

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: August 2017
From: A. Eric Johnston
Re: Protection of Religious Child Placing Agency from Discrimination
Regulation of Overnight and Long Term Youth Residential Treatment Facilities

The Alabama Child Placing Agency Inclusion Act

Early in 2015 we anticipated the U.S. Supreme Court would declare same sex marriage constitutional. One of the immediate fallouts from that would be the effect it would have on religious operated child placing agencies. These are agencies operated by churches, denominations or religious nonprofit entities which are licensed by the state to do adoptions and are under significant and necessary regulation of the manner in which those adoptions must be done.

SLI was asked to draft legislation to protect the religious rights of these agencies. Bills were drafted and introduced in both the 2015 and 2016 regular sessions of the Alabama Legislature. While the bills made good progress, they ran into significant opposition and did not pass. The bills were reintroduced in the 2017 regular session and were ultimately signed into law by Governor Kay Ivey. It was a difficult course to completion. SLI provided advice to the sponsors and testimony to the various committees.

The law protects the sanctity of life by providing a comprehensive and necessary option to women who have troubled or unplanned pregnancies. Adoption is a necessary alternative to abortion, unless the mother decides to keep her child. We must protect that option. Unlike most sanctity of life bills, this bill also encountered opposition from the LGBTQ community. Gay rights advocates saw it as a discriminatory proposal.

The Alabama Child Placing Agency Inclusion Act, HB24 (Rich Wingo)/SB165 (Bill Hightower) simply provides that the religious rights of private religious child placing agencies must be protected. These include agencies like Alabama Baptist Children's Home, Catholic Social Services, Agape of North Alabama, Lifeline Children's Services, Inc., *etcetera*. These agencies uniformly believe marriage is a God ordained institution between one man and one woman, and that homosexuality is a sin.

The Alabama Department of Human Relations ("DHR") regulates all child placing agencies. It sets necessary standards to be sure that children are placed in appropriate homes for adoption. However, the bill was concerned with prospective regulations that might require agencies to make same sex placements for adoption. Of course, this would be likely since homosexual couples cannot procreate and adoption would be the only alternative for having children.

State law requires child placing agencies to obtain a license from DHR. It is not required, however, that the agencies take federal or state funds for their operations. In fact, religious child placing agencies in Alabama do not take such funds. Under the new law, for a religious agency not taking such funds which refuses to make same sex marriage placements, DHR may not refuse to license them or discriminate against them in any of the licensure provisions. The child placing agency still must meet the Minimum Standards for Child Placing Agencies, required by the Alabama Childcare Act of 1971. These standards are to assure the safety and wellbeing of the child, but they too cannot be amended to violate the new law.

Initially, DHR was not happy with the proposed legislation, but we worked out our problems with them. The ACLU and others claimed DHR would lose over \$40 million in federal HHS funds if this bill passed. They simply did not understand the law or deceitfully misinterpreted it. Alabama will not lose those funds.

DHR was not the main opposition. Also, abortion rights advocates were not happy with the legislation, but they too were not the real opposition. The real opposition came from the LGBTQ community, particularly under the leadership of the Human Rights Campaign ("HRC"), an activist gay rights political organization which has significant funding. Theirs was a daily presence in the statehouse. They testified against the bill. They used their influence and their significant financial resources to try to stop the bill.

The basis of their claims was that this bill would discriminate against homosexuals. They claimed the religious organizations were intolerant and inconsiderate of homosexuals' rights. Obviously, the opposite is true. The religious freedom of these organizations was the main right to be protected. While the religious organizations do 30% of state adoptions, the remaining 70% are done by secular agencies which do not have the same qualms against same sex placements. Therefore, homosexuals are not denied the right to adopt. No rights including equal protection rights are violated. It is they who are intolerant and wish to discriminate against persons of faith. At times, opponents tried to make the bill a Christian intolerance effort. Actually, this law will apply to any religion which has beliefs on the traditional sanctity of marriage, *viz.*, Christianity, Judaism, Islam, *etcetera*.

The battle did not end on the floors of the Senate and House with passage of the bill. When it was sent to Governor Kay Ivey for her signature, we are told she was requested by HRC to put an executive amendment on the

bill. It was a nonsensical short amendment that was totally unnecessary and could have caused some interpretation problems once the bill became law. The main concern was the lateness of the session and the possibility the bill would not have a chance to come back through the Senate and House for approval of the executive amendment. The sponsors of the bill, Representative Rich Wingo and Senator Bill Hightower, were stalwart in their efforts. They did not want to place the amendment on the bill. However, the pressure was not coming just from HRC but, again we are informed, pressure was also coming from Google, Apple and AT&T, significant financial and political players in the state. The sponsors were ready to stand firm against the amendment when they were informed by one of the lobbyists for the other side that the request for the executive amendment had been withdrawn. In the meantime, many churches and their members had been contacting the Governor's Office to support the bill. The Governor signed the bill into law.

We believe this bill is constitutional. The battle was, more than anything, a battle for religious freedom. Religious freedom is under attack more than ever before and it is being led by the LGBTQ community. Joining with other secular minded libertarian and liberal individuals, the battle will intensify over time. The passage of this bill was a very important and symbolic victory for the beginning of the war in Alabama.

Questions About HB440

HB440 was a bill filed by Representative Steve McMillan to regulate youth residential facilities, institutions and programs in Alabama, whether religious, faith-based, nonprofit or for profit. These are facilities or programs where minor children are left at the facility by their parents for lengthy residential stays. These stays could probably range from weeks to months.

When the bill was initially filed, there was significant opposition by the faith-based community, because the bill specifically was to regulate church and faith-based programs. It also had provisions against conversion therapy (dealing with homosexual issues), requiring culture sensitive training and other things expected from the LGBTQ community. There was minimal protection for the teaching of religious rights at such a facility if it was run by a church or religious organization.

SLI was requested by the sponsor to review the bill. We made many changes to the bill which included removing the objectionable politically correct provisions, expanding it to cover not just faith-based but any facility, i.e., "religious, faith-based, or church nonprofit, other nonprofit and for profit affiliated youth residential facilities, institutions, and programs operating in Alabama." Additionally, we added lengthy and detailed provisions to protect the religious rights of churches and religious organizations which operate these facilities.

Some questioned whether this law violates religious liberty. We do not believe so and it is quite different from the effort to regulate church daycare programs in the state, reported on in our June 2017 Educational Update. There are two main factors concerning this. First, there are very few of these facilities in Alabama. In fact, we knew of two, one which was a highly regarded program licensed by DHR and another one which was secretly operated, not licensed, and abusive of children. The latter facility located in Mobile County closed, but was the catalyst for the bill. There were many documented activities of child abuse at that facility.

Second, the main thing that must be kept in mind is that the method of operation for these facilities is for parents to leave their children there and then return home, which may have been states away, without the ability to see their children on a daily or regular basis and have very little knowledge of the operations of the facility. Unlike church daycares, this means there is no oversight by anyone except the facility itself. Consequently, we were of the belief that with the amendments to the bill and the protection of religious operation, DHR would be an appropriate licensing and oversight mechanism for protecting minor children. Minor children are defenseless and unlike adults, are subject to many abuses.

There was some concern whether this would affect the religious drug rehabilitation programs operated in the state. In 2011, we worked to exempt those facilities from Department of Mental Health regulation. See Section 22-50-17, 1975 *Code of Alabama*. Those facilities also deal only with persons 19 years of age or older.

We believe there was some misunderstanding of HB440. However, we hope this explanation will provide better understanding that religious freedom was protected, but in the limited context of these facilities, oversight must be provided for the protection of young defenseless boys and girls.