

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 Abortion

SPONSOR(S): Davis

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	9 Y, 5 N	Mathieson	Schoolfield
2) Civil Justice Subcommittee			
3) Health & Human Services Committee			

This bill amends chapter 390, F.S., relating to termination of pregnancies. The bill creates the "Pain-Capable Unborn Child Protection Act," which:

- Requires physicians to make a determination of post fertilization age of a fetus before performing an abortion.
- Prohibits abortions from being performed after the fetus has reached a post fertilization age of 20 weeks, with exceptions for medical necessity or to preserve the life of the unborn.
- Requires physicians that perform abortions to report information relating to the abortion to the Department of Health (DOH).
- Requires DOH to provide a public report containing all of the information reported from abortion providers.
- Establishes criminal and administrative penalties for violating the provisions of this bill relating to the improper performance of an abortion.
- Requires DOH to adopt rules to implement the provisions of the bill.

The bill appears to have no fiscal impact.

The effective date of the bill is July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Fetal Pain

In calendar year 2010, the Department of Health (DOH) reported that there were 214,519 live births in the state of Florida.¹ In the same year, the Agency for Health Care Administration (AHCA) reported that there were a total of 79,908 terminations performed in the state.² Of the total number, 73,883 were performed at a gestational age of 12 weeks or younger, and 6,025 at a gestational age of 13-24 weeks.³

The concept of fetal pain and the capacity of the fetus to recognize pain are the subjects of both ongoing research and significant debate. There are studies that suggest that a fetus may have the physical structures to be capable to feel pain by the gestational age of between 20-24 weeks.⁴ This research focuses on the connection of nociceptors (the central nervous system's pain messengers) in the extremities of the fetal body to the central nervous system.⁵ Researchers have made the following observations:

- The fetus reacts to noxious stimuli in the womb with what would appear to be a recoil response in an adult or child,⁶
- There is an increase in stress hormones in the fetus in response to noxious stimuli,⁷ and
- Fetal anesthesia may be administered to a fetus that is undergoing surgery in the womb, which results in a decrease in fetal stress hormones.⁸

However, there is also research suggesting that despite the presence of such a physical structure within the fetus, it still lacks the capacity to recognize "pain."⁹ Specifically, that the fetus lacks the

¹ Email from AHCA on file with Health and Human Services Committee staff, November 1, 2011.

² *Id.*

³ *Id.*

⁴ See, Laura Myers, Linda Bulich, Philip Hess and Nicole Miller, *Fetal Endoscopic Surgery: Indications and Anaesthetic Management*, 18 BEST PRACTICE & RESEARCH CLINICAL ANAESTHESIOLOGY 231, 241 (June 2004) (first requirement for nociceptors, is the presence of sensory receptors which diffuse throughout the fetus from between 7-14 gestational weeks); K.J.S. Anand and P.R. Hickey, *Pain and its effect in the Human Neonate and Fetus*, 317 NEW ENG. J. MED. 132, 1322 (November, 1987) (Noting that by 20 gestational weeks, sensory receptors have spread to all cutaneous and mucous surfaces of the fetus); Sampsa Vanhatalo and Onno van Nieuwenhuizen, *Fetal Pain?*, 22 BRAIN & DEVELOPMENT 145, 146 (2000) (noting nociceptors have spread across fetal body by 20 gestational weeks).

⁵ See, Phebe Van Scheltema, Sem Bakker, FPHA Vandenbussche and D Oepkes, *Fetal Pain*, 19 FETAL AND MATERNAL MEDICINE REVIEW 311, 313(2008) (noting that the connection is completed with the cortex by gestational week 24-26); Vivette Glover, *Fetal Pain: Implications for Research and Practice*, BR. J. OBSTET. GYNAECOL. 881, 885 (1999) (noting that activation of the thalamic fibres, and connection to the cortex occurs between 17-20 gestational weeks).

