STORAGE NAME: h3999.hcs
DATE: April 7, 1998

HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH CARE SERVICES
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 3999

RELATING TO: Termination of Pregnancies

SPONSOR(S): Rep. Sindler & others

COMPANION BILL(S): S 1814 (identical)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) HEALTH CARE SERVICES
(2)
(3)
(4)
(5)

I. SUMMARY:

HB 3999 provides certain limitations on an unemancipated minor or incompetent person's right to an abortion in Florida. Specifically, the bill:

- Redefines the term abortion and defines several other related terms;
- Prohibits the coercion of a minor to have a termination of pregnancy;
- Requires the person performing or inducing the termination of a pregnancy of an unemancipated minor or incompetent person to notify the parent or legal guardian of the minor or incompetent person's intention at least 48 hours prior to performing or inducing the termination of pregnancy;
- Requires the attending physician of an unemancipated minor, who intends to terminate her pregnancy, to notify an adult sibling, a stepparent, or grandparent of the minor's intention at least 48 hours prior to the termination of pregnancy if the minor declares in a signed written statement that she is a victim of sexual abuse, physical abuse, or neglect;
- Provides for exceptions to the notice requirement and establishes procedures for the judicial waiver of notice;
- Provides that any person who violates the notice requirements or coerces a minor to undergo a termination of pregnancy will be subject to criminal penalties and civil actions; and
- Requires monthly reports listing exceptions to the notice requirements, the number of notices issued, the minor's age, and the number of prior pregnancies and prior terminations of pregnancies to be filed with the Department of Health.

The fiscal impact of this bill is indeterminate.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Since 1972 when the United States Supreme Court decided *Roe v. Wade*, 410 US 113, state legislatures have been testing the Constitutional limits on their authority to impose restrictions on abortions. The *Roe v. Wade* decision was premised upon the right of privacy which the Court held to be a "fundamental right" encompassing a woman's decision to terminate her pregnancy. Whenever a "fundamental right" is involved, regulations limiting that right are subject to strict scrutiny, justified by a "compelling state interest" that must be narrowly drawn to express only that interest.

Since the *Roe* decision, the Supreme Court has retreated somewhat from it position and no longer refers to the right to abortion as a "fundamental right." The Court has also shifted the standard against which it evaluated state regulatory provisions restricting abortions from a "strict scrutiny" standard to a less rigorous "undue burden" standard. Some of the most common restrictions on abortion require a minor choosing to have an abortion to notify or obtain the consent of a parent before the abortion can be performed.

Although the right to abortion may not be considered a "fundamental right" at the federal level, it does not necessarily mean it is not a "fundamental right" at the state level. Under the rule commonly referred to as the "adequate and independent state ground doctrine," a federal court will not disturb a state court judgment that is based on an adequate and independent state ground provided the result is not violative of the federal constitution. The federal Constitution serves as a minimum level of guaranteed rights, and the states, in interpreting their own constitutions, are free to guarantee a higher level of protection. When states do guarantee a higher level of protection, federal courts do not have jurisdiction to review these decisions, as long as the state ground is both adequate and independent.

Florida is one of only five states that has its own express constitutional provision raising the level of protection of the federal Constitution and guaranteeing an independent right to privacy. Such provisions can make a crucial difference in determining whether a statute is constitutional because the statute in question must pass muster under both the federal and state constitutions.

In 1980, Florida citizens voted in general elections to amend the state constitution to provide for a right of privacy. Art. 1, Sec 23 of the Florida Constitution reads:

> Right of privacy..-- Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meeting as provides by law.

The Florida Supreme Court has determined that "the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985). The Florida Supreme Court also held that the state's right of privacy:

> is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulations serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

In the case of *In re T.W.*, 551 So.2d 1186 (Fla. 1989), the Florida Supreme Court concluded, "based on the unambiguous language of the amendment" that since minors are natural persons, they should be afforded the same fundamental right of privacy. To overcome these constitutional rights, a statute imposing on a minor's rights must survive the test set out in *Winfield:* The state must prove that the statute furthers a compelling state interest through the least intrusive means.

