

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 983 Abortion

SPONSOR(S): Flores and others

TIED BILLS: IDEN./SIM. BILLS: SB 1854

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Health Care Regulation Policy Committee	5 Y, 2 N, As CS	Calamas	Calamas
2)	Health & Family Services Policy Council			
3)	Policy Council			
4)				
5)				

SUMMARY ANALYSIS

House Bill 983 amends chapter 390, F.S. governing medical terminations of pregnancies. The bill amends informed consent laws by adding a requirement to use an ultrasound to verify the gestational age of the fetus for all terminations of pregnancy. The bill requires the person performing the ultrasound to allow the patient to view the live ultrasound images and have them contemporaneously explained by specified medical professionals prior to providing informed consent. The bill provides for specific exemptions to the requirement to offer the ultrasound viewing and explanation, and provides the patient a right to decline to view and receive an explanation of the ultrasound images.

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

The effective date of this bill is July 1, 2009.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

##### **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.<sup>1</sup> The Act requires that, except in the event of a medical emergency,<sup>2</sup> prior to obtaining a termination of pregnancy, a patient<sup>3</sup> 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 patient and fetus of carrying the pregnancy to term

The patient 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.<sup>4</sup> The written materials must be prepared and provided by the Department of Health, and the patient has the option to review the written materials provided.<sup>5</sup>

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

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<sup>1</sup> Fla. Stat. § 390.0111(3) (2008).

<sup>2</sup> Fla. Stat. § 390.0111(3)(d) (2008), provides express requirements for meeting the emergency medical exception.

<sup>3</sup> The Act allows for the woman's guardian to receive the information, if she is mentally incompetent.

<sup>4</sup> Fla. Stat. § 390.0111(3), (2008).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Fla. Stat. § 390.0111(3)(c) (2008).

## Litigation of the Woman's Right To Know Act

Shortly after the enactment of the Woman's Right to Know Act, its validity was challenged under the Florida and federal constitutions. The plaintiff physicians and clinics successfully enjoined the enforcement of the Act pending the outcome of the litigation, which injunction was upheld on appeal.<sup>8</sup> Thereafter, the plaintiffs were successful in obtaining a summary judgment against the State on the grounds that the Act violated the right to privacy under Art. I., s. 23 of the Florida Constitution and was unconstitutionally vague under the federal and state constitutions. This decision was also upheld on appeal.<sup>9</sup> The State appealed this decision to the Florida Supreme Court.<sup>10</sup>

The Florida Supreme Court addressed two issues raised by the plaintiffs. With regard to whether the Act violated a woman's right to privacy, the 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 and by Florida statutory law<sup>11</sup> applicable to other medical procedures.<sup>12</sup> Accordingly, the Court determined that the Act was not an unconstitutional violation of a woman's right to privacy.<sup>13</sup>

Second, the Supreme Court addressed the allegation that the term "reasonable patient", and the Act's reference to information about "risks" were unconstitutionally vague. The plaintiffs argued it was unclear whether the Act requires patients to receive information about "non-medical" risks, such as social, economic or other risks.<sup>14</sup> The Court rejected these arguments and held that ". . . 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...."<sup>15</sup>

Because the underlying summary judgment, and subsequent appeals of the summary judgment order, applied only to the plaintiffs' challenges to the part of the Act pertaining to the information a physician must provide orally and in person to the patient, the status of the remaining challenges to the Act is unclear at this time.

## Ultrasound

An ultrasound is a technique involving the formation of a two-dimensional image used for the examination and measurement of internal body structures and the detection of bodily abnormalities.<sup>16</sup> It uses high frequency sound waves (ultrasound) to produce dynamic images (or sonograms) of organs, tissues, or blood flow inside the body. Ultrasound is used to examine many parts of the body, such as the abdomen, breast, reproductive system, heart, and blood vessels, and is increasingly being used to detect heart disease, vascular disease, and injuries to the muscles, tendons, and ligaments.<sup>17</sup>

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<sup>8</sup> *Florida v. Presidential Women's Center*, 707 So. 2d 1145 (Fla. 4<sup>th</sup> Dist. Ct. App. 1998).

<sup>9</sup> *Florida v. Presidential Women's Center*, 884 So. 2d 526 (Fla. 4<sup>th</sup> Dist. Ct. App. 2004).

<sup>10</sup> *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006).

<sup>11</sup> *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006), *citing* Fla. Stat. § 766.103, (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); Fla. Stat. § 458.324, (informed consent for patients who may be in high risk of developing breast cancer); Fla. Stat. § 458.325, (informed consent for patients receiving electroconvulsive and psychosurgical procedures); Fla. Stat. § 945.48, (express and informed consent requirements for inmates receiving psychiatric treatment).

