SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/ 2178

SPONSOR: Judiciary Committee, Health, Aging, and Long-Term Care Committee and Senator Diaz de la Portilla

SUBJECT: Pregnant Minor's Parent/Notification

DATE: March 16, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HC	Favorable/CS
2.	Brown	Lang	JU	Favorable/CS
3.			RC	
4.				
5.				
6.				

I. Summary:

This Senate Joint Resolution ("SJR") proposes the creation of section 22 of Article X of the State Constitution. Language in this SJR provides that the Legislature shall not limit or deny the privacy right guaranteed to minors under the Federal Constitution. This SJR also provides that regardless of the right of privacy provided in Article I, section 23 of the State Constitution, the Legislature is authorized to require a physician to notify the parent or guardian of a pregnant minor prior to terminating the minor's pregnancy. If the Legislature enacts a general law providing for parental notification, the Legislature must include exceptions to the notification requirement and include a judicial bypass procedure.

This SJR provides for the language to be placed on the ballot at the general election to be held in November 2004.

II. Present Situation:

Joint Resolutions to Amend the State Constitution

Under Article XI, section 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment must then be submitted to the electors at the next general election held more than ninety days after the joint resolution is filed with the custodian of state records, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, pursuant to Article XI, section 5.

Regarding the standard of review for amendments that are proposed by the Legislature, the Supreme Court has typically applied a presumption of validity to these amendments.[1]

Ballot Statement

Section 101.161, F.S., requires that whenever a constitutional amendment is submitted to the vote of the people, the substance of the amendment must be printed in clear and unambiguous language on the ballot. The wording of the substance of the amendment and the ballot title to appear on the ballot must be embodied in the joint resolution.

U.S. Supreme Court Standard of Review in Abortion Cases

The landmark case of *Roe v. Wade*, decided in 1973, established a strict scrutiny standard of review for statutes that limit a woman's access to secure an abortion.[2] In *Roe,* the Court determined that a woman's right to have an abortion is part of the fundamental right to privacy, justifying the highest level of review.

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court relaxed the standard of review for abortion cases from strict scrutiny to unduly burdensome, while still recognizing that a woman's right to an abortion emanates from the constitutional penumbra of privacy rights.[3] In *Planned Parenthood*, the Court determined that prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference (defined as a restriction that creates a substantial obstacle to access). In this case, the Court upheld the state's one parent consent requirement that contained provisions for judicial bypass.[4]

The unduly burdensome standard, generally considered to be a hybrid between strict and intermediate level scrutiny, is the standard applied today to cases in which abortion access is statutorily restricted.

Florida Courts Review of Parental Notification Law

The 1999 Florida Legislature passed a parental notification law, the Parental Notice of Abortion Act[5], requiring a physician to give at least 48 hours' actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor, and including a procedure for judicial waiver. This act was never enforced. Both the trial and district courts of appeal precluded implementation of the act due to constitutional concerns. The act was ultimately declared unconstitutional by the Florida Supreme Court in 2003 in *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, on the grounds that it violated a minor's right to privacy under Article I, section 23 of the State Constitution.[6]

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[1] Thomas R. Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 STTLR 61, p. 75 (Fall 2002).
[2] 410 U.S. 113 (1973)
[3] 112 S.Ct. 2791 (1992)
[4] Julia Lichtman, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 Geo. J. on Poverty L.&Pol'y 345, p. 346, 347 (Summer, 2003).
[5] See s. 390.01115, F.S.
[6] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida* (2003 WL 21546546 (Fla.)

In *North Florida,* the Supreme Court reviewed the statute and cited its analysis in *In re: T.W.* as controlling.[7] The court found that in this case, as in *In re: T.W.*, the government failed to provide a compelling state interest for intruding upon the privacy rights of the minor.[8] The Supreme Court approved the trial court's decision permanently enjoining enforcement of the Parental Notice of Abortion Act.

Judicial Review of Parental Consent and Notification Laws in Other Jurisdictions
A number of other states have enacted parental notification laws, which require that a parent be notified before a pregnant minor may undergo a termination of the pregnancy. In some of those states, the law has been blocked by a court or otherwise not enforced.

