



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty and Empower families – This bill requires a physician to give notice to a pregnant minor’s parent or guardian before performing or inducing the termination of the minor’s pregnancy. Currently, pursuant to a court ruling, a physician can perform such a procedure without notice to the minor’s parent or guardian.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background – The Parental Notice of Abortion Act

In 2004, 91,265 pregnancies were terminated in Florida. It is not known how many of those pregnancies were for individuals under age 18.<sup>1</sup>

In 1999, the Legislature passed ch. 99-222, Laws of Florida, later codified as s. 390.01115, F.S. The “Parental Notice of Abortion Act”<sup>2</sup> requires the physician performing or inducing the termination of the pregnancy of a minor to give at least 48 hours’ actual notice to one parent or the legal guardian of the minor.<sup>3,4</sup> If actual notice is not possible, the physician may give constructive notice.<sup>5</sup>

Section 390.01115(2)(a), F.S., defines “actual notice” as notice “that is given directly, in person, or by telephone.” Section 390.01115(2)(c), F.S., defines “constructive notice” as notice “that is given by certified mail to the last known address of the parent or legal guardian of a minor, with delivery deemed to have occurred 48 hours after the certified notice is mailed.”

The Act does not require notice if:

1. A medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements. If a medical emergency exists, the physician may proceed but must document reasons for the medical necessity in the patient's medical records;
2. Notice is waived in writing by the person who is entitled to notice;
3. Notice is waived by the minor who is or has been married or has had the disability of nonage removed;
4. Notice is waived by the patient because the patient has a minor child dependent on her; or
5. Notice is waived by judicial order.

The Act permits a minor to petition the circuit court for a waiver of the notice requirements. It provides the minor with the right to a guardian ad litem and an attorney.<sup>6</sup> The court must rule on the petition

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<sup>1</sup> Agency for Health Care Administration 2005 Bill Analysis, April 1, 2005.

<sup>2</sup> s. 390.01115, F.S.

<sup>3</sup> s. 390.01115(3)(a), F.S.

<sup>4</sup> Section 390.01115(3)(a), F.S., permits the referring physician to give notice.

<sup>5</sup> s. 390.01115(3)(a), F.S.

<sup>6</sup> s. 390.01115(4)(a), F.S.

within 48 hours unless the minor requests an extension of time.<sup>7</sup> At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor.<sup>8</sup> The court must issue an order permitting the minor to terminate her pregnancy without notice if the court finds, by clear evidence, that the minor is sufficiently mature to make the decision.<sup>9</sup> The court must also issue an order authorizing the minor to terminate her pregnancy without notice if the court finds, by clear evidence, that there is evidence of child abuse or sexual abuse of the minor by one or both of her parents or her guardian or that the notification of a parent or guardian is not in the best interest of the minor.<sup>10</sup> If the court does not rule on the petition within the 48 hour period, the petition is granted and the notice requirement is waived.<sup>11</sup>

The Act also provides for written transcription of the proceedings and for an expedited appeal if the court denies the petition. Filing fees are waived at both the circuit court and appellate courts.<sup>12</sup>

Language very similar to the language found in the Act has been upheld by the United States Supreme Court.<sup>13</sup>

### Litigation Over the Act

The Act has never been enforced.<sup>14</sup> On July 1, 1999, various groups sought an injunction against the Act's enforcement and the Florida Supreme Court, on July 10, 2003, held the Act violated the state right to privacy<sup>15</sup> in North Florida Women's Health and Counseling Services v. State. In that case, the court rejected the state's argument that the Act could withstand constitutional challenge because similar statutes have been upheld by the United States Supreme Court.<sup>16</sup> The court explained:

First, any comparison between the federal and Florida rights of privacy is inapposite in light of the fact that **there is no express federal right of privacy clause.** (emphasis in original).<sup>17</sup>

Accordingly, the court based its decision on the explicit right to privacy found in the Florida Constitution. A statute that impinges on fundamental rights, such as the right to privacy, must survive a "strict scrutiny" standard of review. That is, the "court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means."<sup>18</sup> The court specifically relied on state law and rejected any reliance on federal law:

We expressly decide this case on state law grounds and cite federal precedent only to the extent that it illuminates Florida law. Again, we note that any comparison between the federal and Florida rights of privacy is inapposite in light of the fact that there is no express federal right of privacy clause.<sup>19</sup>

Although the court ruled that the Act violated the state constitution, the Act has not been repealed.

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<sup>7</sup> s. 390.01115(4)(b), F.S.

<sup>8</sup> s. 390.01115(4)(e), F.S.

<sup>9</sup> s. 390.01115(4)(c), F.S.

<sup>10</sup> s. 390.01115(4)(d), F.S.

<sup>11</sup> s. 390.01115(4)(b), F.S.

<sup>12</sup> ss. 390.01115(4)(e)-(g)

<sup>13</sup> Lambert v. Wicklund, 520 U.S. 292 (1997).

