

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 1129 Infants Born Alive

**SPONSOR(S):** Health & Human Services Committee; Civil Justice Subcommittee; Health Quality Subcommittee; Pigman and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1636

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	10 Y, 2 N, As CS	McElroy	O'Callaghan
2) Civil Justice Subcommittee	10 Y, 2 N, As CS	Bond	Bond
3) Health & Human Services Committee	15 Y, 0 N, As CS	McElroy	Calamas

### SUMMARY ANALYSIS

The bill provides that an infant born alive, including one born alive during an attempted abortion, is entitled to the same rights, powers, and privileges as any child born in the course of natural birth. Thus, medical practitioners must provide medical care to an infant born alive that is appropriate for the gestational age of the infant, and must see to it that the infant is transported to a hospital.

The bill also creates a mandatory reporting requirement. Health care practitioners, as well as employees of hospitals, physicians' offices and abortion clinics, must report all known violations of the duty to treat and transport an infant born alive to the Department of Health (DOH).

The bill creates a first degree misdemeanor for failure to treat the infant born alive, failure to arrange for transport to a hospital, or failure to report a violation of these duties to the DOH.

The bill also requires the number of infants born alive be included within the mandatory monthly reports submitted to the Agency for Health Care Administration by the director of any medical facility in which a pregnancy is terminated.

The bill appears to have an indeterminate minimal negative fiscal impact on state government. The bill does not appear to have a fiscal impact on local governments.

The bill provides an effective date of July 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### Case Law on Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*, was decided by the United States Supreme Court. Using strict scrutiny, the Court determined that a woman's right to termination is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn. The Court established the trimester framework for the regulation of termination – holding that in the third trimester, a state could prohibit termination to the extent that the woman's life or health was not at risk.<sup>1</sup>

In *Planned Parenthood v. Casey*, the United States Supreme Court, while upholding the fundamental holding of *Roe*, recognized that medical advancement could shift determinations of fetal viability away from the trimester framework.<sup>2</sup>

Article I, s. 23 of the Florida Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."<sup>3</sup>

In *In re T.W.*, the Florida Supreme Court ruled that:

[p]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests....Under our Florida Constitution, the state's interest becomes compelling upon viability....Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical procedures.

The court recognized that after viability, the state can regulate termination in the interest of the unborn child so long as the mother's health is not in jeopardy.<sup>4</sup>

##### Florida's Abortion Laws

In Florida, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.<sup>5</sup> A termination of pregnancy must be performed by a physician<sup>6</sup> licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.<sup>7</sup>

In Florida, a termination of pregnancy may not be performed in the third trimester unless there is a medical emergency.<sup>8</sup> Florida law defines the third trimester to mean the weeks of pregnancy after the 24th.<sup>9</sup> Medical emergency is a situation in which:

<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> 505 U.S. 833 (1992).

<sup>3</sup> See *In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989)(holding that a parental consent statute was unconstitutional because it intrudes on a minor's right to privacy).

<sup>4</sup> *Id.*

<sup>5</sup> Section 390.011(1), F.S.

<sup>6</sup> Section 390.011(2), F.S.

<sup>7</sup> Section 390.011(7), F.S.

<sup>8</sup> Section 390.011(1), F.S.

<sup>9</sup> Section 390.011(7), F.S.

- To a reasonable degree of medical certainty, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman,<sup>10</sup> and is a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death; or
- The good faith clinical judgment of the physician, that a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.<sup>11</sup>

In 2011, the Department of Health (DOH) reported that there were 213,237 live births in the state of Florida.<sup>12</sup> For the same time period, the Agency for Health Care Administration (AHCA) reported that there were 77,166 termination procedures performed in the state.<sup>13</sup>

Florida law currently requires the director of any medical facility in which any pregnancy is terminated to submit a monthly report to the AHCA that contains the number of procedures performed, the reason for same, and the period of gestation at the time such procedures were performed.<sup>14</sup> There is no requirement to provide any information related to infants born alive after an attempt to terminate a pregnancy.

### Born Alive

The federal Born Alive Infants Protection Act (BAIPA) of 2002 states that in determining the meaning of any Act of Congress or of any ruling, regulation, or interpretation of the various federal administrative bureaus and agencies, the words "person", "human being", "child" and "individual" shall include every infant member of the species homo sapiens who is born alive at any stage of development.<sup>15</sup> The Act defined "born alive" as:

the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section or induced abortion.<sup>16</sup>

The BAIPA was initially viewed as a symbolic act which did not alter the treatment that physicians already provided to extremely premature infants.<sup>17</sup> A change occurred in 2005 when the U.S. Department of Health and Human Services (HHS) issued a Program Instruction to state and territorial agencies administering or supervising the administration of the federal Child Abuse Prevention and Treatment Act (CAPTA) Program. The Program Instruction stated that regulations affected by the BAIPA were to be enforced under CAPTA.<sup>18</sup> Specifically, states must ensure that implementation of section 106(b)(2)(B) of CAPTA, which requires states to have procedures for responding to reports of medical neglect (including the withholding of medically indicated treatment from disabled infants with life-threatening conditions), applies to born-alive infants.<sup>19</sup> This created an obligation to provide medical services to a born alive infant, as well as, an obligation to report when such treatment was withheld.<sup>20</sup>

<sup>10</sup> Section 390.0111(1)(a), F.S.

