# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 839 Abortion
**SPONSOR(S):** Davis and others
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Health & Human Services Access Subcommittee | 9 Y, 5 N | Mathieson | Schoolfield |
| 2) Civil Justice Subcommittee | | Caridad | Bond |
| 3) Health & Human Services Committee | | | |

## SUMMARY ANALYSIS

The bill creates the "Pain-Capable Unborn Child Protection Act," to:

- Require a physician to make a determination of postfertilization age of a fetus before performing an abortion.
- Prohibit an abortion from being performed after the fetus has reached a post fertilization age of 20 weeks, with exceptions for medical necessity or to preserve the life of the mother.
- Require a physician that performs abortions to report information relating to the abortion to the Department of Health (DOH).
- Require DOH to provide a public report containing all of the information reported from an abortion provider.
- Establish criminal and administrative penalties for violating the provisions of this bill relating to the improper performance of an abortion.
- Require DOH to adopt rules to implement the provisions of the bill.

The bill does not appear to have a fiscal impact on state or local governments.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Current Situation**

Fetal Pain

In 2010, the Department of Health (DOH) reported there were 214,519 live births in the state of Florida.[1] In the same year, the Agency for Health Care Administration (AHCA) reported there were a total of 79,908 terminations performed in the state.[2] 73,883 of the terminations were performed at a gestational age of 12 weeks or younger, and 6,025 at a gestational age of 13-24 weeks.[3]

The concept of fetal pain and the capacity of the fetus to recognize pain are the subject of ongoing research and debate. Some studies suggest that by 20-24 weeks, a fetus may have the physical structures to be capable of feeling pain.[4] This research focuses on the connection of nociceptors (the central nervous system's pain messengers) in the extremities of the fetal body to the central nervous system.[5] Researchers have made the following observations:

- The fetus reacts to noxious stimuli in the womb with what would appear to be a recoil response in an adult or child,[6]
- There is an increase in stress hormones in the fetus in response to noxious stimuli,[7] and
- Fetal anesthesia may be administered to a fetus that is undergoing surgery in the womb, which results in a decrease in fetal stress hormones.[8]

In contrast, there is also research suggesting that despite the presence of such a physical structure within the fetus, it still lacks the capacity to recognize "pain."[9] Specifically, studies have found that the

