

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 Judiciary

BILL: CS/SB 404

INTRODUCER: Health Policy Committee; and Senator Stargel and others

SUBJECT: Parental Consent for Abortion

DATE: January 17, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Looke/Kibbey</u>	<u>Brown</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 404 creates the Parental Consent for Abortion Act in s. 390.01117, F.S. The Act prohibits a physician from performing an abortion on a minor unless the physician has received a notarized, written consent statement signed by the minor and her mother, father, or legal guardian. However, the consent requirement does not apply if:

- The abortion is performed during a medical emergency when there is insufficient time to obtain consent; or
- The minor petitions the circuit court where she resides and receives a judicial waiver of parental consent.

The bill also authorizes first degree misdemeanor penalties for:

- A physician who willfully and intentionally performs an abortion on an unemancipated minor without the required consent; and
- Any person who provides consent who is not authorized to do so.

In addition to the potential for criminal penalties, the bill specifies that failing to obtain consent is prima facie evidence of interference with family relations in an appropriate civil action. Finally, the bill requires a physician who performs an abortion on a minor to report the performance of the abortion and related information to the Department of Health.

The bill takes effect July 1, 2020.

II. Present Situation:

A Minor's Right to Obtain an Abortion

A minor has a constitutional right to consent to and obtain an abortion.¹ However, that right is not without restrictions. For a minor to obtain an abortion in Florida, she must comply with the provisions of the Parental Notice of Abortion Act contained in s. 390.01114, F.S.

Historical Background of Federal Abortion Law

In a series of decisions rendered over several decades, the United States Supreme Court has established principles governing abortion and a minor's right to obtain an abortion.

Roe v. Wade – A Woman's Constitutional Right to Privacy and Abortion

In 1973, the U.S. Supreme Court issued the primary abortion decision, *Roe v. Wade*.² The Court concluded that a woman's right to terminate her pregnancy is entitled to constitutional protection under a right to privacy, even though "The Constitution does not explicitly mention any right of privacy."³ The Court determined that the right of privacy, whether

[F]ounded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁴

The right, however, is not absolute and is subject to limitations. The Court noted in a later decision, *Planned Parenthood of Central Missouri v. Danforth*,⁵ that the *Roe* Court "emphatically rejected"⁶ the argument

[T]hat the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way and for whatever reason she alone chooses Instead, this right must be considered against important state interests in regulation."⁷

¹ Abortion is defined as the termination of a human pregnancy with an intention *other than* to produce a live birth or remove a dead fetus. s. 390.011(1), F.S. The procedure may only be performed by a state-licensed physician or osteopathic physician or a physician practicing medicine or osteopathic medicine in the employment of the United States. s. 390.011(9), F.S.

A pregnancy may not be terminated during the third trimester or once a physician has determined that a fetus has achieved viability unless there is a medical necessity. For an abortion to be performed during the third trimester of pregnancy or upon viability, two physicians must certify in writing that, in reasonable medical judgment, the termination is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition. If a second physician is not available, one physician may certify in writing as to the medical necessity for legitimate emergency medical procedures to terminate the pregnancy. Sections. 390.0111(1) and 390.01112(1), F.S.

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ *Id.* at 151.

⁴ *Id.* at 153.

⁵ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

⁶ *Id.* at 60.

⁷ *Id.* at 60, 61 (quoting *Roe*, 410 U.S. at 154).

The *Roe* Court reasoned that when certain fundamental rights are involved, a state regulation limiting those rights “may be justified only by a ‘compelling state interest’” and the state regulations “must be narrowly drawn to express only the legitimate state interests at stake.”⁸ The Court noted that a state has an important and legitimate interest in protecting the health of the woman as well as protecting the potentiality of human life.⁹

Planned Parenthood v. Casey – The Undue Burden Standard and Substantial Obstacle Test

In 1992, the U.S. Supreme Court issued another significant abortion decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁰ In upholding abortion regulations, the Court adopted the new “undue burden” standard. An undue burden exists and makes a statute invalid if its “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”¹¹ The Court held that the undue burden standard is an appropriate means of reconciling a state’s interest in human life with the woman’s constitutionally protected liberty to decide whether to terminate a pregnancy.

