

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 Criminal Justice

BILL: SB 698

INTRODUCER: Senators Book and Stewart

SUBJECT: Assisted Reproduction Facilities

DATE: February 17, 2020

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|-----------|--------------------|
| 1. | <u>Davis</u> | <u>Cibula</u> | <u>JU</u> | Favorable |
| 2. | <u>Stokes</u> | <u>Jones</u> | <u>CJ</u> | Pre-meeting |
| 3. | _____ | _____ | <u>RC</u> | _____ |

I. Summary:

SB 698 establishes protections for people who are dealing with infertility and seek medical assistance to artificially conceive a child. The bill also provides remedies for people who are intentionally or recklessly implanted with incorrect sperm, eggs, or embryos by a physician.

The bill requires a donor to complete a contract with a donor bank or fertility clinic that specifies what must be done with an unused donation of human sperm, eggs, or embryos. Donor banks and fertility clinics must ensure that they comply with the terms of the donor's contract, and the facilities will be inspected annually by the Department of Health to ensure that they are complying with best practices policies. The bill authorizes the imposition of fines for violations and the fines will be deposited into the Rape Crisis Program Trust Fund.

Civil causes of actions, criminal prosecutions, and administrative complaints are provided for a patient or child allegedly injured by a physician who intentionally or recklessly implants the incorrect sperm, eggs, or embryos into a patient. The civil damages may include, but are not limited to damages for emotional or mental distress. The time limitations for bringing an action do not begin to run until the patient allegedly injured discovers the violation.

This bill may have an indeterminate fiscal impact on the courts for criminal and civil causes of action, and the Department of Health. Additionally, this bill may have a positive indeterminate prison bed impact (unquantifiable positive prison bed impact). See Section V. Fiscal Impact Statement.

This bill is effective July 1, 2020.

II. Present Situation:

The recent arrival of genetic testing kits and ancestry reports, such as Ancestry.com or 23andMe, has yielded unsettling results for many users. According to media reports, several fertility doctors who represented that they were using the sperm of a patient's husband or an anonymous donor to artificially inseminate a patient, were in fact lying to their patients. The fertility specialists were inseminating the patients with their own sperm. Even more distressing to the victims of these acts was the realization that the doctors' actions were not actually illegal.¹

Fertility Specialists Alleged to Have Been Sperm Donors to their Patients

Virginia

One media report stated that Dr. Cecil Jacobson, a fertility specialist in Vienna, Virginia, may have secretly donated his own sperm to father at least 75 children. Although prosecutors wanted to try Dr. Jacobson for lying to patients about the source of the sperm, no laws at that time prohibited a doctor from donating sperm to a patient. Instead, prosecutors charged him with the more basic counts of criminal fraud in his medical practice which involved the use of telephones and the United States Postal Service. He was convicted of committing 52 counts of fraud and perjury in 1992.²

Connecticut

A doctor in Greenwich, Connecticut, Ben D. Ramaley, settled a lawsuit in 2009 for secretly using his own sperm to impregnate a patient. The case was settled without any depositions being taken, but a gag order was issued which prevented the plaintiffs from discussing the case.³

When Barbara Rousseau used genetic testing to learn who her biological father was, she was astounded to learn that her father was actually her mother's fertility specialist in 1977, not an anonymous sperm donor. Barbara's parents filed a fertility fraud lawsuit against Dr. John Boyd Coats of Berlin, Vermont, in December, 2018, and seek compensatory and exemplary damages. The suit alleges that the doctor's conduct was "outrageously reprehensible" and had the character of outrage that is often "associated with a crime" and was done with malice.⁴

Indiana

In 2018, Dr. Ronald Cline of Zionsville, Indiana, surrendered his medical license after pleading guilty to two counts of obstruction of justice. It was alleged that he inseminated dozens of

¹ Ellen Trachman, Above the Law, *Intense and Dramatic Testimony Propels Texas Fertility Fraud Bill Forward* (April 17, 2019), available at <https://abovethelaw.com/2019/04/intense-and-dramatic-testimony-propels-texas-fertility-fraud-bill-forward/> (last visited February 13, 2020) and CBS News, *Indiana Fertility Doctor Used Own Sperm to Impregnate Patients, Court Docs Say* (September 12, 2016), available at <https://www.cbsnews.com/news/indiana-fertility-doctor-used-own-sperm-to-impregnate-women-court-docs-say/> (last visited February 13, 2020).