<sup>12</sup> *Id.*

<sup>13</sup> *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=ultrasound>, (last viewed March 13, 2009).

<sup>17</sup> Society of Diagnostic Medical Sonography, Medical Ultrasound Fact Sheet (2008), *available at*:

<http://www.sdms.org/resources/muam/default.asp> (last viewed March 13, 2009).

Ultrasounds are considered to be a safe, non-invasive means of investigating a fetus during pregnancy.<sup>18</sup> An ultrasound may be used to detect body measurements to determine the gestational age of the fetus.<sup>19</sup> If the date of a patient's last menstrual cycle is uncertain, then an ultrasound can be used to arrive at a correct "dating" for the patient.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> According to the National Abortion Federation, "[i]n the context of medical abortion, ultrasonography can help determine gestational age, assess the outcome of the procedure, and diagnose ectopic pregnancy and other types of abnormal pregnancy."<sup>23</sup>

Two forms of ultrasound used in pregnancy are trans-abdominal and ultrasound, with advantages and disadvantages to each. Trans-abdominal ultrasound provides a panoramic view of the abdomen and pelvis, whereas trans-vaginal provides a more limited pelvic view. Trans-abdominal ultrasound is noninvasive, and trans-vaginal ultrasound requires insertion of a probe into the vagina. Both are easily combined with a pelvic exam.<sup>24</sup> The trans-abdominal method requires a full bladder for best viewing, which may be accomplished by the patient drinking several glasses of water prior to the examination. According to the National Abortion Federation, some patients find trans-vaginal ultrasound more comfortable than trans-abdominal because trans-vaginal does not require a distended bladder.<sup>25</sup>

Trans-abdominal ultrasound cannot always detect pregnancies under 6 weeks' gestation, while trans-vaginal ultrasound can detect pregnancies at 4.5 to 5 weeks' gestation.<sup>26</sup> However, surgical abortions prior to 6 or 7 weeks' gestation are not commonly available.<sup>27</sup>

In Florida, clinics providing pregnancy termination procedures in the second trimester are required to have ultrasound equipment and conduct ultrasounds on patients prior to the procedure.<sup>28</sup> This requirement is not contingent on the number of second trimester procedures performed by the clinic; if a clinic performs only one second trimester termination of pregnancy a year, that clinic must have ultrasound equipment on site and use it for that procedure. Current law also requires that the person performing the ultrasound must be either a physician or a person working in conjunction with the physician who has documented evidence of having completed a course in the operation of ultrasound equipment as prescribed by rule.<sup>29</sup> The Agency for Health Care Administration (AHCA) regulates abortion clinics and has developed rules pursuant to the statute.<sup>30</sup>

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<sup>18</sup> See "Obstetric Ultrasound, A Comprehensive Guide to Ultrasound Scans in Pregnancy", available at: <http://www.ob-ultrasound.net/> (last viewed March 13, 2009).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* See also S. Stoppler, M.D., W. Sheil, Jr. MD. FACP, FACR, MedicineNet.com, available at: [http://www.medicinenet.com/ectopic\\_pregnancy/article.htm](http://www.medicinenet.com/ectopic_pregnancy/article.htm) (last viewed March 13, 2009).

<sup>22</sup> *Id.*

<sup>23</sup> National Abortion Federation, Early Options, "Ultrasound Imagery in Early Pregnancy", available at: [http://www.prochoice.org/education/cme/online\\_cme/m4ultrasound.asp](http://www.prochoice.org/education/cme/online_cme/m4ultrasound.asp) (last viewed March 13, 2009).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* See also "Obstetric Ultrasound, A Comprehensive Guide to Ultrasound Scans in Pregnancy", *supra*, note 18.

<sup>26</sup> *Id.*

<sup>27</sup> "Safe Surgical Abortion Before Six Weeks' Gestation", Planned Parenthood Federation of America. Available at: <http://www.ppacca.org/site/pp.asp?c=kuJYJeO4F&b=139587> (last viewed March 19, 2009). Until recently, this was due to the lack of accurate early pregnancy tests and the risk of inadequate uterine evacuation. New techniques developed in the 1990s led to safer procedures, however; these procedures are not available in every termination setting (only 23 Planned Parenthood affiliates nationwide provide surgical abortions before 6 weeks' gestation). *Id.* Surgical abortions are conducted in the vast majority of all abortions in the United States; medical abortions comprise 10 percent. (Strauss L. T., Gamble S. B., Parker W. Y., Cook D. A., Zane SB, Hamdan S., "Abortion surveillance--United States, 2004", *MMWR Surveillance Summary* 56 (9): 1-33. Available at: <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5609a1.htm> (last viewed March 19, 2009).

