HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 257 Abortion

SPONSOR(S): Traviesa and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Healthcare Council		Quinn-Gato/ Massengale	Gormley
2) Policy & Budget Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

House Bill 257 amends existing law related to termination of pregnancies in the third trimester by clarifying that such procedures must be performed in a hospital, after proper certification that a termination of pregnancy is necessary to save the life or physical health of the woman. The bill provides for disciplinary action against licensed physicians for violation of the statute.

The bill amends informed consent laws by adding a requirement that the gestational age of the fetus be verified by an ultrasound and that the woman have a right to view the live ultrasound images with specified medical professionals prior to providing informed consent. The bill provides for specific exemptions to the viewing requirements, and allows a woman to decline to view the ultrasound images. Further, the bill precludes physicians from requesting or requiring that patients waive their ability to file a complaint with any disciplinary body or litigate a cause of action against the physician related to the treatment the woman received. The bill expands the Agency for Health Care Administration's rulemaking authority to include these new requirements in abortion clinic regulations. Further, the bill requires that all patients confer with a treating

physician regarding informed consent requirements at least 24 hours prior to a termination of pregnancy. This waiting period does not apply where a medical emergency exists.

The bill creates a “Woman’s Reproductive Bill of Rights” and provides causes of action for violation of these rights, as well as, causes of action for negligence for injuries or death resulting from a termination of pregnancy, and for parents of minors who are not properly notified of their minor child’s termination of pregnancy when required. The bill provides for specific remedies, statutes of limitation, and statutes of repose related to these causes of action. In addition to civil sanctions, the bill creates criminal sanctions for anyone who fraudulently alters, defaces, or falsifies termination of pregnancy medical records, or causes someone else to do the same. The bill also provides for disciplinary action if the statute is violated.

The bill amends current parental notice laws by requiring the court to appoint a guardian ad litem for minors, and requires a court to consider specified, additional factors when determining whether a minor is “sufficiently mature” to decide to terminate her pregnancy. Further, 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. Additionally, the bill creates additional reporting requirements for the Office of the State Court Administrator.

The bill appears to have no fiscal impact to state or local governments.

The effective date of this bill is July 1, 2008.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families – the bill increases the likelihood of parental involvement in a decision to terminate a minor's pregnancy by requiring 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.

Safeguard individual liberty – the bill increases the likelihood of informed consent to the termination of a pregnancy by requiring that an ultrasound be performed and that the woman be offered the opportunity to view the ultrasound, with exceptions.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Third Trimester Termination of Pregnancies

Section 390.0111, F.S., precludes the termination of pregnancy in the third trimester unless two physicians certify in writing to a degree of medical probability that a termination is necessary to save the life of health of a woman. If a termination is medically necessary because of the existence of a legitimate medical emergency, then only one physician must certify in writing that termination is necessary. Moreover, pursuant to s. 797.03, F.S., it is a misdemeanor of the second degree for anyone to perform or assist in the performance of a third trimester termination of pregnancies outside a hospital.

The Woman's Right To Know Act

The Woman's Right to Know Act, Florida's informed consent law related to termination of pregnancy procedures, was enacted by the Legislature in 1997.[1] The Act requires that, except in the event of a medical emergency,[2] prior to obtaining a termination of pregnancy, a woman[3] must be provided the following information, in person, from the physician performing the procedure or the referring physician:

- The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy
- The probable gestational age of the fetus at the time the procedure is to be performed
- The medical risks to the woman and fetus of carrying the pregnancy to term

The woman must also be provided printed materials that include a description of the fetus, a list of agencies that offer alternatives to terminating the pregnancy, and detailed information about the availability of medical assistance benefits for prenatal care, childbirth and neonatal care.[4] The written materials must be prepared and provided by the Department of Health, and the woman has the option to review the written materials provided.[5]

[1] s. 390.0111(3), F.S.
[2] s. 390.0111(3)(d), F.S., provides express requirements for meeting the emergency medical exception.
[3] The Act allows for the woman's guardian to receive the information, if she is mentally incompetent.
[4] s. 390.0111(3), F.S.
[5] Id.

The woman must execute written acknowledgement that she has received all of the above information prior to obtaining the termination of pregnancy.[6] The Act provides for disciplinary action against a physician who fails to comply.[7]

Litigation of the Woman's Right To Know Act

Shortly after the enactment of the Woman's Right to Know Act, the Act was challenged as unconstitutional under the Florida and Federal Constitutions. The plaintiff physicians and clinics successfully enjoined the enforcement of the Act in Fifteenth Judicial Circuit (Palm Beach County area), which was upheld on appeal.[8]

Thereafter, the plaintiffs were successful in obtaining a summary judgment against the State on the grounds that subsection (3)(a)(1) of the Act violated a woman's right to privacy under Art. I., s. 23 of the Florida Constitution and is unconstitutionally vague under the Federal and State Constitutions, which was also upheld on appeal to the Fourth District Court of Appeal.[9] The State appealed this decision to the Florida Supreme Court.[10]

With regard to whether the Act violated a woman's right to privacy, the Florida Supreme Court determined that the information required to be provided to women in order to obtain informed consent was comparable to those informed consent requirements established in common law or by Florida Statute[11] applicable to other medical procedures.[12] Accordingly, the Court determined that the Act was not an unconstitutional violation of a woman's right to privacy.[13]

Furthermore, the plaintiffs alleged that the term "reasonable patient" is unconstitutionally vague and that subsection (3)(a)(1) is unconstitutionally vague in that it is unclear whether the Act requires that patients receive information about "non-medical" risks, such as social, economic or other risks.[14] The Supreme Court rejected these arguments and held that "[s]ubsection (3)(a)(1) of the Act constitutes a neutral informed consent statute that is comparable to the common law and to informed consent statutes implementing the common law that exist for other types of medical procedures…."[15]

Because the underlying summary judgment, and subsequent appeals of the summary judgment order, applied only to the plaintiffs' challenges to subsection (3)(a)(1) of the Act, which pertains to the information a physician or referring physician must provide orally, and in person, to the woman, the status of the remaining challenges to the Act, including subsection (3)(a)(2) is unclear at this time.