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[1] Email from AHCA on file with Health and Human Services Committee staff, Nov. 1, 2011.
[2] *Id*.
[3] *Id*.
[4] *See*, Laura Myers, Linda Bulich, Philip Hess and Nicole Miller, *Fetal Endoscopic Surgery: Indications and Anaesthetic Management*, 18 BEST PRACTICE & RESEARCH CLINICAL ANAESTHESIOLOGY 231, 241 (June 2004) (first requirement for nociceptors, is the presence of sensory receptors which diffuse throughout the fetus from between 7-14 gestational weeks); K.J.S. Anand and P.R. Hickey, *Pain and its effect in the Human Neonate and Fetus*, 317 NEW ENG. J. MED. 132, 1322 (November, 1987) (Noting that by 20 gestational weeks, sensory receptors have spread to all cutaneous and mucous surfaces of the fetus); Sampsa Vanhatalo and Onno van Nieuwenhuizen, *Fetal Pain?*, 22 BRAIN & DEVELOPMENT 145, 146 (2000) (noting nociceptors have spread across fetal body by 20 gestational weeks).
[5] *See*, Phebe Van Scheltema, Sem Bakker, FPHA Vandenbussche and D Oepkes, *Fetal Pain*, 19 FETAL AND MATERNAL MEDICINE REVIEW 311, 313(2008) (noting that the connection is completed with the cortex by gestational week 24-26); Vivette Glover, *Fetal Pain: Implications for Research and Practice*, BR. J. OBSTET. GYNAECOL. 881, 885 (1999) (noting that activation of the thalamic fibres, and connection to the cortex occurs between 17-20 gestational weeks).
[6] *See*, Ritu Gupta, Mark Kilby and Griselda Cooper, *Fetal Surgery and Anaesthetic Implications*, 8 CONTINUING EDUCATION IN ANAESTHESIA, CRITICAL CARE AND PAIN 71, 74 (2008) (noting that at 22 gestational weeks, the fetus may respond to painful stimuli); Xenophon Giannakoulopoulos and Waldo Sepulveda, *Fetal Plasma Cortisol and Beta-Endorphin Response to Intrauterine Needling*, 344 LANCET 77, (July, 1994) (noting that fetus reacted with body movement when needled in the womb, in a way that it did not when the placenta was needled).
[7] *See*, Kha Tran, *Anesthesia for Fetal Surgery*, 15 SEMINARS IN FETAL & NEONATAL MEDICINE 40, 44 (2010) (noting that invasive fetal procedures clearly elicit a stress response); Michelle White and Andrew Wolf, *Pain and Stress in the Human Fetus*, 18 BEST PRACTICE & RESEARCH CLINICAL ANAESTHESIOLOGY 205, (June, 2004) (noting that is not known if a fetus can feel pain, but there is a detectable stress response); Myers et al, *supra* note 4, at 242 (noting stress responses from 18 weeks gestation); Giannakoulopoulos et al, *supra* note 6, at 77-81; Gupta et al, *supra* note 6, at 74.
[8] *See*, Gupta et al, *supra* note 6, at 74; Giannakoulopoulos et al, *supra* note 6, at 80; Van Scheltema et al, *supra* note 5, at 320; Tran, *supra* note 7, 44. *But see* I. Glenn Cohen and Sadath Sayeed, *Fetal Pain, Viability, and the Constitution*, 39 THE JOURNAL OF LAW, MEDICINE AND ETHICS 235, 239-240 (2011) (noting that just because it is not administered during a termination now, does not mean it may not happen in the future).
[9] *See* Stuart Derbyshire, *Foetal Pain*, 24 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNAECOLOGY 647, (October, 2010) (noting that the capacity to feel pain requires conceptual subjectivity, which a fetus may not have); Curtis Lowery,

fetus lacks the anatomical architecture necessary to subjectively experience pain – essentially recognize the stimuli as painful.[10] On the other hand, there is research to suggest a functioning cortex is not necessary to experience pain.[11] In a 2005 review of the evidence, the American Medical Association concluded that:

> [P]ain is an emotional and psychological response that requires conscious recognition of a stimulus. Consequently, the capacity for conscious perception of pain can only arise after the thalamocortical pathways begin to function, which may occur in the third trimester around 29-30 weeks gestational age."[12]

In a 2010 review of research and recommendations for practice, the Royal College of Obstetricians and Gynaecologists of the United Kingdom, noted the following in relation to fetal awareness:

> Connections from the periphery to the cortex are not intact before 24 weeks of gestation. Most pain neuroscientists believe that the cortex is necessary for pain perception; cortical activation correlates strongly with pain experience and an absence of cortical activity generally indicates an absence of pain experience. The lack of cortical connections before 24 weeks, therefore, implies that pain is not possible until after 24 weeks. Even after 24 weeks, there is continuing development and elaboration of intracortical networks.[13]

Anesthesia is routinely administered to the fetus, the mother or both, during pre-natal surgery.[14] As noted previously, research has shown that there is a corresponding reduction in the production of stress hormones in the fetus when anesthesia is used.[15]

The "Pain-Capable Unborn Child Protection Act" is model legislation that prohibits abortion after 20 weeks post-fertilization age based on the scientific evidence mentioned above. This has been passed by Alabama, Idaho, Kansas, Nebraska and Oklahoma.[16] In addition, Alaska, Arkansas, Georgia, Indiana, Louisiana, Michigan, Mississippi, South Dakota, Texas and Utah require providers to give women either written or verbal information regarding fetal pain to women seeking an abortion.[17]

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Mary Hardman, Nirvana Manning, Barbara Clancy, Whit Hall and K.J.S. Anand, *Neurodevelopmental Changes of Fetal Pain,* 31 SEMINARS IN PERINATOLOGY 275, (October, 2007) (noting the difference between a cortical response to pain, which occurs at 29-30 gestational weeks); Van Scheltema et al, *supra* note 5, 313 (the presence of anatomical structures alone is insufficient to demonstrate a capacity to feel pain).

[10] Susan Lee, Henry Ralston, Eleanor Drey, John Partridge and Mark Rosen, *Fetal Pain. A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 949 (August 2005).

[11] *See*, Van Scheltema et al, *supra* note 5; B. Merker, *Consciousness without a cerebral cortex: A challenge for neuroscience and medicine*, 30 BEHAVIOURAL AND BRAIN SCIENCES 63-81 (2007); Stuart Derbyshire, *supra* note 9.

[12] Lee et al *supra* note 10, at 952.

[13] Royal College of Obstetricians and Gynaecologists. *Fetal Awareness: Review of Research and Recommendations for Practice.* London: RCOG Press; 2010, 11.

[14] *See*, Myers, et al., *supra* note 4; Van Scheltema, et al., *supra* note 5; Tran, *supra* note 7.

[15] *Supra* note 8.

[16] *See*, Alabama, ALA. CODE s. 26-23B-1 (2011); Idaho, IDAHO CODE ANN. s.18-501 (2011); Kansas, KAN. STAT. ANN s. 65-6724 (2011); Nebraska, NEB. REV. ST., s. 28-3102 (2011); Oklahoma, 63 OKL. ST. ANN. s. 1-745.1 (2011). The Idaho law was subject to a constitutional challenge, but dismissed for lack of standing. *See, McCormack v. Hiedeman*, 2011cv00397, (D. Idaho, September 23, 2011). However, a class action suit has been filed. *See, McCormack v. Hiedeman*, 2011cv00433, (D. Idaho, 2011)

[17] *See*, Alaska, ALASKA STAT. s. 18.05.032 (2011); Arkansas, ARK. CODE ANN. s. 20-16-1102 (2011); Georgia, GA. CODE ANN. s. 31-9A-3 (2011); Indiana, IND. CODE s. 16-34-2-1.1 (2011); Louisiana, LA. REV. STAT. ANN. s. 40:1299.36.6 (2011); Michigan, MICH. COMP. LAWS s. 333.17015 (2011); Mississippi, MISS. CODE ANN. s. 41-41-43 (2011); South Dakota, S.D. CODIFIED LAWS s. 34-23A-10.1 (2011); Texas, TEX. HEALTH & SAFETY CODE ANN. s. 171.012 (Vernon, 2011); Utah, UTAH CODE ANN. s. 76-7-305 (2011).

Caselaw Related to Abortion

*The Viability Standard*

In *Roe v. Wade*, the United States Supreme Court established a rigid trimester framework dictating when, if ever, states can regulate abortion.[18] The Court held that states could not closely regulate abortions during the first trimester of pregnancy. With respect to the second trimester, the Court held that states could only enact regulations aimed at protecting the mother's health, not the fetus's life. Therefore, no ban on abortions was permitted during the second trimester. Only at the beginning of the third trimester of pregnancy did the state's interest in the life of the fetus become compelling so as to allow it to prohibit abortions. Even then, the Court required states to permit abortion in circumstances necessary to preserve the health or life of the mother.[19]

The current approach is laid out in *Planned Parenthood v. Casey*.[20] Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than the third trimester, the United States Supreme Court rejected the trimester framework and, instead, limited the states' ability to regulate abortion pre-viability.[21]

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[,]"[22] 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."[23] 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."[24]

*The Medical Emergency Exception*

In *Doe v. Bolton*, 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.[25]

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

> The 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

[18] 410 U.S. 113 (1973).
[19] *Id.* at 164-165.
[20] 505. U.S. 833 (1992).
[21] 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.
[22] *See Roe*, 410 U.S. at 164-65.
[23] *See Casey, 505 U.S.* at 870.
[24] *Id*.
[25] 410 U.S. 179 (1973) Other exceptions, such as in cases of rape and when, "[t]he 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).

some potentially significant health risks that would not be considered "immediate."[26] The exception in question provided that a medical emergency is:

> That 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 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.[27]

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.[28]

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.[29]

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, "[t]he 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, said:

> [p]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests….Under our Florida Constitution, the state's interest becomes compelling upon viability….Viability under Florida law occurs at that point in

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[26] *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.
[27] *Id.* at 879.
[28] *Id.* at 880.
[29] *See Voinovich v. Women's Medical Professional Corporation*, 130 F.3d 187 (6th Cir. 1997).
[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).

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."

Limits on Abortion

Florida law prohibits abortions in the third trimester[38] of pregnancy unless the abortion is performed as a medical necessity.[39] Current law provides that if an abortion is performed during viability,[40] 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.[41] 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 and superior consideration in making this determination.[42]

Current law provides no express cause of action related to abortion, except for partial birth abortions.[43]

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.

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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] In Florida, the third trimester is defined as the weeks of pregnancy after the 24th week (weeks 25-birth).[38] 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 there is a medical emergency.
[39] Section 390.0111(1), F.S.
[40] 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.
[41] 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.
[42] S.ection 390.0111(4), F.S.
[43] F.S. 390.0111(11), F.S.

- The probable gestational age of the fetus at the time the termination of pregnancy is to be performed, as determined by an ultrasound.
- The medical risks to the woman and fetus of carrying the pregnancy to term.[44]

The patient must acknowledge in writing that this information has been provided to her before she gives informed consent for an abortion.[45] This information is not required to be provided if the abortion is being performed because of a medical emergency.[46] The method of determining the probable gestational age as required above, is specified in law as an ultrasound.[47] 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.[48] Physicians who fail to inform the patient of the provisions described above are subject to disciplinary action.[49]

Reporting Requirements

Currently, facilities that perform abortions are required to submit a monthly report to AHCA that contains the number of abortions performed, the reason for the abortion, and the gestational age of the fetus.[50] The agency is required to keep this information in a central location from which statistical data can be drawn.[51] 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.[52] The reports are confidential and exempt from public records requirements.[53] Fines may be imposed for violations of the reporting requirements.[54] Currently AHCA collects and maintains the data but is not required to report it.

**Effect of Proposed Changes**

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

- 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 post-fertilization 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.

[44] Section 390.0111(3)(a), F.S.
[45] Section 390.0111(3)3., F.S.
[46] Section 390.0111(3)(a), F.S.
[47] Sections 390.0111(3)(a)1.b.(I)-(IV), F.S.
[48] Section 390.018, F.S.
[49] A violation of this is subject to disciplinary action under s. 458.0331, F.S., for Medical Doctors or s. 459.015, F.S, for Osteopathic Physicians.
[50] Section 390.0112 (1), F.S.
[51] *Id.*
[52] Section 390.0112(2), F.S.
[53] Section 390.0112(3), F.S.
[54] Section 390.0112(4), F.S.

- Medical Emergency.
- Postfertilization age.
- Probable postfertilization age of the unborn child.
- Reasonable medical judgment.
- Unborn child or fetus.

Limit on Abortion

The bill prohibits a physician from performing or attempting[55] to perform an abortion unless the physician has first determined whether the probable post fertilization age of the fetus is 20 or more weeks. An exception is provided if, in reasonable medical judgment,[56] a medical emergency[57] exists. In making the determination, the physician must make any inquiries of the pregnant woman and perform any medical examinations of the woman that a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in determining postfertilization age.

