SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1598

SPONSOR: Senators Bronson, Cowin, and Brown-Waite

SUBJECT: Parental Notification of Abortion

DATE: March 26, 1999 REVISED: 4/6/99

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Liem	Wilson	HC	Fav/2 amendments
2.			JU	
3.			FP	
4.				
5.				

I. Summary:

Senate Bill 1598 is designated the "Parental Notice of Abortion Act." The Act requires a physician who refers a minor for termination of her pregnancy or who plans to perform such a procedure on a minor to first give 48 hours actual notice prior to the procedure to one parent or her legal guardian. If actual notice is not possible after reasonable effort has been made, 48 hours constructive notice must be given. Additionally, the bill provides for waiver of the notice requirement: (1) in instances of a medical emergency, as provided in the bill; (2) when notice is waived in writing by the person who is entitled to notice; (3) if the minor is or has been married or has had the disability of nonage removed under s. 743.015, F.S., or a similar law of other states; (4) if the patient has a minor child dependent on her; or (5) when a circuit court judicially waives notice based upon a petition filed by the minor seeking to terminate her pregnancy. The bill specifies the procedure for the judicial waiver of notice. The bill makes violations of the notice requirements subject to the disciplinary provisions of the allopathic and osteopathic medical practice acts.

This bill amends sections 390.011 and 390.0111, Florida Statutes, 1998 Supplement.

This bill creates three undesignated sections of law.

II. Present Situation:

Federal Law

The 1973 United States Supreme Court decision in *Roe v. Wade* was premised upon the right of privacy which the *Roe* court held to be a "fundamental right" encompassing a woman's decision whether or not to terminate her pregnancy. Where a fundamental right is involved, regulations limiting that right are subject to strict scrutiny. Governmental regulation of a fundamental right is justified only by a "compelling state interest" which must be narrowly drawn to articulate only that interest. As it relates to a state's regulation of termination of pregnancy, the Court found two

interests sufficiently compelling to justify governmental intrusion on a woman's fundamental right to be left alone regarding her decision to terminate her pregnancy: (1) protecting the health of the mother, and (2) protecting the viability of the fetus. The Court recognized that the health of the mother would only be a compelling concern after the first trimester, when abortion-related dangers outweigh the live-birth-related ones. Therefore, the Court held that during the first trimester, a state may not ban, or even closely regulate, abortions. It further held that second trimester abortions could be restricted only to protect the mother's safety.

The state's interest in the fetus is recognized, as it applies to a fetus, only during the last trimester of pregnancy, when the fetus has become viable. Consequently, states could restrict or prohibit abortions entirely subsequent to fetal viability "except when necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman. In *Doe v. Bolton*, the 1973 companion to *Roe*, the Court explained that the health of the mother represents a medical judgment that "may be exercised in light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient."

In *Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) , the U.S. Supreme Court partially retreated from that position. Abandoning the trimester analytical scheme, the Court upheld the basic right of a woman to choose an abortion before fetal viability. However, the standard against which the Court evaluated state regulatory provisions restricting that right shifted from one of "strict scrutiny" to the less rigorous "undue burden." Consequently, state efforts to promote a policy preference for encouraging childbirth over abortion is now permissible even if those measures do not further a health interest. Post-viability, the state may regulate, even proscribe, abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the pregnant woman." In *Casey*, the Court also upheld the constitutionality of a provision of the Pennsylvania law that requires one parent to give informed consent before a minor may obtain an abortion, or the consent of a judge if the minor cannot or does not wish to obtain the consent of a parent.

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. 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 parental notification for abortion. This case, however, only addressed federal constitutional issues and made no mention of the state's constitutional right of privacy. On the other hand, the state Supreme Courts of California and Alaska, two other states with an express constitutional right to privacy, have recently ruled that certain constraints on abortion procedures violated the state's fundamental right to privacy.

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 has ruled on whether or not the provisions meet the four criteria used in determining in *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 a statute 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 their 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, may face constitutional challenges.

State Law

Unlike the U.S. Constitution, the Constitution of the State of Florida contains an express provision guaranteeing a right of privacy, section 23 of Article I. This section was adopted in 1980. In *Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544 (1985), the Florida Supreme Court concluded that section 23 of Article I provided a strong right of privacy not found in the U.S. Constitution, which is interpreted to provide a right to privacy through the cumulative effects of a penumbra of federal constitutional provisions. In *Winfield*, the court also provided a standard of review, holding that:

> The right of privacy is 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 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.

