



Healthcare Council

Thursday, March 20, 2008
3:00 PM – 5:00 PM
404 HOB

Marco Rubio
Speaker

Aaron Bean
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Marco Rubio

Healthcare Council

Start Date and Time: Thursday, March 20, 2008 03:00 pm

End Date and Time: Thursday, March 20, 2008 05:00 pm

Location: 404 HOB

Duration: 2.00 hrs

Consideration of the following bill(s):

HB 257 Abortion by Traviesa

Budget Workshop

Pursuant to rule 7.12, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Wednesday, March 19, 2008.

By request of the Chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Wednesday, March 19, 2008.

NOTICE FINALIZED on 03/18/2008 16:14 by BAI

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families – the bill increases the likelihood of parental involvement in a decision to terminate a minor's pregnancy by requiring a court to consider specific, additional factors in determining whether a minor is sufficiently mature to decide to terminate her pregnancy without notice to her parents.

Safeguard individual liberty – the bill increases the likelihood of informed consent to the termination of a pregnancy by requiring that an ultrasound be performed and that the woman be offered the opportunity to view the ultrasound, with exceptions.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Third Trimester Termination of Pregnancies

Section 390.0111, F.S., precludes the termination of pregnancy in the third trimester unless two physicians certify in writing to a degree of medical probability that a termination is necessary to save the life of health of a woman. If a termination is medically necessary because of the existence of a legitimate medical emergency, then only one physician must certify in writing that termination is necessary. Moreover, pursuant to s. 797.03, F.S., it is a misdemeanor of the second degree for anyone to perform or assist in the performance of a third trimester termination of pregnancies outside a hospital.

The Woman's Right To Know Act

The Woman's Right to Know Act, Florida's informed consent law related to termination of pregnancy procedures, was enacted by the Legislature in 1997.¹ The Act requires that, except in the event of a medical emergency,² prior to obtaining a termination of pregnancy, a woman³ must be provided the following information, in person, from the physician performing the procedure or the referring physician:

- 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
- The medical risks to the woman and fetus of carrying the pregnancy to term

The woman must also be provided printed materials that include a description of the fetus, a list of agencies that offer alternatives to terminating the pregnancy, and detailed information about the availability of medical assistance benefits for prenatal care, childbirth and neonatal care.⁴ The written materials must be prepared and provided by the Department of Health, and the woman has the option to review the written materials provided.⁵

¹ s. 390.0111(3), F.S.

² s. 390.0111(3)(d), F.S., provides express requirements for meeting the emergency medical exception.

³ The Act allows for the woman's guardian to receive the information, if she is mentally incompetent.

⁴ s. 390.0111(3), F.S.

⁵ Id.

The woman must execute written acknowledgement that she has received all of the above information prior to obtaining the termination of pregnancy.⁶ The Act provides for disciplinary action against a physician who fails to comply.⁷

Litigation of the Woman's Right To Know Act

Shortly after the enactment of the Woman's Right to Know Act, the Act was challenged as unconstitutional under the Florida and Federal Constitutions. The plaintiff physicians and clinics successfully enjoined the enforcement of the Act in Fifteenth Judicial Circuit (Palm Beach County area), which was upheld on appeal.⁸

Thereafter, the plaintiffs were successful in obtaining a summary judgment against the State on the grounds that subsection (3)(a)(1) of the Act violated a woman's right to privacy under Art. I., s. 23 of the Florida Constitution and is unconstitutionally vague under the Federal and State Constitutions, which was also upheld on appeal to the Fourth District Court of Appeal.⁹ The State appealed this decision to the Florida Supreme Court.¹⁰

With regard to whether the Act violated a woman's right to privacy, the Florida Supreme Court determined that the information required to be provided to women in order to obtain informed consent was comparable to those informed consent requirements established in common law or by Florida Statute¹¹ applicable to other medical procedures.¹² Accordingly, the Court determined that the Act was not an unconstitutional violation of a woman's right to privacy.¹³

Furthermore, the plaintiffs alleged that the term "reasonable patient" is unconstitutionally vague and that subsection (3)(a)(1) is unconstitutionally vague in that it is unclear whether the Act requires that patients receive information about "non-medical" risks, such as social, economic or other risks.¹⁴ The Supreme Court rejected these arguments and held that "[s]ubsection (3)(a)(1) of 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...."¹⁵

Because the underlying summary judgment, and subsequent appeals of the summary judgment order, applied only to the plaintiffs' challenges to subsection (3)(a)(1) of the Act, which pertains to the information a physician or referring physician must provide orally, and in person, to the woman, the status of the remaining challenges to the Act, including subsection (3)(a)(2) is unclear at this time.

Ultrasound

An ultrasound, also known as a sonogram, is a noninvasive technique involving the formation of a two-dimensional image used for the examination and measurement of internal body structures and the

⁶ Id.

⁷ s. 390.0111(3)(c).

⁸ See *State v. Presidential Women's Center*, 707 So.2d 1145 (Fla. 4th DCA 1998).

⁹ See *State v. Presidential Women's Center*, 884 So.2d 526 (Fla. 4th DCA 2004).

¹⁰ See 937 So.2d 114 (Fla. 2006).

¹¹ 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); 458.324, F.S. (informed consent for patients who may be in high risk of developing breast cancer); 458.325, F.S. (informed consent for patients receiving electroconvulsive and psychosurgical procedures); s. 945.48, F.S. (express and informed consent requirements for inmates receiving psychiatric treatment).

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

detection of bodily abnormalities.¹⁶ Today, ultrasounds are considered to be a safe, non-invasive means of investigating a fetus during pregnancy.

An ultrasound may be used to detect body measurements to determine the gestational age of the fetus.¹⁷ If the date of a woman's last menstrual cycle is uncertain, then an ultrasound can be used to arrive at a correct "dating" for the patient.¹⁸ 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 woman's uterus, such as in the fallopian tubes, ovaries, or abdomen.¹⁹ 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.²⁰

Clinics providing termination of pregnancy procedures in the second trimester are required by law to have ultrasound equipment and conduct ultrasounds on patients prior to the termination procedure.²¹ Thus, if a clinic performs only one second trimester termination of pregnancy a year, that clinic is required to have ultrasound equipment on site. Current law also designates that the persons performing the ultrasound must be either a physician or a person having documented evidence that he or she has completed a course in the operation of ultrasound equipment as prescribed by rule, and who is working in conjunction with the physician.²² AHCA regulates abortion clinics by law and has developed rules pursuant to the statute.²³

For second trimester termination of pregnancy procedures, current law does not require a clinic to review the ultrasound evaluation results with the patient prior to the termination of pregnancy unless the patient requests to review the results. Any such requested review does not require that the images be reviewed with the patient as the ultrasound is being conducted.

While providing ultrasounds for first trimester termination of pregnancies is not required by law, many providers in Florida already conduct ultrasounds prior to terminating a pregnancy during the first trimester.²⁴ For example, A Jacksonville Woman's Health Center, Inc., indicates on its website that ultrasounds are performed on every patient to confirm gestational age, rule out an ectopic pregnancy²⁵, and provide the physician with information necessary to perform the procedure.²⁶ Given these current practices, some providers will not experience any increased costs that could be carried over to patients for such procedures.

Several states, including Alabama, Mississippi, Louisiana, have enacted laws that require an ultrasound be conducted on all patients prior to a termination of pregnancy, and require that the

¹⁶ See <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=ultrasound>.

¹⁷ See Obstetric Ultrasound, A Comprehensive Guide to ultrasound Scans in Pregnancy; located at <http://www.ob-ultrasound.net/>

¹⁸ *Id.*

¹⁹ *Id.* See also S. Stoppler, M.D., W. Sheil, Jr. MD. FACP, FACR, MedicineNet.com; located at http://www.medicinenet.com/ectopic_pregnancy/article.htm.

²⁰ *Id.*

²¹ s. 390.012(3)(d)4.

²² *Id.*

²³ *Id.*

²⁴ See, e.g., Florida Abortion Clinics at <http://www.floridaabortionclinics.com/Abortions.htm>; A Choice for Women at <http://www.achoiceforwomen.com/services/services.asp>; Eve Medical Center at <http://www.eveabortioncarespecialists.com/1and2Trimester.html>; North Florida Womens Health at http://www.northfloridawomenshealth.com/abortion_services.html; A Jacksonville Women's Health Center, Inc. Website at <http://www.ajacksonvillewomenshealth.com/expect.html>; all viewed on March 12, 2008.

²⁵ An ectopic pregnancy is a pregnancy where the baby begins to develop outside the womb, such as in the fallopian tube, and can be life threatening. See Medical Encyclopedia, Ectopic Pregnancy; viewed on March 12, 2008 at <http://www.nlm.nih.gov/medlineplus/print/ency/article/000895.htm>.

²⁶ See A Jacksonville Women's Health Center, Inc. Website at <http://www.ajacksonvillewomenshealth.com/expect.html>; viewed on March 12, 2008.

ultrasound images be offered to the patient for viewing.²⁷ In other states, such as Arkansas, Georgia, Idaho, Michigan, Indiana, Oklahoma, Utah, and Wisconsin if an ultrasound is conducted, the images must be offered to the patient for viewing.²⁸

Medicaid Coverage for Termination of Pregnancies

Pursuant to the 2007-2008 Medicaid Summary of Services, Florida Medicaid covers terminations of pregnancy when a recipient's pregnancy is the result of incest or rape, or when "[t]he woman suffers from a physical disorder, physical injury or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself that would place the woman in danger of death unless a termination of pregnancy is performed." According to AHCA, Medicaid covered the cost of 2 terminations of pregnancy in fiscal year 2006-2007.²⁹

Florida Medicaid's policy is consistent with the federal Hyde Amendment³⁰ with regard to the use of federal funds for termination of pregnancies. The Hyde Amendment prohibits the use of federal funds for termination of pregnancies unless the pregnancy is the result of an act of rape or incest. The Hyde Amendment also allows federal funds to be used to cover termination of pregnancy procedures, if such procedure is necessary to save the life of the woman.

Medicaid Coverage for Ultrasounds

According to AHCA, Medicaid policy currently allows for one ultrasound per pregnancy without any high risk indications. Follow-up ultrasounds would be allowed for high risk indications.³¹

Twenty-Four Hour Waiting Periods

Twenty-one states have laws requiring a woman to wait at least 24 hours prior to the termination of pregnancy procedure.³² A waiting period prior to an termination of pregnancy has been upheld by numerous courts, including the United States Supreme Court in the seminal case *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).³³

In *Casey*, the Pennsylvania Abortion Control Act was challenged in part because of a requirement that a woman receive certain information at least 24 hours before the termination of pregnancy procedure, with an exception for a medical emergency.³⁴ The Court upheld the constitutionality of this particular provision, noting that "requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure . . . [and] cannot be considered a substantial obstacle to obtaining an abortion."³⁵ With regard to the 24 hour waiting period, the Court noted "that important decisions will be

²⁷ See s. 26-23A-6 Ala. Stat. Ann.; s. 41-41-34 Miss. Stat. Ann.; ss. 40:1299.35.1 and 40:1299.35.6 (the definition of "gestational age" includes that the age of the fetus is confirmed through an ultrasound, and the Woman's Right to Know Act requires that a patient be provided with the probable gestational age of the fetus. Therefore, in construing these provisions together, it appears that ultrasounds are required).

²⁸ See ss. 31-9A-3 and 31-9A-4, Ga. Stat. Ann.; 20-16-602, Ark. Stat. Ann.; 18-609, Idaho Stat. Ann.; 333.17015, Mich. Stat. Ann.; 16-34-2-1.1, Ind. Stat. Ann.; 63 Okl. St. Ann, 1-738.3; 76-7-305, Utah Code Ann.; 253.10, Wis. Stat. Ann.

²⁹ March 19, 2008, e-mail from AHCA on file with the Council.

³⁰ The Hyde Amendment was a rider to an appropriations bill that was passed by Congress in 1976; therefore, it has continued as a rider to the annual Labor/Health and Human Services/Education appropriations bill and must be reenacted each year by Congress.

³¹ March 19, 2008, e-mail from AHCA, on file with the Council.

³² See National Conference of State Legislatures (Abortion Laws) at <http://www.ncsl.org/programs/health/aborlaws.htm>. Arkansas requires informed consent to be obtained the day prior to the procedure being performed, while Indiana requires an 18 hour waiting period and South Carolina requires a one hour waiting period. *Id.*

³³ See also *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (declining to find that Ohio's 24 hour waiting period, which provided an exception for a medical emergency, imposed a substantial burden under *Casey*).

³⁴ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³⁵ *Id.* at 883.

more informed and deliberate if they follow some period of reflection does not strike us as unreasonable . . . [and] we cannot say that the waiting period imposes a real health risk.”³⁶

The 1999 Parental Notice of Abortion Act

In calendar year 2006, 95,586 pregnancies were terminated in Florida.³⁷ Vital Statistics within the Department of Health (DOH) collects data on the number of procedures performed, the reason for the procedure, and the period of gestation at the time of the procedure.³⁸ However, DOH does not collect data on the number of procedures performed for individuals who are minors.

In 1999, the Legislature passed Senate Bill 1598, codified as s. 390.01115, F.S. The “Parental Notice of Abortion Act”³⁹ required the physician performing or inducing the termination of the pregnancy of a minor to give at least 48 hours’ actual notice to one parent or the legal guardian of the minor.⁴⁰ If actual notice is not possible, the physician may give constructive notice.⁴¹

Section 390.01115(2)(a), F.S., defined “actual notice” as notice “that is given directly, in person, or by telephone.” Section 390.01115(2)(c), F.S., defined “constructive notice” as notice “that is given by certified mail to the last known address of the parent or legal guardian of a minor, with delivery deemed to have occurred 48 hours after the certified notice is mailed.”

