**STORAGE NAME**: h1585a.jud
**DATE**: April 16, 1999

**HOUSE OF REPRESENTATIVES**
**AS REVISED BY THE COMMITTEE ON**
**JUDICIARY**
**ANALYSIS**

**BILL #**: HB 1585

**RELATING TO**: Parental Notice of Abortion Act

**SPONSOR(S)**: Rep. Murman & others

**COMPANION BILL(S)**: SB 1598(I), HB 1485(c), and CS/SB 1596(c)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE**:

(1) HEALTH CARE SERVICES YEAS 12 NAYS 3
(2) JUDICIARY YEAS 8 NAYS 1
(3) CRIME & PUNISHMENT
(4) HEALTH & HUMAN SERVICES APPROPRIATIONS
(5)

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I. SUMMARY:

HB 1585 provides certain limitations on a minor's right to an abortion in Florida. Specifically, the bill requires the person performing or inducing the termination of a pregnancy of a minor to notify the parent or legal guardian of the minor's intention at least 48 hours prior to performing or inducing the termination of pregnancy.

The bill also provides for disciplinary action for violations of the notice requirement and for procedures for judicial waiver of notice. The court is required to issue an order authorizing the minor to consent to the termination of pregnancy if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to make the decision or there is evidence of child abuse or neglect, or sexual abuse of the complainant by one or both of her parents, her guardian, or her custodian.

In addition, the bill requires the court to conduct waiver proceedings to issue written and specific factual findings and legal conclusions supporting its decision and to maintain confidential records of the evidence and findings. Expedited confidential appeal is allowed, as provided by Florida Supreme Court rule, and filing fees shall not be required of minors who petition for waiver. Minors have the right to court-appointed counsel upon their request and the Florida Supreme Court is requested to adopt rules to ensure that judicial proceedings for waiver are handled in an expeditious and confidential manner and in a manner satisfying state and federal courts.

Finally, the bill provides that notice shall not be required if: a medical emergency exists; notice is waived in writing by the person who is entitled to notice; the minor is or has been married or has the disability of nonage removed; or notice is waived through a judicial procedure.

The fiscal impact of this bill is indeterminate.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

**Florida's Constitutional Right to Privacy**

The federal constitution serves as a minimum level of guaranteed rights, and the states, in interpreting their own constitutions, are free to guarantee a higher level of protection. And Florida's higher level of privacy protection is not solely a matter of judicial interpretation. In 1980, Florida citizens voted in general elections to amend the State Constitution to provide for a right of privacy. In so doing, Florida became one of only five states providing such a guarantee. These types of provisions can make a crucial difference in determining whether a statute is constitutional because the statute in question must pass muster under both the federal and state constitutions.

The right of privacy is found in Art. 1, Sec 23 of the Florida Constitution which reads:

> Right of privacy..-- Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

In describing the impact of this amendment, the Florida Supreme Court in *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985) noted:

> The citizens of Florida opted for more protection from government intrusion when they approved article I, section 23, of the Florida Constitution, This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. . . . The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state . . . enacted an amendment to the Florida Constitution which . . . provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

*Id* at 548. The Florida Supreme Court concluded that Article I, Section 23 of the Florida Constitution provides a strong right of privacy not found in the U.S. Constitution, which is interpreted to provide a right of privacy through the cumulative effects of several federal constitutional provisions. In Winfield, the court also provided a standard of review, holding that:

> The right of privacy is such a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can only be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Id at 547.

**Florida's Previous Attempt to require parental consent prior to a minor's abortion**

In 1988, the Florida Legislature enacted Section 390.001 (4)(a), F.S. The statute required the physician of a pregnant woman under 18 years of age and unmarried to obtain the written informed consent of a parent, custodian, or legal guardian. Alternatively, the physician could rely upon an order of the circuit authorizing termination based on:

> a showing that the minor is sufficiently mature to give an informed consent to the procedure; the fact that a parent, custodian or legal guardian unreasonable withheld consent; the minor's fear of physical or emotional abuse if her parent, custodian, or guardian were required to consent; or any other good cause shown.