² *Doctor Is Found Guilty in Fertility Case*, N.Y. TIMES (March 5, 1992), available at <https://perma.cc/J2NA-NUY8> (last visited February 14, 2020), cited by Jody Lynee Madeira, *infra* at Note 4.

³ LeAnne Gendreau and Diana Perez, NBC Connecticut News, *Fertility Doc Accused of Making His Own Donation* (November 12, 2009) NBC News, available at <https://www.nbcconnecticut.com/news/local/fertility-doctor-may-have-done-the-deed-himself/2060754/> (last visited February 13, 2020).

⁴ Jody Lynee Madeira, *Understanding Illicit Insemination and Fertility Fraud, From Patient Experience to Legal Reform*, Columbia Journal of Gender & Law, 2019 Fall Issue 110, 123-124.

women with his own sperm while telling his patients that the donors were anonymous men. DNA tests revealed that he is likely the father of as many as 46 children whose mothers were his patients. Indiana law, at that time, did not specifically prohibit fertility specialists from donating their own sperm.^{5, 6}

Colorado

Dr. Paul Brennan Jones, a fertility specialist in Grand Junction, Colorado, was sued in October, 2019, for using his own sperm, rather than the sperm of anonymous donors, to impregnate women. Maia Emmons-Boring, whose mother relied on Dr. Jones for fertility treatment nearly 40 years earlier, has learned through DNA testing that she and her sister have five known half-siblings who were fathered by Dr. Jones. Ms. Emmons-Boring has been contacted by three additional people who are biologically linked to them through DNA testing. The civil lawsuit against the doctor alleges negligence, fraud, and other claims for damages.⁷

Idaho

In 2019, Dr. Gerald Mortimer, a retired gynecologist in Idaho Falls, Idaho, admitted to using his own sperm to impregnate multiple women in his infertility practice. He left the Obstetrics and Gynecology Associates practice in Idaho Falls because he feared he would be caught using his own sperm to impregnate women. At least one lawsuit is pending against him.⁸

The Difficulty of Holding the Doctors Legally Accountable

Holding the fertility doctors legally accountable for their fraudulent acts, either criminally or civilly, has been difficult. One of the most obvious obstacles is an expired statute of limitation because the fraudulent act often occurred decades before it was discovered. Another obstacle involves the destruction of evidence which could be the destruction of medical records. It is difficult to prosecute a case criminally as a traditional sexual assault case because the women “consented” to the inseminations. It is difficult to prevail in a civil case because the facts do not readily lend themselves to the elements of fraud. The fraudulent inseminations more closely resemble “fraud in the inducement” where a person agrees to a procedure knowing what is involved, but consents to the procedure based upon false representations made by the defendant doctor.⁹

⁵ Associated Press, *Fertility Doctor Who Used Own Sperm to Impregnate Women Surrenders License* (August 23, 2018), available at <https://nypost.com/2018/08/23/fertility-doctor-who-used-own-sperm-to-impregnate-women-surrenders-license/> (last visited February 13, 2020).

⁶ Associated Press, *Indiana Senate Sends Sperm-Misuse Legislation to Governor* (April 17, 2019), available at <https://www.ibj.com/articles/73357-indiana-senate-sends-sperm-misuse-legislation-to-governor> (last visited February 13, 2020).

⁷ Morgan Phillips, Fox News, *Colorado fertility doctor used his own sperm to impregnate women, lawsuit claims* (October 29, 2019), available at <https://www.foxnews.com/us/colorado-fertility-doctor-used-his-own-sperm-to-impregnate-women-lawsuit-claims> (last visited February 13, 2020).

⁸ Grace Hansen, EastIdahoNews.com, *Former Idaho Falls Doctor Admits to Using Own Sperm to Inseminate Multiple Patients* (November 7, 2019), available at <https://www.eastidahonews.com/2019/11/former-idaho-falls-gynecologist-admits-to-using-own-sperm-to-father-patients-children/> (last visited February 13, 2020).

⁹ *Supra*, Note 4 at 113, 184.

