HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1449 Parental Notice of Abortion
SPONSOR(S): Stargel and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2446

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Criminal & Civil Justice Policy Council		De La Paz	Havlicak
2)	Policy Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

In 2003, the Florida Supreme Court invalidated the Florida Parental Notice of Abortion Act enacted in 1999 on the grounds that it violated the express right to privacy provision of the Florida Constitution. In 2004, the voters approved an amendment to the Florida Constitution to authorize the Legislature to create a parental notification statute notwithstanding the privacy provision in the state constitution. Section 390.01114, F.S., is the current statute enacted in 2005 pursuant to that constitutional authority.

According to information collected by the Office of State Courts Administrator pursuant to reporting requirements of the 2005 statute, minors filing petitions to waive the parental notification requirements of the statute are being granted on average about 95% of the time.

HB 1449 makes several revisions to the parental notification law including:

- Adding a requirement that constructive notice of a minor's abortion must be mailed to the parent or legal guardian via first class mail in addition to certified mail.
- Requiring that actual notice provided by telephone be followed up with written confirmation.
- Requiring that when abortions are performed due to a medical emergency that the physician make reasonable attempts whenever possible, and without endangering the life of the minor, to contact the parent or legal guardian.
- Requiring follow up notification to the parent or legal guardian after an abortion is performed due to a medical emergency.
- Requiring written waivers of persons entitled to notice to be notarized and dated not more than 30 days prior to the abortion.
- Requiring petitions for judicial waiver to be filed in the circuit court where the minor resides.
- Requiring courts to rule on a minor's petition within 3 business days and to provide for a subsequent hearing within 48 hours if the petition is not ruled on in 3 business days.
- Removing the provision finding that failure of a trial court to rule is considered a granting of the petition and requiring a ruling in each case.
- Providing factors for the court to consider to determining a minor's maturity to decide whether to have an abortion without parental involvement.
- Providing that various financial considerations are not to be included in determining what is in a minor's best interest.

This bill does not appear to have a fiscal impact.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Federal standard

The United States Supreme Court (Supreme Court) has held that parents may not exercise "an absolute, and possibly arbitrary, veto" over a minor's decision to terminate her pregnancy.[1] The Supreme Court, however, has consistently recognized the important role parents have in counseling their minor children considering abortion. In review of a parental consent statute the Supreme Court said:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.[2]

The Supreme Court's jurisprudence on parental notification statutes has left questions concerning the minimum essential components of such statutes in order to pass constitutional muster. The uncertainty stems from the inclusion or "bootstrapping" of constitutional requirements of parental consent statutes into parental notification statutes.

In order to prevent another person from having an absolute veto power over a minor's abortion decision, a bypass procedure was developed for states electing to require parental consent for minors to have abortions.[3] In Bellotti v. Baird, the Supreme Court struck down a statute requiring a minor to obtain the consent of both parents before having an abortion, subject to a judicial bypass provision, because the statute's judicial bypass provision was too restrictive.[4] The Supreme Court explained that

[1] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976).
[2] Bellotti v. Baird, 443 U.S. 622, 640-641 (1979) (Quoting Justice Stewart concurring in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 at 91(1976)).
[3] See Akron, *supra* at 510-511.
[4] Bellotti v. Baird, 443 U.S. 622 (1979).

in order to be constitutional, a parental consent statute must contain a bypass provision that does the following:

1. Allows the minor to bypass the consent requirement if she establishes 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 establishes that the *abortion* would be in her best interests;
3. Ensures the minor's anonymity; and
4. Provides for expeditious bypass procedures.[5]

Since the Bellotti opinion, the Supreme Court has reviewed parental notification statutes on four occasions.[6] In its review of parental notification statutes the Supreme Court has specifically declined to decide whether the judicial bypass procedures of parental consent statutes must be present in parental notification statutes.[7] Instead the Supreme Court has upheld such statutes reasoning that a parental notification statute that includes a judicial bypass provision sufficient to satisfy a parental *consent* statute, must necessarily be sufficient for a parental *notification* statute since mere notification does not afford anyone a veto power over a minor's abortion decision.[8]

Florida's Background on Parental Notice Statutes

In 1999, the Legislature passed the "Parental Notice of Abortion Act."[9] The act required a physician performing or inducing an abortion on a minor to provide the minor's parent or legal guardian at least 48 hours notice.[10] The act provided for limited exceptions the most substantial of which were in the case of a medical emergency, and when the notice requirement was waived by a judge.[11] The act was enjoined before it was ever enforced and was subsequently held unconstitutional by the Florida Supreme Court in North Florida Women's Health and Counseling Services v. State in July of 2003.[12] The Florida Supreme Court relied exclusively on the express right to privacy provision found in the Florida Constitution to invalidate the act.[13]

In 2004, the Legislature passed HJR 1 to amend the Florida Constitution to authorize the Legislature to create a parental notification statute notwithstanding the express provision in the state constitution regarding the right to privacy. The voters approved the amendment on November 2, 2004.[14]

The amendment is found at Article X, Section 22 and provides:

> 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.