In the case of *In re T.W.*, the court was faced with the question of whether a state statute requiring parental consent for the abortion of a minor violated the express constitutional right of privacy in the state constitution. Finding that "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy," the court ruled the statute unconstitutional. Rejecting the federal test that a state's interest must only be "significant," the court adopted the Florida standard that the interest be "compelling." The court concluded that neither the interest in protecting minors nor the interest in preserving family unity was sufficiently compelling under Florida law to override Florida's privacy amendment. The parental consent statute also did not pass the test of the least intrusive means of furthering the state interest. The statute did not make provisions for a lawyer for the minor or for a record hearing, which the court felt were necessary for providing an adequate judicial bypass procedure.

Since *In re T.W.* was decided, there have been a number of federal cases deciding similar issues. Most notably, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 120 L.Ed.2d 674 (1992), was decided in 1992 by the United States Supreme Court. In this case, the Supreme Court upheld Pennsylvania abortion regulations on informed consent requirements, parental consent, 24-hour waiting periods, and abortion reporting. *Casey* and other federal cases have indicated that parental consent and notifications statutes meet all federal constitutional requirements as long as they make exceptions for emergencies and provide for an adequate judicial bypass of the consent requirement.

These decisions, however, do not firmly answer questions involving intrusions on a minor's right to privacy in Florida nor do they answer the question of whether or not a judicial bypass to a parental notification is constitutionally required. In making its decisions on a minor's right to an abortion, the Supreme Court has not dealt with the question of a state's express constitutional right to privacy. Recently, a case from Montana, one of the five states that has a state constitutional right to privacy, was heard by the United States Supreme Court, which upheld a statute requiring parent notification for abortion. This case, however, only addressed federal constitutional issues and made no mention of the state's constitutional right of privacy. On the other hand, the state supreme courts of California and Alaska, two other states with an express constitutional right to privacy, have recently ruled that certain constraints on abortion rights violated the state's fundamental right to privacy. The question of whether or not a state's express constitutional right of privacy could have an effect on a minor's access to abortion has not been addressed by the United States Supreme Court.

The federal Court has also declined to make a decision on whether a parental notification statute must include some sort of bypass provision in order to be constitutional. See *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502 (1990). The Court ruled that constitutional parental consent statutes must contain a bypass provision that meets four criteria: 1) allows the minor to bypass the consent statute requirement if she established that she is mature enough and well enough

informed to make the abortion decision independently; 2) allows the minor to bypass the consent requirement if she established that the abortion would be in her best interests; 3) ensures the minor's anonymity; and 4) provides for expeditious bypass procedures. *Bellotti v. Baird*, 443 U.S. 622 (1979). In deciding cases involving parental notice, the Court has never said that bypass provisions were required, but have ruled on whether or not the provisions meet the four criteria used in determining in consent bypass procedures are adequate. (*See Akron II,* 497 U.S., at 508-510)

In both *Casey* and *Hodgson v. Minnesota,* 110 S.Ct. 2926 (1990), the Supreme Court has upheld statute requiring waiting periods before the performance of an abortion. In *Hodgson,* the Court allowed a 48-hour waiting period between notification and the performance of the abortion to give the parents a realistic opportunity to talk to discuss the decision with the daughter. In *Casey,* the Court found that a required 24-hour waiting period before a woman could receive an abortion was constitutional. In Florida, however, due to the constitutional right to privacy, waiting period requirements, like consent or notification requirements, would appear to violate a woman's fundamental right to abortion.

In addressing the issue of a minor's right to privacy in Florida, attention should also be given to other Florida statutes. The Florida Supreme Court noted in *In re T.W.* that under s. 743.065, F.S., a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child -- no matter how dire the possible consequences--except abortion. The court stated that it failed "to see the qualitative difference in term of impact on the well-being of the minor between undergoing a highly dangerous medical procedure on oneself and undergoing a far less dangerous procedure to one's pregnancy. If any qualitative difference exists, it certainly is insufficient in terms of state interest." The court also noted that Florida's adoption act contains no requirement that a minor obtain parental consent prior to placing a child up for adoption. (*See* ch. 63, F.S.)