The Act did not require notice if:

- A medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements. If a medical emergency exists, the physician may proceed but must document reasons for the medical necessity in the patient's medical records;
- Notice is waived in writing by the person who is entitled to notice;
- Notice is waived by the minor who is or has been married or has had the disability of nonage removed;
- Notice is waived by the patient because the patient has a minor child dependent on her; or
- Notice is waived by judicial order.

The Act permitted a minor to petition the circuit court for a waiver of the notice requirements. The court was required to rule on the petition within 48 hours unless the minor requested an extension of time.⁴²

Litigation of the 1999 Parental Notice of Abortion Act

The Act was never enforced as, on July 1, 1999, various groups sought an injunction against the Act’s enforcement and the Florida Supreme Court, on July 10, 2003, held the Act violated the state right to privacy as construed in *North Florida Women’s Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003). In that case, the court rejected the state’s argument that the Act could withstand constitutional challenge because similar statutes have been upheld by the United States Supreme Court.⁴³ The court explained:

³⁶ *Id.* at 885-886.

³⁷ Florida Vital Statistics Annual Reports (viewed March 12, 2008) <http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx>

³⁸ Rule 64V-1.015, F.A.C.

³⁹ s. 390.01115, F.S.

⁴⁰ s. 390.01115(3)(a), F.S. Section 390.01115(3)(a), F.S., permits the referring physician to give notice

⁴¹ s. 390.01115(3)(a), F.S.

⁴² s. 390.01115(4)(b), F.S.

⁴³ *North Florida Women’s Health and Counseling Services v. State*, 866 So. 2d 612, 634 (Fla. 2003).

First, any comparison between the federal and Florida rights of privacy is inapposite in light of the fact that **there is no express federal right of privacy clause.** (emphasis in original).⁴⁴

Accordingly, the court based its decision on the explicit right to privacy found in the Florida Constitution. A statute that impinges on fundamental rights, such as the right to privacy, must survive a “strict scrutiny” standard of review. That is, the “court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means.”⁴⁵ The court specifically relied on state law and rejected any reliance on federal law:

We expressly decide this case on state law grounds and cite federal precedent only to the extent that it illuminates Florida law. Again, we note that any comparison between the federal and Florida rights of privacy is inapposite in light of the fact that there is no express federal right of privacy clause.⁴⁶

The Parental Notice Constitutional Amendment

In 2004, the Legislature passed House Joint Resolution 1 to amend the state constitution. The joint resolution, placed on the November 2004 ballot, provided:

ARTICLE X SECTION 22. Parental notice of termination of a minor’s pregnancy.--The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor’s right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor’s pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

The voters approved this amendment on November 2, 2004.⁴⁷ The amendment permits the Legislature to create a parental notification statute notwithstanding the state right to privacy.

The 2005 Parental Notice of Abortion Act

In 2005, the Legislature passed House Bill 1659, which repealed s. 390.01115, F.S., the 1999 Parental Notice of Abortion Act. The bill recreated the Parental Notice of Abortion Act under s. 390.01114, F.S., and provided the following:

Notice. A physician or the referring physician must give 48 hours actual notice of the physician’s intent to perform or induce the termination of a minor’s pregnancy to one of the minor’s parents or to the legal guardian of the minor. If the physician is unable, after making reasonable efforts, to give actual notice, the physician may provide constructive notice by mail, overnight delivery guaranteed, return receipt requested with delivery restricted to a parent or legal guardian. This constructive notice must be mailed at least 72 hours before the procedure is commenced. The physician is required to document the efforts to provide notice and keep such records with the minor’s medical file.

Notice Exceptions. Article X, s. 22, Fla. Const., requires the Legislature to provide exceptions to the notice requirement. Under s. 390.01114(3)(b), F.S., prior actual or constructive notice is not required in the following circumstances:

⁴⁴ *Id.*

⁴⁵ *Id.* at 625, n. 16.

⁴⁶ *Id.* at 640.

⁴⁷ According to the Department of State website, <http://election.dos.state.fl.us>, 4,639,635 people voted for the amendment and 2,534,910 voted against the amendment.

- If, in the physician's good faith clinical judgment, a medical emergency exists and there is insufficient time to comply with the notice requirements. If a medical emergency exists, the physician may terminate the pregnancy but must document the reason for the medical necessity and provide notice after performing the procedure;
- Notice is waived by the person entitled to receive notice;
- Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015, F.S.;
- Notice is waived by the patient because the patient has a minor child dependent on her; or
- Notice is waived through a waiver petition granted by a circuit court.

Penalties for Failure to Give Notice. A violation of the notice requirement by a physician is grounds for disciplinary action under ss. 458.331 and 459.015, F.S.⁴⁸

Judicial Waiver of Notice. Article X, s. 22, Fla. Const., requires the Legislature to create a procedure for a judicial waiver of notice. Accordingly, s. 390.01114(4), F.S., provides that a pregnant minor who is under 18 years of age may petition the circuit court in the judicial circuit within the jurisdiction of the District Court of Appeal where she resides for a waiver of the notice requirement. The court must provide the minor counsel upon her request and at no cost.

The court must give court proceedings under this act precedence over other pending matters and the court must rule, and issue written findings of fact and conclusions of law, within 48 hours of the minor's request. If the court fails to rule within 48 hours, and an extension has not been granted at the request of the minor, the petition must be granted.

While the law provides that notice shall be given to parents of a minor, there are exceptions such that the court may grant a petition to waive notice if the court finds:

- By clear and convincing evidence, that the minor is sufficiently mature to terminate her pregnancy without the knowledge of her parent or guardian;
- By a preponderance of the evidence, that there is evidence of child abuse or sexual abuse by one or both of her parents or her guardian. In addition, the court must report the evidence of child abuse or sexual abuse to the Department of Children and Families' Child Abuse and Neglect hotline, in accordance with s. 39.201; or
- By a preponderance of the evidence, that the notification of a parent or guardian is not in the best interest of the minor.

If one of these exceptions is not met, the court must dismiss the minor's petition.

The Office of State Court Administrator ("Office") must report to the Governor, President of the Senate, and the Speaker of the House of Representatives on the number of petitions for judicial waiver and the timing and manner of disposal of the petitions.⁴⁹ According to the Office, from July 2006 through December 2007, of the 890 petitions filed, 844 had been granted, 38 dismissed, and 4 granted without judicial order. In other words, over 94 percent of petitions were granted, which is consistent with previous reports.

Litigation of the 2005 Parental Notice of Abortion Act

The 2005 Parental Notice of Abortion Act was challenged in federal court in *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1293 (N.D.Fla. 2005). In that case, the plaintiffs were two physicians and four clinics, based in Florida, that provide, among other health care services, terminations of pregnancies. The plaintiffs sought a preliminary injunction to block enforcement of the act on the basis

⁴⁸ s. 390.01114(3)(c), F.S.

⁴⁹ s. 390.01114(6), F.S.

that the act infringes upon the constitutional rights of both physicians who provide termination of pregnancies and minors who seek the procedure. Specifically, the plaintiffs argued that the act:

- Violates the due process rights of physicians because the provision regarding disciplinary action lacks a *scienter* requirement;
- Is unconstitutionally vague in that it fails to define what constitutes a physician's "reasonable effort" to effect notice;
- Is unconstitutionally vague in that it fails to give physicians adequate guidance about when the medical emergency provision applies;
- Impermissibly burdens the right of minors to seek a termination of pregnancy by failing to contain any deadlines for resolution of appeals from a dismissal of a bypass petition;
- Violates minors' right to travel by failing to provide a venue for non-resident minors seeking termination of pregnancies in Florida; and
- Impermissibly burdens the right of minors to confidentially and anonymously seek a termination of pregnancy by requiring the court to report evidence of sexual abuse.

The court discussed previous cases wherein the United States Supreme Court had found parental notice of abortion statutes constitutional based on, among other considerations, the fact that the statutes at issue contained a "*Belotti*" notice bypass provision.⁵⁰ In *Belotti v. Baird*, 443 U.S. 622 (U.S. 1979), the court noted that, in order for a parental notice statute to be constitutional, the notice bypass provision must allow the minor to show either:

- That she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or
- That even if she is not able to make this decision independently, the desired abortion would be in her best interests.⁵¹

In addition, the judicial proceeding must ensure anonymity and sufficient expedition "to provide an effective opportunity for an abortion to be obtained."⁵²

The court dismissed each of the plaintiff's arguments, noting that the plaintiffs did not demonstrate that they are likely to succeed on the merits of their claims, based in part on the fact that Florida's law satisfied the *Belotti* requirements. Thus, the motion for preliminary injunction was denied. Subsequently, the court granted a substantial portion of the defendant's motion for judgment on the pleadings, finding that the act did not create an undue burden on the minor's right to obtain an abortion.⁵³ The plaintiffs voluntarily dismissed the only remaining claim.

Guardian Ad Litem

Guardian ad Litem Generally

Under current law, the term guardian ad litem has multiple meanings. For all intents and purposes, a guardian ad litem is a volunteer appointed by a judge to represent the interests of a minor before a court. Guardians ad litem may be used in civil or criminal proceedings, including family law matters under chapter 61, dependency proceedings under chapter 39, or probate proceedings under chapter 744, F.S. In appointing a guardian ad litem, the judge may select a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the guardian ad litem program, staff members of a guardian ad litem program office, a court-appointed

⁵⁰ *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1293, 1298 (N.D.Fla. 2005)

⁵¹ *Belotti v. Baird*, 443 U.S. 622, 643-44 (U.S. 1979)

⁵² *Id.* at 644.

⁵³ *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1309 (N.D.Fla. 2005)

attorney, or a responsible adult.⁵⁴ The guardian ad litem becomes a party to such judicial proceeding as a representative of the child, and serves until discharged by the court.

Statewide Guardian Ad Litem Office

The Statewide Guardian Ad Litem Office was established in the 2003 Legislative Session and oversees the operation of the Guardian ad Litem Programs operating in the 20 judicial circuits. The Program recruits, trains and provides guardians ad litem to children in abuse, abandonment and neglect proceedings and, in doing so, is a party to proceedings under Chapter 39.

According to the Statewide Guardian ad Litem Office, the Program does not provide guardian ad litem representation in non-dependency proceedings because the Program focuses its limited resources to meet the needs of abused, abandoned, and neglected children and does not generally represent children in other civil or criminal proceedings unless there is a pending dependency case.⁵⁵ This is consistent with the direction provided to the Program by the Legislature. See Ch. 2007-72, Laws of Florida (providing proviso language stating: "Funds and positions... shall not be used to represent children in dissolution of marriage proceedings unless the child is also subject to dependency proceedings.")⁵⁶

Confidential Records and Appeals

Current law requires the circuit court to provide a written transcript of proceedings and testimony in a judicial waiver hearing and order that a confidential record of the proceedings be maintained. Section 390.01116, F.S., requires that any documents in a judicial waiver proceeding that could be used to identify the minor are confidential and exempt from s. 119.07(1), F.S. and Art. I, s. 24(a), Fla. Const.

Preservation of Medical Records

Section 395.302, F.S., which governs hospitals and other licensed facilities, currently provides that anyone who alters, defaces, or falsifies a medical record, or assists someone else in performing these acts, is guilty of a misdemeanor of the second degree, and a conviction of such is grounds for restriction, suspension, or termination of license privileges. Similar provisions are applicable to nursing home and related health care facilities.⁵⁷

Patients' Rights

Florida law provides for a patient's bill of rights for patients of licensed facilities and health care providers in this state.⁵⁸ The rights generally include the right of the patient to:

- *individual dignity*, including the right to privacy, to have prompt answers to questions or concerns, and to retain and use personal clothing or possessions as space permits
- *information*, including information about the providers tending to the patient, what patient support services are available at the facility, information concerning diagnoses and the planned course of treatment, alternatives, risks, and prognoses, what facility rules and regulations apply to patient conduct, what express grievances or file complaints with regulators, interpreters if the patient does not speak English
- *financial information and disclosure*, including information about known resources for the patient's health care, information about whether the provider accepts assignment under

⁵⁴ s. 39.820, F.S.

⁵⁵ Statewide Guardian Ad Litem Office 2008 Bill Analysis.

⁵⁶ *Id.*

⁵⁷ s. 400.1415, F.S.

⁵⁸ s. 381.026, F.S.

Medicare reimbursement, a reasonable estimate of charges performance outcome and financial data, receive a copy of an itemized bill

- *access to health care*, including impartial access to medical treatment or accommodations regardless of race, national origin, sex, handicap, or source of payment; treatment for emergency medical care; any mode of treatment that is best for the patient based upon the patient's and practitioner's judgment.
- *experimental research*, the patient has a right to know if medical treatment is for purposes of experimental research and consent prior to participation in such.
- *knowledge of rights and responsibilities*, patient has a right to know these in receiving health care.⁵⁹

Further, the patient must receive a "Summary of the Florida Patient's Bill of Rights," including specified information within, from health care facilities and providers upon request.⁶⁰ The Agency for Health Care Administration is required to make printed materials and make a summary of the Patient's Bill of Rights and Responsibilities available to health care facilities and practitioners. Upon request, health care providers and facilities are required to provide patients of the address and telephone number of each state agency responsible for patient complaints related to a facility's or practitioner's noncompliance with licensing requirements, and are required to have policies and procedures to ensure that patients receive information about their rights and how to file complaints with the facility and appropriate state agencies.⁶¹ While there is no cause of action for violation of the Patient's Bill of Rights and Responsibilities, providers and facilities may be subject to administrative fines or corrective action for failure to comply.⁶²

Causes of Action Against Providers

Medical Malpractice Defined

Currently a patient may file a cause of action against a termination of pregnancy provider for medical malpractice or seek other common law remedies. An "action for medical malpractice" is defined in law as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care.⁶³

Pre-Suit Processes for Filing Malpractice Claims

Prior to litigating a medical malpractice claim in court, a claimant must conduct an investigation to ascertain whether there are reasonable grounds upon which to file a claim for malpractice, including whether there are reasonable grounds to believe that the prospective defendant was negligent in the care or treatment of the claimant, which resulted in injuries to the claimant. In order to corroborate this investigation, the claimant must submit a verified, written medical expert opinion from a medical expert by certified mail to the prospective defendant(s) along with the claimant's notice of intent to initiate litigation.⁶⁴ Prospective defendants have similar requirements that must be met in response to the claimant's notice.⁶⁵

Section 766.106(2), F.S. specifies what must be included in the pre-suit notification to prospective defendants, such as a list of all known health care providers seen by claimant for the injuries

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ s. 381.0261, F.S.