⁶ See, Ritu Gupta, Mark Kilby and Griselda Cooper, *Fetal Surgery and Anaesthetic Implications*, 8 CONTINUING EDUCATION IN ANAESTHESIA, CRITICAL CARE AND PAIN 71, 74 (2008) (noting that at 22 gestational weeks, the fetus may respond to painful stimuli); Xenophon Giannakouloupoulos and Waldo Sepulveda, *Fetal Plasma Cortisol and Beta-Endorphin Response to Intrauterine Needling*, 344 LANCET 77, (July, 1994) (noting that fetus reacted with body movement when needed in the womb, in a way that it did not when the placenta was needed).

⁷ See, Kha Tran, *Anaesthesia for Fetal Surgery*, 15 SEMINARS IN FETAL & NEONATAL MEDICINE 40, 44 (2010) (noting that invasive fetal procedures clearly elicit a stress response); Michelle White and Andrew Wolf, *Pain and Stress in the Human Fetus*, 18 BEST PRACTICE & RESEARCH CLINICAL ANAESTHESIOLOGY 205, (June, 2004) (noting that is not known if a fetus can feel pain, but there is a detectable stress response); Myers et al, *supra* note 4, at 242 (noting stress responses from 18 weeks gestation); Giannakouloupoulos et al, *supra* note 6, at 77-81; Gupta et al, *supra* note 6, at 74.

⁸ See, Gupta et al, *supra* note 6, at 74; Giannakouloupoulos et al, *supra* note 6, at 80; Van Scheltema et al, *supra* note 5, at 320; Tran, *supra* note 7, 44. *But see* I. Glenn Cohen and Sadath Sayeed, *Fetal Pain, Viability, and the Constitution*, 39 THE JOURNAL OF LAW, MEDICINE AND ETHICS 235, 239-240 (2011) (noting that just because it is not administered during a termination now, does not mean it may not happen in the future).

⁹ See Stuart Derbyshire, *Foetal Pain*, 24 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNAECOLOGY 647, (October, 2010) (noting that the capacity to feel pain requires conceptual subjectivity, which a fetus may not have); Curtis Lowery, Mary Hardman, Nirvana Manning, Barbara Clancy, Whit Hall and K.J.S. Anand, *Neurodevelopmental Changes of Fetal Pain*, 31 SEMINARS IN PERINATOLOGY 275, (October, 2007) (noting the difference between a cortical response to pain, which occurs at 29-30 gestational

anatomical architecture necessary to subjectively experience pain – essentially recognize the stimuli as painful.¹⁰ However, there is some research that suggests a functioning cortex is not necessary to experience pain.¹¹ In a 2005 review of the evidence, the American Medical Association concluded that:

...pain is an emotional and psychological response that requires conscious recognition of a stimulus. Consequently, the capacity for conscious perception of pain can only arise after the thalamocortical pathways begin to function, which may occur in the third trimester around 29-30 weeks gestational age.¹²

In a 2010 review of research and recommendations for practice, the Royal College of Obstetricians and Gynaecologists of the United Kingdom, noted the following in relation to fetal awareness:

Connections from the periphery to the cortex are not intact before 24 weeks of gestation. Most pain neuroscientists believe that the cortex is necessary for pain perception; cortical activation correlates strongly with pain experience and an absence of cortical activity generally indicates an absence of pain experience. The lack of cortical connections before 24 weeks, therefore, implies that pain is not possible until after 24 weeks. Even after 24 weeks, there is continuing development and elaboration of intracortical networks.¹³

Anesthesia is routinely administered to the fetus, the mother or both, during pre-natal surgery.¹⁴ As noted previously, research has shown that there is a corresponding reduction in the production of stress hormones in the fetus when anesthesia is used.¹⁵

The “Pain-Capable Unborn Child Protection Act” is model legislation that prohibits abortion after 20 weeks postfertilization age based on the scientific evidence mentioned above. This has been passed by Alabama, Idaho, Kansas, Nebraska and Oklahoma.¹⁶ In addition to these states, Alaska, Arkansas, Georgia, Indiana, Louisiana, Michigan, Mississippi, South Dakota, Texas and Utah require providers to give women either written or verbal information regarding fetal pain to women seeking an abortion.¹⁷