*In Re: T.W., A Minor*, 551 So.2d.1186 (Fla 1989), was the case which tested the constitutionality of the new consent law. The court recognized that given the broader protection provided by the Florida Constitution's express right of privacy, and the higher burden that the state must assume to overcome that right, a state law requiring parental consent to termination of a minor's pregnancy faces a more challenging constitutional obstacle than under the privacy rights analysis under the United States Constitution. The Florida Supreme Court found:

> Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body . . . .

The Court then addressed the question of whether this freedom of choice concerning abortions extends to minors:

> We conclude that it does, based on the unambiguous language of the amendment: The right of privacy extends to "[e]very natural person." Minors are natural persons in the eyes of the law and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights," [Planned Parenthood v.] Danforth, 428 U.S. at 74.

The court went on to state that the statute fails because it intrudes upon the privacy of the pregnant minor from conception to birth. The justices observed that where parental rights over a minor child are concerned, that society has recognized additional state interests: protection of the immature minor and preservation of the family unit; but did not find either of these interests sufficiently compelling to override Florida's privacy amendment:

> We agree that the state's interests in protecting minors and in preserving the family are worthy objectives. Unlike the federal constitution, however, which allows intrusion based on a "significant" state interest, the Florida Constitution requires a "compelling state interest in all cases where the right to privacy is implicated. Winfield. We note that Florida does not recognize these two interests as being sufficiently compelling to justify a parental consent requirement where procedures other than abortion are concerned.

The court turned its attention to Section 742.065, F.S. entitled "Unwed pregnant minor or minor mother; consent to medical services for minor or minor's child valid" and found that under this statute a minor may consent, without parental approval, for any medical procedure involving her pregnancy or her existing child -- no matter how dire the possible consequences -- except abortion:

> In light of this wide authority that the state grants an unwed minor to make life or death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned. We fail to see the qualitative difference in terms of well being of the minor between allowing the life of an existing child to come to an end and terminating a pregnancy, or between undergoing a highly dangerous medical procedure on oneself and undergoing a less dangerous procedure to end one's pregnancy.

In the case of *In re T.W.*, the court was faced with the question of whether a state statute requiring parental consent for the abortion of a minor violated the express constitutional right of privacy in the State Constitution. Finding that "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy," the court ruled the statute unconstitutional. Rejecting the federal test that a state's interest must only be "significant," the court adopted the Florida standard that the interest be "compelling."

The court concluded that neither the interest in protecting minors nor the interest in preserving family unity was sufficiently compelling under Florida law to override Florida's privacy amendment. The parental consent statute also did not pass the test of the least intrusive means of furthering the state interest. The statute did not make provisions for a lawyer for the minor or for a record hearing, which the court felt were necessary for providing an adequate judicial bypass procedure.

**Removal of disability of non-age for minors and other similar Florida statutes:**

In finding a lack of compelling state interest in requiring consent to abortions by minors, the Court specifically addressed Section 743.65, F.S., which is one of Florida's disability of nonage minor statutes

and which has been discussed above. Chapter 743 contains a number of provisions for removal disabilities of non-age:

Section 743.015, F.S., is a general provision for the removal of the nonage disability for minors over 16 upon a petition by one or more of the minor's parents.

Disability on non-age to contract is removed in three areas: (1) Section 743.04, F.S. permits minors authorized to participate in the rights, privileges, and benefits conferred by 38 USC Chapter 37, "Home, Farm and Business Loans Act" to execute all contracts necessary and there is no minimum age for removal of this disability to contract; (2) Section 743.05, F.S., removes the disability from minors 16 or older to borrow money for their own education; (3) Section 743.08, F.S., concerns contracts for artistic or creative services, or professional or semi-professional sports.

The disability of non-age to marriage can be waived without parental consent if the minors swear that they are parents of a child and pregnancy is confirmed by a licensed physician. There is no minimum age for these marriages. Section 741.0405, F.S.

