HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 321 Abortion
SPONSOR(S): Trujillo and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee		Prater	Calamas
2) Judiciary Committee			
3) Health Care Appropriations Subcommittee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

This bill amends chapter 390, F.S., relating to termination of pregnancies. The bill:

- Creates the "Pain-Capable Unborn Child Protection Act."
- Requires physicians to make a determination of post fertilization age of a fetus before performing an abortion.
- Prohibits abortions from being performed after the fetus has reached a postfertilization age of 20 weeks, with exceptions for medical necessity or to preserve the life of the unborn.
- Requires physicians that perform abortions to report information relating to the abortion to the Department of Health (DOH).
- Requires DOH to provide a public report containing all of the information reported from abortion providers.
- Establishes standards of legal action to be taken against any person that violates the provisions of this bill relating to the improper performance of an abortion.
- Requires DOH to adopt rules to implement the provisions of the bill.

The bill appears to have no fiscal impact.

The effective date of the bill is July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Fetal Pain

In 2008, there were 1.21 million abortions nationwide.[1] This same year, 22 percent of all pregnancies (excluding miscarriages) resulted in abortion.[2] According to the Guttmacher Institute, which surveys abortion providers, in 2008, there were 94,360 abortions in Florida[3], while there were 231,657 live births.[4] This amounts to approximately 2 abortions for every 5 births. However, the Agency for Health Care Administration (AHCA) reported 86,754 abortions, which is 7,606 less than the number reported by the Guttmacher Institute.[5]

According to AHCA, in 2009, there were 75,397 abortions performed at a gestational age of 12 weeks or younger, 6,516 at a gestational age of 13-24 weeks, and 125 at a gestational age of 25 weeks or older.[6]

Much research has been performed in recent years regarding the issue of fetal pain. Emerging scientific advances involving prenatal surgery have led to numerous medical studies regarding the ability of a fetus to feel pain, and at what stage this occurs. Research has found that pain receptors (nocieptors) are present throughout the fetus' entire body by no later than 20 weeks,[7] and that nerves link these receptors to the brain's thalalmus and subcortical plate by no later than 20 weeks.[8] By 8 weeks after fertilization, the fetus reacts to touch and after 20 weeks, the fetus reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling.[9] Additionally, the application of painful stimuli to a fetus is associated with significant increases in stress hormones.[10]

