Netherlands should recognize the maintenance order since it was entered by the state of the habitual residence of the maintenance creditor.

4. A Dutch father and an English mother have a child out of wedlock in England. When the liaison ends the mother moves to the United States. When the father comes to visit the child, he is served with the type of process which commences a proceeding leading to a maintenance order. The order is valid in the United States because the maintenance debtor has been served with process in the state. The judgment should be recognized by the Netherlands since it was entered by the state of the habitual residence of the maintenance creditor.

Examples, Recognition Impossible:

1. A Dutch mother, while a tourist in the United States, has an affair with an American father. The child is born upon the return of the mother to the Netherlands. A court in the Netherlands enters a maintenance order against the father. Unless the American father voluntarily appears in the Dutch proceeding, or is served with process in the Netherlands, the judgment would not be recognized in the United States because none of the jurisdictional requirements of the Uniform Interstate Family Support Act are applicable. Since the United State cannot recognize the judgment, it would, upon a proper application from the Netherlands enter a new support order against the maintenance debtor who is subject to the jurisdiction of the United States' court.

2. An English mother and a Dutch father have a child out of wedlock while living in England and then separate. After two years of attempting to locate the father, he is finally found when he visits the United States. The mother quickly obtains a maintenance order against the Dutch father in the United States. The order is valid in the United States because the defendant was served with process in the jurisdiction. However the order would probably not be recognized in the Netherlands since the United States is not the habitual residence of either the maintenance debtor, the creditor, nor is it the nationality of the parties. If the Netherlands could not recognize the judgment, it would, under the approach suggested in this paper, obtain a new support order against the maintenance debtor if requested by the United Kingdom.

Thus, it is only in the rare situation, illustrated by the last two examples, that an order from either the United States or a party to the 1973 Hague Convention would not, on its facts, satisfy the jurisdictional standards of the other country. In those cases where the order would not be enforced, the countries should agree, through cooperation principles, to obtain an original order.

It would greatly simplify the task of revising the maintenance conventions if there were no attempt to draft direct or indirect rules of jurisdiction. Instead, as indicated above, the revision should focus on accommodating all divergent jurisdictional views by a standard that requires recognition when the factual basis underlying the maintenance judgment satisfies the jurisdictional rules of the requested state.