

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1127 Abortions

**SPONSOR(S):** Porter and others

**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE  | ACTION | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|--------|---------|--|
| 1) Health & Human Services Quality<br>Subcommittee |        | Prater  | Calamas                                  |
| 2) Health & Human Services Committee               |        |         |  |

### SUMMARY ANALYSIS

This bill amends chapter 309, F.S., relating to termination of pregnancies by:

- Requiring an ultrasound for all patients, prior to an abortion procedure.
- Requiring all patients to be offered an opportunity to view their live ultrasound images and have an explanation given, with certain exceptions.
- Providing an option of the patient to decline the opportunity to view her ultrasound images.
- Requiring the patient to be provided with written materials that describe the stages of fetal development.

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:

##### **Background:**

In 2008, there were 1.21 million abortions nationwide.<sup>1</sup> This same year, 22 percent of all pregnancies (excluding miscarriages) resulted in abortion.<sup>2</sup> According to the most recent statistics available, in 2008, there were 94,360 abortions in Florida<sup>3</sup>, while there were 231,657 live births.<sup>4</sup> This amounts to approximately 2 abortions for every 5 births.

##### The Woman's Right to Know Act

The Woman's Right to Know Act (Act) is Florida's informed consent law related to abortion procedures and was enacted by the Legislature in 1997.<sup>5</sup> The Act requires that, a patient be provided with the following information in person prior to obtaining an abortion:

- 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 whether to terminate a pregnancy;
- The probable gestational age of the fetus at the time the procedure is to be performed; and
- The medical risks to the patient and fetus of carrying the pregnancy to term.<sup>6</sup>

The patient must also be provided printed materials that include a description of the fetus, a list of agencies that offer alternatives to abortion, and detailed information about the availability of medical assistance benefits for prenatal care, childbirth and neonatal care. The written materials must be prepared and provided by the Department of Health (department) and the patient has the option to view the materials provided.<sup>7</sup>

The patient must execute a written acknowledgement that she has received all of the above information prior to obtaining the abortion. The Act provides for disciplinary action against a physician who fails to comply.<sup>8</sup>

The requirements above do not apply if the abortion is being obtained out of medical necessity.<sup>9</sup>

Shortly after the enactment of the Woman's Right to Know Act, its validity was challenged under the Florida and federal constitutions. The plaintiff physicians and clinics successfully enjoined the enforcement of the Act pending the outcome of the litigation, which injunction was upheld on appeal.<sup>10</sup> Thereafter, the plaintiffs were successful in obtaining a summary judgment against the state on the grounds that the Act violated the right to privacy under Art. I., s. 23 of the Florida Constitution and was

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<sup>1</sup> The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.

<sup>2</sup> *Id.*

<sup>3</sup> The Guttmacher Institute, Abortion Incidence and Access to Services in the United States, 2008.

<sup>4</sup> Florida Department of Health, Department of Vital Statistics, 2008.

<sup>5</sup> S. 390.0111(3), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> S. 390.0111(3)(c), F.S.

<sup>9</sup> Two physicians certify in writing to the fact that, to a reasonable degree of medical probability, the abortion is necessary to save the life or preserve the health of the pregnant patient; or the physician certifies in writing to the medical necessity for legitimate emergency medical procedures for abortion in the third trimester, and another physician is not available for consultation.

<sup>10</sup> *Florida v. Presidential Women's Center*, 707 So. 2d 1145 (Fla. 4th Dist. Ct. App. 1998).

unconstitutionally vague under the federal and state constitutions. This decision was also upheld on appeal.<sup>11</sup> The state appealed this decision to the Florida Supreme Court.<sup>12</sup>

The Florida Supreme Court addressed two issues raised by the plaintiffs. With regard to whether the Act violated a woman's right to privacy, the Court determined that the information required to be provided to a patient in order to obtain informed consent was comparable to those informed consent requirements established in common law and by Florida statutory law<sup>13</sup> applicable to other medical procedures.<sup>14</sup> Accordingly, the Court determined that the Act was not an unconstitutional violation of a woman's right to privacy.<sup>15</sup>

Second, the Supreme Court addressed the allegation that the term "reasonable patient", and the Act's reference to information about "risks" were unconstitutionally vague. The plaintiffs argued it was unclear whether the Act requires patients to receive information about "non-medical" risks, such as social, economic or other risks.<sup>16</sup> The Court rejected these arguments and held that "...the Act constitutes a neutral informed consent statute that is comparable to the common law and to informed consent statutes implementing the common law that exist for other types of medical procedures...."<sup>17</sup>

The Florida Supreme Court remanded the case back to the trial court and the trial court dismissed the case for lack of jurisdiction in August, 2010.<sup>18</sup> North Florida Women's Health and Counseling Services, Inc., has since appealed this ruling.<sup>19</sup> The parties are completing the briefs on the appeal and a decision from the court is expected in 2011.