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[1] The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.
[2] *Id.*
[3] The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.
[4] Florida Department of Health, Department of Vital Statistics, 2008.
[5] The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.
[6] Agency for Health Care Administration, Reported Induced Terminations of Pregnancy by Reason, 2009.
[7] Myers LB, Bulich LA, Hess, P, Miller, NM. Fetal endoscopic surgery: indications and anaesthetic management. *Best Practice & Research Clinical Anaesthesiology* 18:2 (2004) 231-258; Derbyshire SW, Foetal pain? *Best Practice & Research Clinical Obstetrics and Gynaecology* 24:5 (2010) 647-655; Annand KJS, Hickey PR. Pain and its effects in the human neonate and fetus. New England Journal of Medicine 317:21 (1987) 1321-1329; Vanhalto S, van Nieuwenhuizen O. Fetal Pain? *Brain & Development*. 22 (2000) 145-150; Brusseau R. Developmental Perpectives: is the Fetus Conscious? *International Anesthesiology Clinics.* 46:3 (2008) 11-23.
[8] Van Scheltema PNA, Bakker S, Vandenbussche FPHA, Oepkes, D. Fetal Pain. *Fetal and Maternal Medicine Review*. 19:4 (2008) 311-324; Glover V. Fetal pain: implications for research and practice. *British Journal of Obstetrics and Gynaecology.* 106 (1999) 881-886; Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA. A Systematic Multidisciplinary Review of the Evidence. *Journal of the American Medical Association.* 294:8 (2005) 947-954; Gupta R, Kilby M, Cooper G. Fetal surgery and anaesthetic implications. *Continuing Education in Anaesthesia, Critical Care & Pain.* 8:2 (2008) 71-75.
[9] Gupta R, Kilby M, Cooper G. Fetal surgery and anaesthetic implications. *Continuing Education in Anaesthesia, Critical Care & Pain.* 8:2 (2008) 71-75; Glover V. The fetus may feel pain from 20 weeks; The Fetal Pain Controversy. *Conscience.* 25:3 (2004) 35-37; Myers LB, Bulich LA, Hess, P, Miller, NM. Fetal endoscopic surgery: indications and anaesthetic management. *Best Practice & Research Clinical Anaesthesiology.* 18:2 (2004) 231-258; Derbyshire SW. Fetal Pain: Do We Know Enough to Do the Right Thing? *Reproductive Health Matters*. 16: 31Supp. (2008) 117-126; Giannakoulopoulos X, Sepulveda W, Kourtis P, Glover V, Fisk NM. Fetal plasma cortisol and β-endorphin response to intrauterine needling. *Lancet.* 344 (1994) 77-81; Lowery CL, Hardman MP, Manning N, Clancy B, Hall RW, Anand KJS. Neurodevelopmental Changes of Fetal Pain. *Seminars in Pernatology.* 31 (2007) 275-282; Mellor DJ, Diesch TJ, Gunn AJ, Bennet L. The importance of „awareness" for understanding fetal pain. *Brain Research Reviews*. 49 (2005) 455-471.
[10] Tran, KM. Anesthesia for fetal surgery. *Seminars in Fetal & Neonatal Medicine.* 15 (2010) 40-45; Myers LB, Bulich LA, Hess, P, Miller, NM. Fetal endoscopic surgery: indications and anaesthetic management. *Best Practice & Research Clinical Anaesthesiology.* 18:2 (2004) 231-258; Derbyshire SW. Fetal Pain: Do We Know Enough to Do the Right Thing? *Reproductive Health Matters*. 16: 31Supp. (2008) 117-126; Gupta R, Kilby M, Cooper G. Fetal surgery and anaesthetic implications. *Continuing Education in Anaesthesia, Critical Care & Pain.* 8:2 (2008) 71-75; Fisk NM, Gitau R, Teixeira MD, Giannakoulopoulos, X, Cameron, AD, Glover

Fetal anesthesia is routinely administered on fetus' undergoing surgery, and fetus' that receive the anesthesia show a decrease in stress hormones compared to those that do not.[11] Some medical experts assert that the fetus is incapable of experiencing pain until a point later in pregnancy than 20 weeks because the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex.[12] However, recent medical research since 2007, provides strong evidence that a functioning cortex is not necessary to experience pain.[13] Lastly, there is documented evidence to show a fetus' reaction to painful stimuli and fetal surgeons have found it necessary to sedate the fetus with anesthesia to prevent the fetus from thrashing about in reaction to invasive surgery.[14]

The "Pain-Capable Unborn Child Protection Act" prohibits abortion after 20 weeks postfertilization age based on the scientific evidence that a fetus is capable of feeling pain at this age. This legislation has been filed in at least 9 other states (Kansas, Oklahoma, Alabama, Georgia, Minnesota, New Mexico, Idaho, Massachusetts, and Kentucky) and was passed and signed into law in Nebraska in 2010. Ten states currently provide either written or verbal information regarding fetal pain to women seeking an abortion (Alaska, Arkansas, Georgia, Louisiana, Minnesota, Missouri, Oklahoma, South Dakota, Texas, and Utah).

Caselaw Related to Abortion

The Viability Standard

In the seminal case regarding abortion, *Roe v. Wade*, the United States Supreme Court established a rigid trimester framework dictating how, if at all, states can regulate abortion.[15] One of the primary

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VA. Effect of Direct Fetal Opioid Analgesia on Fetal Hormonal and Hemodynamic Stress Response to Intrauterine Needling. *Anesthesiology*. 95 (2001) 828-835.