Ultrasound

An ultrasound, also known as a sonogram, is a noninvasive technique involving the formation of a two-dimensional image used for the examination and measurement of internal body structures and the

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[6] Id.
[7] s. 390.0111(3)(c).
[8] *See State v. Presidential Women's Center*, 707 So.2d 1145 (Fla. 4th DCA 1998).
[9] *See State v. Presidential Women's Center*, 884 So.2d 526 (Fla. 4th DCA 2004).
[10] *See* 937 So.2d 114 (Fla. 2006).
[11] s. 766.103, F.S. (general informed consent law for medical profession, which requires that a patient receive information that would provide a "a reasonable individual" with an understanding of the procedure he or she will undergo, medically acceptable alternatives or treatments to that procedure, and the substantial potential risks or hazards associated with such procedure, such that if provided that information); 458.324, F.S. (informed consent for patients who may be in high risk of developing breast cancer); 458.325, F.S. (informed consent for patients receiving electroconvulsive and psychosurgical procedures); s. 945.48, F.S. (express and informed consent requirements for inmates receiving psychiatric treatment).
[12] Id.
[13] Id.
[14] Id.
[15] Id.

detection of bodily abnormalities.[16] Today, ultrasounds are considered to be a safe, non-invasive means of investigating a fetus during pregnancy.

An ultrasound may be used to detect body measurements to determine the gestational age of the fetus.[17] If the date of a woman's last menstrual cycle is uncertain, then an ultrasound can be used to arrive at a correct "dating" for the patient.[18] Moreover, an ultrasound can be used to detect an ectopic pregnancy, which is a potentially fatal condition in which the fertilized egg implants outside a woman's uterus, such as in the fallopian tubes, ovaries, or abdomen.[19] Approximately one in every 50 pregnancies results in an ectopic pregnancy, and it is the leading cause of pregnancy-related death for women in their first trimester of pregnancy.[20]

Clinics providing termination of pregnancy procedures in the second trimester are required by law to have ultrasound equipment and conduct ultrasounds on patients prior to the termination procedure. [21] Thus, if a clinic performs only one second trimester termination of pregnancy a year, that clinic is required to have ultrasound equipment on site. Current law also designates that the persons performing the ultrasound must be either a physician or a person having documented evidence that he or she has completed a course in the operation of ultrasound equipment as prescribed by rule, and who is working in conjunction with the physician.[22] AHCA regulates abortion clinics by law and has developed rules pursuant to the statute.[23]

For second trimester termination of pregnancy procedures, current law does not require a clinic to review the ultrasound evaluation results with the patient prior to the termination of pregnancy unless the patient requests to review the results. Any such requested review does not require that the images be reviewed with the patient as the ultrasound is being conducted.

While providing ultrasounds for first trimester termination of pregnancies is not required by law, many providers in Florida already conduct ultrasounds prior to terminating a pregnancy during the first trimester.[24] For example, A Jacksonville Woman's Health Center, Inc., indicates on its website that ultrasounds are performed on every patient to confirm gestational age, rule out an ectopic pregnancy[25], and provide the physician with information necessary to perform the procedure.[26] Given these current practices, some providers will not experience any increased costs that could be carried over to patients for such procedures.

Several states, including Alabama, Mississippi, Louisiana, have enacted laws that require an ultrasound be conducted on all patients prior to a termination of pregnancy, and require that the

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[16] See http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=ultrasound.
[17] See Obstetric Ultrasound, A Comprehensive Guide to ultrasound Scans in Pregnancy; located at http://www.ob-ultrasound.net/
[18] *Id.*
[19] *Id. See also* S. Stoppler, M.D., W. Sheil, Jr. MD. FACP, FACR, MedicineNet.com; located at http://www.medicinenet.com/ectopic_pregnancy/article.htm.
[20] *Id.*
[21] s. 390.012(3)(d)4.
[22] *Id.*
[23] *Id.*
[24] *See, e.g.*, Florida Abortion Clinics at http://www.floridaabortionclinics.com/Abortions.htm; A Choice for Women at http://www.achoiceforwomen.com/services/services.asp; Eve Medical Center at http://www.eveabortioncarespecialists.com/1and2Trimester.html; North Florida Womens Health at http://www.northfloridawomenshealth.com/abortion_services.html; A Jacksonville Women's Health Center, Inc. Website at http://www.ajacksonvillewomenshealth.com/expect.html.; all viewed on March 12, 2008.
[25] An ectopic pregnancy is a pregnancy where the baby begins to develop outside the womb, such as in the fallopian tube, and can be life threatening. *See* Medical Encyclopedia, Ectopic Pregnancy; viewed on March 12, 2008 at http://www.nlm.nih.gov/medlineplus/print/ency/article/000895.htm.
[26] *See* A Jacksonville Women's Health Center, Inc. Website at http://www.ajacksonvillewomenshealth.com/expect.html; viewed on March 12, 2008.

ultrasound images be offered to the patient for viewing.[27] In other states, such as Arkansas, Georgia, Idaho, Michigan, Indiana, Oklahoma, Utah, and Wisconsin if an ultrasound is conducted, the images must be offered to the patient for viewing.[28]

Medicaid Coverage for Termination of Pregnancies

Pursuant to the 2007-2008 Medicaid Summary of Services, Florida Medicaid covers terminations of pregnancy when a recipient's pregnancy is the result of incest or rape, or when "[t]he woman suffers from a physical disorder, physical injury or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself that would place the woman in danger of death unless a termination of pregnancy is performed." According to AHCA, Medicaid covered the cost of 2 terminations of pregnancy in fiscal year 2006-2007.[29]

Florida Medicaid's policy is consistent with the federal Hyde Amendment[30] with regard to the use of federal funds for termination of pregnancies. The Hyde Amendment prohibits the use of federal funds for termination of pregnancies unless the pregnancy is the result of an act of rape or incest. The Hyde Amendment also allows federal funds to be used to cover termination of pregnancy procedures, if such procedure is necessary to save the life of the woman.