While there is currently no legal action pending which prohibits the department from complying with the requirements of the Act, the department has indicated that it will not proceed with the requirements unless the department is given rulemaking authority from the Legislature.<sup>20</sup> The basis for the Department's reasoning is that the Act and its subject matter are controversial and would initiate a legal challenge.<sup>21</sup>

### Ultrasounds

An ultrasound is a technique involving the formation of a two-dimensional image used for the examination and measurement of internal body structures and the detection of bodily abnormalities.<sup>22</sup> It uses high frequency sound waves (ultrasound) to produce dynamic images (or sonograms) of organs, tissues, or blood flow inside the body. Ultrasound is used to examine many parts of the body, such as the abdomen, breast, reproductive system, heart, and blood vessels, and is increasingly being used to detect heart disease, vascular disease, and injuries to the muscles, tendons, and ligaments.<sup>23</sup>

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<sup>11</sup> *Florida v. Presidential Women's Center*, 884 So. 2d 526 (Fla. 4th Dist. Ct. App. 2004).

<sup>12</sup> *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006).

<sup>13</sup> *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006), citing S. 766.103, F.S., (general informed consent law for medical profession, which requires that a patient receive information that would provide a "a reasonable individual" with an understanding of the procedure he or she will undergo, medically acceptable alternatives or treatments to that procedure, and the substantial potential risks or hazards associated with such procedure, such that if provided that information); Fla. Stat. § 458.324, (informed consent for patients who may be in high risk of developing breast cancer); Fla. Stat. § 458.325, (informed consent for patients receiving electroconvulsive and psychosurgical procedures); Fla. Stat. § 945.48, (express and informed consent requirements for inmates receiving psychiatric treatment).

<sup>14</sup> *Id.*

<sup>15</sup> *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006).

<sup>16</sup> *Id.*

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

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

<sup>19</sup> *N. Fla Women's Health & Counseling Services, Inc. v. State of Fla., Dept. of Health, et al.* Case No. 4D10-3732 (Fla. 4<sup>th</sup> DCA) *appeal pending*.

<sup>20</sup> Affidavit of Elizabeth Renee Alsobrook, Deputy General Counsel, Fla. Dept. of Health, Feb. 5, 2010, *N. Fla Women's Health & Counseling Services, Inc. v. State of Fla., Dept. of Health, et al.* Case No. 4D10-3732 (Fla. 4<sup>th</sup> DCA) *appeal pending*.

<sup>21</sup> *Id.*

<sup>22</sup> See <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=ultrasound>, (last viewed March 13, 2009).

<sup>23</sup> Society of Diagnostic Medical Sonography, Medical Ultrasound Fact Sheet (2008), *available at*: <http://www.sdms.org/resources/muam/default.asp> (last viewed March 13, 2009).

Ultrasounds are considered to be a safe, non-invasive means of investigating a fetus during pregnancy.<sup>24</sup> An ultrasound may be used to detect body measurements to determine the gestational age of the fetus.<sup>25</sup> If the date of a patient's last menstrual cycle is uncertain, an ultrasound can be used to arrive at a correct "dating" for the patient.<sup>26</sup> Moreover, an ultrasound can be used to detect an ectopic pregnancy, which is a potentially fatal condition in which the fertilized egg implants outside a patient's uterus, such as in the fallopian tubes, ovaries, or abdomen.<sup>27</sup> Approximately one in every 50 pregnancies results in an ectopic pregnancy, and it is the leading cause of pregnancy-related death for women in their first trimester of pregnancy.<sup>28</sup> According to the National Abortion Federation, "[i]n the context of medical abortion, ultrasonography can help determine gestational age, assess the outcome of the procedure, and diagnose ectopic pregnancy and other types of abnormal pregnancy."<sup>29</sup>

Two forms of ultrasound used in pregnancy are trans-abdominal and trans-vaginal. Each have advantages and disadvantages. Trans-abdominal ultrasound provides a panoramic view of the abdomen and pelvis, whereas trans-vaginal provides a more limited pelvic view. Trans-abdominal ultrasound is noninvasive, and trans-vaginal ultrasound requires insertion of a probe into the vagina. Both are easily combined with a pelvic exam.<sup>30</sup> The trans-abdominal method requires a full bladder for best viewing, which is accomplished by the patient drinking several glasses of water prior to the examination. According to the National Abortion Federation, some patients find trans-vaginal ultrasound more comfortable than trans-abdominal because trans-vaginal does not require a distended bladder.<sup>31</sup>