Federal Case Law for Parental Involvement Laws and By-Pass Proceedings

In the wake of the *Roe* decision, states began enacting laws to regulate a minor’s access to abortion. Appellate courts attempted to reconcile the right of a minor to obtain an abortion with a parent’s right to be involved in the daughter’s abortion decision. Both the U.S. Supreme Court and the Florida Supreme Court rendered decisions that established frameworks for analyzing whether parental consent and parental notice laws meet constitutional muster.

Planned Parenthood of Central Missouri v. Danforth – Minors are Protected

The U.S. Supreme Court first addressed a parental consent statute in a 1976 decision, *Planned Parenthood of Central Missouri v. Danforth*.¹² The Court struck a Missouri statute that required a minor to obtain the written consent of a parent or person *in loco parentis* before she could obtain an abortion. The Court noted that the state could not impose a blanket parental consent requirement as a condition for abortion and reasoned that the state did not have the constitutional authority to give to “a third party an absolute and possibly arbitrary veto over the decision of the physician” and the minor, “regardless of the reason for withholding the consent.” The Court stated that minors, like adults, are protected under the Constitution and possess constitutional rights. Those rights do not “magically” come into being when someone “attains the state-defined age of majority.”¹³

The majority of the Court noted, however, that there can be little doubt that a state “furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child.”¹⁴

⁸ *Roe* at 155.

⁹ *Id.* at 162.

¹⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹¹ *Id.* at 878.

¹² *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60 (1976).

¹³ *Id.* at 74.

¹⁴ *Id.* at 91.

Bellotti v. Baird – A Framework for the Judicial Waiver of Parental Consent

In the 1979 decision, *Bellotti v. Baird*,¹⁵ the U.S. Supreme Court commented that “parental notice and consent are qualifications that typically may be imposed by the State on a minor’s right to make important decisions” because immature minors often lack the ability to take into account immediate and long-range consequences.¹⁶

Although the Court found the particular statute under review unconstitutional because it imposed an “undue burden” on a minor’s right to obtain an abortion, it outlined a path forward for parental consent laws to be held constitutional by establishing a judicial waiver of notice, also referred to as a judicial bypass procedure. The Court stated:

A pregnant minor is entitled in such a proceeding to show either: (1) 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 (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the “absolute, and possibly arbitrary, veto” that was found impermissible in *Danforth*.¹⁷

The Court concluded that “every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents.”¹⁸ Under the statutory scheme, however, the court may decline to sanction the abortion if it is not persuaded that the minor is mature or that the abortion is in her best interests.

Planned Parenthood v. Casey

The *Casey* decision mentioned earlier also addressed a one-parent consent statute that contained a judicial bypass procedure. With regard to the parental consent provision, the Court stated:

We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.¹⁹

¹⁵ *Bellotti v. Baird*, 443 U.S. 622 (1979)

¹⁶ *Id.* at 640.

¹⁷ *Bellotti*, 443 U.S. at 643, 644.

¹⁸ *Id.* at 647.

¹⁹ *Casey*, at 899.

Lambert v. Wicklund – What a Valid Parental Consent Statute Must Contain

In *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997), the Court distilled the constitutional requirements for a judicial bypass procedure which it had set forth in 1992 in *Bellotti v. Baird*. As restated, a constitutional parental consent statute must:

- Allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently;
- Allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests;
- Ensure the minor’s anonymity; and
- Provide for expeditious bypass procedures.

State Parental Involvement Laws for Minors – Parental Notice and Parental Consent

Parental involvement statutes consist of parental *notice* laws and parental *consent* laws. Parental notice laws generally require that one parent, both parents, or a legal guardian be notified by a physician at least 24 or 48 hours before a minor may obtain and a physician may perform an abortion. The parent or legal guardian is not given “veto” authority over the minor’s decision to obtain an abortion. In contrast, parental consent laws generally require that one of a minor’s parents sign a consent form before a minor may obtain an abortion. Notice statutes are “less onerous” than consent statutes and, therefore, are less likely to constitute an undue burden on abortion rights.²⁰

