The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL: SB 918

INTRODUCER: Senator Flores

SUBJECT: Termination of Pregnancies

DATE: February 26, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HP	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 918 amends the statutes relating to termination of pregnancies to prohibit an abortion if the physician reasonably determines that, in his or her good faith medical judgment, the fetus has achieved viability. Medical exceptions are provided if the termination of pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition. The exceptions allowing a physician to terminate a pregnancy during the third trimester are revised to reflect this same standard.

Before performing an abortion, a physician must determine if the fetus is viable. Viability is redefined to mean the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures. The bill also defines standard medical measures.

The bill provides a parallel structure for abortions during the third trimester and once a fetus has achieved viability, including efforts to preserve the life and health of the fetus, requiring a lawful abortion to be performed in a hospital after these milestones, and criminal penalties for an unlawful abortion.

The bill provides a severability clause but provides that if the new section of law relating to termination of pregnancy during viability is held unconstitutional, then the other amendments in this act are repealed and these sections of law revert to the law as it existed on January 1, 2014.

II. Present Situation:

Case Law on Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*, was decided by the U.S. Supreme Court.[1] Using strict scrutiny, the Court determined that a woman's right to terminate a pregnancy is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[2] Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.[3] The Court established the trimester framework for the regulation of termination – holding that in the third trimester, a state could prohibit termination to the extent that the woman's life or health was not at risk.[4]

In *Planned Parenthood v. Casey*, the U.S. Supreme Court, while upholding the fundamental holding of *Roe,* recognized that medical advancement could shift determinations of fetal viability away from the trimester framework.[5]

Abortion in Florida

Article I, Section 23 of the State Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[6]

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

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

The Florida Supreme Court recognized that after viability, the state can regulate termination in the interest of the unborn child so long as the mother's health is not in jeopardy.[7]

Under Florida law, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[8] A termination of pregnancy must be

[1] 410 U.S. 113 (1973).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] 505 U.S. 833 (1992).
[6] *See In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)(holding that a parental consent statute was unconstitutional because it intrudes on a minor's right to privacy).
[7] *Id.*
[8] Section 390.011(1), F.S.

performed by a physician[9] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[10]

A termination of pregnancy may not be performed in the third trimester unless there is a medical necessity. Florida law defines the third trimester to mean the weeks of pregnancy after the 24th week.[11] Specifically, an abortion may not be performed within the third trimester unless two physicians certify in writing that, to a reasonable degree of medical probability, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman. If a second physician is not available, one physician may certify in writing to the medical necessity for legitimate emergency medical procedures for termination of the pregnancy.

Section 390.0111(4), F.S., provides that if a termination of pregnancy is performed during viability, the person who performs or induces the termination of pregnancy must use that degree of professional skill, care, and diligence to preserve the life and health of the fetus, which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Viability is defined in this provision to mean that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb. However, the woman's life and health constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict.

A termination of pregnancy in the third trimester must be performed in a hospital.[12]

Viability

Current law defines "viability" to mean that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb.[13]

The gestational age of a viable fetus has become earlier in the pregnancy over the years. In 1935, the American Academy of Pediatrics defined a premature infant as one who weighed <2500 g at birth regardless of gestational age. Although no minimum weight for viability was established, 1250 g was frequently used and corresponded to an estimated gestational age of 28 weeks. As continuous positive airway pressure and neonatal total parenteral nutritional therapy became increasingly mainstream, the medical definition of viability continued to evolve as well. By the 1980s, survival of infants who were born weighing 500 to 700 g or were of 24 to 26 weeks' gestation became an expected possibility in regional NICUs. The 1980s and 1990s brought new waves of neonatal biomedical advances, led by tracheal instillation of surfactant for respiratory distress syndrome and the use of antenatal corticosteroids in women with imminent delivery of a

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[9] Section 390.0111(2), F.S.
[10] Section 390.011(8), F.S.
[11] Section 390.011(7), F.S.
[12] Section 797.03(3), F.S.
[13] Section 390.0111(4), F.S.