⁶² *Id.*

⁶³ s. 95.11(4)(b), F.S.

⁶⁴ s. 766.203, F.S. Medical expert opinions provided pursuant to this section are discoverable in litigation.

⁶⁵ *Id.*

complained of and all known health providers who treated or evaluated the claimant during the two-year period prior to the alleged act of negligence. A claimant must wait 90 days after mailing the notice of intent to initiate litigation before filing a cause of action in court. During that 90-day time period, the prospective defendant's insurer or self-insurer must conduct a review to determine the liability of the prospective defendant and, at or before the expiration of the 90-day period, must respond to the claimant's notice via certified mail by rejecting the claim, making a settlement offer, or offering to arbitrate the claim as to damages.⁶⁶ The claimant's counsel then has 30 days to consult his or her client regarding the response.⁶⁷

Statutory Limitations Applicable to Malpractice Claims

The relevant statutory time limitations for bringing malpractice claims against practitioners are as follows:

- An action must be commenced within two years from the time of the injury or within two years from the time the injury is discovered, or should have been discovered with the exercise of due diligence;
- However, an action must be commenced no more than four years from the date of the injury;
- These limitations of actions apply only to the health care provider and persons in privity with the provider of health care.
- If there is evidence that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury, then the period of limitations is extended forward two years from the time that the injury is discovered or should have been discovered with the exercise of due diligence.
- In no event, however, can cause be brought more than seven years from the date the incident giving rise to the injury occurred.

Initiating the pre-suit process under s. 766.106, F.S., tolls the period of limitations as to other prospective defendants. Once pre-suit negotiations have terminated, the claimant has 60-days or the remainder of the period of limitations, whichever is greater, within which to file a claim for malpractice.⁶⁸ A person cannot recover for injuries resulting from medical malpractice that fall outside these statutory periods; moreover, a plaintiff's counsel must certify to the court that a reasonable investigation gave rise to a good faith belief that there was negligence in the care or treatment of the plaintiff. Failure to comply with pre-suit requirements may result in attorney's fees and sanctions levied against the non-compliant party, and an attorney may be referred to the bar for disciplinary review.

Mediation Requirements

Within 120 days after the lawsuit is filed, unless extended by agreement of the parties, the plaintiff and defendant must attend a mediation in person. A settlement conference must occur at least three weeks before trial.⁶⁹

Burden of Proof in Malpractice Claims

In a medical malpractice claim, the plaintiff has the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional

⁶⁶ A claimant may petition the clerk of the court where the lawsuit will eventually be filed and pay a \$37.50 filing fee in order to obtain an automatic extension of the statute of limitations in order to conduct a pre-suit investigation. *See* s. 766.104, F.S.

⁶⁷ s.766.106, F.S. Documents, statements, or reports prepared in furtherance of the prescreening process are not discoverable by or admissible in court by the opposing party. Once a notice of claim is filed, however, the prospective defendant and claimant must make discoverable information available to the other party, such as unsworn statements, documents or things, physical and mental examinations, and written questions. *Id.*

⁶⁸ s. 766.106(4), F.S.

⁶⁹ s.766.108, F.S.

standard applicable to each health care provider type. This standard of care is that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.⁷⁰

Injury alone is insufficient to prove that a health care provider was negligent. Instead, the plaintiff has the burden of proving that his or her injury was proximately caused by a breach of the professional standard of care by the provider.⁷¹

Damages Recoverable for Malpractice

A prevailing plaintiff may recover economic and non-economic damages for injuries sustained.

Economic injuries are financial losses that would not have occurred but for the injury giving rise to the cause of action, including past and future medical expenses and 80 percent of wage loss and loss of earning capacity to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act. While non-economic damages are nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act⁷²

Non-economic damages against practitioners for non-emergency care are limited to \$500,000 per plaintiff, and no practitioner shall be liable for more than \$500,000 regardless of the number of plaintiffs. This amount is increased to \$1 million total from all practitioners if the injury resulted in death or permanent vegetative state. Courts may also increase the amount to be recovered in situations where a catastrophic injury results. All in all, no more than \$1 million in the aggregate can be recovered by all claimants from all practitioners.⁷³ For non-practitioner defendants, the non-economic damages are recoverable are limited to \$750,000 regardless of the number of plaintiffs. This amount is increased to \$1.5 million total from all non-practitioners if the injury resulted in death or permanent vegetative state. Courts may also increase the amount to be recovered in situations where a catastrophic injury results. All in all, no more than \$1.5 million in the aggregate can be recovered by all claimants from all non-practitioner defendants.

Punitive Damages

In any civil action, a plaintiff must proffer or show by reasonable evidence in the record that there is a reasonable basis upon which the plaintiff can recover punitive damages. In order to assert such a claim, a plaintiff must move to amend his or her complaint pursuant to the Florida Rules of Civil Procedure.

In order to recover punitive damages, the plaintiff establishes by clear and convincing evidence, that the defendant was personally guilty of intentional misconduct or gross negligence.⁷⁴ A greater weight

⁷⁰ s. 766.102, F.S.

⁷¹ Id.

⁷² s. 766.202, F.S.

⁷³ s. 766.118(2), F.S.

⁷⁴ s. 768.72, F.S.

of evidence burden of proof applies to a determination of the amount of punitive damages a plaintiff may recover.⁷⁵ A plaintiff's recovery of punitive damages is not altogether without limitation.

Section 768.73, F.S., limits recovery to three times the amount of compensatory damages awarded to each claimant entitled thereto or \$500,000. If, however, a trier of fact determines that there was wrongful conduct on the part of the defendant that was motivated solely by unreasonable economic gain and that the nature of the conduct, together with a high likelihood of resulting injury existed and was known by the managing agent, officer, director or other responsible party, then the amount recovered may be increased to four times the amount of compensatory damages awarded to each plaintiff entitled thereto or \$2 million.⁷⁶ Finally, if there is evidence that the defendant had a specific intent to harm the plaintiff and succeeded in doing so, then there is no cap on the amount of punitive damages that may be recovered.

Effect of Proposed Changes

Third Trimester Termination of Pregnancies

House Bill 257 amends s. 390.0111, F.S., by clarifying that third trimester terminations of pregnancy are required to be performed in a hospital and that they cannot be performed except under specified circumstances, including to save the physical life of the mother. The bill clarifies that a physician's failure to comply with restrictions related to third trimester terminations of pregnancy may result in disciplinary action. Similarly, the bill amends s. 390.012, F.S., to require AHCA to promulgate a rule prohibiting the performance of a third trimester termination other than in a hospital. This clarifies that a violation would subject an abortion clinic to licensure action by AHCA.

Ultrasound and Informed Consent

Additionally, the bill requires the gestational age of the fetus to be to be verified by an ultrasound for all termination of pregnancies, regardless of the trimester. The bill specifies that the ultrasound must be performed by the physician who is to perform the termination of pregnancy or by a person having documented evidence that he or she has completed a course in the operation of ultrasound equipment as prescribed by rule and who is working in conjunction with the physician.

Furthermore, the bill requires the person performing the ultrasound to allow the woman to view the live ultrasound images, and a physician or a registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant working in conjunction with the physician must contemporaneously review and explain the live ultrasound images to the woman, prior to the woman giving informed consent to having an termination of pregnancy procedure performed. The bill provides a woman with the option to decline to view the ultrasound images after she is informed of her right to view them. If she so declines, then the woman must complete a form acknowledging that she was offered an opportunity to view her ultrasound but that she rejected that opportunity. Additionally, the form must also indicate that woman's decision not to view the ultrasound was not based on any undue influence from any third party to discourage her from viewing the images and that she declined to view the images of her own free will.

The bill creates an exception to the requirement that an ultrasound be offered to the woman for viewing if at the time she schedules or arrives for her appointment to obtain a termination of pregnancy, a copy of a restraining order, police report, medical record, or other court order or documentation is presented that evidences that the woman is obtaining the termination of pregnancy because the woman is a victim of rape, incest, domestic violence, or human trafficking or that the woman has been diagnosed with a condition that, on the basis of a physician's good faith clinical judgment, would create a serious risk of

⁷⁵ s. 768.725, F.S.

⁷⁶ s. 768.73, F.S.

substantial and irreversible impairment of a major bodily function if the woman delayed terminating her pregnancy.

The bill requires that the printed materials provided to a woman pursuant to law include a description of the various stages of fetal development, and prevents physicians from requesting or requiring a patient to waive her ability to either file a complaint with any disciplinary body or to litigate a cause of action based on the care received related to a termination of pregnancy or a violation of her rights.

Pursuant to these new requirements in the bill, the bill at Section 9 amends current regulatory provisions applicable to abortion clinics and enforced by AHCA. In doing so, it requires AHCA to promulgate rules that prohibit the performance of third trimester terminations of pregnancy in any facility other than a hospital, and prohibit a clinic from requesting or requiring a patient to waive her ability to either file a complaint with any disciplinary body or to litigate a cause of action based on the care received in the clinic or a violation of her rights. Additionally, the bill deletes cross references to conform to the bill, and amends rulemaking authority consistent with the ultrasound offer and viewing requirements, including applicable exceptions or exemptions, for all terminations of pregnancy as provided for in s. 390.0111.

24-Hour Waiting Period

The bill creates a 24-hour waiting period for a termination of pregnancy procedure, with an exception if a medical emergency is present. The bill requires that the 24-hour period commence after a woman provides written, informed consent to the procedure pursuant to s. 390.0111(3), which includes having an ultrasound.

Women's Reproductive Bill Of Rights

House Bill 257 creates s. 390.01112, which is known as the Women's Reproductive Bill of Rights, which applies to all abortion clinics and physician abortion providers and requires them to adopt and make public a statement of the woman's rights, which generally shall assure women of the following:

- That her abortion must be performed by a physician.
- That she has the right to know, and may request, the name, function, and qualifications of each health care provider who is providing medical services to her.
- That she has a right to have and view an ultrasound, unless viewing is declined or an exception to viewing applies.
- That she is entitled to know the probable gestational age of the fetus, as verified by an ultrasound.
- That, she must wait 24-hours after receiving all testing and information before her abortion will be performed.
- That third trimester abortions must be performed in a hospital.
- That , unless an exception applies, she must provide voluntary and informed, written consent.
- That, unless exception applies, if she is a minor, her parent or legal guardian as set forth in s. 390.01114(3) is entitled to receive actual or constructive notice.
- That she is entitled to receive printed materials containing a description of the fetus, a list of entities that offer alternatives to terminating the pregnancy, and detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.
- That she is entitled to be notified of the medical risks of undergoing or not undergoing the termination of pregnancy.
- That she is entitled to notification of the medical risks to her and her fetus of carrying the pregnancy to term.
- That the clinic, physician, or physician's office is not allowed to request or require her to waive her right to either file a complaint with any disciplinary body or to litigate a cause of action.

- That she is entitled to have all medical records pertaining to her abortion treatment made, protected, and preserved by the physician abortion provider and clinic, and that copies of her medical records shall be made available to her or her statutorily authorized representative.
- That she is entitled to any and all adequate, necessary, and appropriate health care related to the performance or inducement of an abortion, including any and all adequate, necessary, and appropriate postabortion recovery and medical care.
- That, if she is in her second trimester of pregnancy, she is entitled to receive care that meets all the quality and safety standards set forth in this chapter, including all requirements provided for in s. 390.012(3).
- That she has the right to refuse medication or treatment and to be informed of the consequences of such decisions, and that such refusal will be documented in her records.
- That she is entitled to have privacy in her treatment and care, and that, except as provided herein or elsewhere in law, her medical records shall remain confidential pursuant to all applicable state and federal laws.
- That she has the right to a prompt and reasonable response to any question she may have regarding her care or treatment.
- That she has the right to be treated courteously, fairly, and with the fullest measure of dignity at all times and upon all occasions.

The bill requires that women be informed of these rights orally or and through a written statement prior to the termination of pregnancy. Further the bill requires that the statement itemizes each right separately, including each entitlement in s. 390.012 available to a patient obtaining a second trimester abortion, and provide that the patient may file a complaint with AHCA or DOH. Further, the bill requires that the clinic or physician practicing in a doctor's office provide a copy of the patients' bill of reproductive rights to each staff member of the clinic or office, prepare a written plan and provide appropriate staff training to implement these requirements. The statement must be in boldfaced, 14-point type and shall include the website and telephone number of AHCA and DOH.

Failure of a clinic or physician to comply with these requirements constitutes grounds for disciplinary action under 390.012, 408.813, 408.814, and 408.815 (for clinics) and s. 458.331 or s. 459.015 (for physicians). Moreover, anyone who submits a complaint concerning suspected violation by a clinic or physician, or who testifies in an administrative or judicial proceeding arising from such complaint is immune from any criminal or civil liability, unless that person commits perjury, acted in bad faith or with malicious purpose, or if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complainant.

Causes of Action

The bill also creates new provisions of law, ss. 390.01113, 390.01114(3)(d)-(f) and 390.01117, providing cause of action for violation of a woman's rights, failure to provide parental notice, and negligence, respectively. The details of these causes of action are as follows:

Cause of Action - Women's Rights

This cause of action is created in the bill to apply to any woman whose rights as specified in s. 390.01112, were violated, and may be brought by the patient, her parent or legal guardian, her court-appointed guardian or a personal representative of her estate against any physician, nurse, or clinic for the violation.