[11] Van de Velde M, Van Schoubroeck DV, Lewi LE, Marcus MAE, Jani JC, Missant C, Teunkens A, Deprest J. Remifentanil for Fetal Immobilization and Maternal Sedation During Fetoscopic Surgery: A Randomized, Double-Blind Comparison with Diazepam. *Anesthesia & Analgesia*. 101 (2005) 251-258; Myers LB, Bulich LA, Hess, P, Miller, NM. Fetal endoscopic surgery: indications and anaesthetic management. *Best Practice & Research Clinical Anaesthesiology.* 18:2 (2004) 231-258; Gupta R, Kilby M, Cooper G. Fetal surgery and anaesthetic implications. *Continuing Education in Anaesthesia, Critical Care & Pain.* 8:2 (2008) 71-75; Giannakoulopoulos X, Sepulveda W, Kourtis P, Glover V, Fisk NM. Fetal plasma cortisol and β-endorphin response to intrauterine needling. *Lancet.* 344 (1994) 77-81; Van Scheltema PNA, Bakker S, Vandenbussche FPHA, Oepkes, D. Fetal Pain. *Fetal and Maternal Medicine Review*. 19:4 (2008) 311-324; Fisk NM, Gitau R, Teixeira MD, Giannakoulopoulos, X, Cameron, AD, Glover VA. Effect of Direct Fetal Opioid Analgesia on Fetal Hormonal and Hemodynamic Stress Response to Intrauterine Needling. *Anesthesiology*. 95 (2001) 828-835; De Buck F, Deprest J, Van de Velde M. Anesthesia for fetal surgery. *Current Opinion in Anaesthesiology*. 21 (2008) 293-297; Derbyshire SW. Fetal Pain: Do We Know Enough to Do the Right Thing? *Reproductive Health Matters*. 16: 31Supp. (2008) 117-126.

[12] Lee SJ, Ralston HJP, Drey EA, Partridge JC, Rosen MA. Fetal Pain: a systematic multidisciplinary review of the evidence. JAMA. 2005;294(8):947-954, at 949.

[13] Anand KJS. Fetal Pain? *Pain: Clinical Updates.* 14:2 (2006) 1-4; Fetal Awareness: Review of Research and Recommendations for Practice. Report of a Working Party. *Royal College of Obstetricians and Gynecologists.* March 2010; Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA. A Systematic Multidisciplinary Review of the Evidence. *Journal of the American Medical Association.* 294:8 (2005) 947-954; Brusseau R, Myers L. Developing consciousness: fetal anesthesia and analgesia. *Seminars in Anesthesia, Perioperative Medicine and Pain.* 25 (2006) 189-195; Mellor DJ, Diesch TJ, Gunn AJ, Bennet L. The importance of „awareness" for understanding fetal pain. *Brain Research Reviews*. 49 (2005) 455-471; Derbyshire SWG. Can fetuses feel pain? *British Medical Journal*. 332 (2006) 909-912; Merker B. Consciousness without a cerebral cortex: A challenge for neuroscience and medicine. *Behavioral and Brain Sciences.* 30 (2007) 63-81; Anand KJS. Consciousness, cortical function, and pain perception in nonverbal humans. *Behavioral and Brain Sciences*. 30:1 (2007) 82-83; Brusseau R. Developmental Perpectives: is the Fetus Conscious? *International Anesthesiology Clinics.* 46:3 (2008) 11-23.

[14] Van de Velde M, Van Schoubroeck DV, Lewi LE, Marcus MAE, Jani JC, Missant C, Teunkens A, Deprest J. Remifentanil for Fetal Immobilization and Maternal Sedation During Fetoscopic Surgery: A Randomized, Double-Blind Comparison with Diazepam. *Anesthesia & Analgesia*. 101 (2005) 251-258; Giannakoulopoulos X, Sepulveda W, Kourtis P, Glover V, Fisk NM. Fetal plasma cortisol and β-endorphin response to intrauterine needling. *Lancet.* 344 (1994) 77-81; Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA. A Systematic Multidisciplinary Review of the Evidence. *Journal of the American Medical Association.* 294:8 (2005) 947-954; Van Scheltema PNA, Bakker S, Vandenbussche FPHA, Oepkes, D. Fetal Pain. *Fetal and Maternal Medicine Review*. 19:4 (2008) 311-324.