44 States Have Enacted Parental Involvement Laws

Abortion restrictions for minors vary significantly from state to state. According to data published by two opposing advocacy groups, the Guttmacher Institute,²¹ a pro-choice group, and Americans for Life, a pro-life group,²² and independent research, 44 states have enacted laws that require some form of parental involvement when a minor seeks an abortion. These laws can be placed within broad categories, but there are variations and exceptions that distinguish the enactments. The state laws may be categorized as follows:

- 20 states require some form of parental consent.
 - The 3 states that require the consent of *both* parents are: Kansas, Mississippi, and North Dakota.
 - The 17 states that require the consent of a single parent are: Alabama, Arizona, Arkansas, Idaho, Kentucky, Louisiana, Massachusetts,²³ Michigan, Missouri, Nebraska, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin.
- 11 states require only parental notification. Those states are: Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Minnesota, New Hampshire, South Dakota, and West Virginia.

²⁰ *Womancare of Orlando v. Agwunobi*, 448 F. Supp. 2d 1309, 1315 (N.D. Fla. 2006).

²¹ Guttmacher Institute, *Parental Involvement in Minors’ Abortions*, <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions>.

²² Email from Katie Glenn, Americans United for Life (Nov. 20, 2019) (on file with the Senate Committee on Judiciary).

²³ According to the Massachusetts Judiciary Committee, SB 1209 and its companion, HB 3320, are pending before the Legislature. The bills eliminate the current requirement for minors to obtain parental consent before having an abortion.

- 5 states require both notice and consent. Those states are: Oklahoma, Texas, Utah, Virginia, and Wyoming.
- 7 states have passed laws that are temporarily or permanently enjoined. Those states are: Alaska, California, Indiana,²⁴ Montana, Nevada, New Jersey, and New Mexico.
- 1 state, Maine, has repealed its parental notification law.
- 6 states do not appear to have enacted parental involvement laws. Those states are: Connecticut, Hawaii, New York, Oregon, Vermont, and Washington.

According to the Guttmacher Institute, all of the states that require parental involvement provide for a judicial bypass procedure, except Maryland. There, a physician, has the discretion to provide an abortion if he or she believes that parental notification could lead to abuse of the minor, the minor is mature and capable of giving informed consent, or parental notice would not be in the best interest of the minor.²⁵

Florida Abortion Law and Minors' Rights

The State Constitution's Privacy Provision

The Florida Constitution contains an express privacy provision in Article 1, section 23. A similar provision is not found in the United States Constitution. The Florida Supreme Court has determined that the state provision guarantees “an independent right to privacy.”²⁶ As such, Florida courts have interpreted this provision to afford greater privacy rights than the privacy rights of the United States Constitution. The provision states:

Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

1988 Parental Consent Law

The Legislature amended the then existing termination of pregnancies statute in 1988 to include additional provisions to facilitate the ability of a minor to obtain an abortion without parental consent.²⁷

Judicial Waiver of Notice or Judicial Bypass Procedure

The termination of pregnancies statute, as amended, required an unmarried minor to provide a physician with her written request for an abortion and the written, informed consent of a parent, custodian, or legal guardian. However, as an alternative, the physician could rely on a circuit court order authorizing the abortion without the consent of a parent, custodian, or legal guardian, which is often referred to as a “judicial bypass procedure.” The court could authorize the abortion if it found:

- The minor is sufficiently mature to give informed consent;

²⁴ The parental consent law was blocked by the Seventh Circuit Court of Appeals on Aug. 27, 2019. *Planned Parenthood of Indiana and Kentucky, Inc. v. Adams*, 937 F. 3d 973 (7th Cir. 2019).

²⁵ Maryland Code, Health-General s. 20-103.

²⁶ *In re T.W.*, 551 So. 2d 1186, 1190 (1989).

²⁷ Chapter 88-97, s. 6, Laws of Fla.

- The parent, custodian, or legal guardian unreasonably withheld consent;
- The minor fears physical or emotional abuse if the parental authority were requested to consent; or
- Any other good cause shown.

Additionally, the statute provided that if the court found that the minor was not sufficiently mature, the court was required to determine the best interest of the minor and enter an order in accordance with that determination.

