

Uniform Desertion and Nonsupport Act—Present Text and Proposed Revision—A Comparison With Ohio Law

On May 14, 1948 the Council of Delegates of the Ohio State Bar Association incorporated in the Association's legislative program for the 1949 session of the General Assembly a recommendation for the adoption of the Uniform Desertion and Nonsupport Act.¹

At the meeting of the National Conference of Commissioners on Uniform State Laws in Seattle, Washington, August 30 to September 4, 1948, the Committee on Review of the Uniform Desertion and Nonsupport Act submitted a preliminary draft of a revision of the Act.² The committee had reported to the National Conference in 1944 that the act as originally promulgated in 1910 had not been accepted in its recommended form and that from responses received from questionnaires submitted to the Commissioners of the States in which the Act was purported to have been enacted, it appeared that the Act in its present form did not lend itself to uniformity of treatment. The Committee at that time recommended that the Act be reclassified as a Model Act.³

The National Conference did not follow the Committee's 1944 recommendation; however, the Committee on Review was instructed to continue its study of the Act and to submit a revision to meet the objections encountered.

The Committee's study of all the state statutes culminated in a tentative draft in 1946 of a revised act which, with instruc-

¹ Minutes, Council of Delegates, Ohio State Bar Association, Toledo, Ohio, May 13-14, 1948.

² Report, Section Committee on Review of Uniform Desertion and Nonsupport Act, Sept. 2, 1948. This committee was established by the National Conference in 1943 to conduct a survey of the Act's acceptance by the states and to determine whether a revision of the Act was desirable.

³ Report, *Committee on Review of Uniform Desertion and Nonsupport Act*, HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 272 (1944). The report was summarized by the Committee Chairman as follows: "None of the Commissioners from whom we have heard indicates the existence of a demand in his state that its statute be amended more nearly to conform with the provisions of the Uniform Act. This very lack of uniformity and apparent absence of demand for uniformity would seem to demonstrate that this Act does not lend itself to uniformity of treatment. All would agree in principle that proper steps should be taken to prevent or punish the neglect of dependents, but there well may be differences of opinion concerning the most effective means to that end. Also, there may well be variances in social and governmental structure in the several states that justify diversity of treatment of the problem."

tions and expressions of policy furnished by the National Conference of the same year, resulted in the submission of a proposed act to the National Conference in 1948. After extensive discussion of the proposed draft in the Committee of the Whole, the Committee on Review was continued and further consideration of the revised act was delayed until a future meeting of the conference.⁴

The Committee on Uniform Laws of the Ohio State Bar Association, in view of the action taken by the National Conference, has recommended to the Council of Delegates that further sponsorship by the Association of the present act be suspended pending disposition of the proposed revision.

Although there is little probability that the present Uniform Desertion and Nonsupport Act will be sponsored by the Ohio State Bar Association during the 1949 session of the legislature, a survey of the Act and a comparison with the present analogous Ohio law, together with the issues and policies arising from the proposed revised draft, are timely.

HISTORY OF THE UNIFORM ACT

The Act was originally recommended as a uniform law for adoption in the states and territories, by the National Conference of Commissioners on Uniform State Laws in 1910. The National Conference credits the Act with adoption in twenty-one states and territories.⁵ Uniform Laws Annotated includes those officially credited and, in addition, Idaho, New Hampshire, and Oklahoma.⁶ An examination of these state statutes indicates a conspicuous lack of uniformity, either because they were not "uniform" when originally adopted or as a result of subsequent amendment. Mississippi is the only jurisdiction which enacted the Uniform Act as proposed by the commissioners, and it was retained in its original form only from the date of its adoption, 1911, until 1928 when, by amendment, Sections 2 to 8 were eliminated and the substance of Section 1 was materially altered by limiting its application to desertion and nonsupport of a child under 16 years of age, omitting all reference to desertion or nonsupport of a wife.⁷ Of the twenty other jurisdictions credited with adopting the Act in substance, thirteen have

⁴ Proceedings, Committee of The Whole, Uniform Desertion and Nonsupport Act, National Conference of Commissioners on Uniform State Laws, Seattle, Washington, August 30-September 4, 1948.

⁵ HANDBOOK, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 391 (1944). Listed are: Ala., Alaska, Cal., Del., Hawaii, Ill., Kan., Mass., Miss., Nev., N. J., N. D., S. D., Tex., Utah, Vt., Va., Wash., W. Va., Wis., and Wyo.

⁶ 10 UNIFORM LAWS ANN. 6 (Supp. 1947).

⁷ MISS. CODE ANN. § 2087 (1942).

since amended their original enactments.⁸ Of the seven states whose law remains as originally enacted, the Delaware and Kansas statutes are nearest to the form and substance of the Uniform Act. The California statute, enacted in 1911, added two sections to the Penal Code of that state, corresponding generally to Sections 6 and 7 of the Uniform Act.⁹ To this extent only does the California statute conform. It is, therefore, reasonably conclusive that the Act failed in its prime objective—uniformity.

In determining adoption of its proposed acts the National Conference considers as Uniform Acts only those state statutes whose titles conclude with the phrase "and to make uniform the law with reference thereto." As a result, states having acts similar in substance, departing only in form and verbiage, have not been accepted as "uniform" by the Conference. Ohio's law seems to be in this classification.¹⁰

HISTORY OF THE OHIO LAW

Ohio's law on the general subject of desertion and nonsupport of dependents had its beginning in the Act of 1890, thereafter designated as Section 3140-2, Revised Statutes.¹¹ The title of the Act was, "To prevent abandonment and pauperism". It will be observed that this statute was enacted approximately twenty years prior to the issuance of the Uniform Act.

The statute of 1890 made it a misdemeanor for a father or, when charged by law with the maintenance thereof, a mother of a legitimate or illegitimate child or children under sixteen years of age, to neglect or refuse to provide such child or children with necessary and proper home, care, food, and clothing. The Act further provided for suspension of sentence, upon conviction, if the person convicted gave bond to the state, conditioned that he furnish such necessary and proper home, care, food, and clothing.

In 1900 the legislature amended Section 3140-2, Revised Statutes,¹² including further liabilities, penalties, and conditions intended to strengthen and broaden its application. The amended act

⁸ ALA. CODE ANN. tit. 34, §§ 90-104 (1940); MASS. ANN. LAWS c. 273, §§ 1-10 (1933); NEVADA COMP. LAWS ANN. § 10516 (1929); N. J. STAT. ANN. § 2:121-1-2 (Cum. Supp. 1947); N. D. REV. CODE § 9594 a 1-9594 a 4 (1943); TEXAS STAT. PEN. CODE art. 602 (1936); VERMONT PUB. LAWS § 3091 (1933); VA. CODE ANN. §§ 1936-1944 a (1942); W. VA. CODE ANN. §§ 4777-4782 (1943); WYO. COMP. STAT. ANN. §§ 9-801—9-808 (1945); ALASKA COMP. LAWS §§ 5088-5092 (1933); HAWAII REV. LAWS § 12251 (1945); UTAH CODE ANN. § 103-13-1 (1943).

⁹ CAL. PENAL CODE § 270 e, 273 h (1941).

¹⁰ OHIO GEN. CODE §§ 13008-13021, 12970 (Supp. 1946).

¹¹ 87 Ohio Laws 216 (1890).

¹² 94 Ohio Laws 105 (1900).

included a provision for neglect of a child, legally an inmate of a county or district children's home, making the offense a felony by imposing imprisonment in the penitentiary for a maximum term of three years.¹³ The amendment further provided for venue of the action and arrest by the sheriff upon failure to comply with the court order, such arrest to be made by warrant on the precept of the prosecuting attorney.

