HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 903 Application of Foreign Law in Certain Cases
SPONSOR(S): Combee and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 386

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) Judiciary Committee			

SUMMARY ANALYSIS

The law of a foreign jurisdiction or system may be recognized in Florida in a variety of circumstances. Contracts may contain a clause which provides that disputes must be decided according to the laws of another jurisdiction, or that disputes must be adjudicated in another jurisdiction. These are known as "choice of law" and "forum selection" provisions, respectively.

Marriage contracts are enforceable as a general rule in Florida. A conflict of laws arises when parties otherwise subject to Florida's body of family law request a Florida court to enforce a marital contract according to laws of another jurisdiction. Currently, case law has indicated that where foreign law frustrates the public policy of this state, it will not be enforced. This bill codifies these holdings, making clear that the public policy of Florida will be to protect the constitutional rights of the parties above the enforcement of a foreign law or a forum selection clause.

The bill is limited in its application to dissolution proceedings and support enforcement under The Uniform Interstate Family Support Act. The bill provides that constitutional rights may be waived, but directs that waivers will be interpreted to protect the party waiving his or her rights.

The bill:

- Provides that any legal decision, or contract provision is void and unenforceable if it is based upon a foreign law or system that does not grant the parties the same protections guaranteed by the state and federal constitutions.
- Provides that a forum selection clause in a contract violates the public policy of this state and is unenforceable if enforcement would result in a violation of constitutional protections.
- Provides that a claim of *forum non conveniens,* must be denied if a court finds that granting the claim violates or would likely lead to a violation of any constitutional right of the non-claimant in the foreign forum.

This bill does not appear to have a fiscal impact on state or local governments.

This bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The law of a foreign jurisdiction or system may be recognized in Florida in a variety of circumstances. "A court may take judicial notice of . . . laws of foreign nations and of an organization of nations." Section 90.202, F.S. However, even if recognized, the laws of foreign nations are not necessarily enforced unless there is a reason to do so, usually by prior agreement of the parties.

Contracts often contain clauses which provide for dispute settlement according to the laws of a certain jurisdiction. These are known as "choice of law" provisions. These may direct interpretation or enforcement of the contract according to the laws of another state, but may require adherence to the law of another country. Contracts may also contain a "forum selection clause" providing that disputes must be decided in a particular jurisdiction. These clauses compel the court to decline jurisdiction, yielding it to the other state or country. Marital contracts (ante-nuptial and post-nuptial agreements) may contain either or both such provisions, and they are enforceable in a dissolution proceeding in Florida.

A conflict of laws arises when parties otherwise subject to Florida's body of family law request a Florida court to enforce a marital contract or support order according to the law of another jurisdiction, or request that the case be transferred to another jurisdiction for decision. This bill addresses both types of provisions - the choice of substantive law to be applied, and the choice of forum. It also covers the non-contractual situation which might cause a court to relinquish jurisdiction, i.e., a claim of forum non conveniens.[1] The bill is limited in its application to dissolution proceedings (Chapter 61, F.S.), and support enforcement under The Uniform Interstate Family Support Act, Chapter 88, F.S.

Foreign support orders are enforced in Florida under the Uniform Interstate Family Support Act,[2] which directs that as a general rule, the law of the state issuing the order shall govern, even if enforcement is requested in Florida.[3] Likewise, Chapter 61, F.S., which governs dissolution of marriage, acknowledges the enforceability of a choice of law provision in an antenuptial agreement.[4]

If such provisions do not offend the public policy of Florida, they are enforceable, even if the law to be applied is different than Florida law.[5] Historically, Florida courts have enforced a prenuptial contract according to the law of the place where it was entered into, unless enforcement would be contrary to public policy or unconstitutional.[6] For example, in *Akileh v. Elchahal*,[7] the court enforced the parties' Islamic ante-nuptial agreement, arguably a religious arrangement, since it complied with Florida contract law, and the court found nothing in the contract unconscionable.

Florida has also enacted the "Uniform Premarital Agreement Act," which specifically states that premarital agreements, including their choice of law provisions, are enforceable. *See* s. 61.079 F.S. Choice of law provisions in property settlement agreements are valid and enforceable pursuant to the Uniform Interstate Family Support Act, as codified in Ch. 88, F.S.[8]

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[1] "Forum non conveniens is a common law doctrine addressing the problem that arises when a local court technically has jurisdiction over a suit but the cause of action may be fairly and more conveniently litigated elsewhere." *Kinney System, Inc., v. Continental Ins. Co.*, 674 So.2d 86 (Fla. 1996). *See* also sec. 47.122, F.S.
[2] Chapter 88, F.S.
[3] *See* 28 USC sec. 1738B, which is entitled "The Full Faith and Credit for Child Support Orders Act." Federal law requires that all states recognize support orders as a matter of full faith and credit. As a side note, the recognition of a foreign support order is not absolute, but the exceptions are immaterial to this analysis.
[4] *See* s. 61.079, F.S.
[5] *McNamara v. McNamara*, 40 So.3d 78, 80 (Fla. 5th DCA 2010).
[6] *Gessler v. Gessler*, 273 F.2d 302 (5th Cir. 1959).
[7] 666 So.2d 246 (Fla. 2d DCA 1996).
[8] *See* generally *Keeton v. Keeton*, 807 So.2d 186 (Fla. 1st DCA 2002)(holding that property settlement agreement was enforceable in Florida with Kentucky law controlling), and *Blitz v. Florida Dept. Of Revenue ex rel. Maxwell*, 898 So.2d 121, 125 (Fla. 4th DCA 2005).

