

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 404

INTRODUCER: Senator Stargel and others

SUBJECT: Parental Consent for Abortion

DATE: December 9, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Brown	HP	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 404 creates s. 390.01117, F.S., to prohibit a physician from performing an abortion on a minor unless the physician has been presented with consent from the minor's mother, father, or legal guardian. This requirement does not apply if the abortion is performed during a medical emergency where there was insufficient time to obtain consent. Additionally, the minor may petition the circuit court in the area where the minor resides to allow the abortion to proceed without obtaining consent. The court must issue an order authorizing the minor to obtain an abortion without consent if specified criteria are met.

The bill provides additional reporting requirements for a physician who has performed an abortion on a minor. The bill also establishes criminal penalties for a physician who knowingly or recklessly performs an abortion on a minor without parental consent and for any person who provides consent who is not authorized to do so. The bill specifies that failing to obtain consent is prima facie evidence of interference with family relations in an appropriate civil action.

The bill provides that the provisions of the bill may not be construed to create or recognize a right to abortion, to be construed as to limit the common law rights of parents or guardians, and that the Legislature does not intend to make lawful an abortion that is currently unlawful. The bill also provides that any provision of the bill held to be invalid or unenforceable must be construed so as to give it the maximum effect permitted by law and, if the provision is held to be entirely invalid or unenforceable, the provision is deemed severable from the remainder of the bill and may still apply to other persons in dissimilar situations or circumstances from the circumstances for which the provisions was ruled invalid or unenforceable.

The bill provides an effective date of July 1, 2020.

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 remove a dead fetus.¹ The termination of a pregnancy must be performed by a physician² 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.³

The termination of a 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 womb through standard medical measures.⁴ Specifically, an abortion may not be performed after viability or within the third trimester unless two physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and 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 the termination of the pregnancy.⁵

Sections 390.0111(4) and 390.01112(3), F.S., provide that if a termination of pregnancy is performed during the third trimester or during viability, the physician 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 the physician 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 the concerns are in conflict. This termination of a pregnancy must be performed in a hospital.⁶

Case Law on Abortion

Federal Case Law

In 1973, the U.S. Supreme Court issued the landmark *Roe v. Wade* decision.⁷ Using the strict scrutiny standard, the Court determined that a woman's right to terminate a pregnancy is protected by a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.⁸ Further, the Court reasoned that state

¹ Section 390.011(1), F.S.

² Section 390.0111(2), F.S.

³ Section 390.011(8), F.S.

⁴ Sections 390.011(11) and (12), F.S.

⁵ Sections 390.0111(1) and 390.01112(1), F.S.

⁶ Section 797.03(3), F.S.

⁷ 410 U.S. 113 (1973).

⁸ *Id.*

regulations limiting the exercise of this right must be justified by a compelling state interest and must be narrowly drawn.⁹

In 1992, the U.S. Supreme Court ruled on the constitutionality of a Pennsylvania statute involving a 24-hour waiting period between the provision of information to a woman and the performance of an abortion. In that decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰ the Court upheld the statute and relaxed the standard of review in abortion cases involving adult women from “strict scrutiny” to “unduly burdensome.” An undue burden exists and makes a statute invalid if the statute’s purpose or effect is to place a substantial obstacle in the way of a woman seeking an abortion before the fetus is viable.¹¹

The Court held that the undue burden standard is an appropriate means of reconciling a state’s interest in human life with the woman’s constitutionally protected liberty to decide whether to terminate a pregnancy. The Court determined that, prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference. Before viability, a state’s interests are not strong enough to support prohibiting an abortion or the imposition of a substantial obstacle to the woman’s right to elect the procedure.¹² However, once viability occurs, a state has the power to restrict abortions if the law contains exceptions for pregnancies that endanger a woman’s life or health.

Case Law on Parental Consent Laws

Federal Case Law

Both the U.S. Supreme Court and the Florida Supreme Court have addressed parental consent laws with varying conclusions. In *Bellotti v. Baird*¹³ the U.S. Supreme Court found that:

States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. [With these limitations on freedom] grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.

Further, the Court, in finding the particular statute under review unconstitutional, but providing a path for parental consent laws to be constitutional, found that:

If the state decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it must provide an alternative procedure whereby authorization for the abortion can be obtained; pregnant minor is entitled in such a proceeding to show either that she is mature and well enough informed to make her abortion decision in consultation with her physician independently of her

⁹ *Id.*

¹⁰ 505 U.S. 833 (1992).

¹¹ *Id.* at 878.

¹² *Id.* at 846.