Several States' Responses to Fertility Fraud

Texas

In response to the revelation that the doctors' actions were not technically illegal, several states have enacted laws to criminalize the doctors' deceptive acts. Texas, for example, enacted a law in 2019 that creates a sexual assault felony, punishable by up to 2 years' imprisonment, if a health care services provider, while performing an assisted reproduction procedure, uses human reproductive material from a donor knowing that the recipient has not expressly consented to the use of the material from that donor. Additionally, and because most children born under these fraudulent circumstances and their parents do not discover the truth of their conception until many years later, victims are given 2 years from the time the offense is discovered to bring an action for the crime of sexual assault. The act is prospective in its application.¹⁰

California

California passed legislation in 2011 that criminalized the use of sperm, ova, or embryos in assisted reproduction technology for a purpose other than that indicated by the provider. A violator will be punished by imprisonment between 3 and 5 years and a fine that does not exceed \$50,000.¹¹

Indiana

Indiana similarly enacted legislation in 2019. The statute establishes a cause of action for civil fertility fraud and provides that a prevailing plaintiff may receive compensatory and punitive damages or liquidated damages of \$10,000. The legal action must be commenced within 10 years of the child's 18th birthday, 20 years after the procedure was performed, when the person first discovers evidence through DNA testing, when the person becomes aware of a record that provides sufficient evidence to bring a suit against the defendant, or when the defendant confesses to the offense.¹²

Colorado

Colorado is now considering a bill entitled "Misuse of Human Reproductive Material" which creates a new civil cause of action as well as a criminal offense if a health care provider, during the course of assisted reproduction, uses a donation from someone without obtaining the written consent of the patient. The bill provides for compensatory or liquidated damages of \$50,000 in a civil action and provides a felony penalty for the criminal act. Conviction of the offense is also considered unprofessional conduct under the licensing statute.¹³

¹⁰ Texas SB 1259 (2019), available at <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=SB1259> (last visited February 13, 2020).

¹¹ California Penal Code s. 367g., available at https://california.public.law/codes/ca_penal_code_section_367g (last visited February 13, 2020).

¹² Senate Enrolled Act No. 174, an act amending the Indiana Code concerning civil procedure, available at <http://iga.in.gov/legislative/2019/bills/senate/174#document-d66c4e90> (last visited February 13, 2020).

¹³ HB 20-1014, Colorado General Assembly, Second Regular Session, 72nd General Assembly, available at <https://www.leg.colorado.gov/bills/hb20-1014> (last visited February 13, 2020).

Additional States Considering Legislation

Nebraska, Ohio, and Washington state are currently considering legislation to provide redress against physicians for fertility fraud.

Florida Law

It does not appear that Florida law specifically prohibits a health care practitioner from inseminating a patient with reproductive material from a donor without the patient's consent. As discussed above, the statute of limitations, the time allowed to bring an action for a previous act, has generally expired because many people do not realize that fraud was committed until decades after the insemination. Similarly, it would be challenging to prove sexual battery because the patient "consented" to the insemination, and the act was not technically committed against her will.

Fertility Clinics in Florida

As far as staff has been able to determine, no current law requires donor banks or fertility clinics to be regulated, registered, or inspected in the state. According to the Department of Health, there are approximately 30 fertility clinics operating in the state, some with multiple locations, and four donor banks.¹⁴

III. Effect of Proposed Changes:

The bill establishes protections for people who are dealing with infertility and seek medical assistance to artificially conceive a child. The bill:

- Establishes causes of actions against a physician who intentionally or recklessly implants the incorrect reproductive material into a patient;
- Expands the traditional statutes of limitations for legal actions;
- Requires donor contracts dealing with sperm, eggs, or embryos to specify how donations will be handled;
- Requires donor banks and fertility clinics to develop best practices policies for storing and segregating specimens; and
- Provides for inspections as well as fines for donor bank and fertility clinic violations.

Definitions – Subsection (1)

- The bill defines:
 - "Assisted reproductive technology," to mean all treatments or procedures that include the handling of human eggs, sperm, or embryos, including in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, and any other specific technology the department deems appropriate by rule.
 - "Department," to mean the Department of Health.

¹⁴ Florida Department of Health, *SB 698 Legislative Bill Analysis*, (February 7, 2020) (on file with the Senate Committee on Criminal Justice).

