The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL:	SB 1636
INTRODUCER:	Senator Flores
SUBJECT:	Infants Born Alive
DATE:	April 5, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	**Pre-meeting**
2.			JU	
3.			AP	
4.				
5.				
6.				

I. Summary:

SB 1636 amends the Florida Statutes to:

- Create a definition for "born alive" under chapter 390, F.S., relating to termination of pregnancies;
- Grant an infant who is born alive during or immediately after an attempted abortion the same rights as infants born naturally;
- Require healthcare professionals to apply the same level of care towards the infant as they would for an infant born naturally;
- Require that the infant be immediately transported and admitted to a hospital;
- Create a presumption that the parents of the infant have surrendered their parental rights;
- Require health care practitioners to report violations to the Department of Health (DOH); and
- Cause violations of these requirements to be punishable as a first degree misdemeanor.

This bill substantially amends sections 390.011 and 390.0111 of the Florida Statutes.

II. Present Situation:

Case Law on Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*, was decided by the U.S. Supreme Court.[1] Using strict scrutiny, the Court determined that a woman's right to terminate a pregnancy is part of a fundamental right to privacy guaranteed under the Due Process Clause of

[1] 410 U.S. 113 (1973).

the Fourteenth Amendment of the U.S. Constitution.[2] 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.[3] 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.[4]

In *Planned Parenthood v. Casey*, the U.S. Supreme Court, while upholding the fundamental holding of *Roe,* recognized that medical advancement could shift determinations of fetal viability away from the trimester framework.[5]

Abortion in Florida

Article I, Section 23 of the State 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."[6]

In *In re T.W.*, the Florida Supreme Court, determined 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.[7]

In Florida law, 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.[8] A termination of pregnancy must be performed by a physician[9] 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.[10]

A termination of pregnancy may not be performed in the third trimester unless there is a medical emergency.[11] Florida law defines the third trimester to mean the weeks of pregnancy after the 24th week.[12] A medical emergency is a situation in which:

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[2] Id.
[3] Id.
[4] Id.
[5] 505 U.S. 833 (1992).
[6] *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).
[7] Id.
[8] s. 390.011(1), F.S.
[9] s. 390.0111(2), F.S.
[10] s. 390.011(7), F.S.
[11] s. 390.0111(1), 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,[13] 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
- In the good faith clinical judgment of the physician, a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.[14]

Section 391.0111(4), F.S., provides that if a termination of pregnancy is performed during viability, the perform who performs or induces the termination of pregnancy must use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Viability is defined in this provision to mean that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb. However, the woman's life and health constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict.

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.[15] 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.[16]

The BAIPA was initially viewed as a symbolic act which did not alter the treatment that physicians already provided to extremely premature infants.[17] 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

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[12] s. 390.011(7), F.S.
[13] s. 390.0111(1)(a), F.S.
[14] s. 390.01114(2)(d), F.S.
[15] 1 U.S.C. 8(a).
[16] 1 U.S.C. 8(b).
[17] 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).

regulations affected by the BAIPA were to be enforced under CAPTA.[18] 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.[19] 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.[20] 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.[21]

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.[22] 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.[23] Thus, individuals who failed to provide stabilizing treatment to a born alive infant may be subject to penalties under the EMTALA.[24]

Voluntary Surrender of Infants

Florida law provides for the treatment and protection of a surrendered newborn.[25] Under Florida law a "newborn infant" means a child who a licensed physician reasonably believes is approximately 7 days old or younger at the time the child is left at a hospital, emergency medical services (EMS) station, or a fire station.[26] Hospitals are authorized to admit and provide all necessary services and care to a surrendered new born infant.[27] Likewise, EMS technicians, paramedics and firefighters are also authorized to render EMS to a newborn infant.[28] However, EMS technicians, paramedics and firefighters have a secondary obligation of arranging for the immediate transport of the newborn infant to a hospital for admittance.[29]

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[18] 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.
[19] Id.
[20] Conway, Craig, *What Will Become of the Born-Alive Infants Protection Act?* www.law.uh.edu/healthlaw/perspectives/2009/(CC)%20BAIPA.pdf (last visited on April 5, 2013).
[21] 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 (last visited on April 5, 2013).
[22] *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 April 5, 2013).
[23] Id.
[24] Id. n. 21.
[25] s. 383.50, F.S.
[26] s. 383.50(1), F.S.
[27] s. 383.50(4), F.S
[28] s. 383.50(3)(a), F.S.
[29] s. 383.50(3)(b), F.S

Termination of Parental Rights

In Florida, termination of parental rights is initiated by the filing of a petition which alleges the basis for the termination, that the termination is in the manifest best interests of the child, and that the termination is the least restrictive means of protecting the child from harm.[30] Parental rights will not be terminated until the court has adjudicated the petition.

Under Florida law parents of surrendered newborn infants are presumed to have consented to the termination of their parental rights.[31] However, this is a rebuttable presumption and a parent of a surrendered newborn infant may claim a newborn infant up until the time the court enters a judgment terminating his or her parental rights.[32]

III. Effect of Proposed Changes:

Section 1 amends s. 390.011, F.S., to define "born alive" as 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 induces labor, Cesarean section, induced abortion, or other method.

Section 2 amends s. 390.0111, F.S., to:

- Grant an infant who is born alive during or immediately after an attempted abortion the same rights as infants born naturally;
- Require healthcare professionals to apply the same level of skill, care, and diligence towards the infant as they would for an infant born naturally;
- Require that the infant be immediately transported and admitted to a hospital;[33]
- Create a presumption that the parents of the infant have surrendered their parental rights;[34]
- Mandate that the infant receive medical care and social services;[35]
- Require health care practitioners and employees of hospitals, physician's offices, and abortion clinics with knowledge of a violation of these provisions to report the violation to the DOH; and
- Cause violations of these requirements to be punishable as a first degree misdemeanor.

Section 3 provides an effective date of July 1, 2013.

[30] s. 39.802(4), F.S.
[31] s. 383.50(2), F.S. (there is a presumption that the parent who leaves a newborn infant at a hospital, emergency medical services (EMS) station or a fire station intended to leave the newborn infant and consented to termination of parental rights).
[32] s. 383.50(6), F.S.
[33] Pursuant to s. 390.012(3)(c), F.S., which requires abortion clinics to designate a medical director who is a physician with privileges at a licensed hospital or has a transfer agreement with a licensed hospital in place.
[34] Pursuant to s. 383.50(2), F.S., which presumes that a parent who leaves the newborn infant in accordance with this section intended to leave the newborn infant and consented to termination of parental rights.
[35] Pursuant to s. 383.50(4), (7), and (8), F.S., which includes EMTALA services, notification to a local child-placing agency, and Medicaid services.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

SB 1636 may have an indeterminate negative fiscal impact on the State of Florida by requiring that the State provide for medical care and social services for infants who fall under the definition of "born alive."

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.