Caselaw Related to Abortion

The Viability Standard

In the seminal case regarding abortion, *Roe v. Wade*, the United States Supreme Court established a rigid trimester framework dictating how, if at all, states can regulate abortion.¹⁸ One of the primary holdings in the case was that, in the third trimester, when the fetus is considered viable, the state

weeks); Van Scheltema et al, *supra* note 5, 313 (the presence of anatomical structures alone is insufficient to demonstrate a capacity to feel pain).

¹⁰ Susan Lee, Henry Ralston, Eleanor Drey, John Partridge and Mark Rosen, *Fetal Pain. A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 949 (August 2005).

¹¹ See, Van Scheltema et al, *supra* note 5; B. Merker, *Consciousness without a cerebral cortex: A challenge for neuroscience and medicine*, 30 BEHAVIOURAL AND BRAIN SCIENCES 63-81 (2007) ; Stuart Derbyshire, *supra* note 9.

¹² Lee et al *supra* note 10, at 952.

¹³ Royal College of Obstetricians and Gynaecologists. *Fetal Awareness: Review of Research and Recommendations for Practice*. London: RCOG Press; 2010, 11.

¹⁴ See, Myers, et al., *supra* note 4; Van Scheltema, et al., *supra* note 5; Tran, *supra* note 7.

¹⁵ *Supra* note 8.

¹⁶ See, Alabama, ALA. CODE s. 26-23B-1 (2011); Idaho, IDAHO CODE ANN. s.18-501 (2011); Kansas, KAN. STAT. ANN s. 65-6724 (2011); Nebraska, NEB. REV. ST., s. 28-3102 (2011); Oklahoma, 63 OKL. ST. ANN. s. 1-745.1 (2011). The Idaho law was subject to a constitutional challenge, but dismissed for lack of standing. See, *McCormack v. Hiedeman*, 2011cv00397, (D. Idaho, September 23, 2011). However, a class action suit has been filed. See, *McCormack v. Hiedeman*, 2011cv00433, (D. Idaho, 2011)

¹⁷ See, Alaska, ALASKA STAT. s. 18.05.032 (2011); Arkansas, ARK. CODE ANN. s. 20-16-1102 (2011); Georgia, GA. CODE ANN. s. 31-9A-3 (2011); Indiana, IND. CODE s. 16-34-2-1.1 (2011); Louisiana, LA. REV. STAT. ANN. s. 40:1299.36.6 (2011); Michigan, MICH. COMP. LAWS s. 333.17015 (2011); Mississippi, MISS. CODE ANN. s. 41-41-43 (2011); South Dakota, S.D. CODIFIED LAWS s. 34-23A-10.1 (2011); Texas, TEX. HEALTH & SAFETY CODE ANN. s. 171.012 (Vernon, 2011); Utah, UTAH CODE ANN. s. 76-7-305 (2011).

¹⁸ 410 U.S. 113 (1973).

interest in the life of the child allows it to prohibit abortions as long as the life or health of the mother is not at risk.¹⁹

Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than that of the third trimester, in *Planned Parenthood v. Casey*²⁰ the United States Supreme Court rejected the trimester framework in favor of limiting the states' ability to regulate abortion pre-viability.²¹

Thus, while upholding the underlying holding in *Roe* that states can “[r]egulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother[,]”²² the Court determined that the line for this authority should be drawn at “viability,” because “[T]o be sure, as we have said, there may be some medical developments that affect the precise point of viability...but this is an imprecision with tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter.”²³ Furthermore, the Court recognized that “In some broad sense, it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”²⁴

The Medical Emergency Exception

In *Doe v. Bolton*, an early United States Supreme Court decision decided around the time of *Roe*, the Supreme Court was faced with determining, among other things, whether a Georgia statute criminalizing abortions (pre- and post-viability) except when determined to be necessary based upon a physician’s “best clinical judgment” was unconstitutionally void for vagueness for inadequately warning a physician under what circumstances an abortion could be performed.²⁵

In its reasoning, the Court agreed with the District Court decision that the exception was not unconstitutionally vague, by recognizing that:

[t]he medical judgment may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.

