# 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: CS/SB 1598

SPONSOR: Committee on Judiciary and Senators Bronson, Cowin, and Brown-Waite

SUBJECT: Parental Notification of Abortion

DATE: April 15, 1999 REVISED: _____ _____ _____ _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Liem | Wilson | HC | Fav/2 Amendments |
| 2. | Matthews | Johnson | JU | Favorable/CS |
| 3. | | | FP | |
| 4. | | | | |
| 5. | | | | |

**I. Summary:**

Senate Bill 1598 is designated as 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 to one parent or her legal guardian prior to the procedure. 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 medical and osteopathic medical practice acts.

This bill amends ss. 390.011 and 390.0111, F.S. (Supp.1998). This bill also creates undesignated sections of law.

**II. Present Situation:**

## Federal Law

In 1973, the United States Supreme Court premised a woman's fundamental right to decide to terminate her pregnancy on the right of privacy. *See Roe v. Wade* The Court found that when a fundamental right is involved, regulations limiting that right are subject to strict scrutiny. The regulations can only be justified by a "compelling state interest" which must be narrowly drawn to articulate only that interest. As 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, during the first trimester, the Court held that a state may not ban, or even closely regulate, abortions. During the second trimester, abortions could be restricted only to protect the mother's safety.

During the last trimester of pregnancy, the state's interest in the fetus is recognized when the fetus has become viable. Consequently, the Court held that 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 1992, the Court retreated from that position by abandoning the trimester analytical scheme when it upheld the constitutionality of a Pennsylvania law requiring *parental consent or judicial consent*[1] (via bypass procedure) to a minor's abortion. *See Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The Court still upheld the basic right of a woman to choose an abortion before fetal viability, but shifted the standard of review of government regulations from one of "strict scrutiny" to the less rigorous "undue burden. Therefore, in the post-viability stage, 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." 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.

In order for *parental consent* statutes to be constitutional, the United States Supreme Court has ruled that bypass provisions must be included and meet four criteria: 1) allow 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) allow the minor to bypass the consent requirement if she established that the abortion would be in her best interests; 3) ensure the minor's anonymity; and 4) provide for expeditious bypass procedures. *See Bellotti v. Baird*, 443 U.S. 622 (1979).

In contrast, the Court has 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). Instead, the Court has ruled on whether the *notice* bypass provisions met the four criteria used in determining the adequacy of *consent* bypass procedures. *Id. at 508-510* The Court recently upheld the constitutionality of a *parental notification*[2] for abortion statute in Montana, which is one of only five states that has constitutional right to privacy, but decided the issue on federal constitutional issues without mentioning the state's constitutional right of privacy. To date, the Court has not addressed the

[1]Parental consent statutes generally prohibit a minor's abortion unless consent is obtained.

[2]Parental notification statutes do not necessarily prohibit a minor's abortion but require some form of notification to be made or a waiver of notification before an abortion may be performed.

question of what effect a state's express constitutional right of privacy could have on a challenge of a provision regulating a minor's access to abortion. 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 Court has upheld statutes imposing waiting periods before the performance of an abortion. *See Casey* (24-hour waiting period before a woman could receive an abortion), *supra* and *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990)(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). However, neither Pennsylvania or Minnesota have a state constitutional right to privacy.

**State Law**

Unlike the U.S. Constitution, the Florida Constitution contains an express right of privacy provision. *See* §23, art. I, Fla. Const. This amendment was adopted in 1980. The Florida Supreme Court has concluded that the constitutional provision provides a strong right of privacy not found in the U.S. Constitution, through the cumulative effects of a penumbra of federal constitutional provisions. *See Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544 (1985). The Florida Supreme Court 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 1989, the Florida Supreme Court also struck a statute requiring *parental consent* to a minor's abortion 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." *See In re T.W.*, 551 So.2d 1186 (1989)

In 1997, the Legislature enacted the "Woman's Right to Know Act." *See* chapter 97-151, L.O.F The Act amended chapter 390, F.S., relating to the termination of pregnancies. The Act expanded upon the consent requirement for physicians to obtain voluntary and informed written consents from pregnant women prior to the termination of pregnancies. It required that the physician provide certain information to a pregnant woman prior to the procedure. However, implementation of this Act is currently enjoined pending an appeal. *See State v. Presidential Women's Center*, No. 97-2577 (Fla. 4th DCA, February 18, 1998). The State filed a motion for rehearing challenging the ruling by the Fourth District Court of Appeal to uphold a circuit court's temporary injunction, issued on grounds that the Act was unconstitutionally vague. The Circuit Court based its 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?

Chapter 743, F.S., governs the removal of disability of nonage of minors (also referred to as "emancipation"). The disability of nonage of a minor, defined in s. 1.01(13), F.S., as a person under 18 years of age, may be removed if the minor is married, has been married, or subsequently becomes married, including a minor whose marriage is dissolved, or becomes widowed, or widowered. A circuit court may also 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.

Also under this chapter, an unwed pregnant minor, i.e., unemancipated minor, may 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. *See* § 743.065, F.S. 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.