<sup>11</sup> Section 390.01114(2)(d), F.S.

<sup>12</sup> Florida Department of Health, *Florida Vital Statistics Annual Reports- Births*. <http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx> (last visited on March 16, 2013).

<sup>13</sup> Email from AHCA on file with the Health and Human Services Committee Staff, March 16, 2013.

<sup>14</sup> s. 390.0112(1), F.S.

<sup>15</sup> 1 U.S.C. s. 8(a).

<sup>16</sup> 1 U.S.C. s. 8(b).

<sup>17</sup> Am. Acad. of Ped. Neonatal Resuscitation Prog. Steering Comm., *Born-Alive Infants Protection Act of 2001*, Public Law No. 107-207, 111 PEDIATRICS 680 (Mar. 2003).

<sup>18</sup> U.S. Department of Health and Human Services, Administration of Children, Youth and Families- Program Instruction; Log No-ACYF-CB-PI-05-01; Issuance Date- April 22, 2005.

<sup>19</sup> Id.

<sup>20</sup> Conway, Craig, *What Will Become of the Born-Alive Infants Protection Act?*

[www.law.uh.edu/healthlaw/perspectives/2009/\(CC\)%20BAIPA.pdf](http://www.law.uh.edu/healthlaw/perspectives/2009/(CC)%20BAIPA.pdf) (last visited on March 22, 2013).

Thus, the failure to provide medical services to a born-alive infant may subject a physician to criminal neglect and abuse charges under applicable state law.<sup>21</sup>

The federal Emergency Medical Treatment and Labor Act (EMTALA) places potential provider obligations on hospitals and physicians when presented with an individual who may have an emergency medical condition, irrespective of that individual's ability to pay.<sup>22</sup> The Centers for Medicare and Medicaid Services (CMS), a subunit of the HHS, issued its "Guidance on the interaction of the BAIPA and the EMTALA" in 2005. According to the CMS, born alive infants as "individuals" were entitled to protection under the EMTALA.<sup>23</sup> Thus, individuals who failed to provide stabilizing treatment to a born alive infant may be subject to penalties under the EMTALA.<sup>24</sup>

Currently, twenty-eight states have statutory provisions which define and/or offer protections for born-alive infants.

Florida does not have a statutory provision that specifically addresses born-alive infants.

### **Effects of Proposed Changes**

The bill amends s. 390.011, F.S., to define the term "born alive" to mean:

The complete expulsion or extraction from the mother of a human infant, at any stage of development, who, after such expulsion or extraction, breathes or has a beating heart, or definite and voluntary movement of muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, Cesarean section, induced abortion, or other method.

This is almost identical to the definition of born alive contained within the BAIPA of 2002.

The BAIPA does not expressly contain a requirement to treat or hospitalize a born alive infant. However, it is the position of CMS that a physician or hospital who fails to render stabilizing treatment may be subject to fines under the EMTALA.

The bill provides that, should an infant be born alive during or immediately after an attempted abortion:

- The infant is entitled to the same rights, powers and privileges as any other child born in the course of a natural birth.
- Any health care practitioner present must humanely exercise the same degree of professional skill, care and diligence to preserve the health and life of the infant with care appropriate for the gestational age of the infant.
- The infant must be immediately transported and admitted to a hospital.

The BAIPA does not expressly contain a reporting requirement for violations of its provisions. However, it is the position of the HHS that the withholding of medical treatment to a born alive infant must be reported under the CAPTA.

The bill provides that a health care practitioner or any employee of a hospital, physician's office, or abortion clinic who has knowledge of a violation of the legal requirements pertaining to an infant born alive must report the violation to the DOH.

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<sup>21</sup> Hermer, Laura, *The "Born-Alive Infants Protection Act" and its Potential Impact on Medical Care and Practice*. [www.law.uh.edu/healthlaw/perspectives/2006/\(LH\)BAIPA.pdf](http://www.law.uh.edu/healthlaw/perspectives/2006/(LH)BAIPA.pdf) (last visited on March 22, 2013).

<sup>22</sup> See Sadath A. Sayeed, *Baby Doe Redux? The Department of Health and Human Services and the Born-Alive Infants Protection Act of 2002: A Cautionary Note on Normative Neonatal Practice*, 116:4 PEDIATRICS e576 (Oct. 2005). <http://pediatrics.aappublications.org/content/116/4/e576.full.pdf+html> (last visited on March 22, 2013).