Medicaid Coverage for Ultrasounds

According to AHCA, Medicaid policy currently allows for one ultrasound per pregnancy without any high risk indications. Follow-up ultrasounds would be allowed for high risk indications.[31]

Twenty-Four Hour Waiting Periods

Twenty-one states have laws requiring a woman to wait at least 24 hours prior to the termination of pregnancy procedure.[32] A waiting period prior to an termination of pregnancy has been upheld by numerous courts, including the United States Supreme Court in the seminal case *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[33]

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 termination of pregnancy procedure, with an exception for a medical emergency.[34] 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."[35] With regard to the 24 hour waiting period, the Court noted "that important decisions will be

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[27] *See* s. 26-23A-6 Ala. Stat. Ann.; s. 41-41-34 Miss. Stat. Ann; ss. 40:1299.35.1 and 40:1299.35.6 (the definition of "gestational age" includes that the age of the fetus is confirmed through an ultrasound, and the Woman's Right to Know Act requires that a patient be provided with the probable gestational age of the fetus. Therefore, in construing these provisions together, it appears that ultrasounds are required).

[28] See ss. 31-9A-3 and 31-9A-4, Ga. Stat. Ann.; 20-16-602, Ark. Stat. Ann.; 18-609, Idaho Stat. Ann; 333.17015, Mich. Stat. Ann; 16-34-2-1.1, Ind. Stat. Ann; 63 Okl. St. Ann, 1-738.3; 76-7-305, Utah Code Ann.; 253.10, Wis. Stat. Ann.

[29] March 19, 2008, e-mail from AHCA on file with the Council.

[30] The Hyde Amendment was a rider to an appropriations bill that was passed by Congress in 1976; therefore, it has continued as a rider to the annual Labor/Health and Human Services/Education appropriations bill and must be reenacted each year by Congress.

[31] March 19, 2008, e-mail from AHCA, on file with the Council.

[32] *See* National Conference of State Legislatures (Abortion Laws) at http://www.ncsl.org/programs/health/aborlaws.htm. Arkansas requires informed consent to be obtained the day prior to the procedure being performed, while Indiana requires an 18 hour waiting period and South Carolina requires a one hour waiting period. *Id.*

[33] *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*).

[34] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

[35] *Id.* at 883.

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."[36]

The 1999 Parental Notice of Abortion Act

In calendar year 2006, 95,586 pregnancies were terminated in Florida.[37] Vital Statistics within the Department of Health (DOH) collects data on the number of procedures performed, the reason for the procedure, and the period of gestation at the time of the procedure.[38] However, DOH does not collect data on the number of procedures performed for individuals who are minors.

In 1999, the Legislature passed Senate Bill 1598, codified as s. 390.01115, F.S. The "Parental Notice of Abortion Act"[39] 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.[40] If actual notice is not possible, the physician may give constructive notice.[41]

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.[42]

Litigation of 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 as construed 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.[43] The court explained:

[36] *Id.* at 885-886.
[37] Florida Vital Statistics Annual Reports (viewed March 12, 2008) http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx
[38] Rule 64V-1.015, F.A.C.
[39] s. 390.01115, F.S.
[40] s. 390.01115(3)(a), F.S. Section 390.01115(3)(a), F.S., permits the referring physician to give notice
[41] s. 390.01115(3)(a), F.S.
[42] s. 390.01115(4)(b), F.S.
[43] *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612, 634 (Fla. 2003).

> 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).[44]

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."[45] 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.[46]

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.[47] The amendment 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 1999 Parental Notice of Abortion Act. The bill recreated the Parental Notice of Abortion Act under s. 390.01114, F.S., and provided 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 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:

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[44] *Id.*
[45] *Id.* at 625, n. 16.
[46] *Id.* at 640.
[47] 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.

- 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.[48]

*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.

While the law provides that notice shall be given to parents of a minor, there are exceptions such that 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 one of these exceptions is not met, the court 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.[49] According to the Office, from July 2006 through December 2007, of the 890 petitions filed, 844 had been granted, 38 dismissed, and 4 granted without judicial order. In other words, over 94 percent of petitions were granted, which is consistent with previous reports.

Litigation of 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, terminations of pregnancies. The plaintiffs sought a preliminary injunction to block enforcement of the act on the basis

[48] s. 390.01114(3)(c), F.S.
[49] s. 390.01114(6), F.S.

that the act infringes upon the constitutional rights of both physicians who provide termination of pregnancies and minors who seek the procedure. 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 a termination of pregnancy 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 termination of pregnancies in Florida; and
- Impermissibly burdens the right of minors to confidentially and anonymously seek a termination of pregnancy 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.[50] 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.[51]

In addition, the judicial proceeding must ensure anonymity and sufficient expedition "to provide an effective opportunity for an abortion to be obtained."[52]

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.[53] The plaintiffs voluntarily dismissed the only remaining claim.

