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 Fiscal Policy

BILL:	CS/SB 724
INTRODUCER:	Fiscal Policy Committee and Senators Flores and Gaetz
SUBJECT:	Termination of Pregnancies
DATE:	April 21, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	**Favorable**
2.	Davis	Cibula	JU	**Favorable**
3.	Hrdlicka	Hrdlicka	FP	**Fav/CS**

I. Summary:

CS/SB 724 redefines what constitutes "voluntary and informed consent" when terminating a pregnancy. Currently, s. 390.0111(3), F.S., requires a physician, before performing an abortion, to obtain the voluntary and informed written consent of the pregnant woman. Consent is voluntary and informed only if the physician, or the referring physician, informs the woman of the nature and risks of undergoing or not undergoing the procedure, the probable gestational age of the fetus, and the medical risks to the woman and fetus of carrying the pregnancy to term.

This bill additionally requires that:

- The physician be physically present in the same room as the woman when providing her the necessary information about the procedure; and
- The information be provided to the woman at least 24 hours before the procedure is performed.
- If the woman provides to the physician a copy of a restraining order, police report, medical record, or other documentation that evidences that she is obtaining an abortion due to rape, incest, domestic violence, or human trafficking, then the information may be provided to her within 24 hours before the procedure is performed.

II. Present Situation:

Abortion in Florida

Under Florida law, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or remove a dead fetus.[1] The termination of a pregnancy must

[1] Section 390.011(1), F.S.

be performed by a physician[2] 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.[3]

The termination of a pregnancy may not be performed in the third trimester or if a physician determines that the fetus has achieved viability unless there is a medical necessity. Florida law defines the third trimester to mean the weeks of pregnancy after the 24th week and defines viability to mean the state of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures.[4] Specifically, an abortion may not be performed after viability or within the third trimester unless two physicians certify in writing that, in reasonable medical judgment, the termination of the 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. If a second physician is not available, one physician may certify in writing to the medical necessity for legitimate emergency medical procedures for the termination of the pregnancy.[5]

Sections 390.0111(4) and 390.01112(3), F.S., provide that if a termination of pregnancy is performed during the third trimester or during viability, the physician 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 the physician would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. 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 the concerns are in conflict. This termination of a pregnancy must be performed in a hospital.[6]

Case Law on Abortion

Federal Case Law

In 1973, the U.S. Supreme Court issued the landmark *Roe v. Wade* decision.[7] Using the strict scrutiny standard, the Court determined that a woman's right to terminate a pregnancy is protected by a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[8] Further, the Court reasoned that state regulations limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.[9]

In 1992, the U.S. Supreme Court ruled on the constitutionality of a Pennsylvania statute involving a 24-hour waiting period between the provision of information to a woman and the performance of an abortion. In that decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[10] the Court upheld the statute and relaxed the standard of review in abortion cases

[2] Section 390.0111(2), F.S.
[3] Section 390.011(8), F.S.
[4] Sections 390.011(11) and (12), F.S.
[5] Sections 390.0111(1) and 390.01112(1), F.S.
[6] Sections 797.03(3), F.S.
[7] 410 U.S. 113 (1973).
[8] *Id.*
[9] *Id.*
[10] 505 U.S. 833 (1992).

involving adult women from "strict scrutiny" to "unduly burdensome." An undue burden exists and makes a statute invalid if the statute's purpose or effect is to place a substantial obstacle in the way of a woman seeking an abortion before the fetus is viable.[11] The Court held that the undue burden standard is an appropriate means of reconciling a state's interest in human life with the woman's constitutionally protected liberty to decide whether to terminate a pregnancy. The Court determined that, prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference. Before viability, a state's interests are not strong enough to support prohibiting an abortion or the imposition of a substantial obstacle to the woman's right to elect the procedure.[12] However, once viability occurs, a state has the power to restrict abortions if the law contains exceptions for pregnancies that endanger a woman's life or health.

The Court held that the informed consent provision of Pennsylvania's abortion statute requiring a physician to provide information relevant to the woman's informed consent did not impose an undue burden on the woman's right to abortion. Rather, the provision was a reasonable means to insure that the woman's consent was informed. The Court also determined that the 24-hour waiting period did not impose an undue burden on the woman's abortion right, even though the waiting period had the effect of increasing the costs for the woman and the risk of a delayed abortion.[13]

Florida Law on Abortion

Florida law embraces more privacy interests and expressly extends more privacy protection to its citizens than the U.S. Constitution does. Article I, s. 23 of the State Constitution provides an express right to privacy. The Florida Supreme Court has recognized that this constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[14] The Florida Supreme Court ruled in *In re T. W.*[15]

> Under Florida law, prior 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.[16]

[11] *Id*. at 878.
[12] *Id*. at 846.
[13] *Id*. at 886-887.
[14] *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).
[15] 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).
[16] *Id*. at 1193-94.