[15] 410 U.S. 113 (1973).

holdings in the case was that, in the third trimester, when the fetus is considered viable, states can prohibit abortions as long as the life or health of the mother is not at risk.[16]

Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than that of the third trimester, in *Planned Parenthood v. Casey*[17] the United States Supreme Court rejected the trimester framework in favor of limiting the states' ability to regulate abortion pre-viability.[18]

Thus, while upholding the underlying holding in *Roe* that states can "[r]egulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother[,]"[19] the Court determined that the line for this authority should be drawn at "viability," because "[T]o be sure, as we have said, there may be some medical developments that affect the precise point of viability…but this is an imprecision with tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter."[20] Furthermore, the Court recognized that "In some broad sense, it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[21]

The Medical Emergency Exception

In *Doe v. Bolton*, an early United States Supreme Court decision decided around the time of *Roe*, the Supreme Court was faced with determining, among other things, whether a Georgia statute criminalizing abortions (pre- and post-viability) except when determined to be necessary based upon a physician's "best clinical judgment" was unconstitutionally void for vagueness for inadequately warning a physician under what circumstances an abortion could be performed.[22]

In its reasoning, the Court agreed with the District Court decision that the exception was not unconstitutionally vague, by recognizing that:

> [t]he medical judgment may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.

This broad determination of what constituted a medical emergency was later tested in the *Casey case*, albeit in a different context. One question before the Supreme Court in *Casey* was whether the medical emergency exception to a 24-hour waiting period for an abortion was too narrow in that there were some potentially significant health risks that would not be considered "immediate."[23] The exception in question provided that a medical emergency is:

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the

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[16] *Id.* at 164-165.
[17] 505 U.S. 833 (1992).
[18] The standard developed in the Casey case was the "undue burden" standard, which provides that a state regulation cannot impose an undue burden on, meaning it cannot place a substantial obstacle in the path of, the woman's right to choose. *Id.* at 876-79.
[19] *See Roe*, 410 U.S. at 164-65.
[20] *See Casey, 505 U.S.* at 870.
[21] *Id*.
[22] 410 U.S. 179 (1973) Other exceptions, such as in cases of rape and when, "The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect." *Id.* at 183. *See also, U.S. v. Vuitich*, 402 U.S. 62, 71-72 (1971)(determining that a medical emergency exception to a criminal statute banning abortions would include consideration of the mental health of the pregnant woman).
[23] *Id.* at 880. The Court also considered a medical emergency exception related to informed consent requirements in pre-viability cases. Some courts have construed the Court's reasoning in *Casey* to require a mental health component to the medical emergency exception for obtaining informed consent because the Court recognized that psychological well-being is a facet of health and it is important that a woman comprehend the full consequences of her decision so as to reduce the risk that the woman will later discover that the decision was not fully informed, which could cause significant psychological consequences. *Id.* at 881-885.

> immediate abortion of her pregnancy to avert death or for which delay will create serious risk of substantial and irreversible impairment of a major bodily function.[24]

In evaluating the more objective standard under which the physician is to determine the existence of a medical emergency, the Court in *Casey* determined that the exception would not significantly threaten the life and health of a woman and imposed no undue burden on the woman's right to choose.[25]

Since *Casey*, the scope of the medical emergency exception, particularly whether the broader requirement in *Doe* that the woman's mental health should be considered, is not entirely settled. For example, in 1997, the Sixth Circuit Court of Appeal, which is not binding on Florida, affirmed a United States District Court case wherein the trial court determined an Ohio statute restricting post-viability abortions was unconstitutional for, among other reasons, failure to include a medical emergency exception that incorporates the mental health of the mother.[26]

The United States Supreme Court denied the petition for writ of certiorari[27] on March 23, 1998;[28] however, Justice Thomas, with whom Justices Scalia and the Chief Justice joined, wrote a strong dissenting opinion within which Justice Thomas claimed that the 6th Circuit Court of Appeal, "[w]renched this Court's prior statements out of context in finding the statute's mental health exception constitutionally infirm." Justice Thomas recognized that the 6th Circuit used dicta within the *Doe v. Bolton*[29] opinion to stand for the proposition a similar medical emergency exception approved in the later decided *Casey case* requires a mental health exception.

