SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL:	CS/SB 1908
SPONSOR:	Judiciary Committee, Senator Dockery and others
SUBJECT:	Parental Notice of Abortion Act
DATE:	April 8, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HE	**Fav/4 amendments**
2.	Brown	Maclure	JU	**Fav/CS**
3.				
4.				
5.				
6.				

I. Summary:

This committee substitute provides for implementation of s. 22, Art. X, State Constitution, which authorizes the Legislature to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The committee substitute:

- Prohibits the performing or inducement of a termination of pregnancy upon a minor without 48 hours of notice to one parent or the legal guardian of the pregnant minor;
- Provides for disciplinary action against a physician for violation of the notice requirement;
- Mandates notice requirements, including exceptions to the requirement for notice;
- Provides a procedure for judicial waiver of notice;
- Provides for notice of right to counsel;
- Provides for issuance of a court order authorizing consent to a termination of pregnancy without notification;
- Authorizes a minor to file a petition using a pseudonym and requires the court to keep the petition and related documents under seal;
- Requires expedited and confidential appeal;
- Clarifies that the burden of proof is "clear and convincing" in determining whether a minor is sufficiently mature or whether there is evidence of child abuse or sexual abuse;
- Provides for waiver of filing fees and court costs;
- Provides that minors and counties are not required to pay for court-appointed counsel;
- Requests the Supreme Court to adopt rules and forms for petitions, including provisions addressing confidentiality; and
- Requires the Supreme Court to report annually to the Governor and the Legislature on the number of petitions filed, and the timing and manner of disposal of the petitions.

This committee substitute repeals section 390.01115, Florida Statutes, and creates section 390.01114, Florida Statutes.

II. Present Situation:

Case Law on Abortion Regulations

In 1973, the landmark case of *Roe v. Wade* established that restrictions on a woman's access to secure an abortion are subject to a strict scrutiny standard of review. In *Roe*, the Court determined that a woman's right to have an abortion is part of the fundamental right to privacy guaranteed under the Due Process clause of the Fourteenth Amendment of the federal constitution, justifying the highest level of review.[1]

In 1979, the Court declined to extend an adult's fundamental right of privacy to minors in the case of *Bellotti v. Baird*.[2] Although children are provided identical constitutional protections in certain areas of law to that of adults, the Court reasoned, differential treatment is justified when necessary to protect the unique vulnerability of children, in light of their incapacity to make critical decisions at the same maturity level as adults.[3] The Court additionally acknowledged the importance of judicial deference to the parental role.[4]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court relaxed the standard of review in abortion cases involving adult women from strict scrutiny to unduly burdensome, while still recognizing that the right to an abortion emanates from the constitutional penumbra of privacy rights.[5] In *Planned Parenthood*, the Court determined that prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference.[6]

The unduly burdensome standard, generally considered to be a hybrid between strict scrutiny and intermediate level scrutiny, shifted the Court's focus to whether a restriction creates a substantial obstacle to access. This is the prevailing standard today applied in cases in which abortion access is statutorily restricted.

However, the undue burden standard was held not to apply in Florida. The 1999 Legislature passed a parental notification law, the Parental Notice of Abortion Act, requiring a physician to give at least 48 hours of actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor. Although a judicial waiver procedure was included, the act was never enforced.[7] In 2003, the Florida Supreme Court[8] ruled this legislation unconstitutional on the grounds that it violated a minor's right to privacy, as expressly protected

[1] 410 U.S. 113, 114, 152 (1973).
[2] 443 U.S. 622 (1979).
[3] *Id.* at 623.
[4] *Id.*
[5] 505 U.S. 833, 834 (1992).
[6] *Id.* at 837.
[7] *See* s. 390.01115, F.S.
[8] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So.2d 612, 619 (Fla. 2003)

under Article I, s. 23 of the State Constitution.[9] Citing the principle holding of *In re T.W.*,[10] the court reiterated that, as the privacy right is a fundamental right in Florida, any restrictions on privacy warrant a strict scrutiny review, rather than that of an undue burden. Here, the court held that the state failed to show a compelling state interest.[11]

Parental Notification Laws in Other States

At least 16 states other than Florida have enacted parental notification laws which require that a pregnant minor's parent be notified before the pregnant minor may undergo a termination of her pregnancy. In five other states, parental notice laws have been found unconstitutional.[12]

Courts have generally upheld parental notification laws where they include:

- A health exception and a death exception;
- Language providing for confidentiality and expediency in judicial bypass proceedings, both at the trial and appellate levels; and
- A sufficient judicial bypass procedure.