In *In re T.W.*, 551 So.2d 1186 (1989), the Florida Supreme Court struck down a state statute requiring parental consent for a minor's termination of pregnancy as violative of Florida's constitutional right of privacy, saying "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy." 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 notification of an intent to terminate a minor's pregnancy faces a more challenging constitutional obstacle than under the privacy rights analysis under the U.S. Constitution and *Casey*.

During the 1997 legislative session, the "Woman's Right to Know Act" was enacted as chapter 97-151, Laws of Fla., amending ch. 390, F.S., the state law regulating termination of pregnancy. The Act requires physicians, prior to performing a termination of pregnancy procedure, to explain certain specified information to the woman who is to receive the procedure. Subsequent to enactment, the Circuit Court for the Fifteenth Judicial Circuit in Palm Beach County issued a temporary injunction that enjoined implementation of the Act. The District Court of Appeal of the Fourth District, during its January 1998 term, upheld the circuit court's injunction. The State, as

appellant challenging the injunction, has filed a motion for rehearing, which is pending before the district court.

As a result of the temporary injunction, changes made to ch. 390, F.S., have not been implemented. The Fourth District Court of Appeal upheld the temporary injunction on its finding that the 1997 changes to ch. 390, F.S., are unconstitutionally vague. The court based this finding on the shift in the applicable informed consent standard away from all other informed consent standards in state law. The court stated:

> By changing informed consent from what a reasonable physician would do under the circumstances, to what a reasonable patient would want to know, but without the traditional informed consent language 'under the circumstances,' arguably leaves the physicians with no standards to comport to. Is the so called 'reasonable patient' a fourteen year old rape victim who is pregnant, or a mature woman who could have a variety of reasons for seeking an abortion?

Consequently, the law that governs the termination of pregnancies in Florida remains ch. 390, F.S., as amended through 1996.

Chapter 743, F.S., provides for removal of disability of nonage of minors. Removal of a minor's nonage disability is generally referred to as "emancipation." Under ch. 743, F.S., if a minor, defined in s. 1.01(13), F.S., as a person under 18 years of age, is married, has been married, or subsequently becomes married, including a minor whose marriage is dissolved, widowed, or widowered, the disability of nonage is removed. Additionally, under this statute, a circuit court may remove the disability of nonage of a minor age 16 or older residing in the state upon a petition filed by the minor's natural or legal guardian or a guardian ad litem. Once emancipated, a minor may assume the management of his or her estate, contract and be contracted with, sue and be sued, and perform all acts that he or she could do if not a minor.

Section 743.065, F.S., authorizes an unwed pregnant minor, i.e., unemancipated minor (unless emancipated by petition, as described above), to consent to the performance of medical or surgical care or services relating to her pregnancy by a hospital or a clinic or by a state-licensed physician. Furthermore, under this provision of law, an unwed minor mother may consent to the performance of medical or surgical care or services for her child by a hospital, clinic, or a state-licensed physician. Such consents are declared valid and binding as if the minor had achieved majority--that is, had attained 18 years of age. This section is explicitly stated to not affect the law relating to termination of pregnancy as provided in ch. 390, F.S.

Other statutes address a minor's right to privacy in Florida. The Florida Supreme Court noted in *In re T.W.* that under s. 743.065, F.S., a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child--no matter how dire the possible consequences--except abortion. The court stated that it failed "to see the qualitative difference in terms of impact on the well-being of the minor between undergoing a highly dangerous medical procedure on oneself and undergoing a far less dangerous procedure to one's pregnancy. If any qualitative difference exists, it certainly is insufficient in terms of state interest." The court also noted that Florida's adoption act contains no requirement that a minor obtain parental consent prior to placing a child up for adoption. (*See* ch. 63, F.S.)

Veto of HB 3999 from 1998 Legislative Session

The 1998 Legislature enacted HB 3999, the Parental Notice of Abortion Act. The Senate companion measure was CS/SB 1814. The bill that passed was very similar to SB 1598. Governor Chiles vetoed HB 3999, stating the following as his reasons.

> While one may debate the public policy issues embraced by the legislation, the Florida Supreme Court has already spoken clearly as to the issue of reproductive rights in this context. The Supreme Court, which is the ultimate authority in interpreting the Florida Constitution, has determined that the explicit privacy right provided in the state constitution encompasses a woman's right to terminate her pregnancy, and that right applies to minors as well as to adults. The Supreme Court, in the 1989 case of In re T.W., A Minor, struck as unconstitutional a similar statute requiring a minor to obtain parental consent to an abortion.
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> It is highly significant that the 1998 Legislature also considered a joint resolution which would have placed before voters this fall a proposed amendment to the Florida Constitution to declare the right of parents to consent to medical treatment -- explicitly including abortion -- of their minor children. If the constitutional amendment were approved by voters, the Supreme Court ruling no longer would have applied. The joint resolution was defeated, however, on the floor of the Florida House of Representatives. Therefore, the constitutional provision regarding the right of privacy and the resulting Supreme Court ruling with respect to termination of pregnancy by minors remain intact.
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> In spite of the defeat of the legislative proposal for a constitutional amendment, the Legislature enacted HB 3999, which would place in the statutes the parental notification requirement. But because the Supreme Court has already spoken to the application of the constitution's privacy provision in the termination of pregnancy decisions of a minor, nothing would be gained by allowing this statutory provision to become law.
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> For this reason, I am withholding my approval of House Bill 3999, and do hereby veto the same.