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[5] Id. at 643-44, (plurality opinion).

[6] H.L. v. Matheson, 450 U.S. 398, 407 (1981); Lambert v. Wicklund, 520 U.S. 292 (1997); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990); and Hodgson v. Minnesota, 497 U.S. 417 (1990)

[7] Akron, *supra* at 510; Wicklund, *supra* at 295.

[8] Akron, *supra* at 510-511; Wicklund *supra* at 295.

[9] Ch. 99-322, Laws of Florida, later codified as s. 390.01115, F.S. (1999).

[10] S. 390.01115(3)(a), F.S. (1999).

[11] S. 390.01115(3)(b), F.S. (1999).

[12] North Florida Women's Health and Counseling Services v. State, 866 So.2d 612 (Fla. 2003).

[13] Id. at 640.

[14] According to the Department of State website, http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/2004&DATAMODE=, 4,639,635 (64.7%) voted in favor of the amendment and 2,534,910 (35.3%) voted against the amendment.

In 2005, the Legislature passed a revised version of its parental notification statute which is currently codified at s. 390.01114, F.S.[15] Several provisions of the 2005 act were challenged in the federal district court but were upheld.[16]

Current Law and the Effect of HB 1449

The Notification Requirement

The current statute requires a physician to notify the parent or legal guardian of a minor at least 48 hours before performing or inducing an abortion on that minor.[17] The physician must provide "actual notice"[18] unless "actual notice is not possible after a reasonable effort has been made," in which case "constructive notice"[19] must be given. "Actual notice" is given directly, in person or by telephone, to a parent or legal guardian of the minor. "Constructive notice" is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian.

Under HB 1449, constructive notice must be given by both first class mail and certified mail. In addition, when actual notice is provided by telephone, it must be followed up with written confirmation by the physician and mailed to the last known address of the parent or legal guardian in the same manner as constructive notice.

Exceptions to the Notification Requirement

Under the current statute, notice is not required if (1) in 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 requirement; (2) the parent or guardian waives notice in writing; (3) the minor is or has been married or has had the disability of nonage removed; (4) the minor has a minor dependent child; or (5) the minor has successfully petitioned a circuit court for a waiver of the notice requirement.[20]

The Medical Emergency Exception

The current law and the bill utilize the same definition of medical emergency and provides the this exception under the same circumstances.[21] Under the bill, however, whenever a medical emergency exists, the physician "should make reasonable attempts, whenever possible without endangering the life of the minor, to contact the parent or legal guardian."

Like current law, HB 1449 allows a physician to proceed with an abortion in medical emergencies and requires that the physician document the reasons for the medical necessity in the minor's medical records. HB 1449, however, adds a requirement that the physician provide notice of the abortion directly in person or by telephone to the parent or legal guardian of the minor. The notice must include the details of the medical emergency and any additional risks to the minor. If such direct notice has not been provided to the parent or legal guardian within 24

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15 Ch. 2005-52, Laws of Florida.

16 Womancare of Orlando v. Agwunobi, 448 F.Supp.2d 1309 (N.D. Florida 2006).

17 S. 390.01114(3)(a), F.S.

18 S. 390.01114(2)(a), F.S.

19 For purposes of "constructive notice," delivery is deemed to have occurred after 72 hours have passed. S. 390.01114(2)(c), F.S.

20 S. 390.01114 (3)(b), F.S.

21 "Medical Emergency" means a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of the 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 major bodily function. S. 390.01114(2)(d), F.S.

hours after the abortion, the physician must provide notice in writing and delivered in the same manner required for constructive notice.

Written Waiver of Persons Entitled to Notice

Current law provides an exception from the notice requirements of section 390.01114(3), F.S., if "[n]otice is waived in writing by the person who is entitled to notice." The section contains no verification requirement to guarantee the authenticity of such written waivers, and so it is possible that minors could provide the physician with forged parental waivers and circumvent the entire notification requirement with a single unverified handwritten note.

HB 1449 requires such written waivers to be notarized and dated no more than 30 days before the abortion. Written waivers must contain a specific waiver of the parent's or legal guardian's right to notice of the minor's abortion.

Forum

Current law allows a minor to petition for a judicial waiver in any circuit court within the entire jurisdiction of the District Court of Appeal having jurisdiction over the judicial circuit within which the minor resides. There are five appellate districts in the state with each having jurisdiction over several of the twenty judicial circuits statewide. Under the current law, a minor has a wide selection of judicial circuits and circuit judges to choose from when deciding where to file her petition. Under the current law, nothing precludes a minor from intentionally avoiding a particular judicial circuit entirely.

