

LEGAL SERVICES

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MEMORANDUM

March 15, 2011

SUBJECT: Limited application of foreign law
(Work Order No. 27-LS0333M)

TO: Representative Carl Gatto
Attn: Karen Sawyer

FROM: Dennis C. Bailey *DCB*
Legislative Counsel
and
Dan Wayne
Legislative Counsel

Since there is a hearing on your bill coming up on March 17 and drafting attorney Dennis Bailey has been out of the office because of illness for a few days, I've briefly addressed the three concerns raised in the March 10 e-mail from Karen Sawyer to this office.

1. The bill's potential for interfering with a choice of law provision in a contract seems direct and not inadvertent, as far as I am able to determine. Language on page 2 of the bill, lines 2 - 8, relates to agreements containing choice of law provisions. This language would void an agreement containing a choice of law provision if the provision has an effect that violates an individual's constitutionally protected individual rights unless the provision can be changed to eliminate its unconstitutional effect.
2. The bill uses the term "foreign law" instead of "law," and defines the term to mean "a law, rule, or legal code or system established and used or applied in a jurisdiction outside of the United States and the territories of the United States." I understand that the "foreign law" that is of concern to you is the law from outside of the U. S. If that is correct, no change is necessary.
3. HB 88 does not necessarily conflict with provisions of AS 25.30.400 - 25.30.590 that may require enforcement of foreign orders under the Hague Convention on the Civil Aspects of International Child Abduction, a multinational treaty to which the United States is a signatory. The United States Congress implemented the Convention in the International Child Abduction Remedies Act, (ICARA), 42 U.S.C. 11601 et seq. The ICARA grants concurrent jurisdiction to state and federal courts. 42 U.S.C. 11603. It allows a court that has jurisdiction to exercise discretion that is potentially very broad. 42 U.S.C. 11604. This may reduce the risk of a conflict between the bill's provisions and federal law to some degree. 42 U.S.C. 11604, reads:

§ 11604. Provisional remedies

(a) Authority of courts. In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603 (b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority. No court exercising jurisdiction of an action brought under section 11603 (b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Keep in mind that, as noted in the December 30, 2010 memo to your office, if the bill's provisions are adopted and are later found to be in conflict with federal law, including ICARA, the Supremacy Clause of the U. S. Constitution would cause the conflict to be resolved in favor of the federal law.

If I can be of further assistance, please advise.

DCB:DCW:plm
11-138.plm

Karen Sawyer

From: Karen Sawyer
Sent: Thursday, March 10, 2011 3:35 PM
To: LAA Legal
Cc: 'Carl Gatto'
Subject: HB 88 legal opinion requested
Attachments: HB 88; HB 88

Importance: High

Follow Up Flag: Follow up
Flag Status: Flagged

Hello,

Attached are two e-mails from Doug Wolliver, Courts System legislative liaison, in response to my request for information about whether any of the Family Courts in Alaska have experienced cases where foreign law (example, Sharia Law) had been invoked. These two e-mails are his replies to date. I am requesting a legal opinion on the questions below.

Doug made these suggestions based on what the family court judges said:

- look into **“choice of law” clauses in contracts**. I don't believe that such a contract clause can be upheld if it violated our constitutions and your bill drafter has probably already considered this (they generally think of most everything).
 - **MY REQUEST:** double-check just to make sure the bill does not inadvertently interfere with **choice of law clauses**, which are routine.
- consider **defining law “foreign law.”** In many contexts a foreign jurisdiction is any jurisdiction other than Alaska. So, for example, registering a domestic violence restraining order from Washington State is considered registering a foreign order.
 - **MY REQUEST:** HB 88, version M, already has a definition of foreign law. However, it limits the jurisdiction to the United States and its territories. **Do we need to specifically mention “Alaska jurisdiction”, or is it okay as is?**
- **AS 25.30.400-590 (a portion of the Uniform Child Custody Jurisdiction and Enforcement Act)** provides for the enforcement of foreign orders under the Hague Convention on the Civil Aspects of International Child Abduction. I don't know if HB 88 conflicts with that statute, but it is something you might consider investigating.
 - **MY REQUEST:** Does HB 88 conflict with statute above?

FYI: My request of the Department of Law regarding cases involving foreign law came back with the answer of 'the State has had no cases'.

We have a bill hearing on HB 88 next week, Thursday, March 17th, at 8AM in House State Affairs.

Thanks much.