In 1908 the legislature repealed the original act of 1890, and the amendatory act of 1900, and passed an act which was again designated as section 3140-2, Revised Statutes,¹⁴ and subsequently, under the codification of 1910, with slight changes in text not varying the intent and effect of the statute, it became Sections 13008 to 13021 of the General Code. It remained unchanged until amended effective January 1, 1946.¹⁵

This latest amendment affected only Sections 13008, 13009, and 13012. The provisions of Section 13008 were enlarged to include "or other person charged by law with the maintenance"; raised the age of the child or children from under sixteen years to under eighteen years; and added "or of a physically or mentally handicapped child under twenty-one years of age." Sections 13009 and 13012 were amended merely to include the enlarged provisions of 13008.

EFFECT OF ADOPTION OF THE UNIFORM ACT

It has been held, in jurisdictions adopting the Uniform Act, that a former act, though not inconsistent with the Uniform Act, was repealed thereby.¹⁶ The Vermont court said:

We may take judicial notice that the Act of 1915 was prepared and recommended by the National Conference of Commissioners on Uniform State Laws, and that at the time of its adoption by the Legislature of this state it had already been adopted by several of the other states. It would do violence to the expressed intention of the Legislature, to promote uniformity of law on the subject, to presume that they intended to defeat that purpose by retaining a statute which would create dissimilarity.¹⁷

It has also been decided that the Uniform Act is an independent act upon the subject with which it deals, complete in itself, designed to take the place of the former act.¹⁸ On the other hand, it has been asserted, notwithstanding the constitutional objective of the National Conference "to promote uniformity of judicial decisions

¹³ *McKelvy v. State*, 87 Ohio St. 1, 99 N.E. 1076 (1912).

¹⁴ 99 Ohio Laws 228, 230 (1908).

¹⁵ 121 Ohio Laws 557 (1945).

¹⁶ *In re Turner*, 92 Vt. 210, 102 Atl. 943 (1918).

¹⁷ *Id.* at 216, 102 Atl. at 946.

¹⁸ *People v. Ankrum*, 286 Ill. 319, 121 N.E. 579 (1919).

throughout the United States,"¹⁹ that an earlier act was not repealed by implication.²⁰ Repeal of the present analogous sections of the Ohio Code would appear to be desired in order to fully effectuate the enactment of a uniform law.

THE OFFENSE

Section 13008 of the Ohio General Code makes it a felony for a parent or other person, charged by law with the maintenance of a legitimate or illegitimate child or children under the age of eighteen years, or of a physically or mentally handicapped child under twenty-one years of age, or for a husband of a pregnant woman, to fail, neglect, or refuse to provide the necessary or proper home, care, food and clothing for such persons designated. A companion section, 13009, makes it a felony for a father or a husband of a pregnant woman to leave with intent to abandon such child or children under the age of eighteen years or such pregnant woman.

Section 12970 of the Ohio General Code is analogous to Sections 13008 and 13009, and makes it a misdemeanor for any parent or person having control of a child or children under sixteen years of age to wilfully abandon, torture, torment, cruelly or unlawfully punish, or wilfully or negligently fail to furnish necessary and proper food, clothing, or shelter.

The Uniform Act provides in Section 1 that any husband or parent who without just cause deserts, or wilfully neglects, or refuses to provide for the support or maintenance of a wife or child under the age of sixteen years in destitute or necessitous circumstances shall be guilty of a crime, punishable by a fine not exceeding five hundred dollars, or imprisonment not exceeding two years or both.

The offenses defined by these respective sections are analogous, the material differences being that Ohio law does not extend the offense to cover the husband of a wife not pregnant. On the other hand the Uniform Act does not include a person charged by law with the maintenance of a child, nor does it include in its protection illegitimate children. Furthermore, Ohio has seen fit to raise the applicable age of the minor child from sixteen to eighteen years, or in the case of the physically or mentally handicapped, to twenty-one years.

Ohio imposes a penalty of six months to one year imprisonment in jail or workhouse, or from one year to three years in the peni-

¹⁹ CONST. AND BY LAWS, CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Art. I, § 2.

²⁰ *State v. Garris*, 98 N. J. L. 608, 121 Atl. 292 (Sup. Ct. 1923).

tentiary. The court is thereby given a wide range of penalties to be assessed in its discretion in recognition of the varied degrees of culpability usual to this class of offenses.²¹

Deviation from the text of Section 1 of the Uniform Act, by those states credited with adoption, is most noticeable in the severity of the penalty imposed²² and in procedure. Discrepancy to a lesser degree is also found as to the persons made liable, and those whom the Act attempts to protect.