The United States Supreme Court has typically upheld the constitutionality of some parental consent/notification laws, under the Federal Constitution, although the Court recognizes a constitutionally protected right to an abortion for minors, somewhat on par to that of pregnant adults. However, the Court has declined to extend an adult's fundamental right to privacy to minors.[9] Although children are provided identical constitutional protections in certain areas of the law, the Court in *Bellotti v. Baird* indicated that differential treatment is justified when necessary to protect the unique vulnerability of children, in light of their incapacity to make critical decisions with the same maturity as adults, as well as the importance of judicial deference to the parental role.[10] Still, the Court held the state statute invalid, as it did not provide for a judicial bypass.[11]

Therefore, critical to the Court's analysis in reviewing a parental notification statute is whether an adequate judicial bypass procedure is in place. If so, it generally passes federal constitutional muster, as was the case in *Planned Parenthood v. Casey* and *Planned Parenthood Association of Kansas City, MO, Inc. v. Ashcroft*.[12] In fact, statutes without a judicial bypass provision are typically treated by the Court as presumptively unconstitutional.[13]

For those statutes that contain a judicial bypass provision, the Court generally finds it sufficient where it includes language authorizing judicial discretion to waive notification if it is not in the best interest of the minor.[14]

Right to Privacy
Florida's Constitution provides for a right to privacy in Article I, section 23, as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be

[7] *In re: T.W.*, 551 So.2d 1186, 1192 (1989)
[8] *North Florida* at 20.
[9] Eric Pezold, *Privacy – No Magical Maturation of Privacy Rights for Minors: Privacy is Fundamental to All Alaskan Citizens Under the Alaska Constitution*, 34 Rutgers L.J. 1317, p. 1320 (Summer 2003).
[10] 443 U.S. 622 (1979)
[11] *Bellotti* at 651.
[12] 505 U.S. 833 (1992); 462 U.S. 476 (1983)
[13] *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).
[14] *See Lambert v. Wicklund*, 520 U.S. 292, 299 (1997)

construed to limit the public's right of access to public records and meetings as provided by law.

The Florida Supreme Court has held that the express right of privacy in Article I, section 23 of the State Constitution provides broader protection than that afforded by the U.S. Constitution.[15]. Therefore, any state regulation of a fundamental right is subject to the highest standard of review, i.e., strict scrutiny. The Florida Supreme Court has held that the right of privacy is "clearly implicated in a woman's decision of whether or not to continue her pregnancy."[16] Therefore, proponents of a parental notification law in Florida are seeking to create an exception to this right of privacy for a minor who seeks an abortion. In Florida, given the express constitutional right of privacy, a constitutional amendment appears to be the only avenue for implementing such a law.

III. Effect of Proposed Changes:

This Senate Joint Resolution proposes the creation of section 22 of Article X of the State Constitution to require a physician to notify the parent or guardian of a pregnant minor prior to terminating the minor's pregnancy. Language in this SJR provides that the Legislature shall not limit or deny the privacy right guaranteed to minors under the Federal Constitution. Regardless of the right of privacy provided in Article I, section 23 of the State Constitution, the Legislature is authorized to enact the parental notification mandate by general law.

This SJR provides that if the Legislature enacts a general law requiring parental notification by a physician, the Legislature must include language providing for exceptions and a judicial waiver procedure.

As required by section 101.161, F.S., this SJR provides a ballot statement. This SJR provides for the language to be placed on the ballot at the general election to be held in November 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this SJR have no impact on municipalities and the counties under the requirements of Article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this SJR have no impact on public records or open meetings issues under the requirements of Article I, section 24(a) and (b) of the Florida Constitution.

[15] See *Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544 (Fla. 1985)
[16] *In re: T.W.*, 551 So.2d 1186, 1192 (1989)

C. Trust Funds Restrictions:

The provisions of this SJR have no impact on the trust fund restrictions under the requirements of Article III, subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Under Article XI, section 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment must then be submitted to the electors at the next general election held more than ninety days after the joint resolution is filed with the custodian of state records, unless, under the provisions in Article X, section 5, it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Physicians will incur the cost of notifying a parent or guardian before each termination of the pregnancy of a minor.

C. Government Sector Impact:

This SJR may result in increased litigation. The cost to state government is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.