Guardian Ad Litem

Guardian ad Litem Generally

Under current law, the term guardian ad litem has multiple meanings. For all intents and purposes, a guardian ad litem is a volunteer appointed by a judge to represent the interests of a minor before a court. Guardians ad litem may be used in civil or criminal proceedings, including family law matters under chapter 61, dependency proceedings under chapter 39, or probate proceedings under chapter 744, F.S. In appointing a guardian ad litem, the judge may select a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the guardian ad litem program, staff members of a guardian ad litem program office, a court-appointed

[50] *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1293, 1298 (N.D.Fla. 2005)
[51] *Belotti v. Baird,* 443 U.S. 622, 643-44 (U.S. 1979)
[52] *Id.* at 644.
[53] *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1309 (N.D.Fla. 2005)

attorney, or a responsible adult.[54] The guardian ad litem becomes a party to such judicial proceeding as a representative of the child, and serves until discharged by the court.

Statewide Guardian Ad Litem Office

The Statewide Guardian Ad Litem Office was established in the 2003 Legislative Session and oversees the operation of the Guardian ad Litem Programs operating in the 20 judicial circuits. The Program recruits, trains and provides guardians ad litem to children in abuse, abandonment and neglect proceedings and, in doing so, is a party to proceedings under Chapter 39.

According to the Statewide Guardian ad Litem Office, the Program does not provide guardian ad litem representation in non-dependency proceedings because the Program focuses its limited resources to meet the needs of abused, abandoned, and neglected children and does not generally represent children in other civil or criminal proceedings unless there is a pending dependency case.[55] This is consistent with the direction provided to the Program by the Legislature. See Ch. 2007-72, Laws of Florida (providing proviso language stating: "Funds and positions… shall not be used to represent children in dissolution of marriage proceedings unless the child is also subject to dependency proceedings.").[56]

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.

Preservation of Medical Records

Section 395.302, F.S., which governs hospitals and other licensed facilities, currently provides that anyone who alters, defaces, or falsifies a medical record, or assists someone else in performing these acts, is guilty of a misdemeanor of the second degree, and a conviction of such is grounds for restriction, suspension, or termination of license privileges. Similar provisions are applicable to nursing home and related health care facilities.[57]

Patients' Rights

Florida law provides for a patient's bill of rights for patients of licensed facilities and health care providers in this state.[58] The rights generally include the right of the patient to:

- *individual dignity*, including the right to privacy, to have prompt answers to questions or concerns, and to retain and use personal clothing or possessions as space permits
- *information*, including information about the providers tending to the patient, what patient support services are available at the facility, information concerning diagnoses and the planned course of treatment, alternatives, risks, and prognoses, what facility rules and regulations apply to patient conduct, what express grievances or file complaints with regulators, interpreters if the patient does not speak English
- *financial information and disclosure*, including information about known resources for the patient's health care, information about whether the provider accepts assignment under

[54] s. 39.820, F.S.
[55] Statewide Guardian Ad Litem Office 2008 Bill Analysis.
[56] *Id.*
[57] s. 400.1415, F.S.
[58] s. 381.026, F.S.

Medicare reimbursement, a reasonable estimate of charges performance outcome and financial data, receive a copy of an itemized bill

- *access to health care*, including impartial access to medical treatment or accommodations regardless of race, national origin, sex, handicap, or source of payment; treatment for emergency medical care; any mode of treatment that is best for the patient based upon the patient's and practitioner's judgment.
- *experimental research*, the patient has a right to know if medical treatment is for purposes of experimental research and consent prior to participation in such.
- *knowledge of rights and responsibilities*, patient has a right to know these in receiving health care.[59]

Further, the patient must receive a "Summary of the Florida Patient's Bill of Rights," including specified information within, from health care facilities and providers upon request.[60] The Agency for Health Care Administration is required to make printed materials and make a summary of the Patient's Bill of Rights and Responsibilities available to health care facilities and practitioners. Upon request, health care providers and facilities are required to provide patients of the address and telephone number of each state agency responsible for patient complaints related to a facility's or practitioner's noncompliance with licensing requirements, and are required to have policies and procedures to ensure that patients receive information about their rights and how to file complaints with the facility and appropriate state agencies.[61] While there is no cause of action for violation of the Patient's Bill of Rights and Responsibilities, providers and facilities may be subject to administrative fines or corrective action for failure to comply.[62]

Causes of Action Against Providers

Medical Malpractice Defined

Currently a patient may file a cause of action against a termination of pregnancy provider for medical malpractice or seek other common law remedies. An "action for medical malpractice" is defined in law as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care.[63]

Pre-Suit Processes for Filing Malpractice Claims

Prior to litigating a medical malpractice claim in court, a claimant must conduct an investigation to ascertain whether there are reasonable grounds upon which to file a claim for malpractice, including whether there are reasonable grounds to believe that the prospective defendant was negligent in the care or treatment of the claimant, which resulted in injuries to the claimant. In order to corroborate this investigation, the claimant must submit a verified, written medical expert opinion from a medical expert by certified mail to the prospective defendant(s) along with the claimant's notice of intent to initiate litigation.[64] Prospective defendants have similar requirements that must be met in response to the claimant's notice.[65]

Section 766.106(2), F.S. specifies what must be included in the pre-suit notification to prospective defendants, such as a list of all known health care providers seen by claimant for the injuries

[59] *Id.*
[60] *Id.*
[61] s. 381.0261, F.S.
[62] *Id.*
[63] s. 95.11(4)(b), F.S.
[64] s. 766.203, F.S. Medical expert opinions provided pursuant to this section are discoverable in litigation.
[65] *Id.*

complained of and all known health providers who treated or evaluated the claimant during the two-year period prior to the alleged act of negligence. A claimant must wait 90 days after mailing the notice of intent to initiate litigation before filing a cause of action in court. During that 90-day time period, the prospective defendant's insurer or self-insurer must conduct a review to determine the liability of the prospective defendant and, at or before the expiration of the 90-day period, must respond to the claimant's notice via certified mail by rejecting the claim, making a settlement offer, or offering to arbitrate the claim as to damages.[66] The claimant's counsel then has 30 days to consult his or her client regarding the response.[67]

Statutory Limitations Applicable to Malpractice Claims

The relevant statutory time limitations for bringing malpractice claims against practitioners are as follows:

- An action must be commenced within two years from the time of the injury or within two years from the time the injury is discovered, or should have been discovered with the exercise of due diligence;
- However, an action must be commenced no more than four years from the date of the injury;
- These limitations of actions apply only to the health care provider and persons in privity with the provider of health care.
- If there is evidence that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury, then the period of limitations is extended forward two years from the time that the injury is discovered or should have been discovered with the exercise of due diligence.
- In no event, however, can cause be brought more than seven years from the date the incident giving rise to the injury occurred.