preterm infant at 24 to 34 weeks' gestation. With these changes, survival of infants born at 23 and 24 weeks' estimated gestational age became increasingly frequent.[14]

The determination of viability is not an exact science and the stage at which a fetus is viable is an individual determination based on each pregnant woman and fetus. Gestational age, weight, sex, plurality or whether it is a single fetus, as well as other factors, may be considered in the determination of viability now and in the future as neonatal and medical care advances.[15,16]

Twenty-one states place limits on abortions after the fetus is viable. Generally, exceptions are made when the life and health of the women is at risk.[17]

Documenting Gestational Age

The Agency for Health Care Administration (Agency) is responsible for regulating abortion clinics under ch. 390, F.S., and part II of ch. 408, F.S. Section 390.012, F.S., requires the Agency to adopt rules[18] for, among other things, clinics that perform abortions after the first trimester of pregnancy. These rules must address physical facilities, supplies and equipment standards, personnel, medical screening and evaluation of patients, abortion procedures, recovery room standards, follow-up care, and adverse incident reporting. The statutes further prescribe specific components to be included within the rules relating to each of these subject areas.

Within rules relating to medical screening and evaluation of patients, the rules must, among other things, require that the physician is responsible for estimating the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age and shall write the estimate in the patient's medical history. The physician is also required to keep original prints of each ultrasound examination in the patient's medical history file.

III. Effect of Proposed Changes:

The bill prohibits abortions once a physician has determined a fetus is viable in the same manner as abortions are prohibited during the third trimester of pregnancy. This provides for comparable treatment as medical advances allow the life of a fetus to be sustainable outside the womb at an

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[14] *See Limits of Human Viability in the United States: A Medicolegal Review*, Bonnie Hope Arzuaga, MD and Ben Hokew Lee, MD, MPH, MSCR, Pediatrics Perspectives, published online November 1, 2011, available at: http://pediatrics.aappublications.org/content/128/6/1047.full (Last visited Feb. 26, 2014)

[15] Wolters Kluwer Health, UpToDate, available at: http://www.uptodate.com/contents/limit-of-viability#H8144843, (Last visited Feb. 26, 2014).

[16] The U.S. Department of Health and Human Services, National Institutes of Health *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, Pregnancy and Perinatology Branch-supported researchers developed a tool using data from the Neonatal Research Network (NRN) that shows outcome trends for infants born at extremely preterm gestations. Found at:http://www.nichd.nih.gov/about/org/der/branches/ppb/programs/epbo/pages/epbo_case.aspx, (Last visited Feb. 26, 2014).

[17] These states include Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Ohio, Tennessee, Utah, Washington, Wisconsin, and Wyoming. *See* Guttmacher Institute State Policies in Brief *State Policies on Later Abortions*, as of February 1, 2014, found at: http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf (Last visited Feb. 25, 2014).

[18] These rules are found in Rule Chapter 59A-9, Florida Administrative Code.

earlier point of gestation than the third trimester. The bill leaves in place the current prohibition on performing abortions during the third trimester.

Definitions

Section 1 of the bill

The term "viable" or "viability" is redefined and moved from another section of law[19] into the definitions section for applicability to the entire chapter 390, Florida Statutes. Under the bill, "viable" or "viability" means the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures.

"Standard medical measure" is defined in the bill to mean the medical care that a physician would provide based on the particular facts of the pregnancy, the information available to the physician, and the technology reasonably available in a hospital, as defined in s. 395.002, F.S., with an obstetrical department, to preserve the life and health of the fetus, with or without temporary artificial life sustaining support, if the fetus were born at the same stage of fetal development.

Termination of Pregnancy in the Third Trimester and During Viability

Sections 2 and 3 of the bill

The bill establishes the same prohibitions and conditions for performing an abortion in the third trimester of pregnancy and once a fetus has achieved viability. The medical exceptions that allow a physician to perform an abortion in the third trimester of pregnancy are modified and are consistent with the medical exceptions established during viability.