Even more recently, in *Gonzales v. Carhart*,[30] the United States Supreme Court upheld a federal law banning partial birth abortions which did not include a medical emergency exception. Justice Kennedy's opinion for the Court acknowledged that, "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."[31]

The United States Supreme Court has not yet had a case regarding regulation of abortion in consideration of fetal pain; however, in *Gonzalez v. Carhart*, the Supreme Court recognized that, "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[32]

Applicable Florida Caselaw

Article I, Section 23 of the Florida Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[33]

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

> [p]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests….Under our

[24] *Id.* at 879.
[25] *Id.* at 880.
[26] *See Voinovich v. Women's Medical Professional Corporation*, 130 F.3d 187 (6th Cir. 1997).
[27] Which means that the Court declined to take up the issue on appeal.
[28] *See Voinovich v. Women's Medical Professional Corporation*, 523 U.S. 1036 (1998).
[29] 410 U.S. 179 (1973).
[30] 550 U.S. 124 (2007).
[31] *Id.* at 163.
[32] *Id.* (*Citations Omitted*).
[33] *See In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989)(holding that a parental consent statute was unconstitutional because it intrudes on a minor's right to privacy).

> Florida Constitution, the state's interest becomes compelling upon viability….Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical procedures.[34]

The court recognized that after viability, the state can regulate abortion in the interest of the unborn so long as the mother's health is not in jeopardy.[35]

In *Womancare of Orlando v. Agwunobi,*[36] an almost identical medical emergency exception to that in the *Casey* case was upheld when Florida's parental notification statute was challenged.[37] Florida's parental notification statute, s. 390.01114, F.S., defines medical emergency as, "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."

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose. Additionally, any laws enacted for the purpose of creating a public records exemption must be in a separate bill related solely to creating the exemption. [38]

Limits on Abortion

Florida law prohibits abortions in the third trimester[39] of pregnancy unless the abortion is performed as a medical necessity.[40] Current law provides that if an abortion is performed during viability,[41] the person that performs the abortion must use the degree of professional, skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. A person who violates either of these provisions commits a third degree felony.[42] In regards to preserving the life of the fetus when an abortion is performed during viability, the woman's life and health are considered to be an overriding

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[34] *Id.* at 1193-94.
[35] *Id.* at 1194.
[36] 448 F.Supp. 2d 1293, 1301 N.D. Fla. (2005).
[37] One of the underlying issues in the case was whether the parenting notice statute was unconstitutionally vague in that it allegedly failed to give physicians adequate guidance about when the medical emergency provision applies. It was this question for which the court determined that the medical emergency definition was sufficient. The medical emergency provision applies as an exception to obtaining parental notice.
[38] Section 24(c), Art. I of the State Constitution.
[39] In Florida, the third trimester is defined as the weeks of pregnancy after the 24th week (weeks 25-birth).[39] However, AHCA data indicates that of the 125 abortions performed in the 25th week or after in 2009, 121 of them were elective, i.e., not for a medical emergency. Although Florida defines the third trimester as any week after the 24th week of pregnancy, the American Congress of Obstetricians and Gynecologists list the third trimester as weeks 29-40; the second trimester as weeks 14-28; and the first trimester as weeks 0-13. First and Second trimester abortions are currently permitted in Florida without limitations except that certain informed consent and parental notice, where applicable, requirements must be met prior to an abortion being performed unless thater is a medical emergency.
[40] S. 390.0111 (1), F.S.
[41] Viability is defined in s. 390.0111(4), F.S. as the state of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb.
[42] A third degree felony is punishable by a fine not exceeding $5,000 or a term of imprisonment not exceeding 5 years. If the offender is determined by the court to be a habitual offender, the term of imprisonment shall not exceed 10 years. Ss. 775.082, 775.083, 775.084, F.S.

and superior consideration in making this determination.[43] Currently, there is no exception in Florida law to allow for an abortion to be performed in order to save the life of an fetus.