<sup>14</sup> North Florida Women's Health and Counseling Services v. State, 866 So. 2d 612, 615 (Fla. 2003).

<sup>15</sup> Art. I, s. 23, Fla. Const.

<sup>16</sup> NFWHCS, 866 So. 2d at 634.

<sup>17</sup> NFWHCS, 866 So. 2d at 634.

<sup>18</sup> NFWHCS, 866 So. 2d at 625, n. 16.

<sup>19</sup> NFWHCS, 866 So. 2d at 640.

## The Constitutional Amendment to Overrule North Florida Women's Health and Counseling Services

In 2004, the Legislature passed HJR 1 to amend the state constitution. The joint resolution, placed on the November 2004 ballot, provided:

ARTICLE X SECTION 22. Parental notice of termination of a minor's pregnancy.--The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

The voters approved this amendment on November 2, 2004.<sup>20</sup>

This language permits the Legislature to create a parental notification statute notwithstanding the state right to privacy.

### HB 1659

HB 1659 amends s. 390.01115, F.S. It is arguable that s. 390.01115, F.S., could be enforced in light of the subsequent amendment to the constitution in response to the Florida Supreme Court's holding that the statute violated the state constitution's right to privacy.<sup>21</sup> This bill would make clear that the Legislature intends that the section be enforced.

### The Notice Requirement

This bill requires that a physician must give 48 hours actual notice of the physician's intent to perform or induce the termination of a minor's pregnancy to one of the minor's parents or to the legal guardian of the minor. This bill defines "notice."

"Notice" means notice that is given by certified mail, return receipt requested, to a parent or legal guardian of a pregnant minor or notice that is given by direct in-person communication with a parent or guardian of pregnant minor.

Current law permits notice to be given by the referring physician. This bill requires the physician who will perform or induce the termination of pregnancy to give the notice. This bill eliminates the distinction between "actual" and "constructive" notice contained in current law and instead provides the above definition of notice. This bill repeals the section permitting notice to be given by telephone.

Article X, s. 22, Fla. Const., requires the Legislature to provide exceptions to the notice requirement. Under this bill, notice is not required if:

- A medical emergency exists and there is insufficient time to comply with the notice requirements. If a medical emergency exists, the physician may terminate the pregnancy but must document the reason for the medical necessity and provide notice after performing the procedure.

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<sup>20</sup> According to the Department of State website, <http://election.dos.state.fl.us>, 4,639,635 people voted for the amendment and 2,534,910 voted against the amendment.

<sup>21</sup> While staff could not find Florida case law relating the effect of a subsequent constitutional amendment on statutes which had been held unconstitutional by a court but never repealed, other states have generally held that a such a statute should be reenacted to have effect, absent some showing that the constitutional amendment was intended to have retroactive effect. See generally, Matthews v. Quinton, 362 P.2d 932 (Alaska 1961); Fellows v. Shultz, 469 P.2d 141 (New Mexico 1970); Bucher v. Powell County, 589 P.2d 660 (Montana 1978); Mintz v. Southern Railway Company, 556 So.2d 1082 (Alabama 1989); State v. Cousan, 684 So.2d 382 (Louisiana 1996).

This bill defines “medical emergency” as “a condition that, on the good faith clinical judgment of a physician treating a minor, so complicates the medical condition of a pregnant minor as to necessitate the immediate termination of the minor’s pregnancy to avert her death, or for which delay in the termination of her pregnancy will create certain risk of substantial and irreversible impairment of a major bodily function.” This definition makes two changes from current law. First, it requires that the physician determining that there is a medical emergency must be treating the minor. Second, it requires that the delay in termination will create a “certain risk” of impairment. Current law requires that the delay create a “serious” risk of impairment.<sup>22</sup>

- Notice is waived by the minor who is or has been married or has had the disability of nonage removed.

#### Penalties for Failure to Give Notice

Current law provides that a violation of the notice requirements by a physician is grounds for disciplinary action under ss. 458.331 and 459.015, F.S.<sup>23</sup> This bill adds that a violation of the notice provisions is considered an act of medical malpractice. Art. X, s. 26(a), Fla. Const., provides:

No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.

#### Judicial Waiver of Notice

Article X, s. 22, Fla. Const., requires the Legislature to create a procedure for judicial waiver of notice. This bill provides that a pregnant minor who is 14 years of age or older may petition the circuit court in the county where she resides for a waiver of the notice requirements. Current law permits any minor to petition for a waiver in any county. A guardian ad litem may be appointed for the minor. A minor must be informed of her right to counsel and the court must appoint counsel if the minor requests it. The guardian ad litem and right to counsel provisions are the same as current law.<sup>24</sup>

This bill requires that the court give court proceedings under this act precedence over other pending matters and requires the court to rule within 7 days of the minor’s request. Current law requires a ruling within 48 hours. Current law waives the notice requirement if the court does not rule within 48 hours.<sup>25</sup> This bill strikes that provision.