The bill specifies that the action may be brought in any court of competent jurisdiction, and entitles a prevailing plaintiff to recover actual damages; punitive damages when malicious, wanton, or willful disregard of the rights of others can be shown; and reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith or with malicious purpose or that there was a complete absence of a justiciable issue of either law or fact. If the defendant prevails, the defendant can recover reasonable attorney's fees under s. 57.105 if the court determines that the

plaintiff's claim involved a complete absence of justiciable law or fact. The bill specifies that these remedies are in addition to other legal and administrative remedies available to a patient, her estate, or to the agency or department.

Furthermore, the bill sets forth criteria upon which a court must rely in awarding the amount of attorney's fees, which include: the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusions of other employment by the attorney due to the acceptance of the case, the customary fee, whether the fee is fixed or contingent, the amount involved or the results obtained, the experience, reputation, and ability of the attorney; the costs expended to prosecute the claim, the type of fee arrangement between the attorney and the client, whether the relevant market requires a contingency fee multiplier to obtain competent counsel; whether the attorney was able to mitigate the risk of nonpayment in any way.

The bill specifies that the cause of action for violation of a woman's rights is not a claim for medical malpractice and applicable laws pertaining to do medical malpractice claims do not apply. Moreover, the bill exempts certain provisions provided for in s. 768.21(8), relating to wrongful death claims from applying to claims alleging the death of the patient. Finally, the bill exempts ss. 768.72, 768.725, and 768.73 from applying to such cause of action.

Cause of Action - Negligence

The negligence cause of action is created in the bill to apply to any woman who suffers injury or death as a result of a termination of pregnancy and, similar to the cause of action for violation of a woman's rights, may be brought by the woman, her parent or legal guardian, her court-appointed guardian, or a personal representative of her estate regardless of the cause of death to enforce the right. If the claim involves negligence or injury to the woman that resulted in her death, then the plaintiff is entitled to recover both survival damages pursuant to s. 46:021 and wrongful death damages pursuant to s. 768.21. If the action alleges a claim for injury to the woman that did not cause her death, the personal representative of the estate may recover damages for negligence that caused injury to the woman. The damages and attorney's fees provisions applicable to violations of a woman's rights claims are identical for the negligence cause of action in the bill.

The bill creates a preponderance of the evidence burden on the plaintiff to prove that the defendant owed a duty to the woman, which was breached, and resulted in a legal cause of loss, injury, death, or damage to the patient and that the woman sustained loss, injury, death, or damage as a result of the breach. Moreover, the bill clarifies that the cause of action is not one of strict liability and that injury or death of the woman is evidence only of negligence, not negligence per se.

The bill specifies the following legal duties owed to the woman:

- Clinic - a clinic, person, or entity shall have a duty to exercise reasonable care, which is that degree of care that a reasonably careful clinic, person, or entity would use under like circumstances.
- Physician - a physician shall have the duty to exercise care consistent with the prevailing professional standard of care for physicians, which is that level of care, skill, and treatment that, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar physicians.
- Licensed practical nurse, registered nurse, or advanced registered nurse practitioner (licensed under part I of chapter 464) - nurses have the duty to exercise care consistent with the prevailing professional standard of care, meaning: the level of care, skill, and treatment that, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar nurses.

Identical to the provisions applicable to causes of action for violation of a woman's rights, a negligence cause of action under the bill is not a claim for medical malpractice and applicable laws pertaining to do medical malpractice claims do not apply. Additionally, the bill exempts certain provisions provided for in

s. 768.21(8), relating to wrongful death claims from applying to claims alleging the death of the patient. Finally, the bill exempts ss. 768.72, 768.725, and 768.73 from applying to such cause of action.

Cause of Action - Parental Notice

The bill provides parents or legal guardians of a minor upon whom a termination of pregnancy has been performed or induced, who did not receive actual or constructive notice from the physician who performed or induced the termination of pregnancy, absent an exception, to bring a cause of action or obtain relief against a physician. This relief is not available to a parent or legal guardian if the pregnancy resulted from the parent or guardian's criminal conduct. For this cause of action, relief is limited to monetary damages for all injuries, psychological and physical, occasioned by the violation and damages equal to three times the cost of the termination of pregnancy, in addition to any other legal or administrative remedies that may be available to the plaintiff or DOH for the violation.

For all three causes of action, the applicable statute of limitations created by the bill is 2 years from the time of the injury to the action occurred, or within 2 years from the time the injury discovered or should have been discovered with the exercise of due diligence. In those actions where it can be shown that fraudulent concealment or intentional misrepresentation of fact prevented discovery of the injury, then the statute of limitations is extended forward 2 years from the time the injury is discovered with the exercise of due diligence. Further, the bill provides that the statute of limitations applies to causes of action that accrued prior to the effective date of the bill; however, any such cause of action that would not have been barred under prior law may be brought within the time allowed by prior law or within 2 years after the effective date of that section, whichever is earlier, and will be barred thereafter.

Parental Notice

The bill makes technical changes to existing law in order to separate out constructive and actual notice requirements in existing law for clarity purposes.

The bill requires the court to appoint a guardian ad litem for the minor. The bill does not specify that the guardian ad litem must be a guardian ad litem that volunteers through or is trained by the Statewide Guardian ad Litem Office, and so may be any responsible adult.

The bill requires a court to consider the following minimum factors when determining whether a minor is "sufficiently mature" to decide to terminate her pregnancy:

- Whether the minor is mature enough to make her abortion decision, based upon the minor's age; credibility and demeanor as a witness; and emotional development.
- Whether the minor is well informed to make the decision on her own, based upon the minor's ability to assess the immediate and long-term consequences of her choices; and her ability to understand and explain the nature and risks of undergoing or not undergoing the termination of pregnancy procedure and to apply that understanding to her decision.

The bill also suggests that a court should also consider whether there has been any undue influence by another on the minor's decision to have an abortion. Current law does not specify factors for the court to consider when determining whether a minor is sufficiently mature to terminate her pregnancy;⁷⁷ however, the court is required to hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, and all other relevant evidence.⁷⁸

The bill requires the court to include, in its written final order, factual findings and legal conclusions as to whether the minor is sufficiently mature, based on the factors described above.

⁷⁷ s. 390.01114(4)(c), F.S.

⁷⁸ s. 390.01114(4)(e), F.S.

Finally, the bill requires the Florida Supreme Court, through the Office of the State Courts Administrator, to include additional elements in reports currently required by law: the judicial circuit within which the minor resided; whether the petition was granted or denied based on the minor's maturity or the best interest of the minor, or both; whether the minor was represented by court-appointed or private counsel; and the age of the minor.

Medical Records

Finally, the bill provides criminal sanctions for anyone who fraudulently alters, defaces, or falsifies any medical record related to a termination of pregnancy or causes or procures any of these offenses to be committed. Such acts are misdemeanors of the second degree, punishable as provided in s. 775.082 or s. 775.083. Moreover, that bill provides that such violation by a licensed practitioner is grounds for disciplinary action under a licensee's applicable practice act, which discipline may include restriction, suspension, or termination of a licensee's privileges.

The bill provides Legislative intent language regarding its intent to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and provides that the bill should not be construed as any effort to impinge upon those prerogatives. To that end, the bill provides that should any court of competent jurisdiction enter a final judgment concluding or declaring that any provision of the bill improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature's intends that any such provision be construed as a request for rule change pursuant to s. 2, Art. V, of the State Constitution and not as a mandatory legislative directive.

Additionally, the bill provides for severability should any provision of the bill be determined invalid.

The effective date of the bill is July 1, 2008.

C. SECTION DIRECTORY:

Section 1. Amending s. 390.0111, F.S.; relating to termination of pregnancies.

Section 2. Creating s. 390.0112, F.S.; relating to the women's reproductive bill of rights.

Section 3. Creating s. 390.01113, F.S.; relating to a civil action for violations of patients' rights; relief.

Section 4. Amending s. 390.01114, F.S.; relating to parental notice of abortion act.

Section 5. Creating s. 390.01117, F.S.; relating to civil action for negligence; remedies.

Section 6. Creating s. 390.01118, F.S.; relating to statute of limitations.

Section 7. Creating provisions relating to prior accrued causes of action.

Section 8. Creating s. 390.01119, F.S.; relating to medical records.

Section 9. Amending s. 390.012, F.S.; relating to powers of agency; rules; disposal of fetal remains.

Section 10. Providing legislative intent regarding court rules and request for rule change.

Section 11. Providing for severability.

Section 12. Providing an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill provides for a potential, indeterminate fiscal impact. (See Fiscal Comments Section.)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires clinics conducting only first trimester terminations of pregnancy to purchase ultrasound equipment, if such equipment is not currently available on premises. Further, the bill creates additional administrative requirements for clinics conducting terminations of pregnancies. The bill could result in lawsuits against physicians and clinics for alleged violations of a woman's rights as prescribed in the bill, negligence, or failure to comply with parental notice provisions.

D. FISCAL COMMENTS:

Office of the State Courts Administrator

According to the Office of the State Courts Administrator, the impact of this bill is anticipated to be minimal for the State Courts System. The bill would create various new civil causes of action in relation to the law affording women the right to access professional medical assistance when seeking to terminate a pregnancy. These include civil causes of action against physicians and medical staff for violation of patient rights, violation of notice provisions, and negligence. Litigation is also possible in connection with disciplinary actions for violations of the law relating to third trimester termination of pregnancies.

Statewide Guardian Ad Litem Office

Section 4 of the bill requires appointment of a guardian ad litem (GAL) for minors seeking judicial waiver of parental notification of abortion. The Florida Statutes include many references to appointment of a guardian ad litem, for example in dissolution of marriage proceedings, actions related to the property of minors, and involuntary admission for residential services for developmental disabilities, to name just a few. These guardians ad litem are not affiliated with the Guardian ad Litem Program. The Program represents abused, abandoned, and neglected children in dependency proceedings under Chapter 39. See s. 39.820(1), F.S..

The bill does not specify whether the guardians ad litem appointed under section 390.01114 would come from the Guardian ad Litem Program. According to the Statewide Guardian ad Litem Office, however, the Program does not provide guardian ad litem representation in non-dependency proceedings. Therefore, the program should not need additional resources.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

It is possible that certain provisions in this bill, including provisions relating to the 24-hour waiting period, 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 for AHCA to amend its rules in order to conform to the changes in the bill. AHCA has sufficient rulemaking authority to implement the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

The term guardian ad litem has multiple meanings under current law. In filing this bill, my intent in including the appointment of a guardian ad litem for minors was for judges to appoint volunteers from the community. I do not intend for courts to use the Statewide Guardian Ad Litem Office to meet the requirements of the bill, as demonstrated by my decision not to specify that Office in the bill.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to abortion; amending s. 390.0111, F.S.;
 3 clarifying the requirement that third trimester abortions
 4 be performed in a hospital; specifying that the health
 5 exception to restrictions on performing third trimester
 6 abortions relates to physical health; providing for
 7 disciplinary action for violation of specified provisions;
 8 requiring an ultrasound be performed on any woman
 9 obtaining an abortion; specifying who must perform an
 10 ultrasound; providing that the ultrasound must be reviewed
 11 with the patient prior to the woman giving informed
 12 consent; specifying who must review the ultrasound with
 13 the patient; providing that the woman must certify in
 14 writing that she declined to review the ultrasound and did
 15 so of her own free will and without undue influence;
 16 providing an exemption to view the ultrasound for women
 17 who are the victims of rape, incest, domestic violence, or
 18 human trafficking or for women who have a serious medical
 19 condition necessitating the abortion; revising
 20 requirements for written materials; providing ban on
 21 physicians seeking waivers of patients' rights to file
 22 complaints with regulatory bodies or litigate causes of
 23 action; requiring a 24-hour waiting period before a
 24 physician may perform or induce an abortion on any
 25 patient; providing for exception in the case of a medical
 26 emergency; creating s. 390.01112, F.S.; providing for a
 27 women's reproductive bill of rights; requiring abortion
 28 clinics and physician abortion providers to adopt a public

29 statement of patients' rights and to treat patients in
 30 accordance with that statement; providing for required
 31 provisions in the statement to patients; requiring clinics
 32 and physician abortion providers to provide the
 33 information in their statement orally and in writing to
 34 patients or their court-appointed guardians; requiring
 35 that the statements be provided to staff members;
 36 requiring staff training; providing for disciplinary
 37 action for violation of patients' bill of rights;
 38 providing for immunity to persons filing complaints or
 39 testifying in proceedings, subject to certain conditions;
 40 creating s. 390.01113, F.S.; creating a private civil
 41 action against physicians, clinics, or nurses for
 42 violation of a patients' rights; providing persons who may
 43 file a cause of action; providing venue; providing for
 44 actual and punitive damages; providing for recovery of
 45 attorney's fees under certain circumstances; providing
 46 criteria for recovering attorney's fees; providing that a
 47 cause of action under this section is not a claim for
 48 medical malpractice; providing basis for punitive damages
 49 and exemptions from other provisions of law governing
 50 punitive damages; amending s. 390.01114, F.S.; revising
 51 provisions relating to parental notice of abortion;
 52 providing exceptions; providing for a cause of action
 53 under certain circumstances for parents who do not receive
 54 notice; providing for damages for cause of action;
 55 requiring appointment of a guardian ad litem for a minor
 56 petitioning for a waiver of the notice requirements;

57 specifying factors to be considered in determining whether
 58 a minor is sufficiently mature to waive the notice
 59 requirements; revising provisions relating to
 60 confidentiality of hearings; requiring that an annual
 61 report concerning waiver proceedings provide additional
 62 information; creating s. 390.01117, F.S.; providing for a
 63 cause of action in negligence for any injury or death a
 64 patient suffers as a result of an abortion; providing for
 65 who may bring a cause of action; providing for survival
 66 and wrongful death damages if the patient dies; providing
 67 for venue; providing for actual and punitive damages;
 68 providing for attorney's fees to prevailing party under
 69 certain circumstances; providing that remedies are in
 70 addition to any other remedies provided for in law;
 71 providing criteria for award of attorney's fees; providing
 72 burden of proof; providing that a cause of action is not
 73 strict liability; providing for legal duties and standards
 74 of care for clinics, physicians, or nurses; providing that
 75 cause of action under this section is not a medical
 76 malpractice claim; providing for exceptions from certain
 77 laws; providing standard for award of punitive damages;
 78 providing for exceptions from certain laws for punitive
 79 damage awards; creating s. 390.01118, F.S.; providing for
 80 a statute of limitations and repose for specified causes
 81 of action; providing for statute of limitations periods of
 82 actions that accrue prior to the effective date of s.
 83 390.01118, F.S.; creating s. 390.01119, F.S.; prohibiting
 84 fraudulently altering, defacing, or falsifying medical

85 records related to an abortion or for causing any of these
 86 offenses; providing criminal penalties; providing for
 87 professional licensure actions for the same violations;
 88 amending s. 390.012, F.S.; providing that agency rules
 89 promulgated shall prohibit the performance of abortions in
 90 the third trimester other than in a hospital; requiring
 91 that the agency rules provide that a clinic or abortion
 92 provider cannot request or require a patient to waive her
 93 rights to sue or file a complaint with a disciplinary
 94 body; deleting references to conform; requiring
 95 ultrasounds for all patients; requiring that live
 96 ultrasound images be reviewed and explained to the
 97 patient; requiring that all other provisions in s.
 98 390.0111, F.S., must be complied with should the patient
 99 decline to view her live ultrasound images; providing that
 100 the patient may decline to review ultrasound images;
 101 providing that any language of the act that could be
 102 construed as infringing upon a court's powers shall be
 103 construed as a request for rule change; providing for
 104 severability; providing an effective date.

