

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 698

INTRODUCER: Senator Book

SUBJECT: Assisted Reproduction Facilities

DATE: February 10, 2020

REVISED: \_\_\_\_\_

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|---------|----------------|-----------|--------------------|
| 1. | Davis   | Cibula         | JU        | <b>Pre-meeting</b> |
| 2. |         |                | CJ        |                    |
| 3. |         |                | RC        |                    |

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**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 or child allegedly injured discovers the violation.

**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.<sup>1</sup>

### **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.<sup>2</sup>

#### ***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.<sup>3</sup>

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.<sup>4</sup>

#### ***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 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

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

<sup>2</sup> *Doctor Is Found Guilty in Fertility Case*, N.Y. TIMES (March 5, 1992) <https://www.nytimes.com/1992/03/05/us/doctor-is-found-guilty-in-fertility-case.html> [https://perma.cc/J2NA-NUY8], cited by Jody Lynee Madeira, *infra* at Note 4.

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

<sup>4</sup> 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.

patients. Indiana law, at that time, did not specifically prohibit fertility specialists from donating their own sperm.<sup>5,6</sup>

### ***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.<sup>7</sup>

### ***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.<sup>8</sup>

## **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.<sup>9</sup>

## **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

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

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

<sup>7</sup> Morgan Phillips, Fox News, *Colorado fertility doctor used his own sperm to impregnate women, lawsuit claims* (Oct. 29, 2019) <https://www.foxnews.com/us/colorado-fertility-doctor-used-his-own-sperm-to-impregnate-women-lawsuit-claims>.

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

<sup>9</sup> *Supra*, Note 4 at 113, 184.

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.<sup>10</sup>

### ***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.<sup>11</sup>

### ***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.<sup>12</sup>

### ***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.<sup>13</sup>

### ***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,

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<sup>10</sup> Texas SB 1259 (2019) <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=SB1259>.

<sup>11</sup> California Penal Code s. 367g. [https://california.public.law/codes/ca\\_penal\\_code\\_section\\_367g](https://california.public.law/codes/ca_penal_code_section_367g).

<sup>12</sup> Senate Enrolled Act No. 174, an act amending the Indiana Code concerning civil procedure. <http://iga.in.gov/legislative/2019/bills/senate/174#document-d66c4e90>.

<sup>13</sup> HB 20-1014, Colorado General Assembly, Second Regular Session, 72<sup>nd</sup> General Assembly, <https://www.leg.colorado.gov/bills/hb20-1014>.

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.<sup>14</sup>

### **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;
- Provides for inspections as well as fines for donor bank and fertility clinic violations.

#### **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 and 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.

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<sup>14</sup> Florida Department of Health, *SB 698 Legislative Bill Analysis*, (Feb. 7, 2020) (on file with the Senate Committee on Judiciary).

## **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.

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, a second degree felony, and the crime must be also be prosecuted within 3 years after the violation is discovered.

### ***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, as defined in the bill, 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 maybe 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.

**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.

**Definitions – Subsection (1)**

The bill defines assisted reproductive technology, department, donation, donor, donor bank, fertility clinic, and incorrect insemination.

**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.<sup>15</sup> The Legislature may wish to limit the application of the presumption of recklessness to civil and administrative proceedings.

**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.<sup>16</sup>

**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.<sup>17</sup>

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<sup>15</sup> See *State v. Brake*, 796 So. 2d 522 (Fla. 2001).

<sup>16</sup> Florida Department of Health, *SB 698 Legislative Bill Analysis*, (Feb. 7, 2020) (on file with the Senate Committee on Judiciary).

<sup>17</sup> *Id.*



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.<sup>18</sup>

Finally, 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.<sup>19</sup>

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.

**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.

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

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<sup>18</sup> *Id.*

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