Prior to a court's examination of whether a particular regulation meets the undue burden test, the state must show that the statute contains a sufficient health and death exception.[13] A health exception is considered to be as requisite for minors as it is for adult women.[14] Additionally, critical to the court's analysis is whether an adequate judicial bypass procedure is in place. The *Bellotti* court established required criteria for an adequate judicial bypass to include:

- Permitting a bypass where the minor demonstrates that she is sufficiently mature and well-informed to make the abortion decision independent of her parents;
- Permitting a bypass where the minor establishes that the abortion would be in her best interests;
- Providing for an anonymous hearing; and
- Requiring that a waiver hearing be expedited.[15]

If so, the judicial bypass generally passes constitutional muster, as demonstrated by the Court's holdings in challenges to state abortion restrictions on minors in Pennsylvania, Missouri, Ohio, and Montana.[16]

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[9] The constitutional right of privacy provision reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's 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."
[10] 551 So.2d 1186, 1192 (Fla. 1989).
[11] *North Florida Women's Health and Counseling Services, supra* note 8, at 642.
[12] These are: Colorado, Illinois, Montana (judicial bypass provisions were upheld but other portions found unconstitutional), New Hampshire, and New Jersey.
[13] *Stenberg v. Carhart*, 530 U.S. 914 (2000).
[14] *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004).
[15] *Bellotti*, *supra* note 2, at 633, 634.
[16] *See, e.g., Planned Parenthood*, *supra* note 5 (PA.); *Planned Parenthood Association of Kansas City, MO, Inc. v. Ashcroft*, 462 U.S. 476 (1983) (MO); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (OH); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (MN).[16]

Constitutional Amendment 1 (2004)

Under Article XI, s. 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The 2004 Legislature passed HJR 1 proposing an amendment to be placed on the ballot for the creation of s. 22 in Article X of the State Constitution, to create an exception to the right of privacy for a minor who seeks an abortion.

> Section 22. Parental notice of termination of a minor's pregnancy.--
> The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

This amendment was approved by 4.6 million voters in the 2004 General Election.

Termination of Pregnancy

Section 390.0111, F.S., prohibits the termination of a pregnancy at any time by anyone other than a physician licensed under ch. 458, F.S., or ch. 459, F.S. Under s. 797.03, F.S., it is unlawful for any person to perform or assist in performing an abortion, except in an emergency care situation, other than in a licensed abortion clinic, licensed hospital, or physician's office.

According to the Office of Vital Statistics in the Department of Health, 89,995 pregnancies were terminated in Florida in 2003. The number of minors who had pregnancies terminated is unknown.

Child Abuse/Domestic Violence

Chapter 39, F.S., provides for judicial proceedings relating to children. Section 39.0015, F.S., defines the term "child abuse" and s. 39.01, F.S., defines "sexual abuse of a child."

III. Effect of Proposed Changes:

This committee substitute repeals s. 390.01115, F.S., and creates s. 390.01114, F.S., as the Parental Notice of Abortion Act.

This committee substitute provides definitions, as follows:

- Actual notice: notice given directly, in person, or by telephone;
- Constructive notice: notice given by certified mail to the last known address of the parent or legal guardian, with delivery deemed to have occurred 48 hours after the certified notice is mailed;

- Child abuse: neglect, mental injury, abandonment by a parent, legal guardian, or custodian, or any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions;
- Medical emergency: a condition that, based on the physician's good faith clinical judgment, requires the immediate termination of pregnancy to avoid death, or for which a delay in termination of pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function;
- Sexual abuse: sexual acts involving a minor, up to and including penetration; and
- Minor: a person under the age of 18 years.

A termination of pregnancy may not be performed or induced upon a minor unless the physician 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 of his or her intention to perform or induce the termination of pregnancy. The notice may be given by a referring physician. The physician 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 physician or the referring physician must give 48 hours' constructive notice. The notice is not required if:

- Based on the physician's good faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements. If a medical emergency exists, the physician may proceed but must document reasons for the medical necessity in the patient's medical records;
- Notice is waived in writing by the person who is entitled to notice;
- Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015, F.S., or a similar statute of another state;
- Notice is waived by the patient because the patient has a minor child dependent on her; or
- Notice is waived under the judicial waiver process established in the committee substitute.

A physician's failure to provide notice to a parent or guardian as required constitutes grounds for disciplinary action under s. 458.331, F.S., or s. 459.015, F.S.

This committee substitute provides for a judicial waiver procedure. A minor may file a petition, using a pseudonym, in any circuit court for a waiver of notice and participate in waiver proceedings. The court is required to maintain the petition and supporting documentation under seal. The petition must include a statement that the petitioner is pregnant and notice has not been waived. The circuit court must advise the minor that she has a right to court-appointed counsel and must provide her with counsel upon her request at no charge to the minor.

Court proceedings must be given precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly. The court must rule, and issue written findings of fact and conclusions of law, within 48 hours after the petition is filed, except that the 48-hour limitation may be extended at the request of the minor. If the court fails to rule within

the 48-hour period and an extension has not been requested, the petition is granted, and the notice requirement is waived.

If the court finds, based on clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court must issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. If the court does not find that the minor is sufficiently mature to decide, that there is evidence of child abuse, or that there is evidence of sexual abuse, it must dismiss the petition.

If the court finds, based on clear and convincing evidence, that there is evidence of child abuse or sexual abuse of the petitioner by one or both of her parents or her guardian, or that the notification of a parent or guardian is not in the best interest of the petitioner, the court must issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. If the court finds evidence of child abuse or sexual abuse by any person, the court must report its finding to the appropriate agency.

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 and must order that a confidential record of the evidence and the judge's findings and conclusions be maintained. At the hearing, the court must hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, and all other relevant evidence.

An expedited confidential appeal must be available, as the Supreme Court provides by rule, to any minor to whom the circuit court denies a waiver of notice. An order authorizing a termination of pregnancy without notice is not subject to appeal.

No filing fees or court costs will be required of any pregnant minor who petitions a court for a waiver of parental notification at either the trial or the appellate level. No county will be obligated to pay the salaries, costs, or expenses of any counsel appointed by the court.

This committee substitute requests the Supreme Court to adopt rules and forms for petitions to ensure that proceedings are handled expeditiously and confidentially, and in a manner consistent with requirements of state and federal courts.

The Supreme Court, through its Office of the State Courts Administrator, is required to report by February 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of waiver petitions filed for the preceding year, and the timing and manner of disposal of such petitions.

This committee substitute takes effect July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this committee substitute have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this committee substitute may have an impact on public records and open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a) of the State Constitution provides that:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government….

The Public Records Law[17] also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term "public records" to include:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used "to perpetuate, communicate, or formalize knowledge."[18] Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.[19]

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[17] Chapter 119, F.S.
[18] *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[19] *See Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

Under Article I, s. 24(c) of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

This committee substitute mentions confidentiality as follows:

- The court shall order that a confidential record of the evidence and the judge's findings and conclusions be maintained.
- An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor to whom the circuit court denies a waiver of notice.
- The petitioner is authorized to file a petition using a pseudonym, and the petition and all supporting documentation must be maintained under seal.
- The Supreme Court is requested to adopt rules to ensure that the hearings protect the minor's confidentiality and the confidentiality of the proceedings.

This committee substitute may need to be accompanied by a public records exemption bill, to the extent any of the provisions have the effect of creating a public records exemption.

C. Trust Funds Restrictions:

The provisions of this committee substitute have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Physicians who perform abortions will have to give 48 hours notice to the parent or legal guardian of a minor before terminating the pregnancy of the minor.

C. Government Sector Impact:

The state would incur the expense of judicial review, including the potential cost of court-appointed counsel for a minor who petitioned the court for judicial bypass of the notification requirements.

D. Other Constitutional Issues:

Constitutional Right of Privacy

Legislation which restricts abortions for minors will generally be upheld if it meets the judicial bypass criteria set out in *Bellotti* and contains adequate health and death exceptions. This committee substitute contains language providing:

- Notice is not required where a documented medical emergency exists;
- A judicial waiver procedure is provided which authorizes waiver when the minor is sufficiently mature or notice is not in her best interest;
- Expedited proceedings and findings are required; and
- Confidentiality provisions are included.

This legislation will likely pass constitutional muster based on a right of privacy challenge.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.