105

106 Be It Enacted by the Legislature of the State of Florida:

107

108 Section 1. Subsections (1) and (3) of section 390.0111,
 109 Florida Statutes, are amended, and subsection (12) is added to
 110 that section, to read:

111 390.0111 Termination of pregnancies.--

112 (1) TERMINATION IN THIRD TRIMESTER; WHEN ALLOWED.--No
113 termination of pregnancy shall be performed on any human being
114 in the third trimester of pregnancy unless:

115 (a) The abortion is performed in a hospital; and

116 (b)1. Two physicians certify in writing to the fact that,
117 to a reasonable degree of medical probability, the termination
118 of pregnancy is necessary to save the life or preserve the
119 physical health of the pregnant woman; or

120 2.(b) The physician certifies in writing to the medical
121 necessity for legitimate emergency medical procedures for
122 termination of pregnancy in the third trimester, and another
123 physician is not available for consultation.

124 (c) Violation of this subsection by a physician
125 constitutes grounds for disciplinary action under s. 458.331 or
126 s. 459.015.

127 (3) CONSENTS REQUIRED.--A termination of pregnancy may not
128 be performed or induced except with the voluntary and informed
129 written consent of the pregnant woman or, in the case of a
130 mental incompetent, the voluntary and informed written consent
131 of her court-appointed guardian.

132 (a) Except in the case of a medical emergency, consent to
133 a termination of pregnancy is voluntary and informed only if:

134 1. The physician who is to perform the procedure, or the
135 referring physician, has, at a minimum, orally, in person,
136 informed the woman of:

137 a. The nature and risks of undergoing or not undergoing
138 the proposed procedure that a reasonable patient would consider

139 material to making a knowing and willful decision of whether to
140 terminate a pregnancy.

141 b. The probable gestational age of the fetus, verified by
142 an ultrasound, at the time the termination of pregnancy is to be
143 performed.

144 (I) The ultrasound must be performed by the physician who
145 is to perform the abortion or by a person having documented
146 evidence that he or she has completed a course in the operation
147 of ultrasound equipment as prescribed by rule and who is working
148 in conjunction with the physician.

149 (II) The person performing the ultrasound must allow the
150 woman to view the live ultrasound images, and a physician or a
151 registered nurse, licensed practical nurse, advanced registered
152 nurse practitioner, or physician assistant working in
153 conjunction with the physician must contemporaneously review and
154 explain the live ultrasound images to the woman, prior to the
155 woman giving informed consent to having an abortion procedure
156 performed. However, this sub-sub-subparagraph does not apply if,
157 at the time the woman schedules or arrives for her appointment
158 to obtain an abortion, a copy of a restraining order, police
159 report, medical record, or other court order or documentation is
160 presented that evidences that the woman is obtaining the
161 abortion because the woman is a victim of rape, incest, domestic
162 violence, or human trafficking or that the woman has been
163 diagnosed with a condition that, on the basis of a physician's
164 good faith clinical judgment, would create a serious risk of
165 substantial and irreversible impairment of a major bodily
166 function if the woman delayed terminating her pregnancy.

167 (III) The woman has a right to decline to view the
168 ultrasound images after she is informed of her right and offered
169 an opportunity to view them. If the woman declines to view the
170 ultrasound images, the woman shall complete a form acknowledging
171 that she was offered an opportunity to view her ultrasound but
172 that she rejected that opportunity. The form must also indicate
173 that the woman's decision not to view the ultrasound was not
174 based on any undue influence from any third party to discourage
175 her from viewing the images and that she declined to view the
176 images of her own free will.

177 c. The medical risks to the woman and fetus of carrying
178 the pregnancy to term.

179 2. Printed materials prepared and provided by the
180 department have been provided to the pregnant woman, if she
181 chooses to view these materials, including:

182 a. A description of the fetus, including a description of
183 the various stages of development.

184 b. A list of entities ~~agencies~~ that offer alternatives to
185 terminating the pregnancy.

186 c. Detailed information on the availability of medical
187 assistance benefits for prenatal care, childbirth, and neonatal
188 care.

189 3. The woman acknowledges in writing, before the
190 termination of pregnancy, that the information required to be
191 provided under this subsection has been provided.

192

193 Nothing in this paragraph is intended to prohibit a physician
194 from providing any additional information which the physician

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195 | deems material to the woman's informed decision to terminate her
 196 | pregnancy.

197 | (b) In the event a medical emergency exists and a
 198 | physician cannot comply with the requirements for informed
 199 | consent, a physician may terminate a pregnancy if he or she has
 200 | obtained at least one corroborative medical opinion attesting to
 201 | the medical necessity for emergency medical procedures and to
 202 | the fact that to a reasonable degree of medical certainty the
 203 | continuation of the pregnancy would threaten the life of the
 204 | pregnant woman. In the event no second physician is available
 205 | for a corroborating opinion, the physician may proceed but shall
 206 | document reasons for the medical necessity in the patient's
 207 | medical records.

208 | (c) A physician shall not request or require a patient to
 209 | waive her ability to either file a complaint with any
 210 | disciplinary body or to litigate a cause of action based on the
 211 | care received related to an abortion or a violation of her
 212 | rights.

213 | ~~(d)~~(e) Violation of this subsection by a physician
 214 | constitutes grounds for disciplinary action under s. 458.331 or
 215 | s. 459.015. Substantial compliance or reasonable belief that
 216 | complying with the requirements of informed consent would
 217 | threaten the life or health of the patient is a defense to any
 218 | action brought under this paragraph.

219 | (12) WAITING PERIOD FOR ABORTION.--Except in the case of a
 220 | medical emergency, no physician shall perform or induce an
 221 | abortion on any woman unless, at least 24 hours prior thereto, a
 222 | treating physician has conferred with the woman, or her court-

223 appointed guardian if she is mentally incompetent, pursuant to
 224 the requirements set forth in subsection (3).

225 Section 2. Section 390.01112, Florida Statutes, is created
 226 to read:

227 390.01112 Women's reproductive bill of rights.--

228 (1) All abortion clinics and physician abortion providers
 229 shall adopt and make public a statement of the rights of
 230 patients seeking abortions and shall treat such patients in
 231 accordance with the provisions of that statement. The statement
 232 shall assure each patient all of the following:

233 (a) That her abortion must be performed by a physician as
 234 defined in s. 390.011.

235 (b) That she has the right to know the name, function, and
 236 qualifications of each health care provider who is providing
 237 medical services to her. She may request this information from
 238 the clinic or physician abortion provider.

239 (c) That she is required to have an ultrasound and she has
 240 the right to view the live ultrasound images and have them
 241 contemporaneously reviewed and explained to her. She has the
 242 right to decline to view the ultrasound after it is offered to
 243 her to view.

244 (d) That she is entitled to know the probable gestational
 245 age of the fetus at the time the abortion is to be performed, as
 246 verified by an ultrasound.

247 (e) That, unless a medical emergency exists, she must
 248 receive an ultrasound and be provided all the information
 249 required under s. 390.0111(3) no less than 24 hours prior to her
 250 abortion.

251 (f) That, if she is in her third trimester of pregnancy,
 252 any abortion must be performed in a hospital.

253 (g) That either the patient, or her court-appointed
 254 guardian if she is mentally incompetent, as set forth in s.
 255 390.0111(3) is entitled to provide voluntary and informed,
 256 written consent, unless a legal exception to obtaining informed
 257 consent exists, before an abortion can be performed or induced.

258 (h) That, if she is a minor, her parent or legal guardian
 259 as set forth in s. 390.01114(3) is entitled to receive actual or
 260 constructive notice, unless a legal exception to compliance with
 261 notice requirements exists, before an abortion can be performed
 262 or induced.

263 (i) That she is entitled to printed materials containing a
 264 description of the fetus, a list of entities that offer
 265 alternatives to terminating the pregnancy, and detailed
 266 information on the availability of medical assistance benefits
 267 for prenatal care, childbirth, and neonatal care.

268 (j) That she is entitled to be notified of the medical
 269 risks of undergoing or not undergoing the proposed procedure
 270 that a reasonable patient would consider material to making a
 271 knowing and willful decision of whether to terminate the
 272 pregnancy.

273 (k) That she is entitled to notification of the medical
 274 risks to her and her fetus of carrying the pregnancy to term.

275 (l) That the clinic, physician, or physician's office is
 276 not allowed to request or require her to waive her right to
 277 either file a complaint with any disciplinary body or to
 278 litigate a cause of action based on the care received related to

279 an abortion or a violation of her rights in order to obtain an
280 abortion.

281 (m) That she is entitled to have all medical records
282 pertaining to her abortion treatment made, protected, and
283 preserved by the physician abortion provider and clinic, and
284 that copies of her medical records shall be made available to
285 her, a representative of her estate, her court-appointed
286 guardian if she is mentally incompetent, her parent or legal
287 guardian pursuant to s. 390.01114(3)(d) if she is a minor, or
288 her legal representative upon request.

289 (n) That she is entitled to any and all adequate,
290 necessary, and appropriate health care related to the
291 performance or inducement of an abortion, including any and all
292 adequate, necessary, and appropriate postabortion recovery and
293 medical care.

294 (o) That, if she is in her second trimester of pregnancy,
295 she is entitled to receive care that meets all the quality and
296 safety standards set forth in this chapter, including all
297 requirements provided for in s. 390.012(3).

298 (p) That she, or her court-appointed guardian if she is
299 mentally incompetent, has the right to refuse medication or
300 treatment and to be informed of the consequences of such
301 decisions. When the medication or treatment is refused, the
302 abortion clinic or physician must notify the patient or her
303 court-appointed guardian of the consequences of such decisions
304 and must document the decision in the patient's medical record.
305 The abortion clinic or physician must continue to provide other
306 services that the patient or her court-appointed guardian agrees

307 to in accordance with the patient's care or treatment needs.

308 (q) That she is entitled to have privacy in her treatment
 309 and care, and that, except as provided herein or elsewhere in
 310 law, her medical records shall remain confidential pursuant to
 311 all applicable state and federal laws.

312 (r) That she has the right to a prompt and reasonable
 313 response to any question she may have regarding her care or
 314 treatment.

315 (s) That she has the right to be treated courteously,
 316 fairly, and with the fullest measure of dignity at all times and
 317 upon all occasions.

318 (2) All clinics and physician abortion providers shall
 319 orally inform patients seeking abortions of their rights as set
 320 forth herein and shall provide a copy of the statement as
 321 provided in subsection (1) to each patient, or her court-
 322 appointed guardian if the patient is mentally incompetent,
 323 before performing an abortion. The statement shall itemize each
 324 of the rights set forth in subsection (1) separately, including
 325 each entitlement in s. 390.012 available to a patient obtaining
 326 a second trimester abortion. The clinic or physician practicing
 327 in a doctor's office shall provide a copy of the patients' bill
 328 of reproductive rights to each staff member of the clinic or
 329 physician's office. Each clinic or physician shall prepare a
 330 written plan and provide appropriate staff training to implement
 331 the provisions of this section. The written statement of rights
 332 must include a statement that a patient may file a complaint
 333 with the agency or department. The statement must be in
 334 boldfaced, 14-point type and shall include the website and

335 telephone number of the agency and department.

336 (3) Any violation of a patient's rights as set forth in
 337 this section by a clinic shall constitute grounds for action by
 338 the agency under the provisions of ss. 390.012, 408.813,
 339 408.814, and 408.815. Any violation of a patient's rights as set
 340 forth in this section by a physician shall constitute grounds
 341 for disciplinary action under s. 458.331 or s. 459.015.

342 (4) Any person who submits or reports a complaint
 343 concerning a suspected violation of the patient's rights or
 344 concerning services or conditions in a clinic or physician's
 345 office or who testifies in any administrative or judicial
 346 proceeding arising from such complaint shall have immunity from
 347 any criminal or civil liability therefor, unless that person has
 348 committed perjury in his or her testimony or acted in bad faith
 349 or with malicious purpose or if the court finds that there was a
 350 complete absence of a justiciable issue of either law or fact
 351 raised by the losing party.

352 Section 3. Section 390.01113, Florida Statutes, is created
 353 to read:

354 390.01113 Civil action for violations of patients' rights;
 355 relief.--

356 (1) Any patient whose rights as specified in s. 390.01112
 357 are violated has a cause of action against any physician, nurse,
 358 or clinic for the violation. The action may be brought by the
 359 patient, her parent or legal guardian if the patient is a minor,
 360 her court-appointed guardian if the patient is mentally
 361 incompetent, or a personal representative of the estate of the
 362 patient to enforce the right.