The Court concluded that, "Following viability, the state may protect its interest in the potentiality of life by regulating abortion, provided that the mother's health is not jeopardized."[17]

Unlike the U.S. Supreme Court, however, the Florida Supreme Court reached a different standard of review for privacy laws involving abortion. The Florida Supreme Court held that, when determining the constitutionality of a statute that impinges upon a right of privacy under the Florida Constitution, the strict scrutiny standard of review applies.[18]

The Woman's Right-to-Know Act

The Woman's Right to Know Act (act) was enacted by the Florida Legislature in 1997.[19] The act required the voluntary and informed written consent of the pregnant woman before an abortion could be performed. The act also specified that consent was only voluntary and informed if the physician informed the woman, in person, of the nature and risks of undergoing the abortion or carrying the pregnancy to term and the probable gestational age of the fetus. In 2011, the Florida Legislature amended the statute and added the requirement that the gestational age of the fetus be verified by an ultrasound and that the pregnant woman be offered the opportunity to view the live ultrasound images and hear an explanation of them.[20]

Litigation of the Woman's Right-to-Know Act

Shortly after enactment, the statute's validity was challenged under the Florida and federal constitutions. The plaintiff physicians and clinics enjoined the enforcement of the act pending the outcome of the litigation, and the injunction was upheld on appeal.[21] Thereafter, the plaintiffs were successful in obtaining a summary judgment against the state on the grounds that the act violated the right to privacy under Article I, s. 23 of the Florida Constitution and was unconstitutionally vague under the federal and state constitutions. This decision was also upheld on appeal.[22] The state appealed this decision to the Florida Supreme Court.[23]

The Florida Supreme Court addressed two issues raised by the plaintiffs. With regard to whether the act violated a woman's right to privacy, the Court determined that the information required to be provided to women in order to obtain informed consent was comparable to those informed consent requirements established in common law and by Florida statutory law[24] applicable to

[17] *Id*. at 1194.
[18] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So. 2d 612 (Fla. 2003).
[19] Chapter 97-151, L.O.F.
[20] Chapter 2011-224, s. 1, L.O.F.
[21] *Florida v. Presidential Women's Center*, 707 So. 2d 1145 (Fla. 4th DCA 1998).
[22] *Florida v. Presidential Women's Center*, 884 So. 2d 526 (Fla. 4th DCA 2004).
[23] *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006).
[24] *Id.* at 117-118. Section 766.103, F.S., is a general informed consent law for the medical profession, which requires that a patient receive information that would provide a "a reasonable individual" with a general understanding of the procedure he or she will undergo, medically acceptable alternative procedures or treatments, and the substantial potential risks or hazards associated with the procedure. The Court also refers to s. 458.324, F.S. (informed consent for patients who may be at high risk of developing breast cancer); s. 458.325, F.S., (informed consent for patients receiving electroconvulsive and psychosurgical procedures); and s. 945.48, F.S., (express and informed consent requirements for inmates receiving psychiatric treatment).

other medical procedures.[25] Accordingly, the Court determined that the act was not an unconstitutional violation of a woman's right to privacy.[26]

Second, the Court addressed the allegation that the term "reasonable patient," and the act's reference to information about "risks" were unconstitutionally vague. The plaintiffs argued it was unclear whether the act requires patients to receive information about "non-medical" risks, such as social, economic, or other risks.[27] The Court rejected these arguments and held that "… the act constitutes a neutral informed consent statute that is comparable to the common law and to informed consent statutes implementing the common law that exist for other types of medical procedures ..."[28]

Abortion Statistics in Florida

The Department of Health reported 220,143 live births in the state for 2014.[29]

According to the Agency for Health Care Administration, there are 65 licensed clinics in Florida that perform abortions.[30]

In 2014, the state reported that 72,107 abortions were performed in the following stages of fetal development:[31]

- 65,934 abortions during the first 12 weeks of gestation;
- 6,173 abortions between 13 and 24 weeks of gestation; and
- None were performed after 24 weeks of gestation.

The majority of abortions, approximately 90 percent, were elective procedures, with:

- 60,007 performed in the first 12 weeks; and
- 5,370 performed between 13 and 24 weeks of gestation.

