HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1659 CS Parental Notification of Termination of a Minor's Pregnancy
SPONSOR(S): Kottkamp and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1908

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	4 Y, 1 N, w/CS	Billmeier	Billmeier
2) Justice Council	8 Y, 2 N, w/CS	Billmeier	De La Paz
3)			
4)			
5)			

SUMMARY ANALYSIS

In 1999, the Legislature created the "Parental Notice of Abortion Act" (Act), which requires that a physician performing or inducing the termination of the pregnancy of a minor must give at least 48 hours notice of the intention to terminate the pregnancy to one of the minor's parents or legal guardians. The Act provides for a judicial waiver of the notice requirement under certain circumstances.

Due to litigation over the constitutionality of the Act, it has never been enforced. In 2003, the Florida Supreme Court held that the Act violated a minor's right to privacy under art. I, s. 23, Fla. Const. In 2004, the voters approved an amendment to the state constitution to permit the Legislature to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The amendment requires the Legislature to provide exceptions to such requirement for notification and to create a process for judicial waiver of the notification.

HB 1659 implements the constitutional amendment. It re-enacts most of the Act. 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 provides exceptions to the notice requirement if a medical emergency exists and there is insufficient time to comply with the notice requirements or if notice is waived by the minor who is or has been married or has had the disability of nonage removed.

This bill provides for a judicial waiver of the notice requirement. It provides that a pregnant minor who is 16 years of age or older may petition the circuit court in the county where she resides for a waiver of the notice requirements. It provides counsel and a guardian ad litem for the minor. This bill requires the court to rule on the petition within 7 days and provides the minor with a right to appeal an adverse ruling. 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, advice, and counsel of her parent or guardian. This bill requires the court to waive the notice requirement if the court finds by a greater weight of the evidence that there is evidence of child abuse or sexual abuse. This bill also requires the court to report evidence of child abuse or sexual abuse to the appropriate agency or law enforcement agency. 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.

The fiscal impact of the bill is uncertain. See "Fiscal Comments."

This bill takes effect July 1, 2005.

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.[1]

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"[2] 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.[3],[4] If actual notice is not possible, the physician may give constructive notice.[5]

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.[6] The court must rule on the petition

[1] Agency for Health Care Administration 2005 Bill Analysis, April 1, 2005.
[2] s. 390.01115, F.S.
[3] s. 390.01115(3)(a), F.S.
[4] Section 390.01115(3)(a), F.S., permits the referring physician to give notice.
[5] s. 390.01115(3)(a), F.S.
[6] s. 390.01115(4)(a), F.S.

within 48 hours unless the minor requests an extension of time.[7] At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor.[8] 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.[9] 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.[10] If the court does not rule on the petition within the 48 hour period, the petition is granted and the notice requirement is waived.[11]

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.[12]

Language very similar to the language found in the Act has been upheld by the United States Supreme Court.[13]

Litigation Over the Act

The Act has never been enforced.[14] 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[15] 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.[16] 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).[17]

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."[18] 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.[19]

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

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[7] s. 390.01115(4)(b), F.S.
[8] s. 390.01115(4)(e), F.S.
[9] s. 390.01115(4)(c), F.S.
[10] s. 390.01115(4)(d), F.S.
[11] s. 390.01115(4)(b), F.S.
[12] ss. 390.01115(4)(e)-(g)
[13] Lambert v. Wicklund, 520 U.S. 292 (1997).
[14] North Florida Women's Health and Counseling Services v. State, 866 So. 2d 612, 615 (Fla. 2003).
[15] Art. I, s. 23, Fla. Const.
[16] NFWHCS, 866 So. 2d at 634.
[17] NFWHCS, 866 So. 2d at 634.
[18] NFWHCS, 866 So. 2d at 625, n. 16.
[19] 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.[20]

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.[21] 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. If the physician is unable, after exhausting all reasonable efforts, to give actual notice, the physician may provide written notice by mail, overnight delivery guaranteed, return receipt requested with delivery restricted to a parent or legal guardian. The notice must be mailed at least 48 hours before the procedure is commenced. The physician is required to document the efforts to provide actual notice and keep such records with the minor's medical records.