<sup>23</sup> *Id.*

<sup>24</sup> Hermer, Laura, *The "Born-Alive Infants Protection Act" and its Potential Impact on Medical Care and Practice*. [www.law.uh.edu/healthlaw/perspectives/2006/\(LH\)BAIPA.pdf](http://www.law.uh.edu/healthlaw/perspectives/2006/(LH)BAIPA.pdf) (last visited on March 22, 2013).

The bill creates a first degree misdemeanor offense for violation of any of the requirements of the new subsection (12). Thus, the following are offenses under the bill:

- Failure of a licensed health care practitioner to humanely exercise the same degree of professional skill, care, and diligence to preserve the life and health of a born alive infant as a reasonably diligent and conscientious health care practitioner would render to an infant born alive at the same gestational age in the course of natural birth.
- Failure of any person to arrange for immediate transport of the infant born alive to a hospital.
- Failure of any health care practitioner or any employee of a hospital, a physician's office, or an abortion clinic who has knowledge of a violation of the duty to treat or the duty to hospitalize to report the violation to the department.

A first degree misdemeanor is punishable by confinement in a county jail for up to one year, a fine of up to \$1000, or both.<sup>25</sup> The bill also provides a rule of construction that would allow prosecution of a more general offense if appropriate.<sup>26</sup>

The bill also includes a neutrality clause that follows the neutrality clause in federal law. The neutrality clause reads: "This subsection does not affirm, deny, on contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being born alive as defined in this subsection."<sup>27</sup>

The bill also amends s. 390.0112, F.S., to require the number of infants born alive be included within the mandatory monthly reports submitted to the AHCA by the director of any medical facility in which a pregnancy is terminated. There is currently no federal requirement for the mandatory reporting of the infants born alive during an attempted abortion.

#### B. SECTION DIRECTORY:

**Section 1.** Amends s. 390.011, F.S., relating to definitions.

**Section 2.** Amends s. 390.0111, F.S., relating to termination of pregnancies.

**Section 3.** Amends s. 390.0112, F.S., relating to termination of pregnancies; reporting.

**Section 4.** Provides an effective date of July 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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

##### 1. Revenues:

There does not appear to be any fiscal impact on the revenues of state government.

##### 2. Expenditures:

The bill appears to have an indeterminate negative fiscal impact on the expenditures of state government (see "Fiscal Comments" below).

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<sup>25</sup> Sections 775.082 and 775.083, F.S.

<sup>26</sup> It is a general rule of statutory construction that a specific criminal offense may take priority over a more general criminal offense where all of the elements of the offense are the same. *Adams v. Culver*, 111 So.2d 665, 667 (Fla. 1959). Without this sentence regarding construction being included in the bill, it is possible, although unlikely, that a court using this rule of construction might reduce a felony criminal charge that could be charged under a current general law to the misdemeanor created by this bill.

<sup>27</sup> The Judiciary Committee of the United States House of Representatives wrote about the intent of the neutrality clause: "A rule of construction in a new subsection (c), absent from the version of the bill passed by the House in the 106th Congress, states that the bill is neutral with respect to abortion rights, providing that the section shall not be construed to `affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being `born alive.' We believe that this clarification further resolves concerns that this legislation may have been intended as a back-door effort to affect abortion and reproductive rights rather than applying solely to the status of an infant following birth. It is also consistent with current law. As a general matter, the Supreme Court has held that `the unborn have never been recognized in the law as persons in the whole sense,' and the law has been reluctant to afford any legal rights to nonviable fetuses `except in narrowly defined situations and except when the rights are contingent upon live birth.'"

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

There does not appear to be any fiscal impact on the revenues of local governments.

2. Expenditures:

Because this bill creates a first degree misdemeanor, it may have an indeterminate jail bed impact on local governments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

There does not appear to be any fiscal impact on the private sector.

**D. FISCAL COMMENTS:**

Born alive infants could potentially create a negative fiscal impact on state government. The bill requires that born alive infants be transferred to a hospital to receive all appropriate medical care. Under certain circumstances the state could be responsible for a portion of the expenses related to this care. This creates an indeterminate impact as there are no reliable statistics for born alive infants in the United States. However, from all available information it appears that born alive infants comprise an exceedingly small percentage of the total number of births per year.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 19, 2013, the Health Quality Subcommittee adopted an amendment to HB 1129. The amendment requires the number of infants born alive during or immediately after an attempted abortion be included within the mandatory monthly reports submitted to the Agency for Health Care Administration by the director of any medical facility in which a pregnancy is terminated.

On March 27, 2013, the Civil Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments provide that the level of medical care owed to an infant born alive is judged by the gestational age of the infant; provide a rule of construction to clarify the misdemeanor offense; and add a neutrality clause matching federal law.

On April 4, 2013, the Health and Human Services Committee adopted two amendments and reported the bill favorably as a committee substitute. The first amendment removed the presumption that a born alive infant has been voluntarily surrendered by his/her mother. The word "expand" was inadvertently omitted from the most recent version of the bill. The second amendment makes a technical correction

to include the word “expand” in the bill. This analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.