However, despite these statutes, courts maintain that where the foreign law frustrates the public policy of this state, or is not established with specificity as a matter of fact,[9] it will not be enforced. For example, where the husband sought to enforce a Danish prenuptial agreement which left nothing to the wife in the event of divorce, the court refused "where to do so would bring harm to a Florida citizen or would frustrate an established public policy of this state."[10]

Section 61.079 F.S., provides that choice of law provisions in premarital agreements are enforceable in Florida.[11] This bill codifies current caselaw which holds generally that such agreements would not be enforced if enforcement would violate constitutional rights.

Likewise, the Uniform Interstate Family Support Act does not include support orders issued pursuant to a foreign country's law or system. It only applies to orders issued by a court in another state of the union. This bill codifies current case law, making clear that the public policy of the state in respect to all matters that might be adjudicated under these statutes is to protect constitutional rights.

The bill defines “foreign law, legal code, or system” as any law, legal code, or system of a jurisdiction outside any state or territory of the United States. The bill provides that:

- Any decision based on any law, legal code, or system that does not grant the parties affected the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States, violates public policy of the State of Florida and is void and unenforceable.
- Any contractual provision, if severable, that provides for a choice of law, legal code, or system to govern disputes, is void and unenforceable if the system chosen includes law that would not provide the parties the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States.
- If a contractual provision provides for a choice of forum outside the state or territory of the United States and if enforcement of that choice of forum would result in a violation of any right guaranteed by the State Constitution or Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought.
- A claim of forum non conveniens must be denied if a court of this state finds that granting the claim violates or would likely lead to a violation of any constitutional right of the nonclaimant in the foreign forum.

These provisions only apply to actual or foreseeable denials of a natural person’s constitutional rights.

The bill allows for an individual to voluntarily restrict his or her fundamental liberties, rights, and privileges guaranteed by the Florida and U.S. constitutions; however, the language of any such contract or other waiver must be strictly construed in favor of preserving the individual's constitutional rights.

The bill provides that it is not to be construed to:

- Require or authorize a court to adjudicate, or prohibit any religious organization from adjudicating, ecclesiastical matters if such adjudication or prohibition would violate art. I s. 3, Fla. Const., or the First Amendment of the U.S. Constitution.
- Conflict with any federal treaty or other international agreement to which the United States is a party and such treaty or agreement preempts state law on the matter at issue.

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[9] See, eg., *Courtlandt Corp. v. Whitmer*, 121 So.2d 57 (Fla. 2d DCA 1960); cf. *Hieber v. Hieber*, 151 So.2d 646 (Fla. 3d DCA 1963) (law of foreign state).
[10] *Gustafson v. Jensen*, 515 So.2d 1298 (Fla. 3rd DCA 1987).
[11] "Parties to a premarital agreement may contract with respect to. . . the choice of law governing the construction of the agreement and any other matter, including their personal rights and obligations, not in violation of either the public policy of this state or a law imposing a criminal penalty." s. 61.079, F.S.

The bill does not apply to a corporation, partnership, or other form of business association.

The bill contains a severability clause, providing that if any provision of this bill or its application is held invalid, the invalidity does not affect other provisions or applications of the bill.

B. SECTION DIRECTORY:

Section 1 creates s. 45.022, F.S., relating to application of foreign law contrary to public policy in certain cases.

Section 2 provides for severability of invalid provisions of the bill.

Section 3 provides that the Division of Law Revision and Information is directed to replace the phrase "the effective date of this act" wherever it occurs with the date the bill becomes a law.

Section 4 provides the act takes effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Federal Preemption

The doctrine of preemption limits state action in any matter where legislation on the topic exists at the federal level. Article VI of the U.S. Constitution provides that the laws and treaties of the U.S. are the "Supreme Law of the Land," and, therefore, they preempt state law. Under the federal Full Faith and Credit for Child Support Orders Act,[12] "each state is required to enact the Uniform Interstate Family Support Act to improve the effectiveness of child support enforcement."[13] The Full Faith and Credit for Child Support Orders Act provides for modification of child support orders issued in other states, and addresses choice of law issues in respect to orders issued in another state. It does not address orders issued by another country.

Dormant Federal Foreign Affairs Powers

Although not explicitly provided for in the U.S. Constitution, the Supreme Court has interpreted the U.S. Constitution to mean that the national government has exclusive power over foreign affairs. In *Zschernig v. Miller*, the Supreme Court reviewed an Oregon statute that refused to let a resident alien inherit property because the alien's home country barred U.S. residents from inheriting property. The Court held that the Oregon law as applied exceeded the limits of state power because the law interfered with the national government's exclusive power over foreign affairs. The Court also held that, to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries,"[14] and the action must pose a "great potential for disruption or embarrassment"[15] to the national unity of foreign policy. Such a determination would necessarily rely heavily on considerations of current political climates and foreign relations, as well as the United States' perception abroad.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[12] 28 USC sec. 1738B(a)(1)
[13] Fla. Jur. 2d, Family Law, sec. 552
[14] *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).
[15] *Id*. at 435.