HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1497 Parental Notification of Abortion
SPONSOR(S): Healthcare Council and Traviesa and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Healthcare Council	10 Y, 4 N, As CS	Lowell	Gormley
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

CS/HB 1497 amends current law in order to prohibit a physician from performing an abortion on a minor, where notice is not required pursuant to s. 390.01114(3)(b), F.S., or on an adult patient unless the physician, at least 24 hours before the procedure, confers with the patient in accordance with s. 390.0111, F.S. (informed consent). The waiting period does not apply where a medical emergency exists.

The bill requires the court to appoint a guardian ad litem for the minor.

The bill requires a court to consider the specific, additional factors when determining whether a minor is "sufficiently mature" to decide to terminate her pregnancy, including the minor's age; overall intelligence; emotional stability; credibility and demeanor as a witness; and ability to accept responsibility. Current law does not specify factors for the court to consider when determining whether a minor is sufficiently mature to terminate her pregnancy.

Last, the bill requires the court to include, in its written final order, factual findings and legal conclusions as to whether the minor is sufficiently mature, based on the factors described above.

The fiscal impact to state government is indeterminate. (See fiscal analysis).

The effective date of this bill is July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – the bill requires the appointment of a guardian ad litem for each minor.

Empower families – the bill requires a court to consider specific, additional factors in determining whether a minor is sufficiently mature to decide to terminate her pregnancy without notice to her parents.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

The 1999 Parental Notice of Abortion Act
In calendar year 2005, 92,513 pregnancies were terminated in Florida.[1] Vital Statistics within the Department of Health ("department") collects data by procedures performed, the reason for the procedure, and the period of gestation at the time of the procedure.[2] The department, however, does not collect data on the number of procedures performed for individuals under age 18.

In 1999, the Legislature passed Senate Bill 1598, codified as s. 390.01115, F.S. The "Parental Notice of Abortion Act"[3] required 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.[4],[5] If actual notice is not possible, the physician may give constructive notice.[6]

Section 390.01115(2)(a), F.S., defined "actual notice" as notice "that is given directly, in person, or by telephone." Section 390.01115(2)(c), F.S., defined "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 did not require notice if:

- 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;
- Notice is waived in writing by the person who is entitled to notice;
- Notice is waived by the minor who is or has been married or has had the disability of nonage removed;
- Notice is waived by the patient because the patient has a minor child dependent on her; or
- Notice is waived by judicial order.

The Act permitted a minor to petition the circuit court for a waiver of the notice requirements. The court was required to rule on the petition within 48 hours unless the minor requested an extension of time.[7]

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[1] Florida Vital Statistics Annual Reports (viewed March 21, 2007) http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx
[2] Rule 64V-1.015, F.A.C.
[3] s. 390.01115, F.S.
[4] s. 390.01115(3)(a), F.S.
[5] Section 390.01115(3)(a), F.S., permits the referring physician to give notice.
[6] s. 390.01115(3)(a), F.S.
[7] s. 390.01115(4)(b), F.S.

Litigation over the 1999 Parental Notice of Abortion Act
The Act was never enforced as, 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 in *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612, (Fla. 2003). 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.[8] 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).[9]

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."[10] 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.[11]

The Parental Notice Constitutional Amendment
In 2004, the Legislature passed House Joint Resolution 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.[12]

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

The 2005 Parental Notice of Abortion Act
In 2005, the Legislature passed House Bill 1659, which repealed s. 390.01115, F.S., the previous Parental Notice of Abortion Act. The bill recreates the Parental Notice of Abortion Act under s. 390.01114, F.S., and provides the following:

Notice. A physician or the referring 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

[8] *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612, 634 (Fla. 2003).
[9] *Id.*
[10] *Id.* at 625, n. 16.
[11] *Id.* at 640.
[12] 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.

guardian of the minor. If the physician is unable, after making reasonable efforts, to give actual notice, the physician may provide constructive notice by mail, overnight delivery guaranteed, return receipt requested with delivery restricted to a parent or legal guardian. This constructive notice must be mailed at least 72 hours before the procedure is commenced. The physician is required to document the efforts to provide notice and keep such records with the minor's medical file.

Notice Exceptions. Article X, s. 22, Fla. Const., requires the Legislature to provide exceptions to the notice requirement. Under s. 390.01114(3)(b), F.S., prior actual or constructive notice is not required in the following circumstances:

- If, in the physicians good faith clinical judgment, 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;
- Notice is waived by the person entitled to receive notice;
- Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015, F.S.;
- Notice is waived by the patient because the patient has a minor child dependent on her; or
- Notice is waived through a waiver petition granted by a circuit court.