In citing s. 743.065, F.S., in *In re T.W., supra*, the Florida Supreme Court noted that 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. It added 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 law does not require a minor's parent to consent prior to placing a child for adoption. *See* ch. 63, F.S

**Veto of HB 3999 from 1998 Legislative Session**

In 1998, the Legislature enacted the Parental Notice of Abortion Act. *See* HB 3999 and companion CS/SB 1814. The bill that passed was very similar to SB 1598. Then Governor Chiles vetoed HB 3999, and stated his reasons, in part, as follows:

> 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. . .[3]

[3]Reference was made to the Florida Supreme Court decision *In re T.W., A Minor, supra*, which struck down a statute requiring a parental consent to a minor's abortion.

**III. Effect of Proposed Changes:**

The bill creates the "Parental Notice of Abortion Act." The bill begins with a number of whereas clauses pertaining to the Legislature's intent and findings relating to the need for the "Parental Notice of Abortion Act." It requires notice prior to termination of pregnancy of a *minor*, provides for judicial waiver of the notification requirement, and requires expedited appeal of the denial of a petition for a waiver of the bill's notice requirements. Specifically, the bill does the following:

**Section 2** amends s. 390.011, F.S. (Supp.1998) to provide definitions for "actual notice," "child abuse and neglect," "constructive notice," "medical emergency," and "sexual abuse." Specifically, "actual notice" is defined as notice given in person or by telephone. "Constructive notice" is defined as notice given by certified mail to the last known address of the parent or legal guardian. "Medical emergency" is defined as

> a condition, that, on the basis of a physician's good-faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a bodily function.

The term "medical emergency" as used in chapter 390, F.S., was previously undefined. By providing a statutory definition, "medical emergency" applies, not only to a minor's termination of pregnancy but also to all terminations of pregnancy affected by chapter 390, F.S. It also may act to limit the scope of a doctor's judgment as to what constitutes a medical emergency for purposes of termination of pregnancies under chapter 390, F.S.

**Section 3** amends s. 390.0111, F.S. (Supp.1998), to provide new provisions relating to termination of pregnancy of a *minor*.

- ***Actual or Constructive Notice***

Unless at least 48 hours actual notice of a minor's intent to terminate a pregnancy is given to a parent or legal guardian, a physician is prohibited from performing or inducing the termination of a minor's pregnancy. The referring physician may be the one to give the actual notice. The physician performing the termination of pregnancy must receive written notice from the referring physician certifying that he or she provided actual notice. If actual notice is not possible after a reasonable effort has been made, the physician performing or inducing the termination of a minor's pregnancy or his or her agent must be the one to give 48 hours constructive notice. The term "reasonable effort" is not defined.

Notice is not required if:

- a medical emergency exists and at least one other physician corroborates the medical emergency or if another physician is unavailable or if there is insufficient time to get a second opinion due to a medical emergency, the first physician documents the reasons for the medical necessity in the patient's records;
- a written waiver has been executed by the person entitled to notice;

- a waiver exists by virtue of the minor's current or prior marital status, or removal of the disability of age under s. 743.015, F.S., or other similar statute of another state;
- the minor already has a minor child dependent on her; or
- a waiver is obtained through the judicial bypass procedure under subsection (5) of the bill.

A physician is subject to disciplinary action under the medical or osteopathic medical practice provisions of chapters 458 and 459, F.S., for violation of these notice requirements.

- ***Procedure for Judicial Waiver of Notice***

The bill also includes a procedure for judicial bypass of the notice requirement by authorizing a minor, whether a resident of Florida or not, to petition a circuit court for a waiver of the notice requirement. 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. Failure to rule within the 48-hour period, provided no extension has been requested will result in the grant of the petition and waiver of the notice requirements. 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 circuit court rules within the 48-hour, the 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 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. 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***

Only an order denying a petition for waiver of notice is appealable. An expedited confidential appeal must be available, as provided by rule of the state Supreme Court. No filing fees may be assessed against a minor petitioning for judicial waiver of parental notice at either the trial or

appellate levels. Residency is not a requirement for minors to avail themselves of the requirements and procedures under the Act.

The Supreme Court is also requested to adopt rules to ensure that proceedings under the judicial bypass provision are handled expeditiously and in a manner that will satisfy the requirements of state and federal courts.

**Section 4** of the bill authorizes members of the Florida Legislature who sponsored or cosponsored this act to intervene in a legal action challenging the constitutionality of this act. If the action is filed in state court, it is within the state court's jurisdictional purview to oversee rules of practice and procedure, including intervenor status. Under the Florida Rules of Civil Procedure, anyone claiming an interest in pending litigation may *assert* a right to intervene but that right is subordinated to the propriety of the main proceeding, unless otherwise ordered by the court. *See* Fla. R. Civ. P. 1.230 An intervener becomes a party to an action, and may have a permissive right, or an absolute right to intervene, including a right to litigate on the merits of the claim or defense.[4]

**Section 5** of the bill provides for the severability clause to give effect to other provisions or applications of the act in the event any provision or application is held invalid.