- “Donation,” to mean the giving of human sperm, eggs, or embryos to a donor bank or fertility clinic for use in assisted reproduction, regardless of whether for personal use or compensation.
- “Donor,” to mean a person who gives a donation.
- “Donor bank,” to mean a facility that collects donations from donors for use by a fertility clinic.
- “Fertility clinic,” to mean a facility in which human eggs are subject to assisted reproductive technology based on manipulation of eggs or embryos that are subject to implantation.
- “Incorrect insemination,” to mean the implantation of sperm, eggs, or embryos into a patient which is contrary to the terms of the donor’s contract.

Causes of Action Against a Physician – Subsection (6)

The bill establishes causes of action against a physician who intentionally or recklessly implants the incorrect sperm, eggs, or embryo into a patient.

- Civilly, the physician is liable to the patient or a child born from the assisted reproduction procedure for all damages that are reasonably necessary to compensate the patient or the child for any injuries suffered including, but not limited to, emotional or mental distress.
- Criminally, the physician commits a felony of the third degree.¹⁵ The physician commits a sexual battery if the incorrect insemination is determined to be the physician’s own biological specimen.
- Administratively, the physician is subject to disciplinary action for failing to perform a statutory or legal obligation, and additionally is subject to denial of a license or disciplinary action, by the Department of Health and the Board of Medicine or the Board of Osteopathic Medicine, whichever is applicable.

Time Limitations for Initiating Civil, Criminal, or Administrative Actions Against a Physician – Subsection (7)

Civil Actions

The time limitations for a civil action brought by or on behalf of a patient or a child who is allegedly injured by an incorrect insemination do not begin to run until the patient discovers the violation. Hence, the period for bringing an action is 3 years after the discovery of the violation pursuant to s. 95.11(3)(p), F.S.

Criminal Prosecutions

The time limitations for the prosecution of intentionally or recklessly implanting the incorrect sperm, eggs, or embryos into a patient does not begin to run until the patient discovers the violation and reports it to a law enforcement agency or other governmental agency. The law enforcement agency or other governmental agency has a duty to promptly report the allegation to the state attorney for the judicial circuit where the alleged violation occurred.

¹⁵ A third degree felony is punishable by up to five years in state prison and a fine not exceeding \$5,000. Sections 775.082 and 775.083, F.S.

If the violation did not involve reproductive material from the physician, the crime is a third degree felony, and the crime must be prosecuted within 3 years after discovery of the violation. If the doctor's own biological specimen is used, the crime is sexual battery. Assuming both the doctor and patient are 18 years or older, this is a second degree felony.¹⁶ Generally, there is a 3 year statute of limitations for second degree felonies.¹⁷ However, there is an 8 year statute of limitations for first or second degree sexual battery offenses, when the victim is 16 years of age or older at the time of the offense, and the offense was not barred on or before July 1, 2015.¹⁸

Administrative Complaints

The time limitations for a regulatory agency to file an administrative complaint against a physician's license do not begin to run until the patient discovers the violation and reports it to the department or law enforcement agency. Accordingly, an administrative complaint against a physician's license must be brought within 6 years of the discovery of the act, pursuant to s. 456.073(13), F.S.

Donor Contracts – Subsection (2)

The bill requires a donor to enter into a contract with a donor bank or fertility clinic before he or she is permitted to donate to that facility. The contract must include what must be done with the specimen if:

- The donor dies or becomes incapacitated;
- A designated recipient who is to receive the donation dies or becomes incapacitated;
- The donor and recipient separate or their marriage is dissolved; and
- The specimen is unused, including whether the specimen may be disposed of, offered to a different recipient, or may be donated to science.

A donor bank must ensure that each donation transferred to a fertility clinic is clearly labeled based upon the terms of the donor's contract. A fertility clinic must ensure that each donation received from a donor or a donor bank is implanted, returned, or disposed of according to the terms of the donor's contract.

Best Practices Policies – Subsection (3)

The bill requires each donor bank and fertility clinic, by January 1, 2021, to develop a written best practices policy for storing and segregating sperm, eggs, and embryos to ensure that the correct specimens are implanted in the correct patients and also handled as directed by each donor's contract with either the donor bank or fertility clinic. The best practices policy must be submitted to the Department of Health each year for review. If a fertility clinic does not have a written best practices policy in place, the bill creates a presumption of physician recklessness in a cause of action brought under the provision of the bill.