In situations where written notice is given by mail, the physician shall document the minor's name, date of birth, date of termination of pregnancy, the name and address of the minor's parent or legal guardian, and that the termination of pregnancy was performed. The physician must maintain such records for ten years or until the minor reaches age 21, whichever occurs first.

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 procedures for notice.

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[20] 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.

[21] 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).

Exceptions to the Notice Requirement

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.

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.[22]

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

• Notice is waived pursuant to the judicial waiver procedure contained in the bill.

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.[23] 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 16 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. The bill requires the court to appoint a guardian ad litem for the minor. A minor must be informed of her right to counsel and the court must appoint counsel if the guardian ad litem requests it. Under current law, a guardian ad litem may be appointed and counsel must be appointed upon the minor's request.[24]

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.[25] This bill does not contain that provision.

[22] s. 390.01115(2)(d), F.S.
[23] s. 390.01115(3)(c), F.S.
[24] s. 390.01115(4)(a), F.S.
[25] s. 390.01115(4)(b), F.S.

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.[26]

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.

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.[27] This bill lowers the standard from "clear" evidence to "preponderance of the evidence" and requires the court to waive notice if the child has been a victim of child abuse or sexual abuse by a family or household member. This bill also requires the court to report evidence of child abuse or sexual abuse to the Department of Children and Families or the appropriate law enforcement agency.

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.[28] 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.[29] 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. This bill requires the court to order that a record of any judicial waiver hearing be kept confidential to the extent provided by s. 390.01116, F.S. It provides a right to appeal to any minor when the court denies a waiver. There is no appeal of a court's order authorizing termination of pregnancy without notice. No filing fees or court costs shall be required of any minor at either the trial or appellate levels.

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 16 and older to seek a judicial waiver of the notification requirement but does not permit minors under age 16 to do so. Restrictions based on age are permissible:

[26] s. 390.01115(4)(c), F.S.
[27] s. 390.01115(4)(d), F.S.
[28] s. 390.01115(5), F.S.
[29] s. 390.01115(4)(e), F.S.

> 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.[30]

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. The United States Supreme Court has recognized that the state may have an interest in protecting potential life:

> The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate governmental objective of protecting potential life."[31]

Section 743.065, F.S., permits a minor to consent to medical procedures relating to her pregnancy. It can be argued that this provision furthers the Legislature's interest in protecting potential life by allowing the minor to take actions to protect the health of the child.

In addition, the Legislature has made age-based classifications in other areas based on age 16. For example, section 800.04, F.S., creates crimes for engaging in sexual activity with a person under 16, even if the minor consents. Section 741.0405, F.S., permits a minor, at age 16, to obtain a marriage license with parental consent. Section 743.015, F.S., permits the court to remove the disability of nonage of a minor age 16 or older upon petition filed by a minor's parents. It can be argued that these statutes show a consistent legislative policy that minors under age 16 require parental guidance before making important decisions. This bill does not require parental consent; only parental notice. It can be argued that this bill advances the interest in protecting potential life recognized by the United States Supreme Court in Matheson.

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.

[30] Wright v. State, 739 So. 2d 1230, 1232 (Fla. 1st DCA 1999).
[31] H.L. v. Matheson, 450 U.S. 398 (1981)(quoting Harris v. McRae, 488 U.S. at 325).

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

The Civil Justice Committee considered the bill on April 6, 2005. The committee adopted an amendment to change the age which a minor can seek a judicial waiver from 14 to 16. The amendment requires a physician that performs or induces a termination of pregnancy of a minor in an emergency situation to provide notice within 24 hours. It requires a physician who provides notice by certified mail to receive confirmation that the notice was received before proceeding with the termination of pregnancy. The amendment also clarified that the record of any judicial waiver proceedings is only confidential to the extent provided by law and that this bill does not expand that public records exemption. The bill, as amended, was reported favorably as a committee substitute.

The Justice Council considered the bill on April 18, 2005. The committee adopted an amendment that modified the notice requirements by requiring overnight delivery of notice by mail. It also provided that a minor of any age must be granted a judicial waiver of the notice requirement in cases of child abuse or sexual abuse by a family or household member. The bill, as amended, was reported favorably as a council substitute.