According AHCA, there were 6,641 abortions performed at a gestational age of 13 weeks or greater in Florida in 2009.[44] That same year, 2,986 premature babies aged 29 weeks gestation and younger survived birth.[45]

Current law provides no express cause of action related to abortion, except for partial birth abortions.[46]

Informed Consent Requirements

Current law provides that prior to the performance of any abortion, the physician who is to perform the abortion, or a referring physician, must inform the patient of:

- the nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of the probable gestational age of the fetus.
- the probable gestational age of the fetus at the time the termination of pregnancy is to be performed
- the medical risks to the woman and fetus of carrying the pregnancy to term[47]

The patient must acknowledge in writing that this information has been provided to her before she gives informed consent for an abortion.[48] This information is not required to be provided if the abortion is being performed because of a medical emergency.[49] The method of determining the probable gestational, age as required above, is not specified in current law. Physicians who fail to inform the patient of the provisions described above are subject to disciplinary action.[50]

For any abortion performed later than the first trimester, the physician who is to perform the abortion is required to estimate the gestational age based on an ultrasound.[51] Failure to meet this requirement can result in a fine imposed by AHCA and other administrative penalties, as defined in s. 408.831, F.S.[52]

Reporting Requirements

Currently facilities that perform abortions are required to submit a monthly report that contains the number of abortions performed, the reason for the abortion, and the gestational age of the fetus.[53] AHCA is required to keep this information in a central location from which statistical data can be drawn.[54] If the abortion is performed in a location other than an abortion clinic, the physician who performed the abortion is responsible for reporting the information.[55] The reports are confidential and exempt from public records requirements.[56] Fines may be imposed for violations of the reporting requirements.[57] Currently AHCA collects and maintains the data but is not required to report it.

Effect of Proposed Changes

[43] S.390.0111(4), F.S.
[44] Agency for Health Care Administration, Reported Induced Terminations of Pregnancy by reason, Jan-Dec 2009, on file with the subcommittee.
[45] Department of Health, Births by Year of Birth by Calculated Gestation 2009, on file with the subcommittee.
[46] F.S. 390.0111(11), F.S.
[47] S. 390.0111(3)(a), F.S.
[48] S. 390.0111(3)3., F.S.
[49] S. 390.0111(3)(a), F.S.
[50] A violation of this is subject to disciplinary action under s. 458.0331 or s. 459.015, F.S.
[51] 390.012(3)(d)5., F.S.
[52] S. 390.018, F.S.
[53] S. 390.0112 (1), F.S.
[54] *Id.*
[55] S. 390.0112(2), F.S.
[56] S. 390.0112(3), F.S.
[57] S. 390.0112(4), F.S.

The bill creates the "Pain-Capable Unborn Child Protection Act." The Act contains Legislative findings that:

- By 20 weeks after fertilization, there is substantial evidence that an unborn child has the physical structures necessary to experience pain.
- By 20 weeks after fertilization, there is substantial evidence that unborn children seek to evade certain stimuli in a manner that would be interpreted as a response to pain in an infant or an adult.
- Anesthesia is routinely administered to unborn children who are aged 20 weeks postfertilization and older who undergo prenatal surgery.
- Even before 20 weeks after fertilization, unborn children have been observed to exhibit hormonal stress responses to painful stimuli and these responses were reduced when pain medication was administered.
- The state has a compelling state interest in protecting the lives of unborn children from the state at which substantial medical evidence indicates that they are capable of feeling pain.

The bill defines the following terms:

- "Attempt to perform or induce an abortion"
- "Fertilization"
- "Medical emergency"
- "Postfertilization age"
- "Probable postfertilization age"
- "Reasonable medical judgment"
- "Unborn child"

The bill requires that a physician determine the probable postfertilization[58] age of the fetus prior to performing an abortion, or to rely on the determination of postfertilization age from another physician. The bill defines postfertilization age as the age of an unborn child as calculated from the fertilization of the human ovum.[59] In determining the age, the bill requires the physician to make inquiries of the patient and to perform medical examinations and tests that the physician would consider necessary to making an accurate determination of postfertilization age. The bill authorizes disciplinary action[60] for any physician that fails to comply with these provisions.

The bill prohibits a person from performing or attempting[61] to perform an abortion if it has been determined that the probable post fertilization age of the fetus is 20 or more weeks. An exception is provided if, in reasonable medical judgment,[62] the patient has a condition in which the abortion is necessary to prevent death, or prevent substantial and irreversible physical impairment of a major bodily function. The bill clarifies that such a condition cannot be considered if it is based on a claim or diagnosis that the patient will engage in conduct that would result in her death or the substantial and irreversible physical impairment of a major bodily function. The bill also provides an exception allowing an abortion to be performed after 20 weeks postfertilization age if it is necessary to preserve the life of an unborn child.