Procedural Safeguards

The statute required the circuit court to ensure that:

- The minor's identity would remain anonymous in the proceeding.
- She could participate in the court proceedings on her own or through someone acting on her behalf.
- The proceedings were confidential.
- The proceedings were to be conducted promptly and a decision issued within 48 hours after the petition was filed, but the minor could request an extension.
- An expedited anonymous appeal was available to the minor who requests it.

In re T.W., A Minor - The Florida Supreme Court Held the Parental Consent Statute Invalid

In 1989, in the case of *In re T.W.*, the Florida Supreme Court held the parental consent law unconstitutional. The Court determined that a woman's right to privacy, which includes the right to seek an abortion, also extends to a minor. The Court said the statute failed because it intruded upon the "privacy of the pregnant minor from conception to birth."²⁸ The Court concluded that, under the State Constitution, the state's interest in protecting the potentiality of life by regulating abortion becomes compelling upon viability.²⁹

The Privacy Provision is Involved

The Court construed the State Constitution's privacy provision in the *In re T.W.*, decision. The Court stated that, when an abortion is involved:

Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment.³⁰

The "Compelling Interest Standard" Was Not Met

The Court concluded that, although a minor's rights are not absolute, when privacy rights are involved, the State must demonstrate that the consent statute furthers a "compelling" state interest through the least intrusive means. The state was not entitled to the more relaxed standard of demonstrating a "significant" state interest as required under federal court opinions interpreting the U.S. Constitution.

²⁸ *In re T.W.*, at 1194.

²⁹ *In re T.W.*, at 1193-94.

³⁰ *Id.* at 1192.

The Court supported its determination that the compelling interest standard was not met by observing that other statutes allow a minor to consent, without parental approval, for some medical and surgical procedures other than abortion. The Court noted that parental consent was not required and that an unmarried minor could grant consent when she seeks medical treatment during her pregnancy, when she seeks services for her child, or when she places her child for adoption.³¹

The Least Intrusive Means Were Not Used

The Florida Supreme Court also found that the parental consent statute was not the least intrusive means of furthering a state interest because it did not provide adequate procedural safeguards. The Court noted three safeguards that should have been provided but were not:

- Legal counsel during the judicial waiver proceedings;
- A record of the hearing to memorialize the judge's reasons for denying a petition for waiver; and
- Exceptions from the consent requirement for emergency or therapeutic abortions."³²

Parental Notice of Abortion Acts of 1999 and 2005

The Legislature first enacted a Parental *Notice of Abortion Act* in 1999. As its name indicates, the Act required that a parent be given advance notice of a child's intent to have an abortion.³³ The statute was challenged in court on the basis that the law violated a minor's right to privacy under the Florida Constitution.³⁴ The Florida Supreme Court determined that the law violated the State Constitution's right to privacy because the minor was not given a method to "bypass" the parental notice requirement when certain circumstances existed.³⁵

In response to the Florida Supreme Court's decision, the Legislature proposed a constitutional amendment that authorized the Legislature, notwithstanding a minor's right to privacy under the State Constitution, to require a physician to notify a minor's parent or guardian prior to an abortion. The amendment was ratified by the voters in 2004.³⁶

After the adoption of the amendment, the Legislature passed another Parental Notice of Abortion Act in 2005.³⁷ In its current version, the statute requires an attending physician to give actual notice, in person or by phone, to a parent or legal guardian of the minor, at least 48 hours before

³¹ *Id.* at 1195.

³² *Id.* at 1196.

³³ Chapter 99-322, Laws of Fla. (Creating s. 390.01115, F.S., effective July 1, 1999. A companion measure, the public records exemption bill that would shield identifying information of the minor, was passed that same session and became Chapter 99-321, Laws of Fla.).

³⁴ FLA. CONST., art. I s. 23.

³⁵ *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).

³⁶ FLA. CONST. art. X. s. 22. The amendment states:

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.

³⁷ Chapter 2005-52, s. 2, Laws of Fla.

the inducement or performance of a termination of a pregnancy on the minor.³⁸ If actual notice is not possible after a reasonable effort, the physician performing or inducing the termination of the pregnancy or the referring physician must give constructive notice.³⁹ Parental notice is not required under the Act if certain circumstances are present.⁴⁰ The act contains no criminal penalties for a physician who does not comply with the Act although a noncompliant physician may face administrative fines imposed by the Agency for Health Care Administration.