In addition to the waiver of non-age for unwed pregnant minors or minor mothers contained in Section 743.65, F.S., Section 384.30 states that the consent of the parents or guardian of a minor is not a prerequisite for consultation, examination and treatment of the minor for a sexually transmitted disease.

Chapter 63 , F.S. does not require a minor to have parental consent to place a child for adoption.

Section 794.011, F.S., indicates that a 12 year old minor is capable of consent to what would otherwise be sexual battery.

**Areas in which Florida law requires parental consent:**

Section 323.46, F.S., requires a student's parents to grant permission to a school to dispense medication prescribed for the student.

Section 323.465, F.S., requires the consent of parents before school district students can be referred to or offered contraception.

Section 741.0405, F.S., requires parental consent for the marriage of a minor unless an orphan over the age of 16, an expectant parent or previously married.

Section 877.04, F.S., requires the written notarized consent of the parent before a minor may be tattooed.

Section 985.2065, F.S. , indicates that non-authorized persons may not knowingly shelter an unmarried minor for more than 24 hours without the consent of the minor's parent or without notifying the law; and it also provides that persons may not knowingly provide aid to an unmarried minor who has run away from home without first contacting the minor's parents or notifying law enforcement.

**Attempts in other states to require parental consent or notification**

Since *In re T.W.* was decided, there have been a number of federal cases deciding similar issues. Most notably, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 120 L.Ed.2d 674 (1992), was decided in 1992 by the United States Supreme Court. In this case, the Supreme Court upheld Pennsylvania abortion regulations on informed consent requirements, parental consent, 24-hour waiting periods, and abortion reporting. *Casey* and other federal cases have indicated that parental consent and notification statutes meet all federal constitutional requirements as long as they make exceptions for emergencies and provide for an adequate judicial bypass of the consent requirement.

These decisions, however, do not firmly answer questions involving intrusions on a minor's right to privacy in Florida nor do they answer the question of whether or not a judicial bypass to a parental notification is constitutionally required. In making its decisions on a minor's right to an abortion, the Supreme Court has not dealt with the question of a state's express constitutional right to privacy. Recently, a case from Montana, one of the five states that has a state constitutional right to privacy, was heard by the United States Supreme Court, which upheld a statute requiring parent notification for abortion. *Lambert v. Wicklund*, 520 U.S. 292, 117 S.Ct. 1169 (1997). This case, however, only addressed federal constitutional issues and made no mention of the state's constitutional right of privacy.

The State of Alaska has a constitutional right to privacy and in *Mat-Su Coalition for Choice v. Valley Hospital*, 948 P.2d 963 (Alaska 1997) the court ruled that the refusal of a partially publically funded hospital to perform abortions violated the state's fundamental right to privacy. *American Academy of Pediatrics v. Lungren*, 912 P.2d 1148 (Calif. 1996) interprets California's consitutional right of privacy, found the privacy rights on unemancipated minors to be more restricted than those of adults and sustained a parental consent statute which included a broad judicial by-pass.

**Additional federal considerations**:

The question of whether or not a state's express constitutional right of privacy could have an effect on a minor's access to abortion has not been addressed by the United States Supreme Court.

The federal Court has also declined to make a decision on whether a parental notification statute must include some sort of bypass provision in order to be constitutional. See *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502 (1990). The Court ruled that constitutional parental consent statutes must contain a bypass provision that meets four criteria: 1) allows the minor to bypass the consent statute requirement if she established that she is mature enough and well enough informed to make the abortion decision independently; 2) allows the minor to bypass the consent requirement if she established that the abortion would be in her best interests; 3) ensures the minor's anonymity; and 4) provides for expeditious bypass procedures. *Bellotti v. Baird*, 443 U.S. 622 (1979). In deciding cases involving parental notice, the Court has never said that bypass provisions were required, but have ruled on whether or not the provisions meet the four criteria used in determining if consent bypass procedures are adequate. *See Akron II,* 497 U.S., at 508-510.