Trans-abdominal ultrasound cannot always detect pregnancies under 6 weeks' gestation, while trans-vaginal ultrasound can detect pregnancies at 4.5 to 5 weeks' gestation.<sup>32</sup>

In Florida, clinics providing pregnancy termination procedures in the second trimester are required to have ultrasound equipment and conduct ultrasounds on patients prior to the procedure.<sup>33</sup> This requirement is not contingent on the number of second trimester procedures performed by the clinic; if a clinic performs only one second trimester abortion a year, that clinic must have ultrasound equipment on site and use it for that procedure. Current law also requires that the person performing the ultrasound must be either a physician or a person working in conjunction with the physician who has documented evidence of having completed a course in the operation of ultrasound equipment as prescribed by rule.<sup>34</sup> The Agency for Health Care Administration (AHCA) regulates abortion clinics and has developed rules pursuant to the statute.<sup>35</sup>

Current law does not require a clinic to review the ultrasound results with the patient prior to the abortion, unless the patient requests to review the results.<sup>36</sup> Current law does not require the requested review to be done with the patient as the ultrasound is being conducted.

Although providing ultrasounds for first trimester abortions is not required by law, nearly all providers already conduct ultrasounds prior to terminating a pregnancy during the first trimester. Thirty five

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<sup>24</sup> See "Obstetric Ultrasound, A Comprehensive Guide to Ultrasound Scans in Pregnancy", available at: <http://www.ob-ultrasound.net/> (last viewed March 13, 2009).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* See also S. Stoppler, M.D., W. Sheil, Jr. MD. FACP, FACR, MedicineNet.com, available at: [http://www.medicinenet.com/ectopic\\_pregnancy/article.htm](http://www.medicinenet.com/ectopic_pregnancy/article.htm) (last viewed March 13, 2009).

<sup>28</sup> *Id.*

<sup>29</sup> <sup>23</sup> National Abortion Federation, Early Options, "Ultrasound Imagery in Early Pregnancy", available at: [http://www.prochoice.org/education/cme/online\\_cme/m4ultrasound.asp](http://www.prochoice.org/education/cme/online_cme/m4ultrasound.asp) (last viewed March 13, 2009).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* See also "Obstetric Ultrasound, A Comprehensive Guide to Ultrasound Scans in Pregnancy", *supra*, note 18.

<sup>32</sup> *Id.*

<sup>33</sup> S.390.012(3)(d)4., F.S.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> S. 390.012(3)(d)4., F.S.

abortion clinics in Florida are licensed to provide first trimester abortions.<sup>37</sup> Out of these 35 licensees, only 31 actually perform first trimester abortions. Of these 31 clinics, 29 already perform an ultrasound before the procedure. One clinic indicated that they perform an ultrasound prior to an abortion “sometimes,” and the remaining clinic was unable to be reached after several attempts.<sup>38</sup>

Abortions in the third trimester of pregnancy are prohibited in Florida, unless the abortion is necessary to save the life or preserve the health of the pregnant patient.<sup>39</sup> In such cases, the abortion must be performed in a hospital.<sup>40</sup> Failure to perform a third trimester abortion in a hospital is a second degree misdemeanor punishable pursuant to s. 775.082 or s. 775.083, F.S.<sup>41</sup>

### State Ultrasound Laws

Many states have requirements related to the provision of ultrasounds for abortions.

- 18 states regulate the provision of ultrasound by abortion providers.
- 9 states require verbal counseling or written materials to include information on accessing ultrasound services (Georgia, Indiana, Kansas, Michigan, Missouri, Nebraska, Oklahoma, Utah, Wisconsin).
- 3 states mandate that an abortion provider perform an ultrasound on each woman seeking an abortion, and require the provider to offer the woman the opportunity to view the image (Alabama, Louisiana, Mississippi).
- 2 states require the abortion provider to perform an ultrasound on each woman obtaining an abortion after the first trimester, and to offer the woman the opportunity to view the image (Arizona, Florida).
- 10 states require that a woman be provided with the opportunity to view an ultrasound image if her provider performs the procedure as part of the preparation for an abortion (Arkansas, Georgia, Idaho, Kansas, Michigan, Nebraska, Ohio, South Carolina, West Virginia, Wisconsin).
- 4 states require that a woman be provided with the opportunity to view an ultrasound image (Missouri, North Dakota, South Dakota, Utah).