The remaining 10 percent were performed due to:

- Social or economic reasons – 5,115.
- Rape – 749.
- Serious fetal genetic defect, deformity, or abnormality – 562.
- Physical health of the mother that is not life endangering – 158.
- Emotion or psychological health of the mother – 77.
- Life endangering physical condition – 69.
- Incest – 0.

[25] *Id.*
[26] *Id.* at 118, 120.
[27] *Id.* at 118-119.
[28] *Id.* at 120.
[29] E-mail from Ken T. Jones, Florida Department of Health, Bureau of Vital Statistics, on April 10, 2014 (on file with the Senate Committee on Judiciary).
[30] E-mail from Orlando Pryor, Agency for Health Care Administration, on April 10, 2014 (on file with the Senate Committee on Judiciary).
[31] Agency for Health Care Administration, *Reported Induced Terminations of Pregnancy (ITOP) by Reason, by Weeks of Gestation, Calendar Year 2014* (on file with the Committee on Judiciary).

Counseling and Waiting Periods for Abortions in Other States

Currently, 26 states require a waiting period between abortion counseling and the actual abortion procedure. Most states require 24 hour waiting periods, but Alabama and Arkansas require 48 hour waiting periods while Missouri, South Dakota, and Utah require 72 hour waiting periods. Of the states having waiting periods, 12 require pre-abortion counseling to be provided in person which necessitates two separate trips to the facility before an abortion can be performed.[32] Under the undue burden standard adopted by the United States Supreme Court in *Planned Parenthood*, while "24-hour waiting period[s] may make some abortions more expensive and less convenient, it cannot be said that [they are] invalid …"[33]

III. Effect of Proposed Changes:

SB 724 revises the requirements for what is "voluntary and informed consent" when terminating a pregnancy in s. 390.0111, F.S. The current law requires that a physician, before performing an abortion, obtain the voluntary and informed written consent of the pregnant woman, unless a medical emergency exists. Consent is voluntary and informed only if the physician who is to perform the abortion, or the referring physician, informs the woman of:

- The nature and risks of undergoing or not undergoing the proposed procedure;
- The probable gestational age of the fetus, verified by an ultrasound, at the time the termination of pregnancy is to be performed; and
- The medical risks to the woman and fetus of carrying the pregnancy to term.

This bill amends the current law to add two additional elements of informed consent. The three conditions above must be met by the physician who is to perform the procedure or the referring physician, and the information must be given by the physician:

- While physically present in the same room as the woman; and
- At least 24 hours before the procedure is performed.

Because of the 24-hour waiting period, a pregnant woman may need to make two trips to the facility to obtain an abortion.

However, the information may be provided to a woman *within* 24 hours before the procedure is performed upon her request if she provides a copy of a restraining order, police report, medical record, or other documentation that evidences that she is obtaining an abortion due to being the victim of rape, incest, domestic violence, or human trafficking. The request may be made at the time the appointment is scheduled or when the woman arrives for the appointment to obtain the abortion.

The bill also republishes s. 390.012, F.S., for the purpose of incorporating the amendment made to s. 390.0111, F.S.

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[32] Guttmacher Institute, *Counseling and Waiting Periods for Abortion*, April 1, 2015, available at http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last visited April 10, 2015). Arkansas amended its law on April 6, 2015, to require a 48 hour waiting period and the presence of a physician or qualified person for pre-abortion counseling (HB 1578, 2015).

[33] *Supra* note 10, at 838.

The bill takes effect on July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to have an impact on cities or counties and as such, does not appear to be a mandate for constitutional purposes.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

If the bill becomes law and is challenged, it is uncertain whether a court will apply the strict scrutiny or undue burden standard of review. Historically, the Florida Supreme Court has applied the strict scrutiny standard to legislation imposing abortion restrictions. In contrast, the U.S. Supreme Court adopted the undue burden standard in a challenge to a Pennsylvania law similar to this bill. Whether the Florida Supreme Court will choose to adopt the undue burden standard under the Florida Constitution's privacy protections is not known (See *Florida Law on Abortion* above).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 390.011 of the Florida Statutes.

This bill reenacts section 390.012 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.)

CS by Fiscal Policy on April 20, 2015:
The committee substitute provides that if the woman provides to the physician a copy of a restraining order, police report, medical record, or other documentation that evidences that she is obtaining an abortion due to rape, incest, domestic violence, or human trafficking, then the information may be provided to her within 24 hours before the procedure is performed.

B. Amendments:

None.