Penalties for Failure to Give Notice. A violation of the notice requirement by a physician is grounds for disciplinary action under ss. 458.331 and 459.015, F.S.[13]

Judicial Waiver of Notice. Article X, s. 22, Fla. Const., requires the Legislature to create a procedure for a judicial waiver of notice. Accordingly, s. 390.01114(4), F.S., provides that a pregnant minor who is under 18 years of age may petition the circuit court in the judicial circuit within the jurisdiction of the District Court of Appeal where she resides for a waiver of the notice requirement. The court must provide the minor counsel upon her request and at no cost.

The court must give court proceedings under this act precedence over other pending matters and the court must rule, and issue written findings of fact and conclusions of law, within 48 hours of the minor's request. If the court fails to rule within 48 hours, and an extension has not been granted at the request of the minor, the petition must be granted.

The court may grant a petition to waive 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;
- By a preponderance of the evidence, that there is evidence of child abuse or sexual abuse by one or both of her parents or her guardian. In addition, the court must report the evidence of child abuse or sexual abuse to the Department of Children and Families' Child Abuse and Neglect hotline, in accordance with s. 39.201; or
- By a preponderance of the evidence, that the notification of a parent or guardian is not in the best interest of the minor.

If the court does not make a finding under one of these three circumstances described above, it must dismiss the minor's petition.

The Office of State Court Administrator ("Office") must 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.[14] According to the Office, from July through December 2006, of the 287 petitions filed, 263 had been granted, 18 dismissed, and four granted without judicial order. In other words, over 90 percent of petitions have been granted in the most recent reporting period, which is consistent with previous reports.

[13] s. 390.01114(3)(c), F.S.
[14] s. 390.01114(6), F.S.

Litigation over the 2005 Parental Notice of Abortion Act

The 2005 Parental Notice of Abortion Act was challenged in federal court in *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1293 (N.D.Fla. 2005). In that case, the plaintiffs were two physicians and four clinics, based in Florida, that provide, among other health care services, abortions. The plaintiffs sought a preliminary injunction to block enforcement of the act on the basis that the act infringes upon the constitutional rights of both physicians who provide abortions and minors who seek abortions. Specifically, the plaintiffs argued that the act:

- Violates the due process rights of physicians because the provision regarding disciplinary action lacks a *scienter* requirement;
- Is unconstitutionally vague in that it fails to define what constitutes a physician's "reasonable effort" to effect notice;
- Is unconstitutionally vague in that it fails to give physicians adequate guidance about when the medical emergency provision applies;
- Impermissibly burdens the right of minors to seek an abortion by failing to contain any deadlines for resolution of appeals from a dismissal of a bypass petition;
- Violates minors' right to travel by failing to provide a venue for non-resident minors seeking abortions in Florida; and
- Impermissibly burdens the right of minors to confidentially and anonymously seek an abortion by requiring the court to report evidence of sexual abuse.

The court discussed previous cases wherein the United States Supreme Court had found parental notice of abortion statutes constitutional based on, among other considerations, the fact that the statutes at issue contained a "*Belotti"* notice bypass provision.[15] In *Belotti v. Baird,* 443 U.S. 622 (U.S. 1979), the court noted that, in order for a parental notice statute to be constitutional, the notice bypass provision must allow the minor to show either:

- That she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or
- That even if she is not able to make this decision independently, the desired abortion would be in her best interests.[16]

In addition, the judicial proceeding must ensure anonymity and sufficient expedition "to provide an effective opportunity for an abortion to be obtained."[17]

The court dismissed each of the plaintiff's arguments, noting that the plaintiffs did not demonstrate that that they are likely to succeed on the merits of their claims, based in part on the fact that Florida's law satisfied the *Belotti* requirements. Thus, the motion for preliminary injunction was denied. Subsequently, the court granted a substantial portion of the defendant's motion for judgment on the pleadings, finding that the act did not create an undue burden on the minor's right to obtain an abortion.[18] The plaintiffs voluntarily dismissed the only remaining claim.