Initiating the pre-suit process under s. 766.106, F.S., tolls the period of limitations as to other prospective defendants. Once pre-suit negotiations have terminated, the claimant has 60-days or the remainder of the period of limitations, whichever is greater, within which to file a claim for malpractice.[68] A person cannot recover for injuries resulting from medical malpractice that fall outside these statutory periods; moreover, a plaintiff's counsel must certify to the court that a reasonable investigation gave rise to a good faith belief that there was negligence in the care or treatment of the plaintiff. Failure to comply with pre-suit requirements may result in attorney's fees and sanctions levied against the non-compliant party, and an attorney may be referred to the bar for disciplinary review.

Mediation Requirements

Within 120 days after the lawsuit is filed, unless extended by agreement of the parties, the plaintiff and defendant must attend a mediation in person. A settlement conference must occur at least three weeks before trial.[69]

Burden of Proof in Malpractice Claims

In a medical malpractice claim, the plaintiff has the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional

[66] A claimant may petition the clerk of the court where the lawsuit will eventually be filed and pay a $37.50 filing fee in order to obtain an automatic extension of the statute of limitations in order to conduct a pre-suit investigation. *See* s. 766.104, F.S.
[67] s.766.106, F.S. Documents, statements, or reports prepared in furtherance of the prescreening process are not discoverable by or admissible in court by the opposing party. Once a notice of claim is filed, however, the prospective defendant and claimant must make discoverable information available to the other party, such as unsworn statements, documents or things, physical and mental examinations, and written questions. *Id.*
[68] s. 766.106(4), F.S.
[69] s.766.108, F.S.

standard applicable to each health care provider type. This standard of care is that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.[70]

Injury alone is insufficient to prove that a health care provider was negligent. Instead, the plaintiff has the burden of proving that his or her injury was proximately caused by a breach of the professional standard of care by the provider.[71]

Damages Recoverable for Malpractice

A prevailing plaintiff may recover economic and non-economic damages for injuries sustained.

Economic injuries are financial losses that would not have occurred but for the injury giving rise to the cause of action, including past and future medical expenses and 80 percent of wage loss and loss of earning capacity to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act. While non-economic damages are nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act[72]

Non-economic damages against practitioners for non-emergency care are limited to $500,000 per plaintiff, and no practitioner shall be liable for more than $500,000 regardless of the number of plaintiffs. This amount is increased to $1 million total from all practitioners if the injury resulted in death or permanent vegetative state. Courts may also increase the amount to be recovered in situations where a catastrophic injury results. All in all, no more than $1 million in the aggregate can be recovered by all claimants from all practitioners.[73] For non-practitioner defendants, the non-economic damages are recoverable are limited to $750,000 regardless of the number of plaintiffs. This amount is increased to $1.5 million total from all non-practitioners if the injury resulted in death or permanent vegetative state. Courts may also increase the amount to be recovered in situations where a catastrophic injury results. All in all, no more than $1.5 million in the aggregate can be recovered by all claimants from all non-practitioner defendants.

Punitive Damages

In any civil action, a plaintiff must proffer or show by reasonable evidence in the record that there is a reasonable basis upon which the plaintiff can recover punitive damages. In order to assert such a claim, a plaintiff must move to amend his or her complaint pursuant to the Florida Rules of Civil Procedure.

In order to recover punitive damages, the plaintiff establishes by clear and convincing evidence, that the defendant was personally guilty of intentional misconduct or gross negligence.[74] A greater weight

[70] s. 766.102, F.S.
[71] Id.
[72] s. 766.202, F.S.
[73] s. 766.118(2), F.S.
[74] s. 768.72, F.S.

of evidence burden of proof applies to a determination of the amount of punitive damages a plaintiff may recover.[75] A plaintiff's recovery of punitive damages is not altogether without limitation.

Section 768.73, F.S., limits recovery to three times the amount of compensatory damages awarded to each claimant entitled thereto or $500,000. If, however, a trier of fact determines that there was wrongful conduct on the part of the defendant that was motivated solely by unreasonable economic gain and that the nature of the conduct, together with a high likelihood of resulting injury existed and was known by the managing agent, officer, director or other responsible party, then the amount recovered may be increased to four times the amount of compensatory damages awarded to each plaintiff entitled thereto or $2 million.[76] Finally, if there is evidence that the defendant had a specific intent to harm the plaintiff and succeeded in doing so, then there is no cap on the amount of punitive damages that may be recovered.

Effect of Proposed Changes

Third Trimester Termination of Pregnancies

House Bill 257 amends s. 390.0111, F.S., by clarifying that third trimester terminations of pregnancy are required to be performed in a hospital and that they cannot be performed except under specified circumstances, including to save the physical life of the mother. The bill clarifies that a physician's failure to comply with restrictions related to third trimester terminations of pregnancy may result in disciplinary action. Similarly, the bill amends s. 390.012, F.S., to require AHCA to promulgate a rule prohibiting the performance of a third trimester termination other than in a hospital. This clarifies that a violation would subject an abortion clinic to licensure action by AHCA.

