

STORAGE NAME: H4761.cjc

DATE: April 10, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
Civil Justice and Claims
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HJR 4761

RELATING TO: Medical Treatment/Parental Consent

SPONSOR(S): Representative Kelly and others

COMPANION BILL(S): SJR 2140 (similar) by Senator Lee

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

(1) CIVIL JUSTICE & CLAIMS YEAS 6 NAYS 3

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I. SUMMARY:

This joint resolution creates Article X, Section 18 of the Florida Constitution. The proposal would narrow the right of privacy, conferred by Article I, Section 23 of the Florida Constitution.

Specifically, the joint resolution provides that a parent's right to consent to medical treatment of a minor "including, but not limited to, abortion," shall not be restricted by other provisions of the Florida Constitution. The proposal establishes that "the state has a compelling interest in protecting the rights of parents to make such decisions for their minor children."

This joint resolution would not have a significant fiscal impact on state government.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The Right to Privacy under the Federal Constitution - The Equal Protection and Due Process Clauses of the Fourteenth Amendment protect 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 fit 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.

1. **Scope of Right to Terminate Pregnancy** - 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.
 - a. **Previous Three-Trimester Approach** - 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.
 - b. **Current Pre-Viability Approach** - 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.
2. **Permissible and Impermissible Restrictions on Abortion** - Ever since the United States Supreme Court's decision in Roe v. Wade, state legislatures have been testing the constitutional limits of their authority to impose restrictions on abortions. The following framework has been fleshed out as a result of these efforts:
 - a. **Waiting Period** - States may require a 24-hour waiting period before they permit a woman to obtain an abortion. Planned Parenthood of Southeastern

Pennsylvania v. Casey, 505 U.S. 833 (1992); Hodgson v. Minnesota, 110 S.Ct. 2926 (1990).

- b. **Informed Consent** - States may require a physician or health professional to inform the woman of the availability of materials describing the fetus and providing information about adoption and other alternatives. Casey, 505 U.S. 833 (1992).
- c. **Parental Consent** - 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).
- d. **Spousal Consent** - The courts have held that requiring a woman to sign a statement that she has notified her spouse of an impending abortion is an unduly burdensome restriction on the right to obtain an abortion. Casey, 505 U.S. 833 (1992).
- e. **Medical Guidelines** - A state law requiring that all abortions performed after the first trimester must be performed in a hospital or clinic with all basic medical equipment has been upheld by the courts. Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983). Such facilities may also be required to meet certain recordkeeping provisions.
- f. **No Public Sponsorship of Abortion Required** - Courts do not require the government to pay for abortions for indigent women. Maher v. Roe, 432 U.S. 464 (1977). Even when such abortions are deemed medically necessary, public funding is not required. Harris v. McRae, 448 U.S. 297 (1980). In fact, the government can prohibit all public funding of abortions. The government may also ban the use of public facilities for the performance of abortions and can restrict public employees from performing abortions within the scope of their employment. Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Finally, states can deny public funds to family-planning clinics which recommend abortions or refer patients to abortion clinics. Rust v. Sullivan, 500 U.S. 173 (1991).

Family and Parental Rights under the Federal Constitution - The Supreme Court has held that decisions concerning family life, child rearing, and marriage sometimes rise to

the level of a fundamental right. Often, these family-related rights fall within the right to privacy. The government must demonstrate that regulations interfering with such rights are necessary to advance a compelling interest. The government may not arbitrarily restrict the right of parents to raise and educate their children or to make fundamental decisions regarding their children's welfare. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Parham v. J.R., 442 U.S. 584 (1979). However, the state can prescribe reasonable standards.

The Right to Privacy under the Florida Constitution - The first sentence of Article I, Section 23 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.

1. **State Right More Comprehensive than Federal Right** - 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.
2. **Analytical Framework** - 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: (a) it has a compelling state interest, and (b) 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).
3. **Abortion** - 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, . . . 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.

B. EFFECT OF PROPOSED CHANGES:

This joint resolution provides that a parent's right to consent to medical treatment of a minor "including, but not limited to, abortion," 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, as this right has been construed by the Florida Supreme Court. This joint resolution provides that "the state has a compelling interest in protecting the rights of parents to make such decisions for their minor children."

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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

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

N/A

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

N/A

(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?

Yes. This joint resolution may strengthen the right of parents to participate in the decision making of their children when it comes to certain medical procedures.

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

Yes. This joint resolution may limit a minor's ability to terminate her pregnancy without parental consent.

5. Family Empowerment:

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

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

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

N/A

(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. This joint resolution may strengthen the right of parents to participate in the decision making of their children when it comes to certain medical procedures. Under certain circumstances, this joint resolution also may restrict a minor's ability to terminate her pregnancy.

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:

This joint resolution creates Article X, Section 18 of the Florida Constitution.

E. SECTION-BY-SECTION RESEARCH:

Omitted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

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:

N/A

2. Direct Private Sector Benefits:

N/A

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

N/A

D. FISCAL COMMENTS:

N/A

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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 in the aggregate.

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

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON Civil Justice and Claims:
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