Florida case law on abortion and statutes allowing for medical procedures and the placing of one's child up for adoption without the consent or notification of the parent imply that a statute restricting a minor's right to abortion by requiring parental notification could be perceived by the courts as unconstitutional. Moreover, because the state supreme court has found abortion to be protected by the privacy provision in the constitution, any efforts by the Legislature to restrict access to an abortion could elicit the interpretation of the state supreme court. In any case, however, it can be inferred from both state and federal case law that to be considered constitutional such a statute would require a clause allowing for judicial bypass of the notification requirement.

B. EFFECT OF PROPOSED CHANGES:

The term abortion will be redefined and several other terms will be given definitions.

The coercion of a minor to have a termination of pregnancy will be prohibited, and any person performing or inducing the termination of a pregnancy of an unemancipated minor or incompetent person will be required to give 48 hours notice to the parent or legal guardian of the minor or incompetent person prior to performing or inducing the termination of pregnancy.

If a minor patient declares in a signed written statement that she is a victim of sexual abuse, physical abuse, or neglect, the physician will be required to give notice of the minor's intent to perform or induce an abortion to an adult brother or sister, or a stepparent or grandparent of the minor at least 48 hours before the termination of pregnancy. Exceptions will be made for the notice requirement, and procedures for the judicial waiver of notice will be provided. Any person who violates the notice requirements or coerces a minor to undergo a termination of pregnancy will be subject to criminal penalties and civil actions.

Monthly reports listing exceptions to the notice requirements, the number of notices issued, the minor's age, and the number of prior pregnancies and prior terminations of pregnancies will be required to be filed with the Department of Health.

Criminal and civil penalties will be created for violations of the coercion prohibition and notice requirements.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes, the state supreme court is requested to adopt rules to ensure that judicial proceeding to bypass the notice requirements are handled in an expeditious and confidential manner.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes, any person performing or prescribing a termination of pregnancy of an unemancipated minor or an incompetent person must give notice to the parent or legal guardian of the minor or incompetent individual's intention to terminate her pregnancy and file monthly reports with the Department of Health.

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

      No.

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      Yes, a new limitation will be placed on an unemancipated minor or incompetent person's right to an abortion.

5. Family Empowerment:

   a. If the bill purports to provide services to families or children:

      (1) Who evaluates the family's needs?

      When the unemancipated minor or incompetent person chooses to seek waiver of the notice requirement through judicial proceedings, the court will determine whether the parent or legal guardian should be notified.

      (2) Who makes the decisions?

      If a judicial proceeding occurs, the court will make the decision as to whether the parent or guardian should be notified. Once the parent or guardian is notified of the unemancipated minor or incompetent individual's decision to terminate her pregnancy, it is assumed that the minor or incompetent person will make the decision regarding her pregnancy together with her parent or guardian.

      (3) Are private alternatives permitted?

      No.

      (4) Are families required to participate in a program?

      Because the person performing or prescribing the termination of pregnancy is required to inform the parent or guardian of an unemancipated minor or incompetent individual's intention to terminate her pregnancy, families will be required to participate if the parent or legal guardian can be notified or unless the minor or incompetent person receives a judicial waiver.

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

Yes, a parent's right to play a role in their children's affairs will be strengthened, but an unemancipated minor or incompetent person's access to termination of her pregnancy will be limited.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 390.011, 390.0111, and 390.0112, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Provides that this act may be cited as the "Parental Notice of Abortion Act."

Section 2. Amends s. 390.001, F.S., to redefine the term "abortion" and to define "actual notice," "coercion," "constructive notice," "emancipated minor," "incompetent person," "medical emergency," "neglect," "physical abuse," and "sexual abuse."

Section 3. Amends s. 390.0111(3), F.S., relating to termination of pregnancies, to prohibit coercion of a minor to have a termination of pregnancy performed or induced, and to provide that a minor be deemed emancipated for the purposes of eligibility for public-assistance benefits if her parent or guardian denied financial support due to her refusal to terminate her pregnancy.

Amends s. 390.0111(4), F.S., to provide that a termination of a pregnancy of an incompetent person may not be performed or induced without the fulfillment of the notification requirements in s.390.0111(5),F.S. and the voluntary and informed written consent of her court-appointed guardian.