363 (2) The action may be brought in any court of competent
 364 jurisdiction to enforce such rights and to recover actual
 365 damages and punitive damages when malicious, wanton, or willful
 366 disregard of the rights of others can be shown. Any plaintiff
 367 who prevails in any such action for any amount is entitled to
 368 recover reasonable attorney's fees, costs of the action, and
 369 damages, unless the court finds that the plaintiff has acted in
 370 bad faith or with malicious purpose or that there was a complete
 371 absence of a justiciable issue of either law or fact. A
 372 prevailing defendant is entitled to recover reasonable
 373 attorney's fees under s. 57.105 only if the court determines
 374 that the plaintiff's claim involved a complete absence of
 375 justiciable law or fact. The remedies provided in this section
 376 are in addition to other legal and administrative remedies
 377 available to a patient, her estate, or to the agency or
 378 department.

379 (3) Attorney's fees shall be based on the following
 380 criteria:

381 (a) The time and labor required.

382 (b) The novelty and difficulty of the questions.

383 (c) The skill requisite to perform the legal service
 384 properly.

385 (d) The preclusions of other employment by the attorney
 386 due to the acceptance of the case.

387 (e) The customary fee.

388 (f) Whether the fee is fixed or contingent.

389 (g) The amount involved or the results obtained.

390 (h) The experience, reputation, and ability of the

391 attorney.

392 (i) The costs expended to prosecute the claim.

393 (j) The type of fee arrangement between the attorney and
 394 the client.

395 (k) Whether the relevant market requires a contingency fee
 396 multiplier to obtain competent counsel.

397 (1) Whether the attorney was able to mitigate the risk of
 398 nonpayment in any way.

399 (4) Any action brought under this section is not a claim
 400 for medical malpractice and chapter 766 does not apply. The
 401 provisions of s. 768.21(8) do not apply to a claim alleging
 402 death of the patient.

403 (5) For purposes of this section, punitive damages may be
 404 awarded for conduct that is willful, wanton, gross or flagrant,
 405 reckless, or consciously indifferent to the rights of the
 406 patient. Sections 768.72, 768.725, and 768.73 do not apply to
 407 any civil action filed under this section.

408 Section 4. Subsection (3), paragraphs (a), (c), and (e) of
 409 subsection (4), and subsection (6) of section 390.01114, Florida
 410 Statutes, are amended to read:

411 390.01114 Parental Notice of Abortion Act.--

412 (3) NOTIFICATION REQUIRED.--

413 (a)1.a. Actual notice shall be provided by the physician
 414 performing or inducing the termination of pregnancy before the
 415 performance or inducement of the termination of the pregnancy of
 416 a minor. The notice may be given by a referring physician. The
 417 physician who performs or induces the termination of pregnancy
 418 must receive the written statement of the referring physician

419 certifying that the referring physician has given notice. If
 420 actual notice is provided by telephone, the physician must
 421 actually speak with the parent or guardian and must record in
 422 the minor's medical file the name of the parent or guardian
 423 provided notice, the phone number dialed, and the date and time
 424 of the call.

425 b. If actual notice is not possible after a reasonable
 426 effort has been made, the physician performing or inducing the
 427 termination of pregnancy or the referring physician must give
 428 constructive notice. If constructive notice is given, the
 429 physician must document that notice by placing copies of any
 430 document related to the constructive notice, including, but not
 431 limited to, a copy of the letter and the return receipt, in the
 432 minor's medical file.

433 2. Notice given under this subsection by the physician
 434 performing or inducing the termination of pregnancy must include
 435 the name and address of the facility providing the termination
 436 of pregnancy and the name of the physician providing notice.
 437 Notice given under this subsection by a referring physician must
 438 include the name and address of the facility where he or she is
 439 referring the minor and the name of the physician providing
 440 notice. ~~If actual notice is provided by telephone, the physician~~
 441 ~~must actually speak with the parent or guardian, and must record~~
 442 ~~in the minor's medical file the name of the parent or guardian~~
 443 ~~provided notice, the phone number dialed, and the date and time~~
 444 ~~of the call. If constructive notice is given, the physician must~~
 445 ~~document that notice by placing copies of any document related~~
 446 ~~to the constructive notice, including, but not limited to, a~~

447 ~~copy of the letter and the return receipt, in the minor's~~
 448 ~~medical file.~~

449 (b) Notice is not required if:

450 1. In the physician's good faith clinical judgment, a
 451 medical emergency exists and there is insufficient time for the
 452 attending physician to comply with the notification
 453 requirements. If a medical emergency exists, the physician may
 454 proceed but must document reasons for the medical necessity in
 455 the patient's medical records;

456 2. Notice is waived in writing by the person who is
 457 entitled to notice;

458 3. Notice is waived by the minor who is or has been
 459 married or has had the disability of nonage removed under s.
 460 743.015 or a similar statute of another state;

461 4. Notice is waived by the patient because the patient has
 462 a minor child dependent on her; or

463 5. Notice is waived under subsection (4).

464 (c) Violation of this subsection by a physician
 465 constitutes grounds for disciplinary action under s. 458.331 or
 466 s. 459.015.

467 (d) Any parent or legal guardian of a minor upon whom a
 468 termination of pregnancy has been performed or induced who did
 469 not receive actual or constructive notice from the physician who
 470 performed or induced the termination of pregnancy, where an
 471 exception to notice pursuant to paragraph (b) did not exist,
 472 may, in a civil action, obtain appropriate relief, unless the
 473 pregnancy resulted from the parent or legal guardian's criminal
 474 conduct.

475 (e) In a civil action under paragraph (d), appropriate
 476 relief includes:

477 1. Monetary damages for all injuries, psychological and
 478 physical, occasioned by the violation of paragraph(a); and

479 2. Damages equal to three times the cost of the abortion.

480 (f) The damages provided for in paragraph (e) are in
 481 addition to any other legal or administrative remedies that may
 482 be available to the plaintiff or department.

483 (4) PROCEDURE FOR JUDICIAL WAIVER OF NOTICE.--

484 (a) A minor may petition any circuit court in a judicial
 485 circuit within the jurisdiction of the District Court of Appeal
 486 in which she resides for a waiver of the notice requirements of
 487 subsection (3) and may participate in proceedings on her own
 488 behalf. The petition may be filed under a pseudonym or through
 489 the use of initials, as provided by court rule. The petition
 490 must include a statement that the petitioner is pregnant and
 491 notice has not been waived. The court shall advise the minor
 492 that she has a right to court-appointed counsel and shall
 493 provide her with counsel upon her request at no cost to the
 494 minor. The court shall appoint a guardian ad litem for the
 495 minor.

496 (c) If the court finds, by clear and convincing evidence,
 497 that the minor is sufficiently mature to decide whether to
 498 terminate her pregnancy, the court shall issue an order
 499 authorizing the minor to consent to the performance or
 500 inducement of a termination of pregnancy without the
 501 notification of a parent or guardian.

502 1. Factors a court shall consider when determining whether

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503 a minor is sufficiently mature include, but are not limited to,
504 the following:

505 a. Whether the minor is mature enough to make her abortion
506 decision, as evidenced by:

507 (I) The minor's age.

508 (II) The minor's credibility and demeanor as a witness.

509 (III) The minor's emotional development; and

510 b. Whether the minor is well informed enough to make the
511 decision on her own, as evidenced by:

512 (I) The minor's ability to assess both the immediate and
513 long-range consequences of her choices.

514 (II) The minor's ability to understand and explain the
515 nature and risks of undergoing or not undergoing a procedure to
516 terminate her pregnancy and to apply that understanding to her
517 decision.

518 2. The court should also take into consideration whether
519 there has been any undue influence by another on the minor's
520 decision to have an abortion.

521

522 If the court does not make the finding specified in this
523 paragraph or paragraph (d), it must dismiss the petition.

524 (e) A court that conducts proceedings under this section
525 shall:

526 1. Provide for a written transcript of all testimony and
527 proceedings.

528 2. Issue a written final order containing all factual
529 findings and legal conclusions, including factual findings and
530 legal conclusions as to whether the petitioner is sufficiently

531 mature based on the factors set forth in subparagraph(c)1.
 532 3. Order that a confidential record be maintained as
 533 required under s. 390.01116. All hearings under this section,
 534 including appeals, shall remain confidential and closed to the
 535 public, as provided by court rule. A court that conducts
 536 ~~proceedings under this section shall provide for a written~~
 537 ~~transcript of all testimony and proceedings and issue written~~
 538 ~~and specific factual findings and legal conclusions supporting~~
 539 ~~its decision and shall order that a confidential record be~~
 540 ~~maintained, as required under s. 390.01116. At the hearing, the~~
 541 ~~court shall hear evidence relating to the emotional development,~~
 542 ~~maturity, intellect, and understanding of the minor, and all~~
 543 ~~other relevant evidence. All hearings under this section,~~
 544 ~~including appeals, shall remain confidential and closed to the~~
 545 ~~public, as provided by court rule.~~
 546 (6) REPORT.--The Supreme Court, through the Office of the
 547 State Courts Administrator, shall report by February 1 of each
 548 year to the Governor, the President of the Senate, and the
 549 Speaker of the House of Representatives on the number of
 550 petitions filed under subsection (4) for the preceding year, and
 551 the timing and manner of disposal of such petitions by each
 552 circuit court. For each petition, the report shall state the
 553 judicial circuit within which the minor resided; whether the
 554 petition was granted or denied based on the minor's maturity or
 555 the best interest of the minor, or both; whether the minor was
 556 represented by court-appointed or private counsel; and the age
 557 of the minor.

558 Section 5. Section 390.01117, Florida Statutes, is created
 559 to read:

560 390.01117 Civil action for negligence; remedies.--

561 (1) Any patient who suffers injury or death as a result of
 562 an abortion shall have a cause of action for negligence. The
 563 action may be brought by the patient, her parent or legal
 564 guardian if the patient is a minor, her court-appointed guardian
 565 if the patient is mentally incompetent, or a personal
 566 representative of the estate of the patient regardless of the
 567 cause of death to enforce the right. If the claim involves
 568 negligence or injury to the patient that resulted in her death,
 569 then the plaintiff shall be entitled to recover both survival
 570 damages pursuant to s. 46.021 and wrongful death damages
 571 pursuant to s. 768.21. If the action alleges a claim for injury
 572 to the patient that did not cause her death, the personal
 573 representative of the estate may recover damages for negligence
 574 that caused injury to the patient.

575 (2) The action may be brought in any court of competent
 576 jurisdiction to enforce such rights and to recover actual
 577 damages and punitive damages when malicious, wanton, or willful
 578 disregard of the rights of others can be shown. Any plaintiff
 579 who prevails in any such action for any amount is entitled to
 580 recover reasonable attorney's fees, costs of the action, and
 581 damages, unless the court finds that the plaintiff has acted in
 582 bad faith or with malicious purpose or that there was a complete
 583 absence of a justiciable issue of either law or fact. A
 584 prevailing defendant is entitled to recover reasonable
 585 attorney's fees under s. 57.105 only if the court determines

586 that the plaintiff's claim involved a complete absence of
587 justiciable law or fact. The remedies provided in this section
588 are in addition to other legal and administrative remedies
589 available to a patient, her estate, or to the agency or
590 department.

591 (3) Attorney's fees shall be based on the following
592 criteria:

593 (a) The time and labor required.

594 (b) The novelty and difficulty of the questions.

595 (c) The skill requisite to perform the legal service
596 properly.

597 (d) The preclusions of other employment by the attorney
598 due to the acceptance of the case.

599 (e) The customary fee.

600 (f) Whether the fee is fixed or contingent.

601 (g) The amount involved or the results obtained.

602 (h) The experience, reputation, and ability of the
603 attorneys.

604 (i) The costs expended to prosecute the claim.

605 (j) The type of fee arrangement between the attorney and
606 the client.

607 (k) Whether the relevant market requires a contingency fee
608 multiplier to obtain competent counsel.

609 (l) Whether the attorney was able to mitigate the risk of
610 nonpayment in any way.

611 (4) In any claim brought under this section, the plaintiff
612 shall have the burden of proving by a preponderance of the
613 evidence the following:

- 614 (a) The defendant owed a duty to the patient.
- 615 (b) The defendant breached the duty to the patient.
- 616 (c) The breach of the duty was a legal cause of loss,
 617 injury, death, or damage to the patient.
- 618 (d) The patient sustained loss, injury, death, or damage
 619 as a result of the breach.
- 620 (5) Nothing in this section shall be interpreted to create
 621 strict liability. Injury or death resulting to the patient shall
 622 be evidence of negligence, but shall not be negligence per se.
- 623 (6) In any claim brought under this section, a clinic,
 624 person, or entity shall have a duty to exercise reasonable care.
 625 Reasonable care is that degree of care that a reasonably careful
 626 clinic, person, or entity would use under like circumstances.
- 627 (7) In any claim for negligence by a physician, such
 628 physician shall have the duty to exercise care consistent with
 629 the prevailing professional standard of care for physicians. The
 630 prevailing professional standard of care for physicians shall be
 631 that level of care, skill, and treatment that, in light of all
 632 relevant surrounding circumstances, is recognized as acceptable
 633 and appropriate by reasonably prudent similar physicians.
- 634 (8) In any claim for negligence by a licensed practical
 635 nurse, registered nurse, or advanced registered nurse
 636 practitioner licensed under part I of chapter 464, such nurse
 637 shall have the duty to exercise care consistent with the
 638 prevailing professional standard of care for such a nurse. The
 639 prevailing professional standard of care for such a nurse shall
 640 be that level of care, skill, and treatment that, in light of
 641 all relevant surrounding circumstances, is recognized as

642 acceptable and appropriate by reasonably prudent similar nurses.