The constitutionality of the Parental Notice Act was challenged immediately in Federal District Court in *Womancare of Orlando, Inc. v. Agwunobi*.⁴¹ The federal court upheld the constitutionality of the Act and dismissed the plaintiffs' claims that the Act violated due process rights, was unconstitutionally vague, and impermissibly burdened the rights of minors to seek an abortion.

Judicial Waiver of Parental Notice or the Judicial Bypass Proceeding

Venue

The Parental Notice of Abortion Act provides that a minor may petition the circuit court *where she resides* for a waiver of the notice requirements.⁴² The issue of whether an out-of-state minor was precluded from obtaining a judicial waiver and an abortion under this language was addressed in a 2008 appellate decision.⁴³ The First District Court of Appeal decided that the language did not prohibit a minor from Georgia from obtaining a judicial waiver and an abortion in Florida. The court reasoned that the language addressed a "venue" provision and the statute was silent about the venue for nonresident minors and did not expressly prohibit nonresidents from seeking a judicial waiver or an abortion in the state. Accordingly, an out-of-state minor could seek the waiver and abortion in Florida.

The Process

To initiate the process, she may file the petition under a pseudonym or by using initials, as provided by court rule.⁴⁴ The petition must contain a statement that the petitioner is pregnant and notice has not been waived. The court must advise the petitioner that she has a right to court-appointed counsel, and must provide her with counsel, if she requests, at no cost to the young woman.⁴⁵

³⁸ Section. 390.01114(3)(a), F.S. and s. 390.01114(2)(a), F.S.

³⁹ Section 390.01114(3)(a), F.S. Constructive notice is defined as notice given in writing, signed by the physician, and mailed at least 72 hours before the procedure to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested with delivery restricted to the parent or legal guardian. Notice is deemed to have occurred after 72 hours have passed pursuant to s. 390.01114(2)(c). F.S.

⁴⁰ Parental notice is not necessary under s. 390.01114(3)(b), F.S., if: (1) In the good faith clinical judgment of the physician, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements; (2) Notice is waived in writing by the person entitled to notice and the waiver is notarized; (3) Notice is waived by the minor who is or has been married or has had the disability of nonage removed in compliance with law; (4) Notice is waived by the patient because she has a minor child dependent on her; or (5) Notice is waived by a circuit court in a judicial bypass proceeding according to statute.

⁴¹ *Womancare of Orlando v. Agwunobi*, 448 F. Supp. 2d 1309 (N.D. Fla. 2006).

⁴² Section 390.01114(4)(a), F.S.

⁴³ *In re Doe 07-B*, 973 So. 2d 627 (Fla. 1st DCA 2008).

⁴⁴ The Florida Rules of Juvenile Procedure that apply to judicial bypass proceedings are contained in FLA.R.JUV.P.Rule 8.800-Rule 8.840.

⁴⁵ *Id.*

When a minor initiates a judicial bypass proceeding in the circuit court, a private court-appointed attorney is available to represent her should she request counsel.⁴⁶ The statute is clear that private court-appointed counsel approved for this type of work are to be used first for minors who request counsel, but if no attorney is available through the clerk's list of attorneys, then the office of criminal conflict and civil regional counsel in that area will supply an attorney for the proceedings.⁴⁷ Court precedent interpreting the U.S. Constitution says it is essential that the office's records be exempt from public access.

Once a petition is filed, the court must rule and issue written findings of fact and conclusions of law within three business days after the petition is filed. This time period may be extended at the request of the minor.⁴⁸

If the circuit court determines, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court must issue an order authorizing the minor to consent to the abortion without the notification of a parent or guardian. If the court finds that the minor does not possess the requisite maturity to make that determination, it must dismiss the petition.⁴⁹ The court must issue an order authorizing the minor to consent to the performance or inducement of a termination of the pregnancy without notifying a parent or guardian if:

- The court determines by a preponderance of the evidence that the minor is a victim of child abuse or sexual abuse inflicted by her parent or guardian; or
- The court determines by clear and convincing evidence that the notification of a parent or guardian is not in her best interest.⁵⁰