Amends s. 390.0111(5)(a), F.S., to require the person performing or inducing the termination of a pregnancy of an unemancipated minor or incompetent person to notify the parent or legal guardian of the minor or incompetent person's intention at least 48 hours prior to performing or inducing the termination of pregnancy.

Amends s. 390.0111(5)(b), F.S., to require the attending physician of an unemancipated minor, who intends to terminate her pregnancy, to notify an adult sibling, a stepparent, or grandparent of the minor's intention at least 48 hours prior to the termination of pregnancy if the minor declares in a signed written statement that she is a victim of sexual abuse, physical abuse, or neglect.

Amends s. 390.0111(5)(c), F.S., to describe situations in which notice is not required.

Amends s. 390.0111(6)(a), F.S., to allow a minor or an incompetent person to petition for judicial waiver of the notice requirement and to provide for her right of court-appointed counsel. The minor or incompetent person may also be appointed a guardian ad litem.

Amends s. 390.0111(6)(b), F.S., to provide that court proceedings be confidential and ensure the anonymity of the minor or incompetent person, and to require that the court rule and issue written findings or fact and conclusion of law within 48 hours of the time the petition was filed or the petition will be deemed granted.

Amends s. 390.0111(6)(c), F.S., to provide that the court shall issue an order authorizing the minor to consent to a termination of pregnancy without the notification of a parent of guardian if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy.

Amends s. 390.0111(6)(d), F.S., to provide that the court shall issue an order authorizing the minor to consent to a termination of pregnancy without the notification of the parent or guardian if the court finds, by clear and convincing evidence, a pattern of physical, sexual, or emotional abuse of the complainant by one or both of her parents, guardian, or her custodian, or that the notification of a parent or guardian is not in the best interest of the complainant.

Amends s. 390.0111(6)(e), F.S., to set procedures for the court.

Amends s. 390.0111(6)(f), F.S., to provide for expedited confidential appeals to minor or incompetent persons who are denied a waiver of parental notification.

Amends s. 390.0111(6)(g), F.S., to provide that no filing fees are required when a minor or incompetent person petitions for judicial waiver of the notice requirement.

Amends s. 390.0111(12)(c), F.S., to set criminal penalties of felonies of the third degree for: any person who intentionally performs or induces a termination of pregnancy of an unemancipated minor or incompetent person without providing the required notice; any person who signs a waiver of notice who is not authorized to receive notice; and any person who coerces a minor to undergo a termination of pregnancy.

Amends s. 390.0111(13), F.S., to establish prima facie evidence for civil actions against individuals who fail to meet notice requirements.

Amends s. 390.0111(14), F.S., to request the Florida Supreme Court to adopt rules to ensure that proceedings under this section will be handled in an expeditious and confidential manner and will satisfy the requirements of federal courts.

Section 4. Amends s. 390.0112, F.S., relating to reporting of termination of pregnancies, to require that a monthly report be filed with the Department of Health indicating the number of parental notices issued, the number of times exceptions were made to the notice requirement, the minor's age, and the number of prior pregnancies and prior terminations of pregnancies of the minor.

Section 5. Provides that if any provision of this act or application thereof to any person or circumstance is held invalid, the invalidity shall not effect the other provisions or applications of the act.

Section 6. Provides that this act shall take effect upon becoming a law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   See Fiscal Comments.

2. Direct Private Sector Benefits:

   See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

   N/A

D. FISCAL COMMENTS:

An unemancipated minor or an incompetent individual who petitions for a waiver of the notice requirements will be appointed counsel upon her request and will not have to pay filing fees at either the trial or appellate level. Therefore, the state will be required to pay for all court expenses for petitions for a waiver of the notice requirement.

Persons performing or prescribing the termination of pregnancy of unemancipated minors or incompetent individuals will be responsible for the expense involved in notifying the parent or legal guardian of the minor or incompetent individual's intention to terminate her pregnancy, as well as expenses involved in compiling and filing reports with the Department of Health. The Department of Health will also incur expenses involved with maintaining reports regarding notice requirements and exceptions.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Several provisions in this bill are controversial and could be subject to the interpretation of the courts.