The bill takes effect July 1, 1999.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The court is required to order that a confidential record of the evidence and the judge's findings and conclusions be maintained. *See* p. 9, lines 13-14. The Florida Constitution and the Public Records lawprovide a constitutional and statutory right of public access to public records. *See* art. I, §24, Fla. Const. and § 119.07, F.S. The legislature may provide by general law for exemption of records. *See* art. I, §24(c), F.S.For such records to be exempted, however, 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.

[4]As a party to an action, all the rights and liabilities attendant with party status may inure, including but not limited to, an award or sanction of attorney fees and costs.

D. Other Constitutional Issues:

- The bill may raise some constitutional issues as to whether the 48-hour *parental notification*-and-waiting period can satisfy the "compelling state interest" as reviewed under Florida's express constitutional right of privacy provision. Based on the stated legislative findings and intent, it appears that two of the state interests are designed to protect the immature minor and to preserve the family unit. In ruling that a *parental consent* statute was unconstitutional in 1989, the Florida Supreme Court stated that "neither of these interests is sufficiently compelling under Florida law to override Florida's privacy amendment." *See In re T.W.*, 551 So.2d 1186 (1989)

- This bill may raise concern regarding legislative encroachment upon judicial authority in violation of the state constitutional separation of powers provision. *See* art. II, s. 3, Fla. Const. Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has sole and preemptive constitutional authority to promulgate court rules of practice and procedure. *See* §2(a), art. V, Fla. Const. However, the Legislature can repeal the court rules by a 2/3 vote. *See* art. V, s.2(a), Fla. Const. The Legislature cannot enact law that amends or supersedes existing court rules, it can only repeal them. *See Market v. Johnston*, 367 So.2d 1003 (Fla. 1978).

  The issue of substantive versus practice and procedure has been decided on a case-by-case basis. Generally substantive laws create, define and regulate rights. Court rules of practice and procedure prescribe the method or process by which a party seeks to enforce or obtain redress. *See Haven Federal Savings & Loan Assoc.*, 579 So.2d 730 (Fla. 1991). Based on a review of current law, the courts tend to find certain provisions unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or intrude in areas of practice and procedure within the province of the court.

- The bill also raises the issue of court costs and funding as relate to the recently amended Article V of the Florida Constitution. The amendment shifted the major costs of Florida's judicial system from the counties to the state. *See* §14, art. V, Fla. Const. It sets out certain costs to be borne solely by the state, certain costs to be borne fully by the counties, and other costs to be paid from fees. However, wherever the state or federal law prohibits the imposition of such fees for funding a court-related function, the state is responsible for providing supplemental funding. *Id.* Specific judicial and court operational activities and current funding resources have not yet been fully identified. In light of the impending determination of Article V costs, it is not exactly clear whether and how the costs of filing fees, court-appointed guardian ad litem, legal representation of pregnant minors, court transcripts, and expert witness fees would fall within this consideration.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Although indeterminate, the bill places the burden of notification and attendant disciplinary liability for failure to perform that duty on the physician performing or prescribing abortions of unemancipated minors. This may reduce the number of physicians performing abortions on minor due to the increased costs associated with notification, and the risk of disciplinary actions or loss of licensure.

This bill may deter the number of abortions performed or the number of abortions performed without parental consent, particularly if a minor cannot meet the narrowly tailored "medical emergency" standard, is unable to obtain timely documentation of her emancipation, or is unfamiliar with the the availability of the judicial bypass procedure.

It is also indeterminate how many resident or non-resident minors may avail themselves of the judicial bypass provisions under the bill.

C. Government Sector Impact:

Under the bill's judicial bypass provision, there could be a fiscal impact on state courts for costs arising out of waiver of filing fees, court-appointed guardian ad litem, court-appointed counsel, mandated court transcripts, sealing records, evidentiary hearings, expedited hearings, preparation of records for appeal, and other related requirements such as expert witnesses, if needed, to determine the 'sufficient maturity' of a minor. It is unknown how many resident and non-resident minors will use this mechanism.

This bill may have a fiscal impact on the Board of Medicine, the Board of Osteopathic Medicine and the Division of Administrative Hearings arising from any professional disciplinary proceedings related to the failure of a physician to perform the duty to notify.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

- On page 7, lines 8 through 10, it is unclear how a physician who is required to give actual notice could establish that "reasonable effort" had been made toward giving actual notice before giving constructive notice. This could be problematic for a physician who is subject to disciplinary action for failure to make "reasonable effort" under the bill and may even be void for vagueness.

- On page 12, lines 24-27, the bill requests the Florida Supreme Court to adopt rules relating to the expeditious handling of proceedings under s. 390.0111, F.S., in accordance with state and federal court requirements (presumably practice and procedure). To the extent that the Court has no jurisdiction over federal courts or vice versa as to matters of practice and procedure, the Court may choose to adopt rules in accordance with federal court practice and procedure requirements.

- The bill republishes provisions relating to informed consent and partial-birth abortion that have been declared unconstitutional.

**VIII. Amendments:**

None.