¹⁶ A second degree felony is punishable by up to 15 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

¹⁷ Section 775.15, F.S.

¹⁸ Section 775.15(14)(b), F.S.

Inspections – Subsection (4)

The Department of Health is responsible for inspecting donor banks and fertility clinics annually and performing the inspections without notice.

Fines – Subsection (5)

The Department of Health must impose:

- A fine of \$5,000 on a donor bank for each failure to clearly label a donation or otherwise comply with the terms of the donor’s contract.
- An administrative fine of up to \$20,000 on a donor bank or a fertility clinic for each violation of 42 U.S.C. part 263, the preparation of biological products.

All fines collected under this section shall be deposited into the Rape Crisis Trust Fund within the Department of Health.

Effective Date

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:

Section 383.61(3), F.S., provides that there is a “presumption of physician recklessness” if a fertility clinic does not have a written best practices policy in place. This presumption appears to be applicable to civil, administrative, and criminal proceedings resulting from violations of the bill. Similar presumptions in the criminal context have been found to be unconstitutional by courts.¹⁹ The Legislature may wish to limit the application of the presumption of recklessness to civil and administrative proceedings.

¹⁹ See *State v. Brake*, 796 So. 2d 522 (Fla. 2001).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Department of Health agency analysis, as currently written, the bill would create an increased workload and have a fiscal impact of \$610,423. This reflects the need to hire 6 full-time employees and a physician. The Department anticipates needing to hire additional clinical nursing staff to conduct facility inspections as well as contract with a fertility specialist physician. The bill would also create a need for additional staff to manage and review annual contracts and oversee compliance with state and federal requirements.²⁰

This bill may have an indeterminate fiscal impact on the courts for criminal and civil causes of action, and the Department of Health.

Additionally, this bill makes it a third degree felony to intentionally or recklessly implant the incorrect sperm, eggs, or embryos into a patient. It is a sexual battery if the incorrect insemination is of the physician's own biological specimen. Because this bill creates two new crimes, it may have a positive indeterminate prison bed impact (unquantifiable positive prison bed impact).

VI. Technical Deficiencies:

According to the Department of Health agency analysis, the requirement that donor banks and fertility clinics submit best practices to the department for review does not provide guidance on what the requirements must contain or whether the best practices are acceptable or not.²¹

The bill requires the department to inspect donor banks and fertility clinics each year but does not give the department jurisdiction over these facilities and no current law requires the donor banks and fertility clinics to be regulated or registered and the bill does not contain a similar provision.²²

The bill requires the department to impose a range of fines for violations but does not provide rule making authority to meet APA standards that would enable the department to implement the provisions.²³

²⁰ Florida Department of Health, *SB 698 Legislative Bill Analysis*, (February 7, 2020) (on file with the Senate Committee on Criminal Justice).

²¹ *Id.*

²² *Id.*

²³ *Id.*

If the impetus for the bill is the fact that some physicians have used their own biological specimens in patients expecting a specimen from an “anonymous donor,” the Legislature may wish to expressly prohibit a physician from making a donation to a patient without a patient’s express consent.

The bill provides that a physician who intentionally or recklessly implants the incorrect sperm, eggs, or embryos into a patient, commits a sexual battery under s. 794.011, F.S., if the incorrect insemination is of the physician’s own biological specimen. Sexual battery is defined as oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object, however, sexual battery does not include an act done for a bona fide medical purpose.²⁴ To constitute a criminal offense, the sexual battery must occur without the person’s consent. Because the act of insemination is a consensual medical procedure, there may be significant challenges to prosecuting the offense as a sexual battery, under s. 794.011, F.S.

The bill requires the department of health to impose a fine for a donor bank or fertility clinic not in compliance with 42 U.S.C. 263. This section does not contain requirements and only provides allowances for the reparation of biological products by service. A reference to 42 U.S.C. 263a(f), which contains requirements for a laboratory facility may be an appropriate reference.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 383.61 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

²⁴ Section 794.011, F.S.