

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 14, 1998 Revised: _____

Subject: Medical Treatment/Parental Consent

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	_____	Krasovsky	RC	Favorable
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This joint resolution provides that a parent’s right to consent to medical treatment including, but not limited to, abortion for that parent’s minor child as permitted by the United States Constitution, shall not be restricted by other provisions of the Florida Constitution.

This bill creates section 18 in Article X (Miscellaneous) of the Florida Constitution.

II. Present Situation:

The Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution protects four fundamental rights: the right to privacy, the right to vote, the right to travel, and First Amendment rights. If a law infringes upon a fundamental right, courts apply a strict scrutiny analysis. The law will only be upheld if it is necessary to promote a compelling interest. Furthermore, courts require a close nexus between the government’s objective and the means used to advance that objective. If the government denies everyone a fundamental right, the denial results in a substantive due process problem. Conversely, if the government denies a fundamental right to some but not others, an equal protection problem arises. In either case, the applicable standard of review is strict scrutiny.

According to the Supreme Court of the United States, no undue burdens can be placed on a woman’s right to have an abortion before the fetus attains viability. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Procedural requirements may be valid as long as they do not unduly burden a woman’s right to terminate her pregnancy.

The United States Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), overturned portions of the Court’s earlier decision in, *Roe v. Wade*,

410 U.S. 113 (1973). *Roe v. Wade* stood for the proposition that abortion was a fundamental right. The Court in *Roe v. Wade* held that states could not closely regulate abortions during the first trimester of pregnancy. Further, the Court held that during the second trimester, states could only enact regulations aimed at protecting the mother's health, not the fetus's life. Therefore, no ban on abortions was permitted during the second trimester. According to the Court's opinion in *Roe v. Wade* only at the beginning of the third trimester of pregnancy did the state's interest in the life of the fetus become compelling. Even then, the Court required states to permit abortion in circumstances necessary to preserve the health or life of the mother.

In *Casey*, the United States Supreme Court held that no substantial burdens can be placed on a woman's right to have an abortion before the fetus becomes viable. However, the Court also stated that procedural requirements are valid as long as they do not unduly burden the right to terminate a pregnancy. Once the fetus becomes viable, the government may ban abortion unless the continuation of the pregnancy represents a threat to the mother's health or life.

Under federal jurisprudence, states may require parental consent to obtain an abortion, but may not give the parent veto power over the minor's decision. Absolute subjugation has been deemed an "undue burden" under the reasoning of *Casey*. States may, however, require parental consent as long as they provide a by-pass procedure. This by-pass procedure must allow the minor to obtain an abortion, without parental consent, if she obtains the consent of a judge. Under this procedure, the judge must consent as long as the minor understands the nature of her decision. See *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502 (1990). When construing parental consent statutes, the Supreme Court has determined that bypass procedures should: (1) allow the minor to bypass the consent statute requirement if she establishes that she is sufficiently mature and well informed to make the abortion decision independently; (2) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (3) ensure the minor's anonymity; and (4) provide for expeditious bypass procedures. *Bellotti v. Baird*, 443 U.S. 622 (1979).

The first sentence of Article I, Section 23 of the Florida Constitution reads, "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." No parallel right is enunciated within the text of the federal constitution, although several state constitutions have analogous provisions.

Florida courts have construed Florida's right to privacy to be more comprehensive than the corresponding federal right. *Shaktman v. State*, 553 So.2d 148 (Fla. 1989); *Division of Pari-Mutuel Wagering v. Winfield*, 477 So.2d 544 (Fla. 1985). The Florida Supreme Court has enumerated three rationales supporting this view. First, the Florida Constitution goes beyond the federal constitution to provide an express textual reference to the right to privacy. *In re T.W., a Minor*, 551 So.2d 1186 (Fla. 1989). Second, the fact that the right to privacy was added to the Florida Constitution following the United States Supreme Court's decision in *Rowe v. Wade*, 410 U.S. 113 (1973), indicates that persons voting for the amendment believed that federal protections were inadequate. *In re T.W., a Minor*, 551 So.2d at 1191. Third, the drafters of the right to privacy amendment rejected the use of the phrases "unwarranted governmental intrusion"

or “unreasonable governmental intrusion” in order to make the provision as strong as possible. *Id.* at 1191-1192. Consequently, the Florida Supreme Court has interpreted Florida’s right to privacy as fundamental, worthy of the highest protection.

Florida courts use a four-part framework when evaluating government intrusions into individual privacy rights. *Florida Board of Bar Examiners Re: Applicant*, 443 So.2d 71 (Fla. 1984); *Byron, Harless, Schaffer, Reid & Associates, Inc. v. State ex rel. Schellenberg*, 360 So.2d 83 (Fla. 1978); *In re T.W. a Minor*, 551 So.2d at 1186. Any person wishing to assert the right to privacy must show: (a) state action, and (b) a reasonable expectation of privacy. Once these two elements have been established, the person’s right to privacy rises to the level of a “fundamental” right. To intrude upon a fundamental right, the government must show that: (1) it has a compelling state interest, and (2) it has used the least intrusive means to further that interest. The right to privacy extends to children. *B.B. v. State*, 659 So.2d 256 (Fla. 1995). However, the state has greater power to institute regulations which impact the privacy rights of children, than regulations which impact the privacy rights of adults. See *Jones v. State*, 640 So.2d 1084 (Fla. 1994).

The Florida Supreme Court, in *In re T.W., a Minor*, 551 So.2d 1186 (Fla. 1989), struck down a statute which placed restrictions upon a minor’s right to obtain an abortion. The law in question mandated parental consent and the appointment of a guardian ad litem for the fetus, or alternatively required the minor to petition for a court order. The Court stated, “Florida’s [constitutional] privacy provision is clearly implicated in a woman’s decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one’s body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment.” *Id.* at 1192. The Court reasoned that while the right to privacy extends to minors, a minor’s rights “are not absolute.” *Id.* at 1193.

The challenged statute fails because it intrudes upon the privacy of the pregnant minor from conception to birth. Such a substantial invasion of a pregnant female’s privacy by the state for the full term of the pregnancy is not necessary for the preservation of maternal health or for the potentiality of life. However, where parental rights over a minor child are concerned, society has recognized additional state interests--protection of the immature minor and preservation of the family unit. . . . [W]e find that neither of these interests is sufficiently compelling under Florida law to override Florida’s privacy amendment. *Id.* at 1194.

The Court concluded, “Unlike the federal Constitution, however, which allows intrusion based on a ‘significant’ state interest, the Florida Constitution requires a “compelling state interest in all cases where the right to privacy is implicated.” *Id.* at 1195. According to the Court, the state’s interest in the life of the fetus does not become compelling until the fetus reaches viability. Viability, the Court stated, occurs at that point “when the fetus becomes capable of meaningful life outside the womb through standard medical measures.” *Id.* at 1193-1194.

III. Effect of Proposed Changes:

This joint resolution provides that a parent's right to consent to medical treatment "including, but not limited to, abortion," for that parent's minor child as permitted by the federal constitution shall not be restricted by other provisions of the Florida Constitution. By broadening the right of parental consent, this joint resolution would narrow the right of privacy established in Article I, section 23 of the Florida Constitution. This joint resolution provides that "the state has a compelling interest in protection the right of parents to make such decisions for their minor children."

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