Abortion Waiting Periods

Twenty-six states have laws requiring a woman to wait at least 24 hours prior to the abortion procedure.[19,20] A waiting period prior to an abortion has been upheld by numerous courts, including the

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[15] *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1293, 1298 (N.D.Fla. 2005)
[16] *Belotti v. Baird,* 443 U.S. 622, 643-44 (U.S. 1979)
[17] *Id.* at 644.
[18] *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1309 (N.D.Fla. 2005)
[19] Mandatory Waiting Period and Information Requirements for Women Seeking Abortions, as of December 9, 2005 (viewed March 29, 2007) http://www.statehealthfacts.org/cgi-bin/healthfacts.cgi?action=compare&category=Women's+Health&subcategory=Abortion+Policy&topic=Mandatory+Waiting+Periods
[20] Recent additions include Minnesota (2003); Missouri (2003); and Georgia (2005).

United States Supreme Court in the seminal case *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[21] In *Casey*, the Pennsylvania Abortion Control Act was challenged in part because of a requirement that a woman receive certain information at least 24 hours before the abortion procedure, with an exception for a medical emergency.[22] The Court upheld the constitutionality of this particular provision, noting that "requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure . . . [and] cannot be considered a substantial obstacle to obtaining an abortion."[23] With regard to the 24 hour waiting period, the Court noted "that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable . . . [and] we cannot say that the waiting period imposes a real health risk."[24]

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. 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), F.S. and Art. I, s. 24(a), Fla. Const.

Effect of Proposed Changes

The bill prohibits a physician from performing an abortion on a minor, where notice is not required pursuant to s. 390.01114(3)(b), F.S., or on an adult patient unless the physician, at least 24 hours before the procedure, confers with the patient in accordance with s. 390.0111, F.S. (informed consent). The waiting period does not apply where a medical emergency exists.

The bill requires the court to appoint a guardian ad litem for the minor.

The bill requires a court to consider the following minimum factors when determining whether a minor is "sufficiently mature" to decide to terminate her pregnancy:

- Whether the minor is mature enough to make her abortion decision, based on the minor's age; credibility and demeanor as a witness; and ability to accept responsibility.
- Whether the minor is well informed to make the decision on her own, based on the minor's overall intelligence; emotional development; ability to assess the short-term and long-term consequences of her choices; and ability to understand and explain the medical consequences of terminating her pregnancy and to apply that understanding to her decision.
- Whether there has been any undue influence by another on the minor's decision to have an abortion.

Current law does not specify factors for the court to consider when determining whether a minor is sufficiently mature to terminate her pregnancy;[25] however, the court is required to hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, and all other relevant evidence.[26]

Last, the bill requires the court to include, in its written final order, factual findings and legal conclusions as to whether the minor is sufficiently mature, based on the factors described above.

C. SECTION DIRECTORY:

Section 1. Amends s. 390.0111, F.S., relating to termination of pregnancies.

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[21] *See also Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (declining to find that Ohio's 24 hour waiting period, which provided an exception for a medical emergency, imposed a substantial burden under *Casey*).
[22] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).
[23] *Id.* at 883.
[24] *Id.* at 885-886.
[25] s. 390.01114(4)(c), F.S.
[26] s. 390.01114(4)(e), F.S.

Section 2. Amends s. 390.01114, F.S., relating to the Parental Notice of Abortion Act.

Section 3. Provides for severability.

Section 4. Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   While the bill requires the circuit court to appoint a guardian ad litem for a pregnant minor, the fiscal impact is indeterminate. The guardians ad litem appointed pursuant to section 390.1114, F.S., will either be individuals who serve pro bono or persons who are reimbursed for their services from funds allocated to provide services to the indigent.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

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 appear to affect municipal or county government.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

No rulemaking authority is required as a result of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 27, 2007, the Healthcare Council reported the bill favorably with a Council Substitute that:

- Deletes the 24 hour waiting period for actual or constructive notice;
- Prohibits a physician from performing an abortion on a minor, where notice is not required pursuant to s. 390.01114(3)(b), F.S., or on an adult patient unless the physician, at least 24 hours before the procedure, confers with the patient in accordance with s. 390.0111, F.S. (informed consent). The waiting period does not apply where a medical emergency exists.
- Clarifies that the court, in determining whether a minor is "sufficiently mature", to consider whether the minor is mature enough to make her abortion decision, based on the minor's age; credibility and demeanor as a witness; and ability to accept responsibility. In addition, the court must also consider whether the minor is well informed to make the decision on her own, based on the minor's overall intelligence; emotional development; and ability to assess the short-term and long-term consequences of her choices.
- Adds a severability clause.

The analysis is drafted to reflect the Council Substitute.