Florida Abortion Statistics

While state laws specify what abortion data must be reported, there is no requirement that the state collect data documenting how many minors receive abortions. Therefore, it is unknown how many minors obtain abortions in the state annually. However, according to the Agency for Health Care Administration, 62,731 abortions or terminations of pregnancy were performed in Florida in 2019 as of October 30, 2019.⁵¹ The agency reported that 70,239 terminations were performed in 2018 and 69,102 were reported in 2017.⁵²

⁴⁶ The chief judge of the circuit maintains a list of qualified attorneys in private practice, by county and by category of cases, and provides the list to the clerk of court in each county. Section 27.40(3)(a), F.S.

⁴⁷ Section 27.511(6)(a), F.S.

⁴⁸ Section 390.01114(4)(b)1., F.S. If the court does not rule within the required 3 business days and the minor has not requested an extension, the minor may immediately petition for a hearing with the chief judge of the circuit. The chief judge is responsible for guaranteeing that a hearing is held within 48 hours after the receipt of the minor's petition and an order must be entered within 24 hours after the hearing. If the circuit court does not grant a judicial waiver of the required parental notice, the minor has a right to appeal and that ruling must be issued within seven days after receipt of the appeal. Section 390.01114(4)(b)2., F.S.

⁴⁹ Section 390.01114(4)(c), F.S.

⁵⁰ Section 390.01114(4)(d), F.S.

⁵¹ According to the Agency for Health Care Administration, this figure might include some abortions performed and reported in early November, 2019, but that is uncertain. Data reporting the total number of abortions performed in 2019 will not be posted until February 2020.

⁵² Agency for Health Care Administration, *Abortion Data – Induced Terminations of Pregnancy [ITOP] Reports*, https://ahca.myflorida.com/MCHQ/Central_Services/Training_Support/Reports.shtml.

Florida Statistics –Petitions filed by Minors for Judicial Bypass Waivers

The Florida Supreme Court, through the Office of the State Courts Administrator, is required to report by February 1 of each year the number of petitions filed in the previous year by minors seeking judicial waiver of parental notice. According to these reports, during the last 10 years, there have been 3,017 petitions filed for a judicial waiver of notice. The courts have dismissed 206 of those petitions.⁵³ Accordingly, judicial waiver of notices are granted in approximately 92.7 percent of all requests. The data from those reports is summarized as follows:

<u>Year</u>	<u>Petitions Filed</u>	<u>Petitions Dismissed</u>	<u>Percentage of Petitions Dismissed</u>
2018	193	11	5.70
2017	224	18	8.04
2016	193	15	7.77
2015	245	13	5.31
2014	242	23 ⁵⁴	9.50
2013	319	33 ⁵⁵	10.34
2012	353	38 ⁵⁶	10.76
2011	391	18 ⁵⁷	4.60
2010	381	10	2.62
<u>2009</u>	<u>476</u>	<u>27</u>	<u>5.67</u>
Total	3,017	206	6.83

III. Effect of Proposed Changes:

CS/SB 404 creates the Parental Consent for Abortion Act in s. 390.01117, F.S.

Consent of Parent of Legal Guardian Required - Subsections (3) and (4)

The Act prohibits a physician from performing an abortion on an unemancipated minor younger than 18 years of age⁵⁸ unless the physician has received a notarized, written consent statement signed by the minor and her mother, father, or legal guardian. The statement must provide that the minor is pregnant, that she intends to seek an abortion, and that her parent or legal guardian consents to the abortion because the abortion is in her best interest. The consent requirement does not apply if:

⁵³ Florida Office of the State Courts Administrator, *Fiscal Years 2009-2018, Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County, January through December* (on file with the Senate Committee on Judiciary).

⁵⁴ Two counties each had one petition filed during calendar year 2013 that was disposed of during calendar year 2014.

⁵⁵ Two counties each had one petition filed during calendar year 2013 that was not disposed of during calendar year 2013.

⁵⁶ Three counties had a total of three petitions filed during calendar year 2011 that were disposed of during calendar year 2012.