DEFENSES

Section 13008-1 of the Ohio General Code permits as a defense to the offense, inability to provide because of lack of property or earnings, inability to secure employment, and physical incapacity to perform labor. There is no comparable provision in the Uniform Act; however, the courts have construed the Act to mean that the offense was not "wilful" if it was by reason of illness or poverty.²³

The person convicted may, under Section 13010 of the General Code, give bond for the performance of the court order for maintenance in return for suspension of sentence. Section 4 of the Uniform Act, likewise, allows the person charged to give recognizance, conditioned upon stipulated maintenance. There is little material difference in these two sections other than procedure.

PROCEDURE

The Ohio General Code under Section 13011 determines the venue of the action to be the county in which such child or pregnant woman may be at the time of the complaint. The Uniform Act makes no provision for venue; however, the courts have held that "existing practice of the court having jurisdiction will be followed,"²⁴ or "resort to the constitution, the common law, and general statutes will be had for criminal procedure."²⁵

Ohio, under Section 13012 of the Code, imposes liability on a parent to provide for a child committed to the care of a children's home, and imposes the same sanctions as Section 13008. Although

²¹ *Seaman v. State*, 106 Ohio St. 177, 140 N.E. 108 (1922).

²² Thirteen jurisdictions classify the offense as a misdemeanor, with fines ranging from none to \$600. Eight make the offense a felony with fines ranging from none to \$500. Of the three states, not officially credited with adoption of the Act, two classify the offense as a misdemeanor and one a felony.

²³ *Bobo v. State*, 90 Tex. Crim. 397, 235 S.W. 878 (1921). See also *Flowers v. State*, 87 Tex. Crim. 293, 221 S.W. 289 (1920).

²⁴ *Donaghy v. State*, 6 Boyce 467, 100 Atl. 696 (Del. 1917).

²⁵ *Fisher v. Sommerville*, 83 W. Va. 160, 98 S.E. 67 (1919).

there is no counterpart in the Uniform Act, courts have imposed liability though the child is being supported by a relative, charitable organization, or the state.²⁶

Section 13015 of the General Code and Section 5 of the Uniform Act each provide for arrest, hearing, forfeiture of bond, modification of order for maintenance, or imposition of penalty upon failure to comply with the original order for support.

Section 13018 of the General Code provides for payment toward support of the dependent of fifty cents for each day of imprisonment of the convicted person if in a jail or workhouse, and Section 13012 allows forty cents a day if imprisonment is in the penitentiary. Section 7 of the Uniform Act provides for an undetermined amount of compensation to the dependent for each day of hard labor performed by the convicted person while imprisoned.

Section 13021 of the General Code provides that citizenship once acquired in this state by the husband, father, or mother of those protected under Sections 13008 and 13021, for the purposes of those subdivisions, shall continue until such child has arrived at the age provided for in such subdivisions. The Uniform Act is silent on the point of continuing jurisdiction of the parties; however, the courts have ruled that its effect is not retroactive against an accused not a resident of the State at the time of the passage of the act.²⁷

Section 3 of the Uniform Act, providing for support of dependents *pendente lite*, has no counterpart in the Ohio law; however, there is authority for entertaining such a motion when the duty of the defendant to support is clear.²⁸

Section 6 of the Uniform Act qualifies the ordinary rules of evidence, and makes both husband and wife competent as witnesses against each other. The Ohio Legislature accomplished this through an amendment to Section 13444-2 qualifying the statute as to actions under Sections 13008 or 13009.²⁹

Section 8 of the Uniform Act provides that the act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. Section 9 is the repealing clause and section 10 is the effective date clause.

Sections 13013, 13014, 13016, 13017, and 13020 of the General Code are procedural sections peculiar to the Ohio Law and need not be discussed here.