### Abortion Clinic Rules

The Women’s Health and Safety Act, enacted in 2005<sup>42</sup> required AHCA to develop and enforce rules for the health, care, and treatment of persons in abortion clinics which perform second trimester abortions, and for the safe operation of such abortion clinics.<sup>43</sup>

## **Effect of Proposed Changes**

### Informed Consent

The bill expands statutory informed consent requirements to require confirmation of the gestational age of the fetus by an ultrasound. This would be required for all abortion procedures, regardless of the trimester. The ultrasound must be performed by the physician who is to perform the abortion or a person that completed a course in the operation of ultrasound equipment. The person performing the

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<sup>37</sup> Florida Health Finder, Abortion Clinics, the Agency for Health Care Administration.

<sup>38</sup> Telephone survey, March 11, 2011. Survey on file with the Health and Human Services Quality Committee.

<sup>39</sup> S. 390.0111(1), F.S.

<sup>40</sup> S. 797.03(3), F.S.

<sup>41</sup> S. 797.03(4), F.S.

<sup>42</sup> Ch. 2005-95, Laws of Florida.

<sup>43</sup> AHCA’s ability to regulate clinics only performing first trimester abortions is very limited. See *Florida Women’s Medical Clinic, Inc. v. Smith*, 478 F. Supp. 233, (S.D.Fla. 1979), appeal dismissed, 620 F.2d 297, wherein the United States District Court for the Southern District of Florida found that the rules implementing the regulation of first trimester abortions were unconstitutional as invasive of the right to privacy. The rules at question addressed surgical services, nursing services, laboratory services, and facilities, and sanitation, housekeeping and maintenance. These rules have since been repealed.

ultrasound must allow the patient to view the live ultrasound images. Additionally, the images must be reviewed and explained to the patient by a physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant working in conjunction with the physician, prior to the patient giving informed consent for the abortion procedure.

Patients who provide certain documentation that the reason for their abortion is a result of rape, incest, domestic violence, human trafficking, or that they have been diagnosed with a condition that would create a risk of substantial and irreversible impairment of a major bodily function are not subject to view or hear an explanation of the live ultrasound images. Acceptable documentation is a copy of a restraining order, police report, medial record, or other court order or documentation.

A patient has a right to decline to view the live ultrasound images after she has been offered an opportunity. If she declines, she must complete a form acknowledging that she has chosen to reject the opportunity to view her ultrasound images. The form must also indicate that the decision not to view the images was not based on any undue influence from any third party and that this decision was of her own free will.

The bill also adds language clarifying what information is contained in the written materials that are required to be provided prior to a patient giving informed consent for an abortion pursuant to the Woman's Right to Know Act. The bill requires that the description of the fetus must include the stages of development.

#### Abortion Clinic Rules

The bill amends s. 390.012, F.S., relating to AHCA clinic rulemaking to reflect the requirement to allow the patient to view the live ultrasound images and receive a contemporaneous explanation of them.

The patient has the right to decline to view the live ultrasound images after she has been offered an opportunity. She must complete a form acknowledging that she has chosen to decline the opportunity to view her ultrasound images. The form must also indicate that the decision not to view the images was not based on any influence from any third party and that this decision was of her own free will.

#### B. SECTION DIRECTORY:

- Section 1:** Amends s. 390.0111 relating to termination of pregnancies.
- Section 2:** Amends s. 390.012 relating to powers of agency; rules; disposal of fetal remains.
- Section 3:** Provides a severability clause.
- Section 4:** Provides and effective date of July 1, 2011.

## 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:

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:

The bill contains a severability clause providing that if any of the provisions of this bill are held invalid, it does not affect the validity of the other provisions of this bill.

It is possible that certain provisions in this bill may be challenged under Art. I, Section 23, of the Florida Constitution, which provides for an express right to privacy. At present, there is no caselaw in Florida construing certain requirements in the bill in light of the express right to privacy; however, federal and other states' caselaw upholding similar provisions, including *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), may be persuasive.

B. RULE-MAKING AUTHORITY:

The bill provides AHCA sufficient rulemaking authority to implement its provisions. According to the Department of Health, current law does not provide sufficient rule authority to implement the provisions of the Women's Right to Know Act.<sup>44</sup> Additional rule authority may be needed to ensure implementation of both the current law and the bills amendments to it.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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<sup>44</sup> Affidavit of Elizabeth Renee Alsobrook, Deputy General Counsel, Fla. Dept. of Health, Feb. 5, 2010, N. Fla Women's Health & Counseling Services, Inc. v. State of Fla., Dept. of Health, et al. Case No. 4D10-3732 (Fla. 4<sup>th</sup> DCA) *appeal pending*.