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[58] Currently, Florida law uses gestational age as a baseline for abortion regulations and restrictions whereas this bill restricts abortion based on "postfertiliation age." Postfertiliation age is is calculated from the fertilization of the human ovum (egg), while gestational age is calculated upon the first day of the pregnant woman's last menstrual cycle.

[59] An ovum is defined as: a mature egg that has undergone reduction, is ready for fertilization, and takes the form of a relatively large inactive gamete providing a comparatively great amount of reserve material and contributing most of the cytoplasm of the zygote. *See* http://www.merriam-webster.com/medlineplus/ovum, (last viewed March 24, 2011).

[60] A violation of this is subject to disciplinary action under s. 458.0331 or s. 459.015, F.S.

[61] The bill defines "attempt to perform or induce abortion" as "an act, or an omission of a statutorily required act, that, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion."

[62] Reasonable medical judgment is defined in the bill as "a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved."

If an abortion is performed at a postfertilization age of 20 weeks or more, under the exceptions listed above, the physician must perform the abortion in a manner that provides the best opportunity for the unborn child to survive, unless it would provide greater risk of the mother's death or the substantial and irreversible impairment of the mother's major bodily functions than would other available methods. This risk cannot be considered based on a claim or diagnosis that the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function. Any person who intentionally or recklessly performs or attempts to perform an abortion in violation of the provisions in this paragraph commits a third degree felony.[63] A penalty cannot be assessed against the patient on whom the abortion was performed or attempted.

The bill provides a cause of action for any woman upon whom an abortion was performed in intentional or reckless violation of the provisions of the paragraph above, or the father of the unborn child who was aborted, against the person who performed the abortion for actual damages. Any woman upon whom an abortion was attempted in intentional or reckless violation of the paragraph above may sue for actual damages.

The woman upon whom the abortion was performed may bring a cause of action for injunctive relief against any person who has intentionally violated this section. The cause of action may also be maintained by a spouse, parent, sibling, guardian, or current or former licensed health care provider of the woman, or by the Attorney General or a county attorney with appropriate jurisdiction. The bill provides that an injunction granted under these circumstances will prevent the violator from performing or attempting to perform any more prohibited abortions in this state.

The bill provides that if judgment is rendered in favor of the plaintiff in any action described above, the court shall render a judgment for attorney's fees in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the lawsuit was frivolous and brought in bad faith, the court shall render a judgment for attorney's fees in favor of the defendant against the plaintiff. Neither damages nor attorney's fees may be assessed against a woman upon whom an abortion was performed or attempted unless the court finds that the suit was frivolous and brought in bad faith.

The bill requires the court to determine, in any civil or criminal proceeding or action brought, if the woman upon whom an abortion was performed or attempted shall be kept anonymous from the public, if she does not give her consent to such disclosure. If the court determines that the woman should remain anonymous, they must issue orders to seal the court records as well as exclude individuals from the courtroom or hearing rooms as necessary to protect her identity. The court orders must also include specific written findings as to the necessity for protecting the identity of the woman; why the order is essential to that end; how the order is narrowly tailored to protect her identity; and why no reasonable less restrictive alternative for protecting her identity exists. If a woman whom an abortion was performed or attempted does not give her consent for public disclosure of her identity, anyone other than a public official that brings a court action, shall do so under a pseudonym. The bill clarifies that the identity of the plaintiff will not conceal the identity of the plaintiff or witnesses from the defendant or attorneys for the defendant.

The bill provides reporting requirements for physicians that perform abortions. The following information must be reported to DOH on a schedule and in accordance with forms and rules adopted by DOH:

- If a determination of probable postfertilization age[64] was required to be made, the probable postfertilization age, and the method and basis of the determination.
- If a determination was not required to be made, the basis of the determination that a medical emergency existed.

[63] A third degree felony is punishable by a fine not exceeding $5,000 or a term of imprisonment not exceeding 5 years. If the offender is determined by the court to be a habitual offender, the term of imprisonment shall not exceed 10 years. Ss. 775.082, 775.083, 775.084, F.S.

[64] According to this bill, probable postfertilization age of the unborn child means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time an abortion is planned to be performed.