Ultrasound and Informed Consent

Additionally, the bill requires the gestational age of the fetus to be to be verified by an ultrasound for all termination of pregnancies, regardless of the trimester. The bill specifies that the ultrasound must be performed by the physician who is to perform the termination of pregnancy or by a person having documented evidence that he or she has completed a course in the operation of ultrasound equipment as prescribed by rule and who is working in conjunction with the physician.

Furthermore, the bill requires the person performing the ultrasound to allow the woman to view the live ultrasound images, and a physician or a registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant working in conjunction with the physician must contemporaneously review and explain the live ultrasound images to the woman, prior to the woman giving informed consent to having an termination of pregnancy procedure performed. The bill provides a woman with the option to decline to view the ultrasound images after she is informed of her right to view them. If she so declines, then the woman must complete a form acknowledging that she was offered an opportunity to view her ultrasound but that she rejected that opportunity. Additionally, the form must also indicate that woman's decision not to view the ultrasound was not based on any undue influence from any third party to discourage her from viewing the images and that she declined to view the images of her own free will.

The bill creates an exception to the requirement that an ultrasound be offered to the woman for viewing if at the time she schedules or arrives for her appointment to obtain a termination of pregnancy, a copy of a restraining order, police report, medical record, or other court order or documentation is presented that evidences that the woman is obtaining the termination of pregnancy because the woman is a victim of rape, incest, domestic violence, or human trafficking or that the woman has been diagnosed with a condition that, on the basis of a physician's good faith clinical judgment, would create a serious risk of

[75] s. 768.725, F.S.
[76] s. 768.73, F.S.

substantial and irreversible impairment of a major bodily function if the woman delayed terminating her pregnancy.

The bill requires that the printed materials provided to a woman pursuant to law include a description of the various stages of fetal development, and prevents physicians from requesting or requiring a patient to waiver her ability to either file a complaint with any disciplinary body or to litigate a cause of action based on the care received related to a termination of pregnancy or a violation of her rights.

Pursuant to these new requirements in the bill, the bill at Section 9 amends current regulatory provisions applicable to abortion clinics and enforced by AHCA. In doing so, it requires AHCA to promulgate rules that prohibit the performance of third trimester terminations of pregnancy in any facility other than a hospital, and prohibit a clinic from requesting or requiring a patient to waive her ability to either file a complaint with any disciplinary body or to litigate a cause of action based on the care received in the clinic or a violation of her rights. Additionally, the bill deletes cross references to conform to the bill, and amends rulemaking authority consistent with the ultrasound offer and viewing requirements, including applicable exceptions or exemptions, for all terminations of pregnancy as provided for in s. 390.0111.

24-Hour Waiting Period

The bill creates a 24-hour waiting period for a termination of pregnancy procedure, with an exception if a medical emergency is present. The bill requires that the 24-hour period commence after a woman provides written, informed consent to the procedure pursuant to s. 390.0111(3), which includes having an ultrasound.

Women's Reproductive Bill Of Rights

House Bill 257 creates s. 390.01112, which is known as the Women's Reproductive Bill of Rights, which applies to all abortion clinics and physician abortion providers and requires them to adopt and make public a statement of the woman's rights, which generally shall assure women of the following:

- That her abortion must be performed by a physician.
- That she has the right to know, and may request, the name, function, and qualifications of each health care provider who is providing medical services to her.
- That she has a right to have and view an ultrasound, unless viewing is declined or an exception to viewing applies.
- That she is entitled to know the probable gestational age of the fetus, as verified by an ultrasound.
- That, she must wait 24-hours after receiving all testing and information before her abortion will be performed.
- That third trimester abortions must be performed in a hospital.
- That , unless an exception applies, she must provide voluntary and informed, written consent.
- That, unless exception applies, if she is a minor, her parent or legal guardian as set forth in s. 390.01114(3) is entitled to receive actual or constructive notice.
- That she is entitled to receive printed materials containing a description of the fetus, a list of entities that offer alternatives to terminating the pregnancy, and detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.
- That she is entitled to be notified of the medical risks of undergoing or not undergoing the termination of pregnancy.
- That she is entitled to notification of the medical risks to her and her fetus of carrying the pregnancy to term.
- That the clinic, physician, or physician's office is not allowed to request or require her to waive her right to either file a complaint with any disciplinary body or to litigate a cause of action.

- That she is entitled to have all medical records pertaining to her abortion treatment made, protected, and preserved by the physician abortion provider and clinic, and that copies of her medical records shall be made available to her or her statutorily authorized representative.
- That she is entitled to any and all adequate, necessary, and appropriate health care related to the performance or inducement of an abortion, including any and all adequate, necessary, and appropriate postabortion recovery and medical care.
- That, if she is in her second trimester of pregnancy, she is entitled to receive care that meets all the quality and safety standards set forth in this chapter, including all requirements provided for in s. 390.012(3).
- That she has the right to refuse medication or treatment and to be informed of the consequences of such decisions, and that such refusal will be documented in her records.
- That she is entitled to have privacy in her treatment and care, and that, except as provided herein or elsewhere in law, her medical records shall remain confidential pursuant to all applicable state and federal laws.
- That she has the right to a prompt and reasonable response to any question she may have regarding her care or treatment.
- That she has the right to be treated courteously, fairly, and with the fullest measure of dignity at all times and upon all occasions.

The bill requires that women be informed of these rights orally or and through a written statement prior to the termination of pregnancy. Further the bill requires that the statement itemizes each right separately, including each entitlement in s. 390.012 available to a patient obtaining a second trimester abortion, and provide that the patient may file a complaint with AHCA or DOH. Further, the bill requires that the clinic or physician practicing in a doctor's office provide a copy of the patients' bill of reproductive rights to each staff member of the clinic or office, prepare a written plan and provide appropriate staff training to implement these requirements. The statement must be in boldfaced, 14-point type and shall include the website and telephone number of AHCA and DOH.

Failure of a clinic or physician to comply with these requirements constitutes grounds for disciplinary action under 390.012, 408.813, 408.814, and 408.815 (for clinics) and s. 458.331 or s. 459.015 (for physicians). Moreover, anyone who submits a complaint concerning suspected violation by a clinic or physician, or who testifies in an administrative or judicial proceeding arising from such complaint is immune from any criminal or civil liability, unless that person commits perjury, acted in bad faith or with malicious purpose, or if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complainant.

Causes of Action

The bill also creates new provisions of law, ss. 390.01113, 390.01114(3)(d)-(f) and 390.01117, providing cause of action for violation of a woman's rights, failure to provide parental notice, and negligence, respectively. The details of these causes of action are as follows:

Cause of Action - Women's Rights

This cause of action is created in the bill to apply to any woman whose rights as specified in s. 390.01112, were violated, and may be brought by the patient, her parent or legal guardian, her court-appointed guardian or a personal representative of her estate against any physician, nurse, or clinic for the violation.

The bill specifies that the action may be brought in any court of competent jurisdiction, and entitles a prevailing plaintiff to recover actual damages; punitive damages when malicious, wanton, or willful disregard of the rights of others can be shown; and reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith or with malicious purpose or that there was a complete absence of a justiciable issue of either law or fact. If the defendant prevails, the defendant can recover reasonable attorney's fees under s. 57.105 if the court determines that the

plaintiff's claim involved a complete absence of justiciable law or fact. The bill specifies that these remedies are in addition to other legal and administrative remedies available to a patient, her estate, or to the agency or department.

Furthermore, the bill sets forth criteria upon which a court must rely in awarding the amount of attorney's fees, which include: the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusions of other employment by the attorney due to the acceptance of the case, the customary fee, whether the fee is fixed or contingent, the amount involved or the results obtained, the experience, reputation, and ability of the attorney; the costs expended to prosecute the claim, the type of fee arrangement between the attorney and the client, whether the relevant market requires a contingency fee multiplier to obtain competent counsel; whether the attorney was able to mitigate the risk of nonpayment in any way.

The bill specifies that the cause of action for violation of a woman's rights is not a claim for medical malpractice and applicable laws pertaining to do medical malpractice claims do not apply. Moreover, the bill exempts certain provisions provided for in s. 768.21(8), relating to wrongful death claims from applying to claims alleging the death of the patient. Finally, the bill exempts ss. 768.72, 768.725, and 768.73 from applying to such cause of action.

Cause of Action - Negligence

The negligence cause of action is created in the bill to apply to any woman who suffers injury or death as a result of a termination of pregnancy and, similar to the cause of action for violation of a woman's rights, may be brought by the woman, her parent or legal guardian, her court-appointed guardian, or a personal representative of her estate regardless of the cause of death to enforce the right. If the claim involves negligence or injury to the woman that resulted in her death, then the plaintiff is entitled to recover both survival damages pursuant to s. 46.021 and wrongful death damages pursuant to s. 768.21. If the action alleges a claim for injury to the woman that did not cause her death, the personal representative of the estate may recover damages for negligence that caused injury to the woman. The damages and attorney's fees provisions applicable to violations of a woman's rights claims are identical for the negligence cause of action in the bill.

The bill creates a preponderance of the evidence burden on the plaintiff to prove that the defendant owed a duty to the woman, which was breached, and resulted in a legal cause of loss, injury, death, or damage to the patient and that the woman sustained loss, injury, death, or damage as a result of the breach. Moreover, the bill clarifies that the cause of action is not one of strict liability and that injury or death of the woman is evidence only of negligence, not negligence per se.

The bill specifies the following legal duties owed to the woman:

- Clinic - a clinic, person, or entity shall have a duty to exercise reasonable care, which is that degree of care that a reasonably careful clinic, person, or entity would use under like circumstances.
- Physician - a physician shall have the duty to exercise care consistent with the prevailing professional standard of care for physicians, which is that level of care, skill, and treatment that, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar physicians.
- Licensed practical nurse, registered nurse, or advanced registered nurse practitioner (licensed under part I of chapter 464) - nurses have the duty to exercise care consistent with the prevailing professional standard of care, meaning: the level of care, skill, and treatment that, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar nurses.

Identical to the provisions applicable to causes of action for violation of a woman's rights, a negligence cause of action under the bill is not a claim for medical malpractice and applicable laws pertaining to do medical malpractice claims do not apply. Additionally, the bill exempts certain provisions provided for in

s. 768.21(8), relating to wrongful death claims from applying to claims alleging the death of the patient. Finally, the bill exempts ss. 768.72, 768.725, and 768.73 from applying to such cause of action.

Cause of Action - Parental Notice

The bill provides parents or legal guardians of a minor upon whom a termination of pregnancy has been performed or induced, who did not receive actual or constructive notice from the physician who performed or induced the termination of pregnancy, absent an exception, to bring a cause of action or obtain relief against a physician. This relief is not available to a parent or legal guardian if the pregnancy resulted from the parent or guardian's criminal conduct. For this cause of action, relief is limited to monetary damages for all injuries, psychological and physical, occasioned by the violation and damages equal to three times the cost of the termination of pregnancy, in addition to any other legal or administrative remedies that may be available to the plaintiff or DOH for the violation.

For all three causes of action, the applicable statute of limitations created by the bill is 2 years from the time of the injury to the action occurred, or within 2 years from the time the injury discovered or should have been discovered with the exercise of due diligence. In those actions where it can be shown that fraudulent concealment or intentional misrepresentation of fact prevented discovery of the injury, then the statute of limitations is extended forward 2 years from the time the injury is discovered with the exercise of due diligence. Further, the bill provides that the statute of limitations applies to causes of action that accrued prior to the effective date of the bill; however, any such cause of action that would not have been barred under prior law may be brought within the time allowed by prior law or within 2 years after the effective date of that section, whichever is earlier, and will be barred thereafter.