III. Effect of Proposed Changes:

The bill designates the provisions of the bill as the “Parental Notice of Abortion Act.” The bill amends s. 390.011, F.S., 1998 Supplement, to provide definitions for the terms: “actual notice,” “child abuse and neglect,” “constructive notice,” “medical emergency,” and “sexual abuse.” It amends s. 390.0111, F.S., 1998 Supplement, to require actual or constructive notice of intent to terminate the pregnancy of a minor, provide for judicial waiver of the notification requirement, and require expedited appeal of the denial of a petition for a waiver of the bill’s notice requirements.

Actual or Constructive Notice of Intent to Terminate the Pregnancy of a Minor Required

A person performing or inducing the termination of a minor’s pregnancy is prohibited from doing so unless the person has given at least 48 hours actual notice (i.e., giving the notice directly, in person, or by telephone) of his or her intent to terminate the pregnancy to one parent or the legal

guardian of the pregnant minor. The notice may be given by a referring physician and the person who performs the termination of pregnancy must receive the written statement of the referring physician certifying that the referring physician has given notice. If actual notice is not possible after a reasonable effort has been made, the person or his or her agent must give 48 hours constructive notice (i.e., giving the notice by certified mail to the last known address of the parent or legal guardian).

Actual or constructive notice to terminate the pregnancy of a minor is not required when a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements. However, the attending physician must obtain at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures. If the attending physician is unable to obtain a corroborative medical opinion because a second physician is not available, he or she may proceed with the termination of the pregnancy, but must document reasons for the medical necessity in the patient's medical records. Also, a physician is not required to give actual or constructive notice of his or her intention to terminate the pregnancy of a minor when the person who is entitled to notice has, in writing, waived his or her right to notice; if the minor is or has been married, or has had the disability of nonage removed under s. 743.015, F.S., or a similar law of another state; because the patient has a minor child dependent on her; or the notice requirement is waived by a circuit court, as provided in the bill. Noncompliance with the notice requirements, as provided in the bill, makes a physician subject to disciplinary action under the allopathic or osteopathic medical practice act.

Judicial Waiver of the Notice Requirement

The bill authorizes a minor, whether or not a resident of Florida, to petition a circuit court for a waiver of the requirement for a physician to give actual or constructive notice of his or her intention to terminate the pregnancy of a minor at least 48 hours prior to performing or inducing the termination. The petition must include a statement that the complainant is pregnant and that notice has not been waived. The court may appoint a guardian *ad litem* who is required to maintain the confidentiality of the proceedings. Also, the court must advise the minor that she has a right to court-appointed counsel, and must provide her with counsel upon her request.

The courts are directed to give precedence to the proceedings relating to petitions for waiver of notice over other pending matters to the extent necessary to ensure that the court reaches a decision promptly. The courts must rule, and issue written findings of fact and conclusions of law, within 48 hours of the time that the petition was filed, unless an extension is requested by the minor who submitted the petition. If the court petitioned fails to rule within the 48-hour period allowed and an extension has not been requested, the petition is deemed to have been granted and the notice requirement is waived.

A circuit court may waive the notice requirement if it finds, using a clear and convincing evidence standard, that:

- The minor is sufficiently mature to decide whether to terminate her pregnancy;
- There is evidence of child abuse or neglect or sexual abuse of the minor by a parent, guardian, or custodian; or
- The notification of the parent or guardian is not in the best interest of the minor.

If the court makes any such findings, it must issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without notification of a parent or guardian. At the hearing on the petition, the court must receive evidence relating to the emotional development, maturity, intellect, and understanding of the minor. If the court does not make any such findings, it must dismiss the petition. The court must provide for a written transcript of all testimony and proceedings and issue written and specific factual findings and legal conclusions supporting its decision. The court must order that a confidential record of the evidence and the judge's findings and conclusions be maintained.

Expedited Appeal of a Petition for Waiver of Notice that is Denied and Court Fees

If the petition for waiver of notice is denied by the circuit court, an expedited confidential appeal must be available, as provided by rule of the state Supreme Court. However, an order authorizing waiver of notice is not subject to appeal. No filing fees may be assessed against a minor petitioning for judicial waiver of parental notice at either the trial or appellate levels. The notice requirements and procedures, as provided in the bill, are made available to minors whether or not they are residents of Florida. The state Supreme Court is requested to adopt rules to ensure that proceedings under s. 390.0111, F.S., are handled in an expeditious manner and in a manner which will satisfy the requirements of federal courts.

Additional Provisions

The bill authorizes any member of the Florida Legislature who sponsored or cosponsored this act to intervene in a legal action challenging the constitutionality if this act.

The bill provides for the severability of the provisions in the act or application of provisions in the act to any person or circumstance which can be given effect separately from a provision that has been invalidated.

The bill takes effect July 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

On page 9, lines 13 and 14, the court is required to order that a confidential record of the evidence and the judge's findings and conclusions be maintained. For such records to be exempt from the Public Records Act, a separate bill must be enacted that exempts the affected documents from the requirements of the Public Records Law. Senate Bill 1596 contains the appropriate and necessary language to exempt this information from the Public Records Law.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

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 may be considered by the courts as a violation of a minor's state constitutional right to privacy. If the provisions in this bill did become subject to interpretation of the court, any state interest would have to pass a compelling state interest standard due to the express privacy provision in the Florida Constitution. It appears that two of the state interests the bill is designed to protect 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."

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Though indeterminable, persons performing or prescribing the termination of pregnancy of unemancipated minors will be responsible for the expense involved in notifying the parent or legal guardian of the minor's intention to terminate her pregnancy. 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. This could have an impact of increased costs to the private sector.

C. Government Sector Impact:

An unemancipated 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 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. The numbers of both resident and non-resident minors who will use this mechanism is unknown.

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. Again, though indeterminate, this could have an impact of increased costs by creating additional cases for

consideration by the Board of Medicine or the Board of Osteopathic Medicine and the Division of Administrative Hearings.

VI. Technical Deficiencies:

On page 7, lines 8 through 10, it is unclear how anyone who is required to give actual notice could establish that "reasonable effort" has been directed toward that objective, as required, before constructive notice may be given. Failure to make reasonable effort would subject the violator, if a physician, to professional disciplinary action.

On page 8, lines 5 and 31, and on page 9, line 3, the word "complainant" is used when the more appropriate word, given the context, is "petitioner."

Page 9, lines 28 through 30, providing for non-resident minors to use the judicial waiver of notice procedure created in the bill, seems to raise jurisdictional issues relating to non-resident parents.

On Page 11, line 29, the bill refers to subsection (8) providing misdemeanor penalties. The correct reference should be to subsection (9).

Page 12, lines 24-27, requests the Florida Supreme Court to adopt rules relating to implementing the requirements of the bill which will satisfy the requirements of state and federal courts. In that the state Supreme Court has no jurisdiction over federal courts and federal courts are subject to case law that may, and more often than not do, impose judicial precedents, laws, regulations, and other imperatives different from those of state jurisprudence and law, such a request may be difficult to fulfill.

VII. Related Issues:

Current law under ch. 390, F.S., requires abortion referral or counseling agencies, before making a referral or aiding a person in obtaining an abortion, to furnish such person with a full and detailed explanation of abortion, including the effects of and alternatives to abortion. Subsection 390.025(2), F.S., further requires that if the person advised is a minor, a good faith effort shall be made by the referral or counseling agency to furnish such information to the parents or guardian of the minor. Failure of such agencies to comply with the requirements imposed in s. 390.025, F.S., subjects the violator to punishment for a first degree misdemeanor. This bill requires the person performing or inducing the termination of a minor's pregnancy, and, alternatively, authorizes the person who refers a minor to a person who will perform or induce the termination of the minor's pregnancy to give at least 48 hours actual notice to one parent or the legal guardian of the intent to terminate the minor's pregnancy. The person who performs the termination of pregnancy is required to receive the written statement of the referring physician certifying that the referring physician has given notice. If, after reasonable effort, actual notice has not been given, the person (presumably the person performing or inducing the termination of pregnancy) or his or her agent is required to give 48 hours constructive notice (notice sent by certified mail to the last known address of the minor's parent or legal guardian). Such a requirement does not appear inconsistent or to conflict with the notice requirement imposed on abortion referral or counseling agencies under existing law.

VIII. Amendments:

#1 by Health, Aging and Long-Term Care:
Replaces the word “complainant” with the word “petitioner.”

#2 by Health, Aging and Long-Term Care:
Corrects a reference to an incorrect subsection.