- If the probable postfertilization age was determined to be 20 weeks or more, the basis for the determination that the pregnant woman had a considtion that so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function; or the basis for determining that the abortion was necessary to preserve the life of an unborn child.
- The abortion method used and, if the abortion was after 20 weeks postfertilization age, whether the abortion method was one that, based on reasonable medical judgment, provided the best opportunity for the unborn child to survive. If such a method was not used, the basis of determination that the abortion method used would pose a greater risk of either death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman than other available methods.

The bill provides that the failure of a physician to report this information 30 days passed the due date, as determined by DOH, will result in a late fee of $500 for each additional 30-day period, or portion of a 30-day period that the report is overdue. A physician that fails to provide a report, or provides an incomplete report, 1 year after the due date, may be directed by a court of competent jurisdiction to submit a complete report within a time period stated by the court, or be subject to civil contempt.[65] A physician that fails to comply with these requirements is also subject to disciplinary action under ss. 458.331 or 459.015. Intentional of reckless falsification of any of the required reports results in a second degree misdemeanor.[66]

The bill requires DOH to issue a public report providing statistics for the previous calendar year compiled from all of the information reported as required by physicians that perform abortions and described above. The report is required to be provided by June 30 of each year. The report must also contain the reports of each previous year's report, adjusted to reflect any late or corrected information. The department must ensure that the information included in the report does not lead to the identification of any woman upon whom an abortion was performed.

Finally, the bill requires DOH to adopt rules to necessary to comply with the requirements set forth in the bill. DOH must adopt the rules within 90 days after the effective date of this bill. The effective date for the bill is July 1, 2011.

B. SECTION DIRECTORY:

Section 1: Creates an unnumbered section of law, designating the "Pain-Capable Unborn Child Protection Act."
Section 2: Creates an unnumbered section of law related to legislative findings**.**
Section 3: Amends s. 390.011, F.S., relating to definitions.
Section 4: Amends s. 390.0111, F.S., relating to termination of pregnancies.
Section 5: Amends s. 765.113, F.S., relating to restrictions on providing consent.
Section 6: Creates an unnumbered section of law, requiring rulemaking by the Department of Health.
Section 7: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[65] Civil contempt is the failure to do something which the party is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. *See* 16 Fla. Prac., Sentencing § 13:6 (2010-2011 ed.).
[66] A second degree misdemeanor is punishable by a fine not exceeding $500 or imprisonment not exceeding 60 days. Ss. 775.082, 775.083, F.S.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

It is possible that this bill may be challenged under Art. I, Section 23, of the Florida Constitution, which provides for an express right to privacy. While the Florida Supreme Court recognized the State's compelling interest in regulating abortion post-viability in *In re T.W.*, 551 So.2d 1186 (1989), the issue of regulating abortions in consideration of fetal pain has not been before the Florida Supreme Court or the United States Supreme Court. Furthermore, other court decisions that have construed the medical health exception to include the "mental health" of the woman may be persuasive.

The bill requires the court to determine, in any civil or criminal proceeding or action brought, if the woman upon whom an abortion was performed or attempted shall be kept anonymous from the public, if she does not give her consent to such disclosure. If the court determines that the woman should remain anonymous, the court must issue orders to seal the court records as well as exclude individuals from the courtroom or hearing rooms as necessary to protect her identity. This provision may violate Article I., s. 24(c) of the Florida Constitution in that it requires court records to be precluded from public without including a public necessity statement for the exemption. Furthermore, the exemption is not included in a separate bill for that purpose.

B. RULE-MAKING AUTHORITY:

The bill requires the Department of Health to promulgate rules to implement the provisions of this bill. They are required to develop the applicable rules within 90 days of the effective date of the bill which is July 1, 2011.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides an exception for an abortion that can be performed after 20 weeks post fertilization age, if the abortion is necessary to preserve the life of the unborn child. Florida law defines “abortion” as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus. Therefore, in the case of the exception described above, it would not be considered an abortion, as defined in Florida law.

The bill provides that a cause of action may be maintained by a “county attorney” against any person who has intentionally violated the bill’s provisions relating to abortion procedures. However, in Florida, such a cause of action would be more appropriately maintained by a state attorney.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES