HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1047 Termination of Pregnancies
SPONSOR(S): Health & Human Services Committee; Adkins
TIED BILLS: **IDEN./SIM. BILLS:** SB 918

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Committee	12 Y, 5 N, As CS	McElroy	Calamas
2) Judiciary Committee			

SUMMARY ANALYSIS

In *Planned Parenthood v. Casey* the U.S. Supreme Court rejected the trimester framework established in *Roe v. Wade* and, instead, established viability as the point at which a state may regulate abortions. Similarly, in *In re T.W.,* the Florida Supreme Court held that the state may regulate abortion once fetal viability has been achieved.

Currently, Florida adheres to the trimester framework, as ch. 390, F.S., prohibits individuals from performing an abortion after the 24th week of pregnancy (third trimester). CS/HB 1047 amends ch. 390, F.S., to create s. 390.01112, F.S., relating to abortions during viability. The bill prohibits an abortion if the fetus has achieved viability, which is defined in the bill as the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures.

Section 390.0111, F.S., currently provides exceptions to the prohibition against abortions during the third trimester when two physicians certify in writing that an abortion is medically necessary to save the life or protect the health of the pregnant woman, or one physician certifies in writing to the medical necessity for legitimate emergency medical procedures for an abortion, and another physician is not available for consultation. The bill modifies these exceptions to allow an abortion during the third trimester if:

- Two physicians certify, in writing, that, in reasonable medical judgment, the abortion is medically necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition; or
- One physician certifies, in writing, that, in reasonable medical judgment, legitimate emergency medical procedures for an abortion are medically necessary to save the pregnant woman's life or avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition and another physician is not available for consultation.

The bill provides identical exceptions to the prohibition against abortions during viability.

The bill requires a physician to determine if a fetus is viable before performing an abortion. The physician must document in the pregnant woman’s medical record, the physician’s determination and the method, equipment, fetal measurements, and any other information used to determine the viability of the fetus.

The bill provides for administrative and criminal penalties against any person who performs, or actively participates in an abortion during viability, and amends s. 797.03, F.S., to prohibit any person from performing or assisting in an abortion on a person during viability other than in a hospital.

Finally, the bill includes severability and reversion clauses.

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

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Case Law on Abortion

Right to Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*[1], was decided by the U.S. Supreme Court. Using strict scrutiny, the Court determined that a woman's right to an abortion is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.[2] In 1992, the fundamental holding of *Roe* was upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey*.[3]

The Viability Standard

In *Roe v. Wade*, the U.S. Supreme Court established a rigid trimester framework dictating when, if ever, states can regulate abortion.[4] The Court held that states could not 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 is permitted during the second trimester. Only at the beginning of the third trimester of pregnancy does the state's interest in the life of the fetus become compelling so as to allow it to prohibit abortions. Even then, the Court requires states to permit an abortion in circumstances necessary to preserve the health or life of the mother.[5]

The current viability standard is set forth in *Planned Parenthood v. Casey*.[6] Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than the third trimester, the U.S. Supreme Court rejected the trimester framework and, instead, limited the states' ability to regulate abortion pre-viability.[7] Thus, while upholding the underlying holding in *Roe*, which authorizes states to "[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[,]"[8] the Court determined that the line for this authority should be drawn at "viability," because "….. 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."[9] 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."[10]

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Id.*
[3] *Casey*, 505 U.S. 833 (1992).
[4] *Roe*, 410 U.S. 113 (1973).
[5] *Id.* at 164-165.
[6] *Casey*, 505. U.S. 833 (1992).
[7] 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.
[8] *See Roe*, 410 U.S. at 164-65.
[9] *See Casey, 505 U.S.* at 870.
[10] *Id.*

The Medical Emergency Exception

In *Doe v. Bolton*, the U.S. 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.[11] 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 *Casey*[12], 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."[13] 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.[14]

In evaluating the more objective standard under which a 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.[15]

Florida Law on Abortion

Right to Abortion

Article I, s. 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."

In *In re T.W.,* the Florida Supreme Court ruled 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 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.

The court recognized that after viability, the state can regulate abortion in the interest of the unborn child if the mother's health is not in jeopardy.[16]

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[11] *Doe*, 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).
[12] *Casey*, 505. U.S. 833 (1992).
[13] *Id.* at 880.
[14] *Id.* at 879.
[15] *Id.* at 880.

Abortion Regulation

In Florida, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[17] An abortion must be performed by a physician[18] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[19]

Section 390.0111, F.S., prohibits an abortion from being performed during the third trimester.[20] Exceptions to this prohibition exist when the abortion is necessary to protect the health of the pregnant woman which is established if:

- Two physicians certify in writing that, to a reasonable degree of medical probability, the abortion is necessary to save the life or preserve the health of the pregnant woman; or
- One physician certifies in writing to the medical necessity for legitimate *emergency* medical procedures for an abortion in the third trimester, and another physician is not available for consultation.[21]

The Department of Health (DOH) and its professional boards regulate healthcare practitioners under ch. 456, F.S., and various individual practice acts.[22] A board is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the DOH.[23] Boards are responsible for approving or denying applications for licensure and making disciplinary decisions on whether a practitioner practices within the authority of their practice act. Practice acts refer to the legal authority in state statute that grants a profession the authority to provide services to the public. The range of disciplinary actions taken by a board includes citations, suspensions, reprimands, probations, and revocations.

The Agency for Health Care Administration (AHCA) licenses and regulates abortion clinics in the state, under ch. 390, F.S., and part II of ch. 408, F.S.[24] All abortion clinics and physicians performing abortions are subject to the following requirements:

- An abortion may only be performed in a validly licensed hospital, abortion clinic, or in a physician's office;[25]
- An abortion clinic must be operated by a person with a valid and current license;[26]
- A third trimester abortion may only be performed in a hospital;[27]
- Proper medical care must be given and used for a fetus when an abortion is performed during viability;[28]
- Experimentation on a fetus is prohibited;[29]
- Except when there is a medical emergency, an abortion may only be performed after a patient has given voluntary and written informed consent;[30]
- Consent includes verification of the fetal age via ultrasound imaging;[31]
- Fetal remains are to be disposed of in a sanitary and appropriate manner;[32] and,

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[16] *Id.*
[17] Section 390.011(1), F.S.
[18] Section 390.0111(2), F.S.
[19] Section 390.011(8), F.S.
[20] Section 390.011(9), F.S., defines the third trimester to mean the weeks of pregnancy after the 24th week of pregnancy.
[21] Section 390.0111(1)(a) and (b), F.S.
[22] Section 456.004, F.S.
[23] Section 456.001, F.S.
[24] Section 408.802(3) provides for the applicability of the Health Care Licensing Procedures Act to abortion clinics.
[25] Section 797.03 (1), F.S.
[26] Section 797.03 (2), F.S.
[27] Section 797.03(3), F.S. The violation of any of these provisions results in a second degree misdemeanor.
[28] Section 390.0111(4), F.S.
[29] Section 390.0111(6), F.S.
[30] Section 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.
[31] Section 390.0111(3)(a)1.b., F.S.
[32] Section 390.0111(8), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.

- Parental notice must be given 48 hours before performing an abortion on a minor,[33] unless waived by a parent or otherwise ordered by a judge.

In addition, pursuant to s. 390.012, F.S., AHCA is directed to prescribe standards for abortion clinics that include:

- Adequate private space for interviewing, counseling, and medical evaluations;
- Dressing rooms for staff and patients;
- Appropriate lavatory areas;
- Areas for pre-procedure hand-washing;
- Private procedure rooms;
- Adequate lighting and ventilation for procedures;
- Surgical or gynecological examination tables and other fixed equipment;
- Post-procedure recovery rooms that are equipped to meet the patients' needs;
- Emergency exits to accommodate a stretcher or gurney;
- Areas for cleaning and sterilizing instruments;
- Adequate areas for the secure storage of medical records and necessary equipment; and
- Conspicuous display of the clinic's license.[34]

Both DOH and AHCA have authority to take licensure action against individuals and clinics that are in violation of statutes or rules.[35]

Florida Abortion Statistics

In 2013, DOH reported that there were 214,405 live births in the state of Florida.[36] In the same year, AHCA reported that there were 71,503 abortion procedures performed in the state.[37] Of those performed:

- 65,098 were performed in the first trimester (12 weeks and under);
- 6,405 were performed in the second trimester (13 to 24 weeks); and
- None were performed in the third trimester (25 weeks and over).[38]

The majority of the procedures (65,210) were elective.[39] The remainder of the abortions were performed due to:

- Emotional or psychological health of the mother (85);
- Physical health of the mother that was not life endangering (92);
- Life endangering physical condition (43);
- Incest (2);
- Rape (240);
- Serious fetal genetic defect, deformity, or abnormality (493); and
- Social or economic reasons (5,338).[40]

Viability

[33] Section 390.01114(3), F.S. A physician who violates this provision is subject to disciplinary action.
[34] Section 390.012(3)(a)1., F.S. Rules related to abortion are found in ch. 59A-9, F.A.C.
[35] Section 390.018, F.S.
[36] Florida Department of Health, *Florida Vital Statistics Annual Reports- Births.* http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx (last visited on March 25, 2014).
[37] Section 390.0112(1), F.S., currently requires the director of any medical facility in which any pregnancy is terminated to submit a monthly report to the AHCA that contains the number of procedures performed, the reason for same, and the period of gestation at the time such procedures were performed.
[38] *Reported Induced Terminations of Pregnancy (ITOP) by Reason, By Weeks of Gestation for Calendar Year 2013*, AHCA, on file with the Health Quality Subcommittee Staff.
[39] *Id.*
[40] *Id.*

Current law defines "viability" as that stage 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] Twenty-one states currently place limits on abortions after the fetus is viable.[42]

Traditionally, fetal weight and gestational age have been the primary factors in determining viability. The gestational age of a viable fetus has become earlier in the pregnancy over time. In 1935, the American Academy of Pediatrics defined a premature infant as one who weighed <2,500 grams at birth regardless of gestational age.[43] Although no minimum weight for viability was established, 1,250 grams was frequently used and corresponded to an estimated gestational age of 28 weeks.[44]

As continuous positive airway pressure and neonatal total parenteral nutritional therapy became increasingly mainstream, the medical definition of viability continued to evolve as well. By the 1980s, survival of infants who were born weighing 500 to 700 grams or were of 24 to 26 weeks' gestation became an expected possibility in regional neo-natal intensive care units.[45] The 1980s and 1990s brought new waves of neonatal biomedical advances, led by tracheal instillation of surfactant for respiratory distress syndrome and the use of antenatal corticosteroids in women with imminent delivery of a preterm infant at 24 to 34 weeks' gestation.[46] With these changes, survival of infants born at 23 and 24 weeks' estimated gestational age became increasingly frequent.[47]

More recent research indicates that "consideration of multiple factors is likely to promote treatment decisions that are less arbitrary, more individualized, more transparent, and better justified than decisions based solely on gestational-age thresholds".[48] Thus, physicians also rely on fetal sex, plural or single fetus pregnancy status, and exposure or non-exposure to antenatal corticosteroids, in addition to age and weight. Research on these five factors has identified survivability trends.[49] Viability generally increases with age, although the benefit of a 1-week increase in gestational age varies by week, and with weight (per each 100-gram increment). Viability is also likelier for female sex fetuses, for fetuses with any use of antenatal corticosteroids, and for single fetuses.[50]

Effect of Proposed Changes

Abortion After Viability

The bill creates s. 390.01112, F.S., relating to abortions during viability. The bill prohibits an abortion on a viable fetus, with certain exceptions.

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[41] Section 390.0111(4), F.S.
[42] These states include Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Ohio, Tennessee, Utah, Washington, Wisconsin, and Wyoming. *See* Guttmacher Institute State Policies in Brief *State Policies on Later Abortions*, as of February 1, 2014, found at: http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf (Last visited March 25, 2014).
[43] *See Limits of Human Viability in the United States: A Medicolegal Review*, Bonnie Hope Arzuaga, MD and Ben Hokew Lee, MD, MPH, MSCR, Pediatrics Perspectives, published online November 1, 2011, available at: http://pediatrics.aappublications.org/content/128/6/1047.full (Last visited March 25, 2014).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Intensive Care for Extreme Prematurity - Moving Beyond Gestational Age*, The New England Journal of Medicine, Jon E. Tyson, M.D., M.P.H., Nehal A. Parikh, D.O., John Langer, M.S., Charles Green, Ph.D., and Rosemary D. Higgins, M.D., N. Engl. J. Med. 2008; 358: 1672-1681 at1680, April 17, 2008.
[49] *Id.* at 1672.
[50] *Id.* These survivability trends have been developed into viability measurement tools, for use by clinicians in determining which extremely preterm infants would benefit from intensive care at birth. See, U.S. Department of Health and Human Services, National Institutes of Health, Eunice Kennedy Shriver National Institute of Child Health and Human Development, Pregnancy and Perinatology Branch, Neonatal Research Network, "Extremely Preterm Birth Outcome Data", Nov. 30, 2012. Found at: http://www.nichd.nih.gov/about/org/der/branches/ppb/programs/epbo/pages/epbo_case.aspx, (Last visited March 25, 2014).

The bill defines “viable” or “viability” as the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures. The bill defines “standard medical measures” as the medical care that a physician would provide based on the particular facts of the pregnancy, the information available to the physician, and the technology reasonably available in a hospital with an obstetrical department, to preserve the life and health of the fetus, with or without temporary artificial life sustaining support, if the fetus were born at the same stage of fetal development.