643 (9) Any action brought pursuant to this section is not a
 644 claim for medical malpractice, and chapter 766 does not apply.
 645 The provisions of s. 768.21(8) do not apply to a claim alleging
 646 death of the patient.

647 (10) For purposes of this section, punitive damages may be
 648 awarded for conduct that is willful, wanton, gross or flagrant,
 649 reckless, or consciously indifferent to the rights of the
 650 patient. Sections 768.72, 768.725, and 768.73 do not apply to
 651 any civil action filed pursuant to this section.

652 Section 6. Section 390.01118, Florida Statutes, is created
 653 to read:

654 390.01118 Statute of limitations.--Any action for damages
 655 brought under s. 390.01113, s. 390.01114(3)(d)-(f), or s.
 656 390.01117 shall be commenced within 2 years from the time the
 657 incident giving rise to the action occurred or within 2 years
 658 from the time the incident is discovered or should have been
 659 discovered with the exercise of due diligence. In those actions
 660 covered by s. 390.01113, s. 390.01114(3)(d)-(f), or s. 390.01117
 661 in which it can be shown that fraudulent concealment or
 662 intentional misrepresentation of fact prevented discovery of the
 663 injury, the period of limitations is extended forward 2 years
 664 from the time the injury is discovered with the exercise of due
 665 diligence.

666 Section 7. Section 390.01118, Florida Statutes, as created
 667 by this act, shall apply to causes of action that have accrued
 668 prior to the effective date of that section; however, any such
 669 cause of action that would not have been barred under prior law

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670 may be brought within the time allowed by prior law or within 2
 671 years after the effective date of that section, whichever is
 672 earlier, and will be barred thereafter.

673 Section 8. Section 390.01119, Florida Statutes, is created
 674 to read:

675 390.01119 Medical records.--

676 (1) Any person who fraudulently alters, defaces, or
 677 falsifies any medical record related to an abortion or causes or
 678 procures any of these offenses to be committed commits a
 679 misdemeanor of the second degree, punishable as provided in s.
 680 775.082 or s. 775.083.

681 (2) A conviction under subsection (1) is also grounds for
 682 disciplinary action under a licensee's applicable practice act,
 683 which discipline may include restriction, suspension, or
 684 termination of a licensee's privileges.

685 Section 9. Subsection (1) and paragraph (d) of subsection
 686 (3) of section 390.012, Florida Statutes, are amended to read:

687 390.012 Powers of agency; rules; disposal of fetal
 688 remains.--

689 (1) The agency may develop and enforce rules pursuant to
 690 ss. 390.011-390.018 ~~390.001-390.018~~ and part II of chapter 408
 691 for the health, care, and treatment of persons in abortion
 692 clinics and for the safe operation of such clinics.

693 (a) The rules shall be reasonably related to the
 694 preservation of maternal health of the clients.

695 (b) The rules shall be in accordance with s. 797.03 and
 696 may not impose an unconstitutional burden on a woman's freedom
 697 to decide whether to terminate her pregnancy.

698 (c) The rules shall prohibit the performance of abortions
 699 in the third trimester other than in a hospital.

700 (d) The rules shall prohibit a clinic from requesting or
 701 requiring a patient to waive her ability to either file a
 702 complaint with any disciplinary body or to litigate a cause of
 703 action based on the care received in the clinic or a violation
 704 of her rights.

705 (e)~~(e)~~ The rules shall provide for:

706 1. The performance of pregnancy termination procedures
 707 only by a licensed physician.

708 2. The making, protection, and preservation of patient
 709 records, which shall be treated as medical records under chapter
 710 458.

711 (3) For clinics that perform or claim to perform abortions
 712 after the first trimester of pregnancy, the agency shall adopt
 713 rules pursuant to ss. 120.536(1) and 120.54 to implement the
 714 provisions of this chapter, including the following:

715 (d) Rules relating to the medical screening and evaluation
 716 of each abortion clinic patient. At a minimum, these rules shall
 717 require:

718 1. A medical history including reported allergies to
 719 medications, antiseptic solutions, or latex; past surgeries; and
 720 an obstetric and gynecological history.

721 2. A physical examination, including a bimanual
 722 examination estimating uterine size and palpation of the adnexa.

723 3. The appropriate laboratory tests, including:

724 a. ~~For an abortion in which an ultrasound examination is~~
 725 ~~not performed before the abortion procedure,~~ Urine or blood
 726 tests for pregnancy performed before the abortion procedure.
 727 b. A test for anemia.
 728 c. Rh typing, unless reliable written documentation of
 729 blood type is available.
 730 d. Other tests as indicated from the physical examination.
 731 4. An ultrasound evaluation for all patients ~~who elect to~~
 732 ~~have an abortion after the first trimester.~~ The rules shall
 733 require that if a person who is not a physician performs an
 734 ultrasound examination, that person shall have documented
 735 evidence that he or she has completed a course in the operation
 736 of ultrasound equipment as prescribed in rule. The physician,
 737 registered nurse, licensed practical nurse, advanced registered
 738 nurse practitioner, or physician assistant shall review and
 739 explain ~~, at the request of the patient,~~ the live ultrasound
 740 images evaluation results, including an estimate of the probable
 741 gestational age of the fetus, with the patient before the
 742 abortion procedure is performed, unless the patient declines
 743 pursuant to s. 390.0111. If the patient declines to view the
 744 live ultrasound images, the rules shall require that s. 390.0111
 745 be complied with in all other respects.
 746 5. That the physician is responsible for estimating the
 747 gestational age of the fetus based on the ultrasound examination
 748 and obstetric standards in keeping with established standards of
 749 care regarding the estimation of fetal age as defined in rule
 750 and shall write the estimate in the patient's medical history.

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751 The physician shall keep original prints of each ultrasound
 752 examination of a patient in the patient's medical history file.

753 Section 10. It is the intent of this act and the
 754 Legislature to accord the utmost comity and respect to the
 755 constitutional prerogatives of Florida's judiciary, and nothing
 756 in this act should be construed as any effort to impinge upon
 757 those prerogatives. To that end, should any court of competent
 758 jurisdiction enter a final judgment concluding or declaring that
 759 any provision of this act improperly encroaches upon the
 760 authority of the Florida Supreme Court to determine the rules of
 761 practice and procedure in Florida courts, the Legislature hereby
 762 declares its intent that any such provision be construed as a
 763 request for rule change pursuant to s. 2, Art. V of the State
 764 Constitution and not as a mandatory legislative directive.

765 Section 11. If any provision of this act or the
 766 application thereof to any person or circumstance is held
 767 invalid, the invalidity does not affect other provisions or
 768 applications of the act which can be given effect without the
 769 invalid provision or application, and to this end the provisions
 770 of this act are declared severable.

771 Section 12. This act shall take effect July 1, 2008.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 257**

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

1 Council/Committee hearing bill: Healthcare Council
2 Representative(s) Skidmore offered the following:
3

4 **Amendment (with directory and title amendments)**

5 Between line(s) 227-228 insert:

6 (1) Access to contraception.-

7 (a) The term "contraception" means any drug or device
8 approved by the United States Food and Drug Administration to
9 prevent pregnancy.

10 (b) The provision of contraception is not subject to or
11 governed by chapter 390, Florida Statutes.

12 -----
13 **T I T L E A M E N D M E N T**

14
15 Remove line(s) 27 and insert:
16 women's reproductive bill of rights; providing a definition;
17 excluding contraception from being governed by chapter 390;
18 requiring abortion
19

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2 (for drafter's use only)

Bill No. **HB 257**

COUNCIL/COMMITTEE ACTION

ADOPTED (Y/N)
ADOPTED AS AMENDED (Y/N)
ADOPTED W/O OBJECTION (Y/N)
FAILED TO ADOPT (Y/N)
WITHDRAWN (Y/N)
OTHER

1 Council/Committee hearing bill: Healthcare Council

2 Representative(s) Skidmore offered the following:

3

4 **Amendment (with directory and title amendments)**

5 Between line(s) 232-233 insert:

6 (a) That she has the right to access birth control under

7 Florida state law.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 3 (for drafter's use only)

Bill No. **HB 257**

COUNCIL/COMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

Council/Committee hearing bill: Healthcare Council

Representative(s) Skidmore offered the following:

Amendment (with directory and title amendments)

Between line(s) 770-771 insert:

Section 12. For fiscal year 2008-2009, the sum of \$1,000,000 is appropriated to the Department of Health to compensate clinics and physician abortion providers who are mandated to provide a copy of the statement as provided in s. 390.01112(1) to each patient, or her court-appointed guardian if the patient is mentally incompetent, before performing an abortion.

T I T L E A M E N D M E N T

Remove line(s) 104 and insert:

severability; providing an appropriation to the Department of Health; providing an effective date.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 4 (for drafter's use only)

Bill No. **HB 257**

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

1 Council/Committee hearing bill: Healthcare Council

2 Representative(s) Cusack offered the following:

3
4 **Amendment (with directory and title amendments)**

5 Between lines 770 and 771 insert:

6 Section 12. For fiscal year 2008-2009, \$1,000,000 is
7 appropriated to the Department of Health in order reimburse
8 abortion providers for the purchase and maintenance of
9 ultrasound equipment mandated pursuant to subparagraph
10 390.0111(3)(a)1.b. for determining the gestational age of the
11 fetus.

12
13
14 -----
15 **T I T L E A M E N D M E N T**

16 Remove line(s) 104 and insert:
17 severability; providing for an appropriation to the Department
18 of Health; providing an effective date.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 5 (for drafter's use only)

Bill No. **HB 257**

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

1 Council/Committee hearing bill: Healthcare Council

2 Representative(s) Porth offered the following:

3
4 **Amendment (with directory and title amendments)**

5 Between line(s) 770 and 771 insert:

6 Section 12. For fiscal year 2008-2009, the sum of
7 \$1,000,000 is appropriated to the Statewide Guardian Ad Litem
8 Office to fund the cost of appointing guardian ad litem to
9 minors seeking judicial bypass under s. 390.01114, Florida
10 Statutes.

11
12
13 **T I T L E A M E N D M E N T**

14 Remove line(s) 104 and insert:
15 severability; providing for an appropriation to the Statewide
16 Guardian Ad Office; providing an effective date.

Medicaid Eligibility Groups

Mandatory	Optional
Infants < 150% of Federal Poverty Level (FPL)	Infants between 150% - 200% FPL
Children ages 1-5 < 133% of FPL	
Children ages 6-18 < 100% of FPL	
Pregnant Women < 150% of FPL	Pregnant Women between 150% - 200% of FPL
Low-Income Families < 23.2% of FPL	Family Planning
Supplemental Security Income Recipients	MEDS A/D < 88% of FPL
Qualified Medicare Beneficiaries	Medically Needy
	Refugees

Medicaid Services

Mandatory	Optional
Advanced Registered Nurse Practitioner Services	Adult Health Screening
Child Health Check-Up (EPSDT)	Adult Dental/Hearing/Vision Services
Family Planning	Ambulatory Surgical Centers
Federally Qualified Health Centers	Assistive Care Services
Home Health Services	Birth Center Services
Hospital Inpatient Services	Capitated Nursing Home Diversion Waiver
Hospital Outpatient Services	Case Management (Adult MH/CMS/Disease Mgt)
Independent Lab Services	Community Mental Health Services
Physician Services	Chiropractic/Podiatric Services
Portable X-Ray Services	County Health Department Clinic Services
Private Duty Nursing Services	Developmental/Early Intervention Services
Rural Health Clinics Services	Freestanding Dialysis Centers
Skilled Nursing Home Care	General/Intermediate Nursing Home Care
Supplemental Medical Insurance	Healthy Start Services
Therapeutic Services for Children	Home/Community Based Services
	Hospice Services
	Intermediate Care Facilities/Developmentally Disabled
	Occupational/Physical/Respiratory/Speech Therapies (except for children)
	Physician Assistant Services
	Prepaid Health Plans
	Prescribed Medicine
	Primary Case Management (MediPass)
	Psychiatric Hospital Services for Children
	School Based Services for Children
	State Mental Health Hospitals

FY 2008-09		General Revenue Base Budget	% of Healthcare Budget	5% Reduction	7.5% Reduction	10% Reduction
General Revenue Base Budget						
Veterans' Affairs	\$13,930,987		0.19%	\$696,549	\$1,044,824	\$1,393,099
Children & Family Services	\$1,532,986,901		20.52%	\$76,649,345	\$114,974,018	\$153,298,690
Health	\$565,710,781		7.57%	\$28,285,539	\$42,428,309	\$56,571,078
Elderly Affairs	\$134,832,480		1.81%	\$6,741,624	\$10,112,436	\$13,483,248
Persons with Disabilities	\$499,659,238		6.69%	\$24,982,962	\$37,474,443	\$49,965,924
Health Care Administration	\$4,722,752,671		63.22%	\$236,137,634	\$354,206,450	\$472,275,267
TOTALS	\$7,469,873,058		100.00%	\$373,493,653	\$560,240,479	\$746,987,306