The amended definition for abortion may be faulty and could be interpreted to include many situations, including instances in which women are given drugs to aid in a normal birth process. Also, based upon this definition of abortion, it is not clear whether a physician prescribing birth control pills or an IUD to an unemancipated minor or incompetent person would be guilty of a third degree felony for prescribing a drug that may terminate a pregnancy. Although abortion is defined in this bill, it is not used in the bill. Instead the undefined term "termination of pregnancy" is used when setting out the requirements for notification. This definition of abortion creates confusion and may be considered void for overbreadth. The definition may also have an effect on the current definition of "abortion clinic", which is currently defined under s. 390.011, F.S. as "any facility in which abortions are performed" but not including "a hospital or a physician's office, provided that the office is not used primarily for the performance of abortions."

The definition and use of "medical emergency" also creates confusion. The bill's definition of medical emergency includes conditions that necessitate the immediate termination of pregnancy to avert death or conditions in which a delay in the termination of pregnancy would create a risk of substantial and irreversible impairment of a major bodily function. When, however, the term "medical emergency" is used in the bill as an exception to the notice requirement, it requires the physician to obtain a corroborative medical opinion attesting to the emergency and to the fact that the continuation of pregnancy would threaten the life of the pregnant woman. As a result, medical emergencies would not qualify as an exception to the notice requirement unless the life of the pregnant minor or incompetent person was threatened.

Several of the requirements set out in the provisions for notification of a parent or guardian when an unemancipated minor or incompetent person intends to terminate her pregnancy could be interpreted as unconstitutional. Both the notification requirements and the imposition of a 48 hour waiting period between the time the parent or guardian is notified and the time the minor or incompetent person may terminate her pregnancy may be considered by the courts as a violation of a minor or incompetent person's state constitutional right to privacy. If the provisions in this bill did become subject to interpretation of the court, any state interest would have to pass a compelling state interest standard due to the express privacy provision in the Florida Constitution. It appears that two of the state interests the bill is designed to protect are the protection of the immature minor and preservation of the family unit. In the case of *In re T.W.,* the Florida Supreme Court found "that neither of these interests is sufficiently compelling under Florida law to override Florida's privacy amendment."

The provision providing that a minor be eligible for public-assistance benefits if she is denied financial support by the minor's parents, guardians, or custodians due to her refusal

to have an abortion is also an area for concern. It is unclear from the language of the bill if minors would automatically be deemed eligible for public-assistance benefits or if they would be merely eligible. Deeming an individual as automatically eligible for public-assistance benefits, notwithstanding other financial resources that might be available, is a violation of the law on both the state and federal level. The bill does not define "public-assistance benefits" which makes it unclear as to what sort of benefits a minor would be eligible to receive.

Furthermore, parents or guardians may already be prohibited from denying financial support for any reason, including the child's refusal to terminate her pregnancy, under Florida's child neglect laws. Section 415.503, F.S., defines child abuse or neglect as "harm or threatened harm to a child's physical or mental health or welfare by the acts or omissions of a parent, adult household member, or other person responsible for the child's welfare." The section defines neglect of the child to mean "that the parent or other person responsible for the child's welfare fails to supply the child with adequate food, clothing, shelter, or health care, although financially able to do so or although offered financial or other means to do so."

The provisions of the bill that allow for the court to determine by clear and convincing evidence that there is a pattern of physical, sexual, or emotional abuse of the complainant are also problematic. Determining that the parent or guardian is guilty of a pattern of physical, sexual, or emotional abuse without giving the parent or guardian a chance to refute the complaints, could be considered a violation of the parent or guardian's due process rights.

The bill may also be problematic in that it subjects persons who do not meet the notice requirement to heavy criminal penalties without clearly defining what a reasonable effort to give actual notice would be.

Finally, the monthly reports indicating notice information are subject to the current law requiring that reports in s. 390.0112, F.S., be confidential and exempt from the public records statute, s. 119.07(1), F.S. However, it appears from the proposed language regarding monthly reports of notice that the intention was to not keep this information confidential or exempt from public records requirements. To properly exempt the monthly reports on notice from the public records requirements, the current language would have to be amended or placed in a separate section.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE SERVICES:

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