⁵⁷ Two counties had a total of three petitions filed in calendar year 2011 that were not disposed of during calendar year 2011.

⁵⁸ An unemancipated minor is someone who has not reached full legal age. A minor is considered emancipated when he or she is independent of parental control, generally as the result of a court order or statute. BLACK’S LAW DICTIONARY (11th ed. 2019).

- The attending physician certifies in the minor's record that a medical emergency⁵⁹ exists and there is insufficient time to obtain consent; or
- Consent is waived because the minor successfully petitions the circuit court where she resides and receives a judicial waiver of the consent requirement.

Procedure for Judicial Waiver of Consent– Subsection (6)

To obtain a judicial waiver of consent, which bypasses the need for parental consent, a minor must petition a circuit court in the area where she resides. She is permitted to participate in the proceedings on her own behalf. The petition must include a statement that she is pregnant and is unemancipated,⁶⁰ that consent from a parent or the legal guardian has not been obtained, and that she wishes to obtain an abortion without first obtaining consent.

Minor's Right to Court-appointed Counsel, Guardian ad Litem

The court must advise the minor that she has a right to court-appointed counsel, and must provide her with counsel upon her request. The court also may appoint a guardian ad litem for the minor who must maintain the confidentiality of the minor's identity. A county is not required to pay the salaries, costs, or expenses of any counsel appointed by the court. A minor may not be charged filing fees or court costs for a petition at either the trial or appellate level.

Confidentiality

The bill requires all court proceedings for the judicial waiver of consent to be confidential and ensure the anonymity of the minor. The minor may file her petition using a pseudonym or only her initials. All documents related to the petition are confidential, may not be made available to the public, and must be sealed. Additionally, all hearings, including appeals, under the bill must remain confidential and closed to the public as provided by court rule.

Time-Sensitive Nature of Proceedings

The bill also declares that the waiver petitions must be given precedence over other matters before the court and establishes accelerated timelines for the court to process petitions as follows:

- The circuit court must rule and issue written findings of fact and conclusions of law within 3 business days after the petition is filed, except that the timeline may be extended at the request of the minor.
- If the court fails to rule within 3 business days, the minor may immediately petition for a hearing to the chief judge who must ensure the hearing is held within 48 hours and that an order is entered within 24 hours after the hearing.
- If the waiver is not granted by the circuit court, the minor may appeal, and the appellate court must rule within 7 days after receipt of the appeal or remand the ruling to the circuit court.

⁵⁹ A medical emergency is defined in s. 390.01114(2)(d), F.S., to mean 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 for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.

⁶⁰ A circuit court has jurisdiction to emancipate a minor residing in this state upon the filing of a petition under conditions and criteria found in ch. 743, F.S. An emancipated minor may be authorized by the court to perform all acts that the minor could perform if he or she were 18 years of age.

- If remanded, the circuit court must rule within 3 business days of the remand.
- If a ruling is overturned on appeal, the reason must be based on an abuse of discretion by the circuit court and may not be based on the weight of the evidence presented to the circuit court.
- The Florida Supreme Court may provide for an expedited appeal by rule for any minor to whom the circuit court denies a waiver. An order authorizing a waiver is not subject to appeal.

Criteria to Consider for Granting a Judicial Waiver

The court must issue an order waiving the parental consent requirement if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy. In making the decision, the court must consider whether there may be any undue influence over the minor's decision by another, as well as the minor's:

- Age.
- Overall intelligence.
- Emotional development and stability.
- Credibility and demeanor as a witness.
- Ability to accept responsibility.
- Ability to assess both the immediate and long-range consequences of her choices.
- Ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.

If the court does not make these findings, it must dismiss the minor's petition.

The court must also grant a waiver of the consent requirement if the court finds, by a preponderance of the evidence, that the minor is the victim of child or sexual abuse, as defined in s. 390.01114, F.S., inflicted by one or both parents or her guardian, or if the court finds, by clear and convincing evidence, that requiring consent is not in the best interest of the minor. Under the bill, the best-interest standard does not include the financial best interest, financial considerations, or the potential financial impact on the minor or her family if she does not terminate the pregnancy. If the court does not make these findings, it must dismiss the petition.