MEDICAID IMPACT CONFERENCE
SFY2008/09 March 12, 2008

Row	Issue	Action	Proposed Start Date	General Revenue	Trust Fund	Total
1	REIMBURSEMENT					
2	Private Duty Nursing Rate Increase	Rate increase of \$10 per hour for Private Duty Nursing funded by an off-set in Hospital Inpatient Services length of stay.	Pending 1/1/2009	Pending \$462,002	Pending \$572,968	Pending \$1,034,970
3	Birthing Centers Rate Increase	Birthing center reimbursement increase for discussion.				
4	Expand Prior Authorization of Inpatient Hospital Services to include Elective Cesarean Sections	Provide estimate of the savings if there was a prior authorization required for elective Cesarean services.	7/1/2008	(\$1,455,126)	(\$1,807,489)	(\$3,262,615)
5	Non-Emergency Transportation	Reduce contract by 1%.	7/1/2008	(\$326,034)	(\$404,983)	(\$731,017)
6	Payment for Preventable Hospital Errors	Provide an estimate of savings by adopting the Medicare policy of no longer reimbursing hospitals for preventable errors.	7/1/2008	(\$96,179)	(\$119,468)	(\$215,647)
7	HCBS Rates	Provide the estimated savings by reducing all HCBS waiver rates by 1%. Include all waivers. List estimates by waiver.	7/1/2008	(\$169,100)	(\$12,187,869)	(\$12,356,969)
8	Reduce Pharmacy Reimbursement	Provide estimated savings by reducing reimbursement of prescribed drugs from AWP minus 15.4%- to AWP minus 16.4%; and WAC plus 5.75% to WAC plus 4.75%.	7/1/2008	(\$4,343,431)	(\$5,395,197)	(\$9,738,628)
9	County Health Department Rates	Savings associated with reducing County Health Department Rates to County Hospital Billing Rates and creating a special payment to CPHU to exempt rates up to 95% of Costs if the county has sufficient county dollars to use a match or IGTS.				
10	County Health Department Rate Freeze/Reduction	Freeze reimbursement rate at the June 30, 2008 level. Provide a mechanism to calculate a % rate reduction in addition to the freeze.	7/1/2008	(\$24,478,992)	(\$31,381,008)	(\$55,860,000)
11	County Health Department Reduction	Provide the estimated savings by reducing the FY 2008-09 rates by 1%. Provide a mechanism to calculate the reduction.	7/1/2008	(\$5,187,647)	(\$6,562,828)	(\$11,750,475)
12	Nursing Home Rate Freeze/Reduction	Provide estimated savings by freezing nursing home rates at the June 30, 2008 level. Provide a mechanism to calculate a % rate reduction in addition to the freeze. Include impact on Hospice Rates (Include impact to 2.9 staffing regulation).				
13	Nursing Home Rate Reduction	Provide the estimated savings by reducing the FY 2008-09 Nursing Home rates by 1%. Provide a mechanism to calculate the reduction. Include impact on Hospice rates. Include impact on 2.9 staffing regulation.	7/1/2008	(\$79,789,507)	(\$99,353,504)	(\$179,143,011)
14	Nursing Staffing Hours	Provide Savings associated with reducing Nurse Staffing Ratios from 2.9 to 2.6 Hours	Indeterminate	Indeterminate	Indeterminate	Indeterminate
15	HMO Rate Freeze/Reduction	Provide estimated savings by freezing HMO rates at the June 30, 2008 level. Provide a mechanism to calculate a % rate reduction in addition to the freeze.	7/1/2008	(\$68,861,398)	(\$87,180,391)	(\$156,041,398)
16	HMO Rate Reduction	Provide the estimated savings by reducing the FY 2008-09 HMO rates by 1%. Provide a mechanism to calculate the reduction.	7/1/2008	(\$9,884,739)	(\$12,466,079)	(\$22,350,818)
17	Exclude retroactive claims from HMO rates	Provide the estimated savings by eliminating retroactive claims from HMO capitation rates.	Annualized	(\$10,339,538)	(\$12,874,512)	(\$23,214,050)
18	Hospital IP Rate Freeze & Reduction	Freeze reimbursement rate at the June 30, 2008 level. Provide a mechanism to calculate a % rate reduction in addition to the freeze. Include impact to HMO Rates.	7/1/2008	(\$40,643,596)	(\$50,707,553)	(\$91,351,149)
19	Hospital IP Reduction Only	Provide the estimated savings by reducing the FY 2008-09 Hospital Inpatient rates by 1%. Provide a mechanism to calculate the reduction. Include impact to HMO rates.	7/1/2008	(\$12,299,587)	(\$15,603,786)	(\$27,903,373)

MEDICAID IMPACT CONFERENCE
SFY2008/09 March 12, 2008

Row	Issue	Action	Proposed Start Date	General Revenue	Trust Fund	Total
20	42	Hospital OP Rate Freeze & Reduction	7/1/2008	(\$38,547,079)	(\$48,036,953)	(\$86,191,803)
21	43	Hospital OP Reduction Only	7/1/2008	(\$3,185,990)	(\$4,057,116)	(\$7,243,106)
22	39	Rural Hospital IP Exemptions	7/1/2008	(\$8,884,344)	(\$11,063,297)	(\$19,946,641)
23	44	Rural Hospital OP Exemptions	7/1/2008	(\$287,146)	(\$356,679)	(\$643,825)
24	40a	Reduce Hospital OP Cap to \$1,400	7/1/2008	(\$172,515)	(\$215,640)	(\$388,155)
25	40b	Reduce Hospital OP Cap to \$1,300	7/1/2008	(\$577,174)	(\$721,458)	(\$1,298,632)
26	40c	Reduce Hospital OP Cap to \$1,200	7/1/2008	(\$1,245,184)	(\$1,556,460)	(\$2,801,644)
27	40d	Reduce Hospital OP Cap to \$1,100	7/1/2008	(\$2,222,413)	(\$2,777,981)	(\$5,000,394)
28	40e	Reduce Hospital OP Cap to \$1,000	7/1/2008	(\$3,547,079)	(\$4,433,793)	(\$7,980,872)
29	45	Eliminate Medipass \$3 Encounter Payment	Annualized	(\$10,648,108)	(\$13,346,738)	(\$23,994,846)
30	47	KidCare 10% Requirement	Pending	Pending	Pending	Pending
31	48	KidCare PLWL & FFP	Pending	Pending	Pending	Pending
32	49	FHK Rate Freeze	7/1/2008	(\$11,373,055)	(\$19,587,306)	(\$30,960,361)
33	50	Reduce Kidcare Rate	7/1/2008	(\$1,453,943)	(\$3,357,253)	(\$4,811,196)
34	51	Dental Services Fee Increase	7/1/2008	\$9,376,471	\$12,441,805	\$21,818,276
35	52	Home Health & PDN Increase	7/1/2008	\$5,134,948	\$6,726,591	\$11,861,539
36	53	Physician Specialty Fee Increase	7/1/2008	\$6,842,446	\$9,042,567	\$15,885,013
37	SERVICES					
38	4	Home Health Services	N/A	\$0	\$0	\$0
39	8	Developmental Disability Waiver Services Provided by State Plan in lieu of Waiver.	7/1/2008	\$515,037	\$678,007	\$1,193,044
40	9	Eliminate Optional Services for Adults (including HCBS)	Annualized	(\$1,464,547,690)	(\$3,222,730,101)	(\$4,687,277,791)

MEDICAID IMPACT CONFERENCE
SFY2008/09 March 12, 2008

Row	Issue	Action	Proposed Start Date	General Revenue	Trust Fund	Total
41	Eliminate Optional Services for Adults (excluding HCBS)	Provide the estimated savings by eliminating all optional services for adults excluding HCBS.	Annualized	(\$1,449,075,232)	(\$2,269,492,910)	(\$3,718,568,142)
42	Pharmaceutical Expense Assistance	Provide an analysis of estimated savings due to reducing the appropriation for this program to the amount needed to fund the program for SFY08/09.	N/A	(\$152,135)	\$0	(\$152,135)
43	Nursing Home Diversion Increase	Provide an estimate to increase the Nursing Home Diversion program by 1,000 slots.	7/1/2008	(\$3,322,733)	(\$4,137,376)	(\$7,460,109)
44	MediPass Conversion 1 - Transfer Existing Managed Care Plans to Full Extent Possible (#1)	In non-reform counties containing two or more Medicaid managed care plans, provide the estimated savings by requiring new Medicaid recipients to choose managed care plans, and requiring existing MediPass recipients in such counties to transfer out of MediPass into managed care plans upon their re-determination over a period of 12 months. This would apply only to recipients who are subject to mandatory managed care enrollment. Assume the 65/35 ratio currently found in ss. 409.9122(2)(f) and 409.9122(2)(k) are removed from statute. If these conditions were put into effect in certain counties on October 1, 2008, provide a savings estimate for FY 2008-09, and provide an annualized (post-phase-in) savings estimate separately, for each AHCA service area individually (not including Reform counties).	10/1/2008	(\$6,222,439)	(\$7,845,743)	(\$14,068,182)
45	MediPass Conversion 2 - Transfer Existing MediPass Recipients Convert to Managed Care Plans Upon Re-determination If They Don't Choose to Stay in MediPass (#2)	In non-reform counties, provide the estimated savings when existing MediPass recipients who do not express a choice of coverage after being given 30 days to choose MediPass or a managed care plan upon re-determination, are assigned to managed care plans instead of remaining in MediPass. This would apply only to MediPass recipients who are subject to mandatory managed care enrollment and who fail to make a choice of coverage upon re-determination. For continuity of care, such recipients who are receiving health care treatment in an institution or facility on an inpatient basis during their 30-day choice period would be excluded. Assume the 65/35 ratio currently found in ss. 409.9122(2)(f) and 409.9122(2)(k) are removed from statute. If these conditions were put into effect on October 1, 2008, provide a savings estimate for FY 2008-09, and provide an annualized savings estimate separately, for each AHCA service area individually (not including Reform counties). If necessary, provide a range of savings based on various assumptions about the percentage of existing MediPass recipients who would fail to choose (e.g. 20%, 35%, 50%, 65%, 80%).	N/A	\$0	\$0	\$0
46	Combination of MediPass conversion (Refer to 46a and 46b)	What savings would be produced by implementing 46a only in AHCA areas 6 and 7, combined with implementing 46b in all other non-Reform counties?	Annual	(\$1,650,279)	(\$2,080,801)	(\$3,731,080)
47	Automated Point of Service Verification System	Provide an estimate of savings that may be generated by requiring in-home Medicaid providers to use a toll-free phone number to record check-in/check-out times and to document the services that have been provided.	Pending	Pending	Pending	Pending
48	ELIGIBILITY					
49	Eliminate Optional Eligibility Groups	Provide estimated savings by eliminating optional eligibility groups. Provide an individual estimate by each optional eligibility group.	Annualized	(\$1,232,684,940)	(\$1,851,735,430)	(\$3,084,420,370)
50	Pregnant Women 150-185%	Provide the estimated savings from eliminating the pregnant women eligibility group from 150-185% FPL.	Annualized	(\$23,238,005)	(\$38,088,869)	(\$61,326,874)
51	Medically Needy (Ambulatory)	Provide the estimated savings by limiting the medically needy eligibility group to ambulatory services only.	Annualized	(\$100,733,533)	(\$125,430,663)	(\$226,164,196)

**MEDICAID IMPACT CONFERENCE
SFY2008/09 March 12, 2008**

Row	Issue	Action	Proposed Start Date	General Revenue	Trust Fund	Total
52	Reduce Medically Needy to Children and PW (All Services)	Provide estimated savings by eliminating medically needy except for children and pregnant woman. (provide all services)	Annualized	(\$147,847,060)	(\$201,084,443)	(\$348,931,503)
53	Reduce Medically Needy to Children and PW (Ambulatory Services Only)	Provide estimated savings by eliminating medically needy except for children and pregnant woman. (provide ambulatory services only)	Annualized	(\$170,678,248)	(\$229,513,220)	(\$400,191,468)
54	Eliminate MEDS AD Waiver	Provide estimated savings from eliminating MEDS AD waiver.	Annualized	(\$152,615,855)	(\$202,815,121)	(\$355,430,976)
55	REVENUE					
56	Premiums	Provide an estimate of savings from imposing premiums for adults as approved under the Deficit Reduction Act (DRA)	7/1/2009	(\$3,000,420)	\$3,000,420	\$0
57	Estimate of Rebates for Physician Administered Drugs	Provide the estimated increase in rebates through collecting federal and supplemental rebates on physician administered drugs.	4/1/2008	\$0	\$0	\$0
58	ICF/DD Assessment	Provide an estimate of revenue generated by requiring an assessment of 1% net revenue to ICF/DD facilities.	Annualized	(\$3,198,044)	\$3,198,044	\$0
59	NH County Billing Increase 5%	Provide estimated savings by increasing the nursing home county contribution increase of 5%.	Annualized	(\$1,048,008)	\$1,048,008	\$0
60	NH County Billing Increase 10%	Provide estimated savings by increasing the nursing home county contribution increase of 10%.	Annualized	(\$2,096,016)	\$2,096,016	\$0
61	NH County Billing Increase 15%	Provide estimated savings by increasing the nursing home county contribution increase of 15%.	Annualized	(\$2,794,688)	\$2,794,688	\$0
62	NH County Billing Increase 20%	Provide estimated savings by increasing the nursing home county contribution increase of 20%.	Annualized	(\$3,842,696)	\$3,842,696	\$0
63	Nursing Home Provider Assessment	Provide an estimate of revenue generated by reestablishing the nursing home assessment from Chapter 92-319 Laws of Florida.	Annualized	(\$39,734,939)	\$39,734,939	\$0
64	HMO Assessment	Provide an estimate of revenue by requiring an assessment of 1% of net revenue on HMO's in the state.	Annualized	(\$78,574,571)	\$78,574,571	\$0
65	Hospital County Contributions	Provide the estimated savings by increasing the county contributions for hospital reimbursement by one day.	Annualized	(\$11,721,954)	\$11,721,954	\$0
66	Hospital IP Assessment to 1.75%	Provide an estimate of revenue generated from increasing the inpatient hospital assessment to 1.75%.	Annualized	(\$49,169,004)	\$49,169,004	\$0
67	Hospital IP Assessment to 2%	Provide an estimate of revenue generated from increasing the inpatient hospital assessment to 2%.	Annualized	(\$98,338,008)	\$98,338,008	\$0
68	Hospital OP Assessment to 1.25%	Provide an estimate of revenue generated from increasing the outpatient hospital assessment to 1.25%.	Annualized	(\$23,508,266)	\$23,508,266	\$0
69	Hospital OP Assessment to 1.50%	Provide an estimate of revenue generated from increasing the outpatient hospital assessment to 1.50%.	Annualized	(\$47,016,532)	\$47,016,532	\$0