¹³ 443 U.S. 622 (1979)

parents' wishes or that, even if she is not able to make the decision independently the abortion would be in her best interests; proceeding in which such a showing is made must assure that resolution of the issue and any appeals will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Florida Case Law

However, the Florida Supreme Court has come to a differing decision based exclusively on the privacy rights guaranteed by article I, section 23 of the Florida Constitution.

In *In re T.W.* the Florida Supreme Court invalidated a parental consent law passed in 1988¹⁴ by finding that, "... the state's interests in protecting minors and in preserving family unity are worthy objectives. Unlike the federal Constitution, however, which allows intrusion based on a 'significant' state interest, the Florida Constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated"¹⁵ and the state "does not recognize [the interests of protecting minors and preserving the family unit] as being sufficiently compelling to justify a parental consent requirement where procedures other than abortion are concerned."¹⁶

To demonstrate this point, the Florida Supreme Court cited s. 743.065, F.S. The Court stated:

Under this statute, a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child—no matter how dire the possible consequences—except abortion. Under *In re Guardianship of Barry*, 445 So.2d 365 (Fla. 2d DCA 1984) (parents permitted to authorize removal of life support system from infant in permanent coma), this could include authority in certain circumstances to order life support discontinued for a comatose child. In light of this wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned. We fail to see the qualitative difference in terms of impact on the well-being of the minor between allowing the life of an existing child to come to an end and terminating a pregnancy, or between undergoing a highly dangerous medical procedure on oneself and undergoing a far less dangerous procedure to end one's pregnancy. If any qualitative difference exists, it certainly is insufficient in terms of state interest.¹⁷

The Florida Supreme Court also found that the parental consent statute was not the least intrusive means of furthering the state interest since, "although the instant statute does provide for a judicial bypass procedure, it makes no provision for a lawyer for the minor or for a record hearing."¹⁸

¹⁴ Section 390.001(4), F.S., (1988)

¹⁵ *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989)

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1196.

III. Effect of Proposed Changes:

SB 404 creates s. 390.01117, F.S., entitled the Parental Consent for Abortion Act. The bill prohibits a physician from performing an abortion on a minor, defined as a person under the age of 18, unless the physician has been presented with consent. The bill defines “consent” as a notarized written statement signed by the minor and either her mother, her father, or her legal guardian declaring that the minor is pregnant, intends to seek an abortion, and that her mother, father, or legal guardian, as applicable, consents to the abortion because the abortion is in the best interest of the minor.

The bill provides exceptions to this requirement if:

- The physician performing the abortion certifies in the minor’s medical record that a medical emergency¹⁹ and there was insufficient time to obtain consent; or
- The consent requirement has been judicially waived.

Judicial Waiver of Consent

To obtain a judicial waiver of consent, a minor may petition any circuit court in the area where she resides and may participate in the proceedings on her own behalf. The petition must include a statement that the minor is pregnant and is unemancipated,²⁰ that consent from a parent or the legal guardian of the minor has not been obtained, and that the minor wishes to obtain an abortion without first obtaining consent.

The court must advise the minor that she has a right to court-appointed counsel and must provide her with counsel upon her request. A county is not required to pay the salaries, costs, or expenses of any counsel appointed by the court. The court also may appoint a guardian ad litem for the minor who must maintain the confidentiality of the minor’s identity. The court may not charge filing fees or court costs for a petition under the bill at either the trial or appellate level.

The bill requires all court proceedings for such a petition to be confidential and to ensure the anonymity of the minor. The proceedings must be sealed and the minor may file her petition using a pseudonym or only her initials. All documents related to the petition are confidential and may not be made available to the public. Additionally, all hearings, including appeals, under the bill must remain confidential and closed to the public as provided by court rule.

The bill also declares that such petitions must be given precedence over other matters before the court and establishes accelerated timelines for such petitions as follows:

- The circuit court must rule and issue written findings of fact and conclusions of law within 3 business days after the petition is filed, except that the timeline may be extended at the request of the minor.

¹⁹ A “medical emergency” is defined in s. 390.01114(2)(d), F.S., 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.

²⁰ A circuit court has jurisdiction to emancipate a minor residing in this state upon the filing of a petition under conditions and criteria found in ch. 743, F.S. An emancipated minor may be authorized by the court to perform all acts that the minor could perform if he or she were 18 years of age.