The bill provides that a physician may not perform an abortion when the physician, or another physician upon whose determination that physician relies, has determined that the probability post fertilization age of the woman's unborn child is 20 or more weeks. This is so, unless the woman has a condition that so complicates her medical condition an abortion is necessary to avert the woman's death or serious physical impairment. Such condition may not be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or serious physical impairment.

If an abortion is performed at a postfertilization age of 20 weeks or more, 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.[58] A penalty cannot be assessed against the patient on whom the abortion was performed or attempted.

Cause of Action

The bill provides a private cause of action for any woman upon whom an abortion was performed or attempted in violation of the bill's prohibition against termination and for the father of the unborn child who was aborted, against the person who performed the abortion in an intentional or a reckless violation of the bill's provisions. The party 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 the aforementioned 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 state attorney with appropriate jurisdiction. The

[55] 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."
[56] 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."
[57] Medical emergency is defined in the bill as "a condition in which the abortion is necessary to prevent death, or prevent substantial and irreversible physical impairment of a major bodily function."
[58] 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. Sections 775.082, 775.083, 775.084, F.S.

bill provides that an injunction granted under these circumstances will prevent the violator from performing or attempting to perform any more abortions in this state.

The bill provides that the prevailing party must be awarded attorney's fees. However, 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 provides that, if the woman upon whom the termination was performed or attempted does not give her consent for disclosure of her identity, a court must determine whether the woman's identity must be kept anonymous from the public. It must do so regardless of whether the proceeding is civil or criminal. If the court determines that the woman should remain anonymous, it 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 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 upon 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, must do so under a pseudonym. The bill specifies that the identity of the plaintiff will not conceal the identity of the plaintiff or witnesses from the defendant or attorneys for the defendant.

Reporting Requirements

The bill provides reporting requirements for physicians that perform abortions. The following information regarding every abortion performed 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[59] 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.
- If the probable postfertilization age was determined to be 20 weeks or more, the basis for the determination that the pregnant woman had a condition 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 with 30 days 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, more than one 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. A physician that fails to comply with these

[59] 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.

requirements is also subject to disciplinary action under ss. 458.331 or 459.015, F.S. Intentional or reckless falsification of any of the required reports is a second degree misdemeanor.[60]

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, 2012.

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, 2012.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

[60] A second degree misdemeanor is punishable by a fine not exceeding $500 or imprisonment not exceeding 60 days. Sections 775.082 and 775.083, F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

The Department of Health may experience a recurring increase in workload associated with additional complaints, investigations and possible imposition of administrative discipline for health care practitioners due to non-compliance. However, according to the department, current resources are adequate to absorb such increase.[61]

## 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:

Right to Privacy

The bill may implicate 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.,*[62] the issue of regulating abortions in consideration of fetal pain has not been before the Florida Supreme Court or the United States Supreme Court.

Public Records

Article I, s. 24(a) of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. However, the Legislature 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 not be 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.[63] This bill may create two public records exceptions:

- The bill provides that if the woman upon whom the termination was performed or attempted files a civil action regarding the abortion and does not give her consent for disclosure of her identity, a court must determine whether her identity must be kept anonymous from the public. If the court determines that the woman should remain anonymous, it must issue orders to seal the court records. It is possible, however, that this may comply with existing exemptions in Rule 2.420 of the Florida Rules of Judicial Administration.

- The bill also provides that a physician performing an abortion must report certain information related to each abortion to the Department of Health. The bill does not require personal identifying information in such reports, but does require the department to redact personal identifying information that may be in such reports before dissemination. This will not be a

[61] Department of Health Bill Analysis, Economic Statement and Fiscal Note on HB 839 (Jan. 13, 2012).
[62] 551 So.2d 1186 (1989).
[63] Article 1, s. 24(c), Fla. Const.

concern if the department, in rulemaking, prohibits physicians from including personal identifying information in such reports.

B. RULE-MAKING AUTHORITY:

The bill requires DOH 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, 2012. The bill provides sufficient rule-making authority to DOH and AHCA to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.