HB 1449 requires petitions to be filed in the circuit court of the jurisdiction where the minor resides.

Expeditious Proceedings

Current law requires the court to issue its ruling within 48 hours of the filing of the petition or the petition is granted by default.

HB 1449 allows the court 3 business day to issue its ruling. The bill also eliminates the default granting of a motion due to the court's failure to rule. Under the bill, if the court does not rule within 3 business days the minor may immediately petition the chief judge of the circuit who must ensure that a hearing is held within 48 hours of receipt of the minor's petition to the chief judge and that an order is entered within 24 hours of the hearing.

Appeals

Section 390.01114(4)(f), F.S., provides for a right for a minor to an expedited appeal of a denial of a petition for a judicial waiver. Due to the ex parte nature of these proceedings, orders granting a waiver are not subject to appeal.

HB 1449 adds a new provision to s. 390.01114(4)(b), F.S., restating that a minor has a right to appeal a denial of a petition for a judicial waiver and adding a requirement that the appellate court must rule within 7 days after receipt of the appeal. The bill also provides, however, that a ruling may be remanded to the circuit court with instructions for the lower court to rule within 3 business days of the remand. The bill specifically requires that reversing a ruling of the lower court must be based on an abuse of discretion standard of appellate review and not based on the weight of the evidence presented to the trial court. In this sense, the bill requires an appellate court to defer to the factual and evidentiary evaluation of the trial judge in denying a petition. Under an abuse of discretion standard, a reversal would not be appropriate where reasonable people could differ as to the propriety of the decision of the trial court to deny a

petition.[22] According to the bill, the express deference to a trial court's evidentiary evaluation is due to the nonadversarial nature of the proceeding.

Judicial Waiver

The current statute contains a Bellotti type bypass provision and allows the court to grant a waiver of its notice requirements under any of the following circumstances:

(1) The court finds by clear and convincing evidence, that the minor is "sufficiently mature" to decide whether to terminate her pregnancy.[23]
(2) The court finds by a preponderance of the evidence, that there "is evidence of child abuse or sexual abuse of the petitioner by one or both of her parents or her guardian."[24]
(3) The court finds by a preponderance of the evidence, that "the notification of a parent or guardian is not in the best interest of the petitioner."[25]

The operation of the waiver provision has severely limited the extent to which the current statute serves to provide parents with notice of their minor's intention to obtain an abortion. The current statute includes a provision to track the number of waiver petitions being filed in court and how they are being disposed of.[26] Based on data obtained from the Office of State Courts Administrator for years 2006 through 2009, in response to that reporting requirement, petitions of minors seeking to waive the notice requirement have been granted on an average of 95% of the time.[27]

Sufficient Maturity

With respect to granting a waiver on the basis of a minor's "sufficient maturity," HB 1449 provides several factors the court must consider in determining whether to grant a petition:

1. The minor's:
    a. Age.
    b. Overall intelligence.
    c. Emotional development and stability.
    d. Credibility and demeanor as a witness.
    e. Ability to accept responsibility.
    f. Ability to assess both the immediate and long-range consequences of the minor's choices.
    g. Ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.
2. Whether there may be any undue influence by another on the minor's decision to have an abortion.

The bill requires a final order on a petition to include factual findings and legal conclusions regarding the maturity of the minor in view of these specific factors.

Child or Sexual Abuse

With respect to granting a waiver on the basis of the minor being a victim of child or sexual abuse of a parent or legal guardian, HB 1449 makes no substantive change to current law.

Best Interest

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[22] See generally, Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).
[23] S. 390. 01114(4)(c), F.S.
[24] S. 390.01114(4)(d), F.S.
[25] Id.
[26] S. 390.01114(6), F.S.
[27] Office of State Courts Administrator, reports Parental Notice of Abortion Act, Petitions Filed and Disposed - dated January 28, 2007; January 30, 2008; January 28, 2009; March 17, 2010.

With respect to granting a waiver on the basis that notification of the parent or legal guardian is not in the best interest of the minor, HB 1449 raises the standard of proof from the *preponderance of the evidence* standard to the higher *clear and convincing evidence* standard of proof.[28] Also, HB 1449 specifically excludes financial best interest, financial considerations or potential financial impact on the minor or the minor's family for continuing the pregnancy, from what may be considered in the minor's best interest.

Reporting of Abuse

Under the current statue, if the court finds evidence of child abuse or sexual abuse of the minor petitioner by any person, the court must report the matter to Department of Children and Families as required under s. 39.201 F.S. Section 39.201 F.S., requires such reports to be made to that department's central abuse hotline.[29]

HB 1449 adds another provision saying that the requirements of s. 39.201 F.S., apply to the parental notice statute. This provision has no substantive effect on current law.

Penalties for Violation

Any violation of the current statute by a physician constitutes grounds for disciplinary action under s. 458.331 or s. 459.015.[30] Disciplinary action may result in the revocation or suspension of the physician's license to practice and/or to the imposition of administrative fines of up to $10,000 for each violation.[31] HB 1449 provides the same penalty provisions for violation of the notification requirements as current law.

Office of State Court Administrator Reporting

Current law requires the Supreme Court through the Office of the State Courts Administrator to report annually to the Governor, the President of the Senate and the Speaker of the House on the number of petitions filed requesting a judicial waiver and the manner of their disposal.

HB 1449 adds a requirement that the annual report include the reason any such waivers are granted.

B. SECTION DIRECTORY:

Section 1. Amending s. 390.01114, F.S., relating to parental notice of a minor's abortion.

Section 2. Providing legislative intent.

Section 3. Providing a severability clause.

Section 4. Providing an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[28] Black's Law Dictionary describes the preponderance of the evidence standard as ". . . evidence which as a whole shows that the fact to be proved is more probable than not." It describes clear and convincing evidence as ". . . where the truth of the facts asserted are highly probable." Black's Law Dictionary 6th Edition.

[29] S. 390.01114(4)(d), F.S. and S. 39.201, F.S.

[30] S. 390.01114(3)(c), F.S.

[31] S. 456.072(2)(d), F.S.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Section 2 of the bill contains legislative intent language stating:

> It is the intent of the Legislature with respect to this act to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and nothing in this act should be construed as an effort to impinge upon those prerogatives. To that end, if any court of competent jurisdiction enters a final judgment concluding or declaring that any provision of this act improperly encroaches on the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature intends that such provision be construed as a request for a rule change pursuant to s. 2, Art. V of the State Constitution and not as a mandatory legislative directive.

Under this section of the bill, if any circuit judge finds *any* single provision of the act improperly procedural, the Legislature's intent appears to be that the entire act be voided as a matter of law and reduced to a mere request for a court rule change. At worst, if taken literally, this section would effectively nullify the bill's force of law at any point a single lower court judge *enters* a final order declaring a provision procedural without regard to the outcome of any appeal. As written, even a lower court's erroneous determination that a single provision of the act is procedural would not restore force of law to the act after a reversal by a district court of appeal or even by the Florida Supreme Court itself. At best, the section is a superfluous and awkward attempt to recognize the relationship between court rulemaking authority and substantive lawmaking when legislation includes provisions relating to court process.

The authorization of the Legislature to enact general law providing for parental notification of a minor's abortion found in Article X, Section 22 of the Florida Constitution, contains an explicit mandate that "The *Legislature* . . . *shall* create a process for judicial waiver of the notification." (emphasis added). Under this specific provision, the Legislature alone shall create the process for

judicial waiver to the parental notification statute. The Florida Supreme Court, in regard to this specific general law, is neither provided the constitutional authority nor has the prerogative to establish its own judicial waiver process contravening the waiver process provided in general law.

It is a well established rule of construction that specific provisions govern over general provisions.[32] The Supreme Court's authority to adopt rules of practice and procedure is a general grant of authority found in Article V, Section 2(a) of the Florida Constitution that covers procedural rules in all state courts. This general grant of court rule authority conflicts with the specific grant of legislative authority relating to general law providing for parental notice of a minor's intent to obtain an abortion. Using the rule of construction noted above, the specific provision found in Article X, Section 22 would govern over the general grant of authority provided in Article V, Section 2(a), assuming the Florida Supreme Court were to apply that rule of construction as it has applied that rule in the past in other settings.

This section of the bill also contradicts the severability clause found in section 3 of the bill. Section 3 provides that if *any* provision of the act is held invalid, such invalidity does not affect other provisions of the act which can be given effect without the invalid provisions, and to that end the provisions of the act are severable. Section 3 of the bill cannot be reconciled with the previous section deeming the entire act to be construed as a suggestion for a possible court rule change and "not as a mandatory legislative directive."

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

HB 1449's new subsection (7) providing an additional child abuse reporting requirement is duplicative of the requirement found in the current statute at subsection (4)(d).

The bill's added provisions relating to appeal appear in two separate subsections of the bill. These two subsections are sufficiently related to each other to appear together in a single subsection.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[32] See Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement, 940 So.2d 1090 (Fla. 2006); R.C. v State, 948 So.2d 48 (1st DCA 2007); T.S. v. Clemons, 770 So.2d 197 (2nd DCA 2000).