- If the court fails to rule within 3 days, the minor may petition for a hearing to the chief judge who must ensure the hearing is held within 48 hours and that an order is entered within 24 hours after the hearing.
- If the waiver is not granted, the minor may appeal and the appellate court must rule within 7 days after receipt of the appeal or remand the ruling to the circuit court.
- If remanded, the circuit court must rule within 3 days of the remand.
- The Florida Supreme Court may provide for an expedited appeal in rule for any minor to whom the circuit court denies a waiver. An order authorizing a waiver is not subject to appeal.

The court must issue an order waiving the consent requirement if the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy. In making such a decision, the court may consider whether there may be any undue influence over the minor's decision by another, as well as the minor's:

- Age.
- Overall intelligence.
- Emotional development and stability.
- Credibility and demeanor as a witness.
- Ability to accept responsibility.
- Ability to assess both the immediate and long-range consequences of her choices.
- Ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.

The court may also grant a waiver of the consent requirement if the court finds, by a preponderance of the evidence, that the minor is the victim of child or sexual abuse, as defined in s. 390.01114, F.S., inflicted by one or both parents or the minor's guardian, or if the court finds, by clear and convincing evidence, that requiring consent is not in the best interest of the minor. Under the bill, the best-interest standard does not include the financial best interest, financial considerations, or the financial impact on the minor or her family if she does not terminate the pregnancy.

If the court finds evidence of child or sexual abuse of the minor by any person, the court must report the evidence of such abuse as provided in s. 39.201, F.S.

A court that conducts proceedings under the bill must:

- Provide for a written transcript of all testimony and proceedings;
- Issue a final written order containing factual findings and legal conclusions supporting its decision, including factual findings and legal conclusions relating to the maturity of the minor; and
- Order that a confidential record be maintained.

The bill also requests the Florida Supreme Court to adopt rules and forms for petitions to ensure that the proceedings under the bill are handled expeditiously, handled in a manner consistent with the bill, and protect the confidentiality of the minor's identity and of the proceedings.

Criminal and Civil Liability

The bill establishes additional criminal and civil liability as follows:

- Any person who willfully and intentionally, or with reckless disregard, performs an abortion on a minor without required consent commits a misdemeanor of the first degree. The bill provides that it is a defense to prosecution under the newly-created section of statute that the minor falsely represented her age or identity to the physician by displaying an apparently valid governmental record or identification such that a careful and prudent person would have relied on the representation. However, this defense does not apply if the physician is shown to have had independent knowledge of the minor's actual age or identity or if the physician failed to use due diligence in determining the minor's age or identity.
- Any person who provides consent who is not authorized to provide consent commits a misdemeanor of the first degree.
- Failure to obtain consent from a person from whom consent is required is prima facie evidence of failure to obtain consent and of interference with family relations in appropriate civil actions. Such prima facie evidence does not apply to any issue other than failure to obtain consent from the parent or legal guardian and interference with family relations in appropriate civil actions. The civil action may be based on a claim that the bill was a result of negligence, gross negligence, wantonness, willfulness, intention, or other legal standard of care. Exemplary damages may be awarded in appropriate civil actions relevant to violations of this section.

Reporting Requirements

The bill requires a physician who has performed an abortion on a minor in the past calendar month to submit a monthly report to the Department of Health which must include the following information for each minor upon whom an abortion was performed:

- If the abortion was performed with consent;
- If the abortion was performed during a medical emergency that excepted the minor from the consent requirement, and the nature of the medical emergency;
- If the abortion was performed with a judicial waiver of consent;
- Her age; and
- The number of times she has been pregnant and the number of abortions that have been performed on her.

Construction and Severability

The bill provides that its provisions:

- May not be construed to create or recognize a right to abortion.
- May not be construed to limit the common law rights of parents or legal guardians.
- Are not intended to make lawful an abortion that is currently unlawful.

Additionally, any provision of the bill held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, must be construed so as to give it the maximum effect permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event such provision shall be deemed severable and may not affect the remainder of the bill or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

The bill provides an effective date of July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

This bill's provisions may implicate the privacy rights established in Art. I, s. 23, of the Florida Constitution. For a discussion on the relevant case law, please see the "Present Situation" section of this analysis.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

SB 404 may have an indeterminate fiscal on the Department of Health and on the State Courts System related to implementing the requirements established by the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

SB 404 requires that a physician must be presented with a notarized statement of consent signed by a minor's parent or legal guardian prior to performing an abortion on the minor. The bill

defines “minor” as a person under the age of 18 years but does not account for emancipated minors. In order to obtain a judicial bypass, the bill requires that a minor be unemancipated. (See lines 140-143.) Therefore, it is possible that the bill, as written, may prevent emancipated minors from obtaining abortions.

VIII. Statutes Affected:

This bill creates section 390.01117 of the Florida Statutes

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.