<sup>28</sup> Fla. Stat. § 390.012(3)(d)4 (2008).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Current law does not require a clinic to review the ultrasound results with the patient prior to the termination of pregnancy, unless the patient requests to review the results. Current law does not require the requested review to be done with the patient as the ultrasound is being conducted.

Current law does not require ultrasounds for first trimester pregnancy termination procedures. However, many providers in Florida voluntarily conduct ultrasounds prior to terminating a pregnancy during the first trimester.<sup>31</sup> 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<sup>32</sup>, and provide the physician with information necessary to perform the procedure.<sup>33</sup> Given these current practices, some providers will not experience any increased costs that could be carried over to patients for such procedures.

Several states require an ultrasound be conducted on all patients prior to a termination of pregnancy, and require that the ultrasound images be offered to the patient for viewing.<sup>34</sup> Other states require the ultrasound images to be offered to the patient for viewing if an ultrasound is conducted.<sup>35</sup> Several states have pending legislation to impose various degrees of ultrasound requirements.<sup>36</sup>

### Medicaid Coverage for Termination of Pregnancy and Ultrasounds

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."<sup>37</sup> According to AHCA, Medicaid covered the cost of 1 termination of pregnancy in fiscal year 2007-2008.<sup>38</sup>

Florida Medicaid's policy complies with the federal Hyde Amendment<sup>39</sup>, which prohibits the use of federal funds for termination of pregnancies unless the pregnancy is the result of an act of rape or incest, or unless necessary to save the life of the mother. 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.

<sup>31</sup> See, e.g., A Choice for Women Website at <http://www.achoiceforwomen.com/services/services.asp>; Eve Medical Center Website at <http://www.eveabortioncarespecialists.com/1and2Trimester.html>; North Florida Women's Health Website at [http://www.northfloridawomenshealth.com/abortion\\_services.html](http://www.northfloridawomenshealth.com/abortion_services.html); and A Jacksonville Women's Health Center, Inc., Website at <http://www.ajacksonvillewomenshealth.com/expect.html>; (all last viewed March 13, 2009).

<sup>32</sup> 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, available at: <http://www.nlm.nih.gov/medlineplus/print/ency/article/000895.htm> (last viewed March 13, 2009).

<sup>33</sup> See A Jacksonville Women's Health Center, Inc., Website at <http://www.ajacksonvillewomenshealth.com/expect.html> (last viewed on March 13, 2009).

<sup>34</sup> See, e.g.: Ala. Code § 26-23A-6 (2009); Miss. Code Ann. § 41-41-34 (2009); La. Rev. Stat. Ann. § 40:1299.35.1, 40:1299.35.6 (2009); S.D. Codified Laws § 34-23A-37 (2009).

<sup>35</sup> See Ark. Code Ann. § 20-16-602 (2009); Ga. Code Ann. §§ 31-9A-3, 31-9A-4 (2009); Idaho Code Ann. § 18-609 (2009); Ind. Code § 16-34-2-1.1 (2009); Mich. Comp. Laws § 333.17015 (2009); Ohio Rev. Code Ann. § 2317.561 (2009); 63 Okla. Stat. tit. 1 § 738.3 (2009); Utah Code Ann. § 76-7-30 (2009); Wis. Stat. § 253.10 (2009).

<sup>36</sup> Several states have pending legislation requiring an ultrasound, in varying degrees. Bills have been filed in Connecticut <http://www.cga.ct.gov/2009/TOB/H/2009HB-05629-R00-HB.htm>, Indiana <http://www.in.gov/legislative/bills/2009/IN/IN0417.1.html>, Kansas <http://www.kslegislature.org/bills/2010/2206.pdf>, Kentucky, Maryland <http://mlis.state.md.us/2009rs/billfile/SB0195.htm>, Missouri, Nebraska <http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB675.pdf>, New York <http://assembly.state.ny.us/leg/?bn=A02726&sh=t>, North Dakota <http://www.legis.nd.gov/assembly/61-2009/bill-text/JAJK0100.pdf>, South Carolina [http://www.scstatehouse.gov/sess118\\_2009-2010/bills/3245.htm](http://www.scstatehouse.gov/sess118_2009-2010/bills/3245.htm), Texas <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB00182I.htm>, Virginia <http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+HB2579E>, and Wyoming <http://legisweb.state.wy.us/2009/Introduced/HB0151.pdf>.

<sup>37</sup> Agency for Health Care Administration, 2008-2009 Medicaid Summary of Services, 77, available at: <http://www.fdhc.state.fl.us/Medicaid/flmedicaid.shtm> (last viewed March 13, 2009).

<sup>38</sup> March 16, 2009, e-mail from AHCA on file with the Health Care Regulation Policy Committee. In addition, Medicaid covered 11 post-miscarriage dilation and curettage procedures.

<sup>39</sup> The Hyde Amendment was a rider to an appropriations bill that was passed by Congress in 1976; therefore, it has continued in various forms as a rider to the annual Labor/Health and Human Services/Education appropriations bill and must be reenacted each year by Congress.

This policy has been challenged and upheld in two separate cases, finding and no federal authority to fund abortions through the Medicaid program, and no Florida constitutional obligation to fund them outside the Medicaid program using only state dollars.<sup>40</sup>

According to AHCA, Medicaid covers one ultrasound per pregnancy for pregnancies without any high risk indications. Follow-up ultrasounds would be covered for high risk indications.<sup>41</sup>

## **Effect of Proposed Changes**

### **Consent and Gestational Age Verification**

House Bill 983 amends law governing medical terminations of pregnancies. The bill requires that the printed materials provided to a patient pursuant to s. 390.0111, F.S., include a description of the various stages of fetal development.

It amends s. 390.0111, F.S., relating to informed consent, to provide that information on the gestational age of the fetus provided to the patient for consent purposes must be verified by an ultrasound. This effectively requires an ultrasound to be administered prior to consent for all terminations of pregnancy, regardless of the trimester. The bill makes conforming changes to s. 390.012(3)(d), F.S., relating to AHCA clinic rulemaking, to reflect the requirement of an ultrasound for all terminations of pregnancy, 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 working in conjunction with the physician who has documented evidence of having completed a course in the operation of ultrasound equipment as prescribed by rule.

### **Ultrasound Viewing and Explanation**

The bill amends s. 390.0111, F.S., relating to informed consent, to require the person performing the ultrasound to allow the patient 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 patient. The ultrasound and the optional viewing with contemporaneous explanation must be done prior to the patient's consent to the pregnancy termination procedure.

The bill provides the patient has the option to decline to view the ultrasound images after she is informed of her right to view them. If she declines, the patient must complete a form acknowledging that she was offered an opportunity to view her ultrasound but that she chose not to take up that option. Additionally, the form must also indicate that she declined to view the images of her own free will and that her decision was not based on any undue influence from any third party.

The bill amends s. 390.012, F.S., relating to AHCA clinic rulemaking, to reflect the requirement to allow the patient to view the live ultrasound images and receive a contemporaneous explanation of them.

### **Exceptions**

The bill creates an exception to the requirement that an ultrasound be offered to the patient 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:

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<sup>40</sup> See *Renee B. v. Agency for Health Care Admin.*, 790 So. 2d 1036 (Fla. 2001) (failure to provide state funding for abortions does not violate the right to privacy; such right does not create an entitlement to financial resources to exercise the right).

<sup>41</sup> Agency for Health Care Administration, 2008-2009 Medicaid Summary of Services, 77, available at: <http://www.fdhc.state.fl.us/Medicaid/flmedicaid.shtml> (last viewed March 13, 2009); and March 17, 2009 e-mail from AHCA, on file with the House Healthcare Council.

- The patient is obtaining the termination of pregnancy because the woman is a victim of rape, incest, domestic violence, or human trafficking; or
- The patient has been diagnosed with a condition that, on the basis of a physician's good faith clinical judgment, would create a serious risk of substantial and irreversible impairment of a major bodily function if she delayed terminating her pregnancy.

Finally, the bill provides that the various provisions are severable.

**B. SECTION DIRECTORY:**

**Section 1:** Amends Section 390.0111, F.S., relating to termination of pregnancies, requiring ultrasounds, providing for ultrasound viewing and explanation, and requiring informed consent materials.

**Section 2:** Amends Section 390.012, F.S., relating to powers of the Agency for Health Care Administration, amending rulemaking requirements to require ultrasounds.

**Section 3:** Provides for severability of the bill's provisions.

**Section 4:** Provides an effective date of July 1, 2009.

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

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**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.

**D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax sharing with counties or municipalities.

2. Other:

It is possible that certain provisions in this bill may be challenged based on the express right to privacy found in Art. I S. 23 of the Florida Constitution. Case law addressing similar issues, including *State v. Presidential Women's Center*, 884 So.2d 526 (Fla. 4th DCA 2004) and *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.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 18, 2009, the Health Care Regulation Policy Committee adopted an amendment and reported the bill favorably. The amendment modified the phrasing of provisions describing a patient's right to decline to view her ultrasound in section 390.0111(3)(a)b.III., F.S.

The analysis is drafted to the committee substitute.