The bill authorizes a termination of pregnancy in the third trimester or during viability when two physicians certify in writing that, to a reasonable degree of medical probability, the termination is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition. If a second physician is not available, the physician may certify in writing to the medical necessity for legitimate emergency medical procedures for termination of the pregnancy to save the pregnant woman's life or avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition.

The bill specifies a standard of care when a termination of pregnancy occurs during viability that parallels the standard of care required when a termination of pregnancy occurs in the third trimester. The physician performing the abortion must exercise the same degree of professional skill, care, and diligence to preserve the life and health of the fetus which the physician would be required to exercise in order to preserve the life and health of a fetus intended to be born and not aborted. Further, if preserving the life and health of the fetus conflicts with preserving the life and health of the woman, the physician must consider preserving the woman's life and health the overriding and superior concern.

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[19] Section 390.0111(4), F.S.

Section 4 of the bill amends s. 797.03, F.S., to prohibit a person performing an abortion on a person during viability other than in a hospital. A person who wilfully violates this provision is guilty of a misdemeanor of the second degree, punishable by a definite term of imprisonment not exceeding 60 days and subject to a fine of up to $500.

Determination of Viability

Section 3 of the bill
Before terminating a pregnancy, a physician must reasonably determine whether, in his or her good faith medical judgment, the fetus has achieved viability. At a minimum, the physician must perform a medical examination of the pregnant woman and, to the maximum extent possible through reasonably available tests and the ultrasound,[20] an examination of the fetus. The physician must document in the pregnant woman's medical file his or her determination and the method, equipment, fetal measurements, and any other information used to determine the viability of the fetus.

Penalties

Section 2 of the bill
The penalties for violating the bill's provisions pertaining to termination of pregnancies during viability in s. 390.01112, F.S., are similar to those for violating the provisions pertaining to termination of pregnancies during the third trimester in s. 390.0111, F.S.

Specifically, the bill provides that a person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of s. 390.01112, F.S., commits a felony of the third degree. If the woman dies as a result of this act, the person commits a felony of the second degree. A felony of the third degree is punishable by a term of imprisonment not exceeding 5 years and may incur a fine of up to $5,000. A felony of the second degree is punishable by a term of imprisonment not exceeding 15 years and may incur a fine of up to $10,000.

Section 5 of the bill provides for severability and reversion. If any provision of this act or its application to any person or circumstance is held invalid, then other provisions which can be given effect are to be given effect. Notwithstanding that, if s. 390.01112, F.S., governing the termination of pregnancies during viability, is held unconstitutional and severed, then the amendments in this act to the other provisions of law are repealed and will revert to the law as it existed on January 1, 2014.

The effective date of this act is July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[20] Current law requires an ultrasound to be performed before an abortion may be performed. *See* s. 390.0111(3)(a)1.b., F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Roe v. Wade, was decided by the U.S. Supreme Court in 1973.[21] Using strict scrutiny, the Court determined that a woman's right to terminate a pregnancy is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[22] Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.[23] The Court established the trimester framework for the regulation of termination – holding that in the third trimester, a state could prohibit termination to the extent that the woman's life or health was not at risk.[24]

Later, in 1992, in *Planned Parenthood v. Casey*, the U.S. Supreme Court, while upholding the fundamental holding of *Roe*, recognized that medical advancement could shift determinations of fetal viability away from the trimester framework.[25]

Article I, Section 23 of the State Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[26]

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

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

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[21] 410 U.S. 113 (1973).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 505 U.S. 833 (1992).
[26] *See In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)(holding that a parental consent statute was unconstitutional because it intrudes on a minor's right to privacy).

The Florida Supreme Court recognized that after viability, the state can regulate termination in the interest of the unborn child so long as the mother's health is not in jeopardy.[27]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 390.011, 390.0111, and 797.03.
This bill creates section 390.01112 of the Florida Statutes.
This bill creates an unnumbered section of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

[27] *Id.*