The bill requires the court to grant the waiver of notice if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to terminate her pregnancy without the knowledge of her parent or guardian. Current law requires “clear” evidence.<sup>26</sup> Current law requires the court to waive the notice requirement if the court finds, by clear evidence, that there is evidence of child abuse or sexual abuse.<sup>27</sup> This bill lowers the standard from “clear” evidence to “greater weight of the evidence.” This bill also requires the court to report evidence of child abuse or sexual abuse to the appropriate agency or law enforcement agency.

This bill clarifies standards for the court to use in determining whether a minor is sufficiently mature to decide whether to terminate her pregnancy without the knowledge of her parent or guardian. It requires the court to hear all relevant evidence including evidence relating to the minor’s emotional development, maturity, intellect, and understanding of the consequences of her actions.

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<sup>22</sup> s. 390.01115(2)(d), F.S.

<sup>23</sup> s. 390.01115(3)(c), F.S.

<sup>24</sup> s. 390.01115(4)(a), F.S.

<sup>25</sup> s. 390.01115(4)(b), F.S.

<sup>26</sup> s. 390.01115(4)(c), F.S.

<sup>27</sup> s. 390.01115(4)(d), F.S.

Current law requires that the court maintain a confidential record of the proceedings and provide for an expedited confidential appeal.<sup>28</sup> Section 390.01116, F.S., requires that any documents in a judicial waiver proceeding that could be used to identify the minor are confidential and exempt from s. 119.07(1) and art. I, s. 24(a), Fla. Const.

Current law requires the Office of State Court Administrator to report to the Governor, President of the Senate, and the Speaker of the House of Representatives on the number of petitions for judicial waiver and the timing and manner of disposal of the petitions.<sup>29</sup> This bill deletes the reporting requirement.

### Confidential Records and Appeals

Current law requires the circuit court to provide a written transcript of proceedings and testimony in a judicial waiver hearing and order that a confidential record of the proceedings be maintained.<sup>30</sup> This bill makes technical changes to that section. Section 390.01116, F.S., provides that any information in documents relating to the petition that could be used to identify the minor are confidential.

This bill takes effect July 1, 2005.

### Constitutional Issues

This bill could be challenged as a violation of a minor's right to privacy and a violation of some minors' rights to equal protection under the law. The current law has never been enforced because the Florida Supreme Court held it violated a minor's right to privacy. This bill appears to be more likely to withstand a privacy challenge because, after the Florida Supreme Court's decision, the voters approved an amendment to the state constitution permitting the Legislature to pass a parental notification statute "notwithstanding a minor's right of privacy." A statute similar to this bill was approved by the United States Supreme Court in Lambert v. Wicklund, 520 U.S. 292 (1997).

The "equal protection" provisions of the state and federal constitution provide that all persons should be treated equally under the law. This bill permits minors age 14 and older to seek a judicial waiver of the notification requirement but does not permit minors under age 14 to do so. Restrictions based on age are permissible:

Age limitations and restrictions may survive a constitutional challenge and be enforced if they pass the "rational basis" test, *i.e.*, the age classifications are reasonably related to a permissible governmental objective.<sup>31</sup>

Here, the constitution provides the power to the Legislature to pass a parental notification statute. The bill's "whereas" clauses explain that the Legislature believes parents have a fundamental right to raise their children and that citizens believe that parents have a right to know when their child is undergoing a serious medical procedure. In order for this statute to survive an equal protection challenge, the court must find that the age classification is reasonably related to a permissible governmental objective.

This bill requires that the court keep certain records and proceedings confidential. However, the public records exemption contained in s. 390.01116, F.S., provides that "any information in documents related to the petition which could be used to identify the minor is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution." To the extent this bill mandates that information beyond the identity of the minor be kept confidential, this bill raises concerns that it might violate Art. I, s. 24, Fla. Const.

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<sup>28</sup> ss. 390.01115(4)(e) and 390.01115(4)(f), F.S.

<sup>29</sup> s. 390.01115(5), F.S.

<sup>30</sup> s. 390.01115(4)(e), F.S.

<sup>31</sup> Wright v. State, 739 So. 2d 1230, 1232 (Fla. 1<sup>st</sup> DCA 1999).

C. SECTION DIRECTORY:

Section 1. Amends s. 390.01115, F.S., relating to parental notice of the termination of a minor's pregnancy.

Section 2. Provides an effective date of July 1, 2005.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill states that no filing fees or court costs may be required of any pregnant minor who petitions the court for a waiver of the notice requirements at either the trial or appellate level. This will have an uncertain impact on state revenues.

2. Expenditures:

The fiscal impact of this bill is uncertain. It permits the circuit court to appoint counsel and a guardian ad litem for a pregnant minor. The costs of providing these services are not known.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local governments.

2. Expenditures:

This bill does not appear to have a fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Constitutional issues raised by this bill are discussed in "Effect of Proposed Changes."

B. RULE-MAKING AUTHORITY:

This bill does not give any agency rule-making authority. It does request that the Supreme Court adopt rules and forms to ensure proceedings relating to judicial waiver are handled expeditiously.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

N/A