The bill requires a physician to determine, in reasonable medical judgment, if a fetus is viable before performing an abortion. “Reasonable medical judgment” is defined by 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.

To satisfy this requirement, a physician must perform a medical examination of the pregnant woman and, to the maximum extent possible through reasonably available tests and the ultrasound required under s. 390.0111(3), F.S., an examination of the fetus. The physician must document in the pregnant woman's medical file the physician's determination and the method, equipment, fetal measurements, and any other information used to determine the viability of the fetus.

Exceptions to Prohibited Abortions

Currently, s. 390.0111(1)(a), F.S., provides an exception to the prohibition against abortions during the third trimester if two physicians certify in writing to the fact that the abortion is necessary to save the life or preserve the health of the pregnant woman. The bill amends this section to allow an abortion if two physicians certify in writing that the abortion, in reasonable medical judgment, is medically necessary save the life or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman. The bill expressly excludes psychological conditions from this exception. The bill creates s. 390.01112, F.S., which provides an identical exception to the ban against abortions during viability.

Currently, s. 390.0111(1)(b), F.S., provides an exception to the prohibition against abortions during the third trimester if a physician certifies in writing to the medical necessity for legitimate *emergency* medical procedures for an abortion in the third trimester, and another physician is not available for consultation. The bill requires the physician to certify in writing that, in reasonable medical judgment, legitimate *emergency* medical procedures for an abortion are medically necessary to save the pregnant woman's life or avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the pregnant woman, and another physician is not available for consultation. The bill expressly excludes psychological conditions from this exception. The bill creates s. 390.01112, F.S., which provides an identical exception to the ban against abortions during viability.

Standard of Care

Section 390.0111(4), F.S., currently establishes the standard of medical care to be applied when an abortion is performed during viability. It requires the physician performing the abortions exercise the same skill, care, and diligence to preserve the life and health of the fetus that would be required had it been intended to be born and not aborted. It also requires a physician to treat the preservation of the pregnant woman's life and health as the overriding and superior concern when performing an abortion. The bill amends this section so that this standard of care applies only to an abortion performed during the third trimester. However, the bill creates s. 390.01112, F.S., which establishes that this standard of care is applicable to an abortion performed during viability.

Administrative and Criminal Penalties

Currently, under s. 390.0111(10), F.S., any person who performs, or actively participates in, an abortion in violation of s. 390.0111, F.S., commits a third degree felony. The bill expands the applicability of this penalty to include any person who performs, or actively participates in, an abortion in violation of s. 390.01112, F.S. Thus, anyone who violates the requirements for an abortion during viability commits a third degree felony.

Currently, under s. 390.0111(14), F.S., failure to comply with the requirements of s. 390.0111, F.S., constitutes grounds for disciplinary action under each practice act and under s. 456.072, F.S. The bill expands the applicability of this penalty to include any person who fails to comply with the requirements of s. 390.01112, F.S. Thus, failure to comply with the requirements for an abortion during viability constitutes grounds for disciplinary action under each practice act and under s. 456.072, F.S.

Section 797.03, F.S., currently prohibits any person from performing or assisting in an abortion in the third trimester other than in a hospital. The bill extends this prohibition to include any person performing or assisting in an abortion on a person during viability other than in a hospital.

Severability and Reversion

The bill includes a severability clause which requires the provisions of the abortion act to be severed if any provision or its application to any person or circumstance is held invalid.

The bill also includes a reversion clause. Under this clause, the amendments made by this act to s. 390.011, F.S., and subsections (4), (10), and (13) of s. 390.0111, F.S., will be repealed and will revert to the law as it existed on January 1, 2014, if s. 390.01112, F.S., is found unconstitutional and severed by a court.

B. SECTION DIRECTORY:

Section 1: Amends s. 390.011, F.S., relating to definitions.
Section 2: Amends s. 390.0111, F.S., relating to termination of pregnancies.
Section 3: Creates s. 390.01112, F.S., relating to termination of pregnancies during viability.
Section 4: Amends s. 797.03, F.S., relating to prohibited acts; penalties.
Section 5: Provides severability and reversion clauses.
Section 6: Provides for an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

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:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGE

On March 27, 2014, the Health & Human Services Committee adopted an amendment to HB 1047. The amendment:

- Establishes “reasonable medical judgment” as the standard to be used by a physician when determining whether a fetus is viable and whether an exception to the prohibitions on abortions during viability and the third trimester is applicable; and
- Defines “reasonable medical judgment” 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.

The bill was reported favorably as a Committee Substitute. This analysis is drafted to the Committee Substitute.