In both *Casey* and *Hodgson v. Minnesota,* 110 S.Ct. 2926 (1990), the Supreme Court has upheld statutes requiring waiting periods before the performance of an abortion. In *Hodgson,* the Court allowed a 48-hour waiting period between notification and the performance of the abortion to give the parents a realistic opportunity to discuss the decision with the daughter. In *Casey,* the Court found that a required 24-hour waiting period before a woman could receive an abortion was constitutional. In Florida, however, due to the constitutional right to privacy, waiting period requirements, like consent or notification requirements, would appear to violate a woman's fundamental right to abortion.

In any case, however, it can be inferred from both state and federal case law that to be considered constitutional, such a statute would require a clause allowing for judicial bypass of the notification requirement.

B. EFFECT OF PROPOSED CHANGES:

Any person performing or inducing the termination of a pregnancy of a minor will be required to give 48 hours notice to the parent or legal guardian of the minor prior to performing or inducing the termination of pregnancy.

Exceptions will be made for the notice requirement, and procedures for the judicial waiver of notice will be provided. The court will be required to issue an order authorizing the minor to consent to the termination of pregnancy, if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to make the decision or there is evidence of child abuse or neglect, or sexual abuse of the complainant by one or both of her parents, her guardian, or her custodian.

Filing fees will not be required for minors who petition for waiver, and minors will have the right to court-appointed counsel upon their request.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

   a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes, the state supreme court is requested to adopt rules to ensure that judicial proceeding to bypass the notice requirements are handled in an expeditious and confidential manner.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes, any person performing or prescribing a termination of pregnancy of a minor must give notice to the parent or legal guardian of the minor's intention to terminate her pregnancy.

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes, a new limitation will be placed on a minor's right to an abortion.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

When the minor chooses to seek waiver of the notice requirement through judicial proceedings, the court will determine whether the parent or legal guardian should be notified.

(2) Who makes the decisions?

If a judicial proceeding occurs, the court will make the decision as to whether the parent or guardian should be notified. Once the parent or guardian is notified of the minor's decision to terminate her pregnancy, it is assumed that the minor will make the decision regarding her pregnancy together with her parent or guardian.

(3) Are private alternatives permitted?

No.

(4) Are families required to participate in a program?

Because the person performing or prescribing the termination of pregnancy is required to inform the parent or guardian of a minor's intention to terminate her pregnancy, families will be required to participate if the parent or legal guardian can be notified or unless the minor receives a judicial waiver.

(5) Are families penalized for not participating in a program?

Florida is one of only five states to have such a specific guarantee

b. Does the bill directly affect the legal rights and obligations between family members?

Yes, a parent's right to play a role in his or her children's affairs will be strengthened, but a minor's access to termination of her pregnancy will be limited.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 390.011 and 390.0111, F.S.

E. SECTION-BY-SECTION ANALYSIS:

**Section 1.** Provides that this act may be cited as the "Parental Notice of Abortion Act."

**Section 2.** Amends s. 390.011, F.S., to define "actual notice," "child abuse and neglect," "constructive notice," "medical emergency," and "sexual abuse."

**Section 3.** Amends s. 390.0111, F.S., relating to termination of pregnancies.

Amends s. 390.0111(3), F.S., to provide for technical changes to clarify language.

Creates s. 390.0111(4)(a), F.S., to provide that a termination of a pregnancy of a minor may not be performed or induced unless the person performing or inducing the termination of pregnancy has given at least 48 hours actual notice to one parent or to the legal guardian of the pregnant minor. Such notice may be given by a referring physician if the person who performs the termination of pregnancy receives the written statement of the referring physician certifying that the referring physician has given notice. The person performing or inducing the abortion or his or her agent must give 48 hours constructive notice if actual notice is not possible after a reasonable effort.

Creates s. 390.0111(4)(b), F.S., to describe situations in which notice is not required. These situations include:

- A medical emergency when certain requirements are met;
- Notice is waived in writing by person who is entitled to notice;
- The minor is or has been married or has had the disability of nonage removed;
- The patient has a minor dependent child; and
- A judicial waiver of notice.