If the court finds evidence of child or sexual abuse of the minor by any person, the court must report the evidence of the abuse as provided in s. 39.201, F.S.

Requirements for the Court

A court that conducts proceedings under the bill must:

- Provide for a written transcript of all testimony and proceedings;
- Issue a final written order containing factual findings and legal conclusions supporting its decision, including factual findings and legal conclusions relating to the maturity of the minor; and
- Order that a confidential record be maintained.

Florida Supreme Court Rulemaking Authority – Subsection (7)

The bill also requests the Florida Supreme Court to adopt rules and forms for petitions to ensure that the judicial waiver of notice proceedings are handled expeditiously, are handled in a manner consistent with the bill, and protect the confidentiality of the minor's identity and the confidentiality of the proceedings.

Criminal Penalties and Civil Liability - Subsection (8)

The bill establishes criminal penalties and civil liability as follows:

- Any person who willfully and intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the minor is unemancipated, without obtaining the necessary consent commits a first degree misdemeanor.⁶¹ The bill provides that it is a defense to prosecution if the minor falsely represented her age or identity to the physician by displaying an apparently valid governmental record or identification such that a careful and prudent person would have relied on the representation. However, this defense does not apply if the physician is shown to have had independent knowledge of the minor's actual age or identity or if the physician failed to use due diligence in determining the minor's age or identity.
- Any person who provides consent who is not authorized to do so commits a misdemeanor of the first degree.
- Failure to obtain consent from a person from whom consent is required is prima facie evidence of failure to obtain consent and of interference with family relations in appropriate civil actions. Such prima facie evidence does not apply to any issue other than failure to obtain consent from the parent or legal guardian and interference with family relations in appropriate civil actions. The civil action may be based upon a claim that the act was a result of negligence, gross negligence, wantonness, willfulness, intention, or other legal standard of care. Exemplary damages may be awarded in appropriate civil actions relevant to violations of this section.
- Failure to comply with the requirements of the Parental Consent for Abortion Act constitutes grounds for disciplinary action under the physician's or osteopathic physician's practice act found in chapters 458 and 459, F.S., respectively, and s. 456.072, F.S., the grounds for discipline as administered by the authority of the Department of Health.

Reporting Requirements – Subsection (5)

The bill requires a physician who performs an abortion on a minor in the past calendar month to submit a monthly report to the Department of Health which must include the following information for each minor upon whom an abortion is performed:

- If the abortion was performed with consent;
- If the abortion was performed during a medical emergency that excepted the minor from the consent requirement and the nature of the medical emergency;
- If the abortion was performed with a judicial waiver of consent;
- Her age; and

⁶¹ A first degree misdemeanor is punishable by a fine not to exceed \$1,000 and imprisonment not to exceed 1 year, as provided in ss 775.083(1)(d) and 775.082(4)(a), F.S.

- The number of times she has been pregnant and the number of abortions that have been performed on her.

Construction and Severability Clause– Subsections (9) and (10)

The bill states that its provisions:

- May not be construed to create or recognize a right to abortion.
- May not be construed to limit the common law rights of parents or legal guardians.
- Are not intended to make lawful an abortion that is currently unlawful.

Additionally, if any provision of the bill is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, the provision must be construed so as to give it the maximum effect permitted by law. However, if the holding is one of utter invalidity or unenforceability, the provision must be deemed severable and may not affect the remainder of the bill or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

The bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

This bill's provisions may implicate the privacy rights established in Art. I, s. 23, of the Florida Constitution. For a discussion on the relevant case law, please see the "Present Situation" section of this analysis.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

CS/SB 404 may have an indeterminate fiscal on the Department of Health and on the State Courts System related to implementing the requirements established by the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

CS/SB 404 does not repeal the existing Parental Notice of Abortion Act but leaves it in place. This may result in confusion as to how to interpret the Parental Notification and Parental Consent acts together because their requirements are different.

VIII. Statutes Affected:

This bill creates section 390.01117 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Health Policy on December 10, 2019:**

The CS defines the term “minor” as an unemancipated person younger than 18 years of age, whereas the underlying bill defined “minor” as a person under the age of 18 years.

B. Amendments:

None.