²⁶ *Donaghy v. State*, *supra* note 24; *People v. Howell*, 214 Ill. App. 372 (1919); *State v. Waller*, 90 Kan. 829, 136 Pac. 215 (1913); *State v. Bess*, 44 Utah 39, 137 Pac. 829 (1913); *Brandel v. State*, 161 Wis. 532, 154 N.W. 997 (1915); *Reid v. State*, 88 Tex. Crim. 364, 226 S.W. 408 (1921).

²⁷ *People v. Herrick*, 200 Ill. App. 428 (1916).

²⁸ *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N.E. 471 (1887); *McDaniel v. Rucker*, 150 Ohio St. 261, 80 N.E. 2d 849 (1948).

²⁹ 113 Ohio Laws 186 (1929).

RESULTS OF ADOPTION OF THE UNIFORM ACT

Adoption of the Uniform Act in its present text would result in these material changes in the Ohio law:

- (1) Husband of a wife not pregnant would be liable under the proposed law.
- (2) Liability of a person, other than a parent, charged by law with maintenance of a child, would be questionable.
- (3) Liability of a father for support and maintenance of an illegitimate child would be questionable.
- (4) The maximum age of the minor child would be reduced from eighteen to sixteen years and the liability for support of a physically or mentally handicapped child between the ages of sixteen and twenty-one would be eliminated.
- (5) Maximum penalty would be reduced from three years imprisonment to two years with a maximum fine of \$500.
- (6) The defense of inability to provide would be dropped in favor of an indefinite judicial construction of the term "wilful."
- (7) Questions of venue and jurisdiction of the accused would require judicial interpretation.³⁰

PROPOSED REVISED ACT

A discussion in detail of the tentative revision at this time would be premature. From the issues raised when the draft was presented to the National Conference, it appears likely that extensive revision will result before the final text is agreed upon.

The instructions concerning the issues and questions of policy furnished the Committee on Review by the Conference covered the following points:

- (1) The act should be recast so that it will be an enforcement measure, and thus provide a criminal or quasi-criminal proceeding for the enforcement of the obligation as imposed by other provisions of law.
- (2) The act should facilitate enforcement without extradition by making enforcement available in the state where the obligor is found.
- (3) The extraditable nature of the offense should be expressly recognized.
- (4) In recasting the procedural features, such as pretrial investigation, orders pendente lite, and release of defendant on probation, effort should be made to avoid making them unnecessarily specific, to the end that they may be readily

³⁰ Notes 23 and 24 *supra*.

usable and acceptable in the several states without involving conflicts with established local practices and procedure.³¹

The revised act as an enforcement measure for an obligation imposed by a separate provision of state law should lend itself more readily to uniform treatment than the present Uniform Act which undertakes primarily to impose the obligation. This feature of the proposed revision seems especially adaptable to the present substantive and procedural provisions of the Ohio law.

Enforcement of the obligation to support, even when the obligor is without the jurisdiction of the state in which dependent resides, is effective and indispensable if the object of uniformity is to be achieved. Extradition, even when granted, would often be an ineffectual remedy as the obligor's means of livelihood would be interrupted. The extraditable nature of the offense, however, should be retained.

The procedural features could well be completely dispensed with, as they are of local and not interstate concern. Ohio law has extensive procedural provisions adapted and adjusted to its judicial system. Such matters as procedure do not appear to lend themselves to uniform treatment as is evidenced by the fact that these features of the present Uniform Act were constantly revised by those states adopting it.

CONCLUSION

The present Ohio law is comprehensive and stringent. Considering its early conception some twenty years prior to the Uniform Act, together with the practice of attentive amendment by the legislature to meet current social, political, and economic requirements, it can quite properly be presumed to be substantively, administratively, and procedurally adapted to this jurisdiction.

The policy governing the current revision of the Uniform Act recognizes this view and the final result of this revision should be acceptable and even desirable as an effective uniform enforcement measure, companionable to the present Ohio law.

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³¹The Committee on Review of the Uniform Act recommended the omission of these procedural features from the revised act but presented them for the consideration of the Committee of the Whole for final determination.