This broad determination of what constituted a medical emergency was later tested in the *Casey* case, albeit in a different context. One question before the Supreme Court in *Casey* was whether the medical emergency exception to a 24-hour waiting period for an abortion was too narrow in that there were some potentially significant health risks that would not be considered “immediate.”²⁶ The exception in question provided that a medical emergency is:

[t]hat condition which, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the

¹⁹ *Id.* at 164-165.

²⁰ 505 U.S. 833 (1992).

²¹ The standard developed in the *Casey* case was the “undue burden” standard, which provides that a state regulation cannot impose an undue burden on, meaning it cannot place a substantial obstacle in the path of, the woman’s right to choose. *Id.* at 876-79.

²² *See Roe*, 410 U.S. at 164-65.

²³ *See Casey*, 505 U.S. at 870.

²⁴ *Id.*

²⁵ 410 U.S. 179 (1973) Other exceptions, such as in cases of rape and when, “The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect.” *Id.* at 183. *See also, U.S. v. Vuitich*, 402 U.S. 62, 71-72 (1971)(determining that a medical emergency exception to a criminal statute banning abortions would include consideration of the mental health of the pregnant woman).

²⁶ *Id.* at 880. The Court also considered a medical emergency exception related to informed consent requirements in pre-viability cases. Some courts have construed the Court’s reasoning in *Casey* to require a mental health component to the medical emergency exception for obtaining informed consent because the Court recognized that psychological well-being is a facet of health and it is important that a woman comprehend the full consequences of her decision so as to reduce the risk that the woman will later discover that the decision was not fully informed, which could cause significant psychological consequences. *Id.* at 881-885.

immediate abortion of her pregnancy to avert death or for which delay will create serious risk of substantial and irreversible impairment of a major bodily function.²⁷

In evaluating the more objective standard under which the physician is to determine the existence of a medical emergency, the Court in *Casey* determined that the exception would not significantly threaten the life and health of a woman and imposed no undue burden on the woman's right to choose.²⁸

Since *Casey*, the scope of the medical emergency exception, particularly whether the broader requirement in *Doe* that the woman's mental health should be considered, is not entirely settled. For example, in 1997, the Sixth Circuit Court of Appeal, which is not binding on Florida, affirmed a United States District Court case wherein the trial court determined an Ohio statute restricting post-viability abortions was unconstitutional for, among other reasons, failure to include a medical emergency exception that incorporates the mental health of the mother.²⁹

The United States Supreme Court denied the petition for writ of certiorari³⁰ on March 23, 1998,³¹ however, Justice Thomas, with whom Justices Scalia and the Chief Justice joined, wrote a strong dissenting opinion within which Justice Thomas claimed that the 6th Circuit Court of Appeal, "[w]renched this Court's prior statements out of context in finding the statute's mental health exception constitutionally infirm." Justice Thomas recognized that the 6th Circuit used dicta within the *Doe v. Bolton*³² opinion to stand for the proposition a similar medical emergency exception approved in the later decided *Casey* case requires a mental health exception.

Even more recently, in *Gonzales v. Carhart*,³³ the United States Supreme Court upheld a federal law banning partial birth abortions which did not include a medical emergency exception. Justice Kennedy's opinion for the Court acknowledged that, "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."³⁴

The United States Supreme Court has not yet had a case regarding regulation of abortion in consideration of fetal pain; however, in *Gonzalez v. Carhart*, the Supreme Court recognized that, "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."³⁵

Applicable Florida Caselaw

Article I, Section 23 of the Florida Constitution provides an express right to privacy. The Florida Supreme Court has recognized the Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."³⁶

In *In re T.W.* the Florida Supreme Court, determined that

[p]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests....Under our Florida Constitution, the state's interest becomes compelling upon

²⁷ *Id.* at 879.

²⁸ *Id.* at 880.

²⁹ See *Voinovich v. Women's Medical Professional Corporation*, 130 F.3d 187 (6th Cir. 1997).

³⁰ Which means that the Court declined to take up the issue on appeal.

³¹ See *Voinovich v. Women's Medical Professional Corporation*, 523 U.S. 1036 (1998).

³² 410 U.S. 179 (1973).

³³ 550 U.S. 124 (2007).

³⁴ *Id.* at 163.

³⁵ *Id.* (Citations Omitted).

³⁶ See *In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989)(holding that a parental consent statute was unconstitutional because it intrudes on a minor's right to privacy).

viability....Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical procedures.³⁷

The court recognized that after viability, the state can regulate abortion in the interest of the unborn so long as the mother's health is not in jeopardy.³⁸

In *Womancare of Orlando v. Agwunobi*,³⁹ an almost identical medical emergency exception to that in the *Casey* case was upheld when Florida's parental notification statute was challenged.⁴⁰ Florida's parental notification statute, s. 390.01114, F.S., defines medical emergency 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 major bodily function."

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose. Additionally, any laws enacted for the purpose of creating a public records exemption must be in a separate bill related solely to creating the exemption.⁴¹

Limits on Abortion

Florida law prohibits abortions in the third trimester⁴² of pregnancy unless the abortion is performed as a medical necessity.⁴³ Current law provides that if an abortion is performed during viability,⁴⁴ the person that performs the abortion must use the degree of professional, skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. A person who violates either of these provisions commits a third degree felony.⁴⁵ In regards to preserving the life of the fetus when an abortion is performed during viability, the woman's life and health are considered to be an overriding and superior consideration in making this determination.⁴⁶

³⁷ *Id.* at 1193-94.

³⁸ *Id.* at 1194.

³⁹ 448 F.Supp. 2d 1293, 1301 N.D. Fla. (2005).

⁴⁰ One of the underlying issues in the case was whether the parenting notice statute was unconstitutionally vague in that it allegedly failed to give physicians adequate guidance about when the medical emergency provision applies. It was this question for which the court determined that the medical emergency definition was sufficient. The medical emergency provision applies as an exception to obtaining parental notice.

⁴¹ Section 24(c), Art. I of the State Constitution.

⁴² In Florida, the third trimester is defined as the weeks of pregnancy after the 24th week (weeks 25-birth).⁴² However, AHCA data indicates that of the 125 abortions performed in the 25th week or after in 2009, 121 of them were elective, i.e., not for a medical emergency. Although Florida defines the third trimester as any week after the 24th week of pregnancy, the American Congress of Obstetricians and Gynecologists list the third trimester as weeks 29-40; the second trimester as weeks 14-28; and the first trimester as weeks 0-13. First and Second trimester abortions are currently permitted in Florida without limitations except that certain informed consent and parental notice, where applicable, requirements must be met prior to an abortion being performed unless there is a medical emergency.

⁴³ S. 390.0111(1), F.S.

⁴⁴ Viability is defined in s. 390.0111(4), F.S. as the state of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb.

⁴⁵ A third degree felony is punishable by a fine not exceeding \$5,000 or a term of imprisonment not exceeding 5 years. If the offender is determined by the court to be a habitual offender, the term of imprisonment shall not exceed 10 years. Ss. 775.082, 775.083, 775.084, F.S.

⁴⁶ S. 390.0111(4), F.S.

Current law provides no express cause of action related to abortion, except for partial birth abortions.⁴⁷

Informed Consent Requirements

Current law provides that prior to the performance of any abortion, the physician who is to perform the abortion, or a referring physician, must inform the patient of:

- The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of the probable gestational age of the fetus.
- The probable gestational age of the fetus at the time the termination of pregnancy is to be performed, as determined by an ultrasound.
- The medical risks to the woman and fetus of carrying the pregnancy to term.⁴⁸

The patient must acknowledge in writing that this information has been provided to her before she gives informed consent for an abortion.⁴⁹ This information is not required to be provided if the abortion is being performed because of a medical emergency.⁵⁰ The method of determining the probable gestational age as required above, is specified in law as an ultrasound.⁵¹ Failure to meet this requirement can result in a fine imposed by AHCA and other administrative penalties, as defined in s. 408.831, F.S.⁵² Physicians who fail to inform the patient of the provisions described above are subject to disciplinary action.⁵³

Reporting Requirements

Currently, facilities that perform abortions are required to submit a monthly report to AHCA that contains the number of abortions performed, the reason for the abortion, and the gestational age of the fetus.⁵⁴ The agency is required to keep this information in a central location from which statistical data can be drawn.⁵⁵ If the abortion is performed in a location other than an abortion clinic, the physician who performed the abortion is responsible for reporting the information.⁵⁶ The reports are confidential and exempt from public records requirements.⁵⁷ Fines may be imposed for violations of the reporting requirements.⁵⁸ Currently AHCA collects and maintains the data but is not required to report it.

Effect of Proposed Changes

The bill creates the “Pain-Capable Unborn Child Protection Act.” The Act contains legislative findings that:

- By 20 weeks after fertilization, there is substantial evidence that an unborn child has the physical structures necessary to experience pain.
- By 20 weeks after fertilization, there is substantial evidence that unborn children seek to evade certain stimuli in a manner that would be interpreted as a response to pain in an infant or an adult.
- Anesthesia is routinely administered to unborn children who are aged 20 weeks postfertilization and older who undergo prenatal surgery.
- Even before 20 weeks after fertilization, unborn children have been observed to exhibit hormonal stress responses to painful stimuli and these responses were reduced when pain medication was administered.

⁴⁷ F.S. 390.0111(11), F.S.

⁴⁸ S. 390.0111(3)(a), F.S.

⁴⁹ S. 390.0111(3)3., F.S.

⁵⁰ S. 390.0111(3)(a), F.S.

⁵¹ SS. 390.0111(3)(a)1.b.(I)-(IV), F.S.

⁵² S. 390.018, F.S.

⁵³ A violation of this is subject to disciplinary action under s. 458.0331, F.S., for Medical Doctors or s. 459.015, F.S, for Osteopathic Physicians.

⁵⁴ S. 390.0112 (1), F.S.

⁵⁵ *Id.*

⁵⁶ S. 390.0112(2), F.S.

⁵⁷ S. 390.0112(3), F.S.

⁵⁸ S. 390.0112(4), F.S.

- The state has a compelling state interest in protecting the lives of unborn children from the state at which substantial medical evidence indicates that they are capable of feeling pain.

Limit on Abortion

The bill prohibits a person from performing or attempting⁵⁹ to perform an abortion if it has been determined that the probable post fertilization age of the fetus is 20 or more weeks. An exception is provided if, in reasonable medical judgment,⁶⁰ a medical emergency⁶¹ exists. The bill clarifies that such a condition cannot be considered if it is based on a claim or diagnosis that the patient will engage in conduct that would result in her death or the substantial and irreversible physical impairment of a major bodily function. The bill also provides an exception allowing an abortion to be performed after 20 weeks postfertilization age if it is necessary to preserve the life of an unborn child.⁶²

The bill requires that a physician determine the probable postfertilization⁶³ age of the fetus prior to performing an abortion, or to rely on the determination of postfertilization age from another physician. The bill defines postfertilization age as the age of an unborn child as calculated from the fertilization of the human ovum.⁶⁴ In determining the age, the bill requires the physician to make inquiries of the patient and to perform medical examinations and tests that the physician would consider necessary to making an accurate determination of postfertilization age. The bill authorizes disciplinary action⁶⁵ for any physician that fails to comply with these provisions.

If an abortion is performed at a postfertilization age of 20 weeks or more, the physician must perform the abortion in a manner that provides the best opportunity for the unborn child to survive, unless it would provide greater risk of the mother's death or the substantial and irreversible impairment of the mother's major bodily functions than would other available methods. This risk cannot be considered based on a claim or diagnosis that the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function. Any person who intentionally or recklessly performs or attempts to perform an abortion in violation of the provisions in this paragraph commits a third degree felony.⁶⁶ A penalty cannot be assessed against the patient on whom the abortion was performed or attempted.

Cause of Action

The bill provides a private cause of action for any woman upon whom an abortion was performed in intentional or reckless violation of the provisions of the paragraph above, or the father of the unborn child who was aborted, against the person who performed the abortion for actual damages. Any woman upon whom an abortion was attempted in intentional or reckless violation of the paragraph above may sue for actual damages.

The woman upon whom the abortion was performed may bring a cause of action for injunctive relief against any person who has intentionally violated this section. The cause of action may also be maintained by a spouse, parent, sibling, guardian, or current or former licensed health care provider of

⁵⁹ The bill defines "attempt to perform or induce abortion" as "an act, or an omission of a statutorily required act, that, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion."

⁶⁰ Reasonable medical judgment is defined in the bill as "a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved."

⁶¹ Medical emergency is defined in the bill as "a condition in which the abortion is necessary to prevent death, or prevent substantial and irreversible physical impairment of a major bodily function."

⁶² An unborn child or fetus is defined in the bill as "an individual organism of the species homo sapiens from fertilization until live birth."

⁶³ Currently, Florida law uses gestational age as a baseline for abortion regulations and restrictions whereas this bill restricts abortion based on "postfertilization age." Postfertilization age is calculated from the fertilization of the human ovum (egg), while gestational age is calculated upon the first day of the pregnant woman's last menstrual cycle.

⁶⁴ An ovum is defined as the female sex cell, when fertilized by a spermatozoon (the male sex cell), an ovum is capable of developing into a new individual of the same species. Stedmans Medical Dictionary ovum (27th ed. 2000).

⁶⁵ A violation of this is subject to disciplinary action under s. 458.0331 or s. 459.015, F.S.

⁶⁶ A third degree felony is punishable by a fine not exceeding \$5,000 or a term of imprisonment not exceeding 5 years. If the offender is determined by the court to be a habitual offender, the term of imprisonment shall not exceed 10 years. Ss. 775.082, 775.083, 775.084, F.S.

the woman, or by the Attorney General or a state attorney with appropriate jurisdiction. The bill provides that an injunction granted under these circumstances will prevent the violator from performing or attempting to perform any more prohibited abortions in this state.

The bill provides that if judgment is rendered in favor of the plaintiff in any action described above, the court shall render a judgment for attorney's fees in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the lawsuit was frivolous and brought in bad faith, the court shall render a judgment for attorney's fees in favor of the defendant against the plaintiff. Neither damages nor attorney's fees may be assessed against a woman upon whom an abortion was performed or attempted unless the court finds that the suit was frivolous and brought in bad faith.

The bill requires the court to determine, in any civil or criminal proceeding or action brought, if the woman upon whom an abortion was performed or attempted shall be kept anonymous from the public, if she does not give her consent to such disclosure. If the court determines that the woman should remain anonymous, they must issue orders to seal the court records as well as exclude individuals from the courtroom or hearing rooms as necessary to protect her identity. The court orders must also include specific written findings as to the necessity for protecting the identity of the woman; why the order is essential to that end; how the order is narrowly tailored to protect her identity; and why no reasonable less restrictive alternative for protecting her identity exists. If a woman whom an abortion was performed or attempted does not give her consent for public disclosure of her identity, anyone other than a public official that brings a court action, shall do so under a pseudonym. The bill clarifies that the identity of the plaintiff will not conceal the identity of the plaintiff or witnesses from the defendant or attorneys for the defendant.

Reporting Requirements

The bill provides reporting requirements for physicians that perform abortions. The following information must be reported to DOH on a schedule and in accordance with forms and rules adopted by DOH:

- If a determination of probable postfertilization age⁶⁷ was required to be made, the probable postfertilization age, and the method and basis of the determination.
- If a determination was not required to be made, the basis of the determination that a medical emergency existed.
- If the probable postfertilization age was determined to be 20 weeks or more, the basis for the determination that the pregnant woman had a condition that so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function; or the basis for determining that the abortion was necessary to preserve the life of an unborn child.
- The abortion method used and, if the abortion was after 20 weeks postfertilization age, whether the abortion method was one that, based on reasonable medical judgment, provided the best opportunity for the unborn child to survive. If such a method was not used, the basis of determination that the abortion method used would pose a greater risk of either death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman than other available methods.

The bill provides that the failure of a physician to report this information 30 days passed the due date, as determined by DOH, will result in a late fee of \$500 for each additional 30-day period, or portion of a 30-day period that the report is overdue. A physician that fails to provide a report, or provides an incomplete report, 1 year after the due date, may be directed by a court of competent jurisdiction to submit a complete report within a time period stated by the court, or be subject to civil contempt.⁶⁸ A physician that fails to comply with these requirements is also subject to disciplinary action under ss.

⁶⁷ According to this bill, probable postfertilization age of the unborn child means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time an abortion is planned to be performed.

⁶⁸ Civil contempt is the failure to do something which the party is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. See 16 Fla. Prac., Sentencing § 13:6 (2010-2011 ed.).

458.331 or 459.015. Intentional or reckless falsification of any of the required reports results in a second degree misdemeanor.⁶⁹

The bill requires DOH to issue a public report providing statistics for the previous calendar year compiled from all of the information reported as required by physicians that perform abortions and described above. The report is required to be provided by June 30 of each year. The report must also contain the reports of each previous year's report, adjusted to reflect any late or corrected information. The department must ensure that the information included in the report does not lead to the identification of any woman upon whom an abortion was performed.

Finally, the bill requires DOH to adopt rules to necessary to comply with the requirements set forth in the bill. DOH must adopt the rules within 90 days after the effective date of this bill. The effective date for the bill is July 1, 2012.

B. SECTION DIRECTORY:

- Section 1:** Creates an unnumbered section of law, designating the "Pain-Capable Unborn Child Protection Act."
- Section 2:** Creates an unnumbered section of law related to legislative findings.
- Section 3:** Amends s. 390.011, F.S., relating to definitions.
- Section 4:** Amends s. 390.0111, F.S., relating to termination of pregnancies.
- Section 5:** Amends s. 765.113, F.S., relating to restrictions on providing consent.
- Section 6:** Creates an unnumbered section of law, requiring rulemaking by the Department of Health.
- Section 7:** Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

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.

⁶⁹ A second degree misdemeanor is punishable by a fine not exceeding \$500 or imprisonment not exceeding 60 days. Ss. 775.082, 775.083, F.S.

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 of 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:

The bill may implicate Art. I, Section 23, of the Florida Constitution, which provides for an express right to privacy. While the Florida Supreme Court recognized the State's compelling interest in regulating abortion post-viability in *In re T.W.*, 551 So.2d 1186 (1989), the issue of regulating abortions in consideration of fetal pain has not been before the Florida Supreme Court or the United States Supreme Court.

B. RULE-MAKING AUTHORITY:

The bill requires DOH to promulgate rules to implement the provisions of this bill. They are required to develop the applicable rules within 90 days of the effective date of the bill, which is July 1, 2012. The bill provides sufficient rule-making authority to DOH and AHCA to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides an exception for an abortion that can be performed after 20 weeks post fertilization age, if the abortion is necessary to preserve the life of the unborn child. Florida law defines "abortion" as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus. Therefore, in the case of the exception described above, it would not be considered an abortion, as defined in Florida law.

House Bill 277 provides a definition for medical emergency that is amended into the same sections of law, but is different from the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES