The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Health Policy

BILL:	SB 724
INTRODUCER:	Senators Flores and Gaetz
SUBJECT:	Termination of Pregnancies
DATE:	March 25, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	**Favorable**
2.			JU	
3.			FP	

I. Summary:

SB 724 amends s. 390.0111, F.S., to require that the information currently required to be presented by a physician to a pregnant woman in order to obtain informed consent[1] from the pregnant woman before performing an abortion must be presented while in the same room as the woman and at least 24 hours before the procedure.

The provisions in the bill take effect on July 1, 2015.

II. Present Situation:

Abortion in Florida

Under Florida law, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[2] A termination of pregnancy must be performed by a physician[3] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[4]

A termination of pregnancy may not be performed in the third trimester or if a physician determines that the fetus has achieved viability unless there is a medical necessity. Florida law defines the third trimester to mean the weeks of pregnancy after the 24th week and defines viability to mean the state of fetal development when the life of a fetus is sustainable outside the

[1] The physician must inform the woman 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 whether to terminate a pregnancy and the probable gestational age of the fetus, verified by an ultrasound, at the time the termination of pregnancy is to be performed.
[2] Section 390.011(1), F.S.
[3] Section 390.0111(2), F.S.
[4] Section 390.011(8), F.S.

womb through standard medical measures.[5] Specifically, an abortion may not be performed after viability or within the third trimester unless two physicians certify in writing that, to a reasonable degree of medical probability, the termination of pregnancy is necessary to save the life or avert a serious risk of substantial irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition. If a second physician is not available, one physician may certify in writing to the medical necessity for legitimate emergency medical procedures for termination of the pregnancy.[6]

Sections 390.0111(4) and 390.01112(3), F.S., provide that if a termination of pregnancy is performed during the third trimester or after viability, the person who performs or induces the termination of pregnancy must use that 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. However, the woman's life and health constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict. Such a termination of pregnancy must be performed in a hospital.[7]

Case Law on Abortion

Federal Case Law

In 1973, the U.S. Supreme Court issued the landmark *Roe v. Wade* decision.[8] Using strict scrutiny, the court determined that a woman's right to terminate a pregnancy is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[9] Further, the court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.[10]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme 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.[11] 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.[12] The Court concluded that the state may regulate the abortion as long as the regulation does not impose an undue burden on a woman's decision to choose an abortion.[13] If the purpose of a provision of law is to place substantial obstacles in the path of a woman seeking an abortion before viability, it is invalid; however, after viability the state may

[5] Sections 390.011(11) and (12), F.S.
[6] Sections 390.0111(1) and 390.01112(1), F.S.
[7] Sections 797.03(3), F.S.
[8] 410 U.S. 113 (1973).
[9] *Id.*
[10] *Id.*
[11] 505 U.S. 833, 876-79 (1992).
[12] *Id.*
[13] *Id*.

restrict abortions if the law contains exceptions for pregnancies endangering a woman's life or health.[14]

Florida Case Law

Article I, section 23 of the State Constitution provides an express right to privacy. The Florida Supreme Court has recognized that this constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[15] The Florida Supreme Court held in *In re T.W.*,[16] and later reaffirmed in *North Florida Women's Health and Counseling Services, Inc. v. State of Florida*,[17] that the undue burden standard expressed in *Planned Parenthood v. Casey* does not apply in Florida. The Florida Supreme Court determined 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.[18]

The Women's Right to Know Act

The Women's Right to Know Act (act) was enacted by the Florida Legislature in 1997.[19] The act required the voluntary and informed written consent of the pregnant woman prior to a termination of pregnancy being performed. The act also specified that consent was only voluntary and informed if the physician informed the woman, in person, of the nature and risks of undergoing the abortion or carrying the pregnancy to term and the probable gestational age of the fetus. In 2011, the Florida Legislature passed ch. 2011-224, L.O.F., which added the requirement that the gestational age of the fetus be verified by an ultrasound and that the pregnant woman must be offered the opportunity to view the live ultrasound images and hear an explanation of them.

Litigation of the Woman's Right to Know Act

Shortly after the enactment of the act, its validity was challenged under the Florida and federal constitutions. The plaintiff physicians and clinics successfully enjoined the enforcement of the act pending the outcome of the litigation, and the injunction was upheld on appeal.[20] Thereafter, the plaintiffs were successful in obtaining a summary judgment against the State on the grounds that the act violated the right to privacy under article I, section 23 of the Florida Constitution and was unconstitutionally vague under the federal and state constitutions. This decision was also upheld on appeal.[21] The State appealed this decision to the Florida Supreme Court.[22]

The Florida Supreme Court addressed two issues raised by the plaintiffs. With regard to whether the act violated a woman's right to privacy, the Court determined that the information required to be provided to women in order to obtain informed consent was comparable to those informed

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[14] *Id.*
[15] *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).
[16] 551 So. 2d 1186, 1192 (Fla. 1989).
[17] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So. 2d 612 (Fla. 2003)
[18] Id.
[19] Ch. 97-151, L.O.F.
[20] *Florida v. Presidential Women's Center*, 707 So. 2d 1145 (Fla. 4th Dist. Ct. App. 1998).
[21] *Florida v. Presidential Women's Center*, 884 So. 2d 526 (Fla. 4th Dist. Ct. App. 2004).
[22] *Florida v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006).

consent requirements established in common law and by Florida statutory law[23] applicable to other medical procedures.[24] Accordingly, the Court determined that the act was not an unconstitutional violation of a woman's right to privacy.[25]

Second, the Supreme Court addressed the allegation that the term "reasonable patient," and the act's reference to information about "risks" were unconstitutionally vague. The plaintiffs argued it was unclear whether the act requires patients to receive information about "non-medical" risks, such as social, economic or other risks.[26] The Court rejected these arguments and held that "…the act constitutes a neutral informed consent statute that is comparable to the common law and to informed consent statutes implementing the common law that exist for other types of medical procedures..."[27]

Counseling and Waiting Periods for Abortions in Other States

Currently, 26 states require a waiting period between abortion counselling and the actual abortion taking place. Most states' waiting periods are 24 hours but Alabama's waiting period is 48 hours and Missouri's, South Dakota's, and Utah's waiting period is 72 hours. Of the states with waiting periods, 11 require pre-abortion counselling to be provided in person which necessitates two separate trips to the facility before an abortion can be performed.[28] Under the undue burden standard adopted by the United States Supreme Court in *Planned Parenthood*, while "24–hour waiting period[s] may make some abortions more expensive and less convenient, it cannot be said that [they are] invalid…"[29]

III. Effect of Proposed Changes:

SB 724 amends s. 390.0111, F.S., to require that a physician inform his or her pregnant patient who is planning on having an abortion of the nature and risks of undergoing or not undergoing the proposed procedure and the probable gestational age of the fetus, verified by an ultrasound, at the time the termination of pregnancy is to be performed while in the same room as the woman and at least 24 hours before the procedure. The physician who is required to provide this information is the referring physician or the one who is to perform the abortion. Because of the 24-hour waiting period, a pregnant woman will need to make two trips to obtain an abortion.

The bill also republishes s. 390.012, F.S., for the purpose of incorporating the amendment made to s. 390.0111, F.S.

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[23] *Presidential Women's Center*, 937 So. 2d at 117-118. Section 766.103, F.S., is a general informed consent law for the medical profession, which requires that a patient receive information that would provide a "a reasonable individual" with a general understanding of the procedure he or she will undergo, medically acceptable alternative procedures or treatments, and the substantial potential risks or hazards associated with the procedure. The court also refers to s. 458.324, F.S. (informed consent for patients who may be in high risk of developing breast cancer); s. 458.325, F.S. (informed consent for patients receiving electroconvulsive and psychosurgical procedures); and s. 945.48, F.S. (express and informed consent requirements for inmates receiving psychiatric treatment).
[24] *Id.*
[25] *Presidential Women's Center*, 937 So. 2d at 118, 120.
[26] *Presidential Women's Center*, 937 So. 2d at 118-119.
[27] *Id.* at 120.
[28] Counseling and Waiting Periods for Abortion, Guttmacher Institute, March 1, 2015, available at http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf, (Last visited on March 26, 2015).
[29] Supra note 11, at 838.

The provisions in the bill take effect on July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

If SB 724 becomes law and is challenged, it is uncertain how a Florida court would rule because the provisions in the bill will likely be subject to a strict scrutiny review rather than that of an undue burden test (see *Florida Case Law* above).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 390.0111 of the Florida Statutes.

The bill republishes s. 390.012, F.S., for the purpose of incorporating the amendment made to s. 390.0111, F.S.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.