Creates s. 390.0111(4)(c), F.S., to provide for disciplinary action under s. 458.331, F.S., or s. 459.015, F.S., for violations of the notice requirement.

Creates s. 390.0111(5)(a), F.S., to allow a minor to petition for judicial waiver of the notice requirement and to provide for her right of court-appointed counsel. The minor may also be appointed a guardian ad litem.

Creates s. 390.0111(5)(b), F.S., to provide that court proceedings under this section must be given precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly, and to require that the court rule and issue written findings or fact and conclusion of law within 48 hours of the time the petition was filed or the petition will be deemed granted.

Creates s. 390.0111(5)(c), F.S., to provide that the court shall issue an order authorizing the minor to consent to a termination of pregnancy without the notification of a parent or guardian if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy. If the court does not make the finding specified in this section or paragraph (d), it must dismiss the petition.

Creates s. 390.0111(5)(d), F.S., to provide that the court shall issue an order authorizing the minor to consent to a termination of pregnancy without the notification of the parent or guardian if the court finds, by clear and convincing evidence, a pattern of physical, sexual, or emotional abuse of the complainant by one or both of her parents, her guardian, or her custodian, or that the notification of a parent or guardian is not in the best interest of the complainant. If the court does not make the finding specified in this section or paragraph (c), it must dismiss the petition.

Creates s. 390.0111(5)(e), F.S., to set procedures for the court for proceedings under this section.

Creates s. 390.0111(5)(f), F.S., to provide for expedited confidential appeals to minors who are denied a waiver of parental notification. Orders authorizing termination of pregnancy without notice are not subject to appeal.

Creates s. 390.0111(5)(g), F.S., to provide that no filing fees are required when a minor or incompetent person petitions for judicial waiver of the notice requirement. Such requirements and procedures are available to minors whether or not they are residents of this state.

Renumbers subsections (4) - (11) to (6) - (13) and provides for several technical amendments in these subsections to clarify language.

Creates s. 390.0111(14), F.S., to request the Florida Supreme Court to adopt rules to ensure that proceedings under this section will be handled expeditiously and in a manner that will satisfy the requirements of state and federal courts.

**Section 4.** Provides that any member of the Legislature of the State of Florida who sponsored or co-sponsored this act has the right to intervene in any legal action challenging the constitutionality of this act.

**Section 5.** Provides that if any provision of this act or application thereof to any person or circumstance is held invalid, the invalidity shall not effect the other provisions or applications of the act.

**Section 6.** Provides for an effective date of July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

   N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   See Fiscal Comments.

2. Direct Private Sector Benefits:

   See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

   N/A

D. FISCAL COMMENTS:

A minor who petitions for a waiver of the notice requirements will be appointed counsel upon her request and will not have to pay filing fees at either the trial or appellate level. Therefore, the state will be required to pay for all court expenses for petitions for a waiver of the notice requirement. There could be a significant fiscal impact on state courts resulting from the judicial waiver of notice proceedings for evidentiary hearings, expedited hearings, appointment of counsel, sealing records, preparation of records for appeal, and other related requirements. In addition, since the bill explicitly authorizes non-resident minors to use the state court system to petition judicial waiver of notice, the fiscal impact is even more unpredictable.

The act creates both a duty of notification and a corresponding liability for failure to perform that duty, including being subject to professional disciplinary proceedings. Although indeterminate, these duties could have an impact of increasing costs by creating additional cases for consideration by the Board of Medicine and the Division of Administrative Hearings.

Persons performing or prescribing the termination of pregnancy of unemancipated minors or incompetent individuals will be responsible for the expense involved in notifying the parent or legal guardian of the minor's or incompetent person's intention to terminate her pregnancy.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

HB 1485 is a public records companion bill to this bill. HB 1485 provides that when a minor petitions a circuit court for a waiver of the notice requirements pertaining to her termination of pregnancy, the court proceedings relating to that petition must ensure the anonymity of the minor, and the identity of the minor is confidential and exempt from the provisions of s. 119.07(1), F.S., and s 24(a), art. I of the State Constitution. In addition, such court proceedings are to be sealed, and the minor has the right to use a pseudonym or the minor's initials when filing her petition. The public records bill has been referred to the House Committees on Judiciary, Family Law and Children, Governmental Operations, and Governmental Rules and Regulations.

Several provisions in this bill are controversial or problematice and could be subject to the interpretation of the courts. The definition and use of the term "medical emergency" could be considered problematic. The bill's definition of medical emergency includes conditions that necessitate the immediate termination of pregnancy to avert death or conditions in which a delay in the termination of pregnancy would create a risk of substantial and irreversible impairment of a major bodily function. It is unclear exactly what constitutes a risk of substantial and irreversible impairment of a major bodily function, and it could be argued that this criteria for a medical emergency is too stringent.

Because they are controversial, it will be argued that both the notification requirements and the imposition of a 48 hour waiting period between the time the parent or guardian is notified and the time the minor may terminate her pregnancy violate a minor or incompetent person's state constitutional right to privacy. When the provisions in this bill are interpreted by the Florida Supreme Court, any infringement of the express privacy provision of the Florida Constitution will have to pass a compelling state interest standard.

It appears that two of the state interests the bill is designed to advance are the protection of the immature minor and preservation of the family unit. In the case of *In re T.W.,* the Florida Supreme Court found "that neither of these interests is sufficiently compelling under Florida law to override Florida's privacy amendment." *T.W.*, however, was a parental consent law which directly negated the right of pregnant minors to consent to their own health care as provided in s. 743.65, F.S. Parental notice as provided in this bill, however, does not block the minor's right to consent to health care, but imposes a pre-condition to the medical treatment. The courts, therefore, could easily distinguish this legislation and hold that the bill is a means of meeting important state interests which consitute a slight intrusion on the minor's constitutional rights, especially so in the cases of the youngest pregnant minors.

The provisions of the bill that allow for the court to determine by clear and convincing evidence that there is a pattern of physical, sexual, or emotional abuse of the complainant may also be problematic. Determining that the parent or guardian is guilty of a pattern of physical, sexual, or emotional abuse, without giving the parent or guardian a chance to refute the complaints, could be considered a violation of the parent or guardian's due process rights. These provisions could be better worded.

Finally, the bill provides that 48 hours constructive notice may be given by the individual performing or inducing the abortion or his or her agent if actual notice is not possible after a reasonable effort; however, the bill gives no indication as to what constitutes a reasonable effort. The bill provides that failure to make reasonable effort would subject the violator, if a physician, to professional disciplinary action.

*Judiciary Committee staff comments following the April 15, 1999 meeting of the Committee:*

Following the Judiciary Committee meeting on April 15, 1999, concerns were raised that by rejecting amendments to strike either the "partial-birth abortion" language or "the women's right to know" language currently contained in Chapter 390, F.S., the Committee intended to re-assert the validity of these provisions. Nothing on the face of the bill indicates such intent to staff. The enforcement of that language has been permanently enjoined by various courts and that judicial restraint would not be affected by this bill. The language is in the bill to effect the renumbering of paragraphs or subsections and adds nothing to the substance of the proposition. Grammatical improvements are included as a matter of course in the bill drafting process in the House. Moreover, the Florida Statutes are reenacted biennially. That action does not affect existing case law or precedent respecting the enforceability of particular statutory provisions. In the same way, re-enactment of a complete section or subsection of Florida Statutes in the process of substantively amending a particular part should not be construed to reassert the enforceability of unamended, provisions, or applications thereof, previously adjudicated to be unconstitutional. This analysis does not, however, reject the possibility that erroneous decisions can be revisited by the courts.

## VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

## VII. SIGNATURES:

COMMITTEE ON HEALTH CARE SERVICES:

| Prepared by: | Staff Director: |
|---|---|
| Amy K. Guinan | Phil E. Williams |

AS REVISED BY THE COMMITTEE ON JUDICIARY:

| Prepared by: | Staff Director: |
|---|---|
| Jo Ann Levin | Don Rubottom |