Parental Notice

The bill makes technical changes to existing law in order to separate out constructive and actual notice requirements in existing law for clarity purposes.

The bill requires the court to appoint a guardian ad litem for the minor. The bill does not specify that the guardian ad litem must be a guardian ad litem that volunteers through or is trained by the Statewide Guardian ad Litem Office, and so may be any responsible adult.

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 upon the minor's age; credibility and demeanor as a witness; and emotional development.
- Whether the minor is well informed to make the decision on her own, based upon the minor's ability to assess the immediate and long-term consequences of her choices; and her ability to understand and explain the nature and risks of undergoing or not undergoing the termination of pregnancy procedure and to apply that understanding to her decision.

The bill also suggests that a court should also consider 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;[77] 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.[78]

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.

[77] s. 390.01114(4)(c), F.S.
[78] s. 390.01114(4)(e), F.S.

Finally, the bill requires the Florida Supreme Court, through the Office of the State Courts Administrator, to include additional elements in reports currently required by law: the judicial circuit within which the minor resided; whether the petition was granted or denied based on the minor's maturity or the best interest of the minor, or both; whether the minor was represented by court–appointed or private counsel; and the age of the minor.

Medical Records

Finally, the bill provides criminal sanctions for anyone who fraudulently alters, defaces, or falsifies any medical record related to a termination of pregnancy or causes or procures any of these offenses to be committed. Such acts are misdemeanors of the second degree, punishable as provided in s. 775.082 or s. 775.083. Moreover, that bill provides that such violation by a licensed practitioner is grounds for disciplinary action under a licensee's applicable practice act, which discipline may include restriction, suspension, or termination of a licensee's privileges.

The bill provides Legislative intent language regarding its intent to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and provides that the bill should not be construed as any effort to impinge upon those prerogatives. To that end, the bill provides that should any court of competent jurisdiction enter a final judgment concluding or declaring that any provision of the bill improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature's intends that any such provision be construed as a request for rule change pursuant to s. 2, Art. V, of the State Constitution and not as a mandatory legislative directive.

Additionally, the bill provides for severability should any provision of the bill be determined invalid.

The effective date of the bill is July 1, 2008.

C. SECTION DIRECTORY:

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

Section 2. Creating s. 390.0112, F.S.; relating to the women's reproductive bill of rights.

Section 3. Creating s. 390.01113, F.S.; relating to a civil action for violations of patients' rights; relief.

Section 4. Amending s. 390.01114, F.S.; relating to parental notice of abortion act.

Section 5. Creating s. 390.01117, F.S.; relating to civil action for negligence; remedies.

Section 6. Creating s. 390.01118, F.S.; relating to statute of limitations.

Section 7. Creating provisions relating to prior accrued causes of action.

Section 8. Creating s. 390.01119, F.S.; relating to medical records.

Section 9. Amending s. 390.012, F.S.; relating to powers of agency; rules; disposal of fetal remains.

Section 10. Providing legislative intent regarding court rules and request for rule change.

Section 11. Providing for severability.

Section 12. Providing an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill provides for a potential, indeterminate fiscal impact. (See Fiscal Comments Section.)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires clinics conducting only first trimester terminations of pregnancy to purchase ultrasound equipment, if such equipment is not currently available on premises. Further, the bill creates additional administrative requirements for clinics conducting terminations of pregnancies. The bill could result in lawsuits against physicians and clinics for alleged violations of a woman's rights as prescribed in the bill, negligence, or failure to comply with parental notice provisions.

D. FISCAL COMMENTS:

Office of the State Courts Administrator

According to the Office of the State Courts Administrator, the impact of this bill is anticipated to be minimal for the State Courts System. The bill would create various new civil causes of action in relation to the law affording women the right to access profession medical assistance when seeking to terminate a pregnancy. These include civil causes of action against physicians and medical staff for violation of patient rights, violation of notice provisions, and negligence. Litigation is also possible in connection with disciplinary actions for violations of the law relating to third trimester termination of pregnancies.

Statewide Guardian Ad Litem Office

Section 4 of the bill requires appointment of a guardian ad litem (GAL) for minors seeking judicial waiver of parental notification of abortion. The Florida Statutes include many references to appointment of a guardian ad litem, for example in dissolution of marriage proceedings, actions related to the property of minors, and involuntary admission for residential services for developmental disabilities, to name just a few. These guardians ad litem are not affiliated with the Guardian ad Litem Program. The Program represents abused, abandoned, and neglected children in dependency proceedings under Chapter 39. See s. 39.820(1), F.S..

The bill does not specify whether the guardians ad litem appointed under section 390.01114 would come from the Guardian ad Litem Program. According to the Statewide Guardian ad Litem Office, however, the Program does not provide guardian ad litem representation in non-dependency proceedings. Therefore, the program should not need additional resources.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

It is possible that certain provisions in this bill, including provisions relating to the 24-hour waiting period, may be challenged under Art. I, Section 23, of the Florida Constitution, which provides for an express right to privacy. At present, there is no caselaw in Florida construing certain requirements in the bill in light of the express right to privacy; however, federal and other states' caselaw upholding similar provisions, including *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), may be persuasive.

B. RULE-MAKING AUTHORITY:

The bill provides for AHCA to amend its rules in order to conform to the changes in the bill. AHCA has sufficient rulemaking authority to implement the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

The term guardian ad litem has multiple meanings under current law. In filing this bill, my intent in including the appointment of a guardian ad litem for minors was for judges to appoint volunteers from the community. I do not intend for courts to use the Statewide Guardian Ad Litem Office to meet the requirements of the bill, as demonstrated by my decision not to specify that Office in the bill.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES