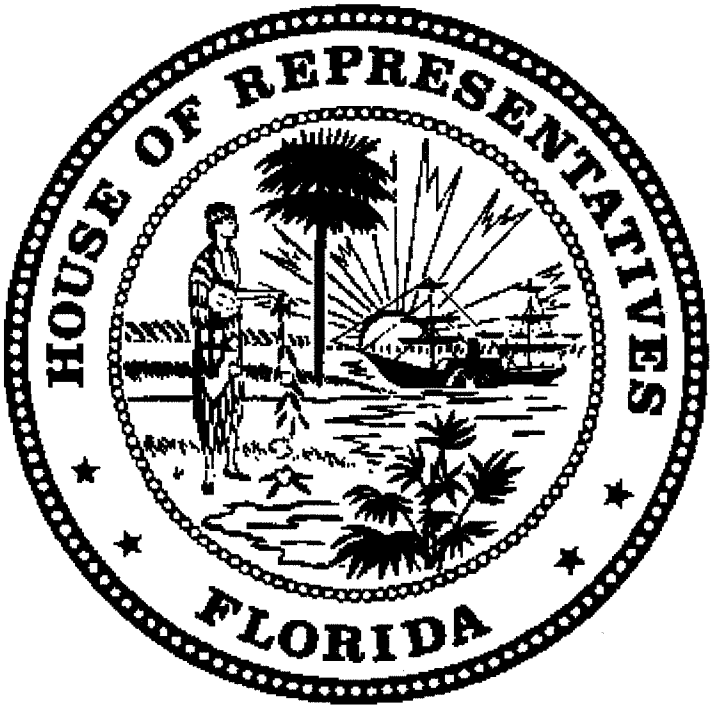

Criminal & Civil Justice Policy Council

Tuesday April 13, 2010
9:15 AM
404 HOB

Larry Cretul
Speaker

William Snyder
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Criminal & Civil Justice Policy Council

Start Date and Time:	Tuesday, April 13, 2010 09:15 am
End Date and Time:	Tuesday, April 13, 2010 12:15 pm
Location:	404 HOB
Duration:	3.00 hrs

Consideration of the following bill(s):

CS/HB 317 Threats by Public Safety & Domestic Security Policy Committee, Adkins
CS/CS/HB 787 Child Abduction Prevention by Policy Council, Public Safety & Domestic Security Policy Committee, Rouson
HJR 1399 Religious Freedom by Precourt
HB 1449 Parental Notice of Abortion by Stargel

NOTICE FINALIZED on 04/09/2010 16:22 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 317 Threats
SPONSOR(S): Public Safety & Domestic Security Policy Committee; Adkins and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 860

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	12 Y, 0 N, As CS	Krol	Cunningham
2)	Criminal & Civil Justice Appropriations Committee	14 Y, 0 N	McAuliffe	Davis
3)	Criminal & Civil Justice Policy Council		Krol TK	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

Section 836.10, F.S., provides that a person commits a second degree felony if the person writes and sends a letter or inscribed communication containing a threat to injure or kill the person to whom the letter or communication is addressed, or a family member of the person to whom the letter or communication is sent. The letter may be signed or sent anonymously. The statute does not specifically include letters or communications written, composed, or sent by *electronic* means.

The bill adds "electronic communication" to the existing statute. Any threats sent in this manner would be punishable by a second degree felony.

The Criminal Justice Impact Conference met February 23, 2010, and could not determine the prison bed impact of this bill because the number of persons that will make electronic threats of death or injury cannot be quantified. However, there were only six people sentenced to state prison in 2008-09 under the current law.

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:

Present Situation

Section 836.10, F.S., provides that a person commits a second degree felony[1] if the person writes and sends a letter or inscribed communication containing a threat to injure or kill the person to whom the letter or communication is addressed, or a family member of the person to whom the letter or communication is sent. The letter or communication may be signed or sent anonymously.

The statute does not specifically include letters or communications written, composed, or sent by *electronic* means.

Proposed Changes

The bill amends s. 836.10, F.S., to add "electronic communication" to the existing statute. Any threats sent in this manner would be punishable by a second degree felony.

B. SECTION DIRECTORY:

Section 1: Amends s. 836.10, F.S., relating to written threats to kill or do bodily injury; punishment.

Section 2: Provides an effective date of October 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Criminal Justice Impact Conference met February 23, 2010, and could not determine the prison bed impact of this bill because the number of persons that will make electronic threats of death or

[1] A second degree felony is punishable by up to 15 years imprisonment and a maximum $10,000 fine. Sections 775.082, 775.083, 775.084, F.S.

injury cannot be quantified. However, there were only six people sentenced to state prison in 2008-09 under the current law.

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 appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On February 16, 2010, the Public Safety & Domestic Security Policy Committee adopted a strike-all amendment to the bill. The amendment:

- Removes language from the bill that created a second degree misdemeanor penalty if a person communicated orally, in writing or through the use of electronic means or other means a threat to do physical harm to a person or property of another in the course of committing an act of domestic violence. The domestic violence statute currently provides a penalty for threats made against a person.

- Adds "electronic communication" to the existing statute. Any threats sent in this manner would be punishable by a second degree felony.

The bill was reported favorably as a Committee Substitute. This analysis reflects the Committee Substitute.

A bill to be entitled

An act relating to threats; amending s. 836.10, F.S.; revising provisions relating to the sending of or procuring the sending of letters or inscribed communications containing certain threats of death or bodily injury; including electronic communications in provisions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 836.10, Florida Statutes, is amended to read:

836.10 Written threats to kill or do bodily injury; punishment.—~~If~~ Any person who writes or composes and also sends or procures the sending of any letter, ~~or~~ inscribed communication, or electronic communication, ~~so written or composed,~~ whether such letter or communication be signed or anonymous, to any person, containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or a threat to kill or do bodily injury to any member of the family of the person to whom such letter or communication is sent commits~~, the person so writing or composing and so sending or procuring the sending of such letter or communication, shall be guilty of~~ a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. This act shall take effect October 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 787 Child Abduction Prevention
SPONSOR(S): Policy Council, Public Safety & Domestic Security Policy Committee, Rouson and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1862

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	10 Y, 0 N, As CS	Krol	Cunningham
2)	Policy Council	13 Y, 0 N, As CS	Varn	Ciccone
3)	Criminal & Civil Justice Policy Council		Krol TK	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

The bill provides additional risk factors for a judge to consider when deciding whether or not a child is at risk of parental abduction. The bill also clearly outlines and makes additions to preventative measures that a judge may order if the judge finds credible evidence that a child is at risk of abduction. Finally, the bill provides that violation of the parenting plan may subject the party to civil or criminal penalties or a federal or state warrant under federal or state law.

The bill does not appear to have a fiscal impact.

The bill provides an effective date of January 1, 2011.

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:

Child Abduction

Approximately 49 percent of child abductions are committed by a parent or relative.[1] When a child is abducted, it is often extremely difficult, time-consuming, and expensive to recover the child.[2] If the child has been taken overseas, the situation becomes worse and the child may be almost impossible to locate or recover.[3]

Uniform Child Abduction Prevention Act

The Uniform Child Abduction Prevention Act (UCAPA) was promulgated by the National Conference of Commissioners on Uniform States Laws (NCCUSL) in 2006.[4] The NCCUSL recommends laws for adoption by states in areas where it believes the laws should be uniform. The UCAPA's stated purpose is to provide a mechanism for a court to impose child abduction prevention measures at any time, both before and after the court has entered a custody decree, thereby deterring and preventing domestic and international abduction.[5] The abduction can be committed by a parent, persons acting on behalf of a parent, or others.

The UCAPA was created to complement and strengthen existing law, such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[6], the federal Parental Kidnapping Prevention Act (PKPA), and with regard to international child abduction, the Hague Convention on the Civil Aspects of

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[1] Karen A. Bilich, Parenting, *Child Abduction Facts*, http://www.parents.com/kids/safety/stranger-safety/child-abduction-facts/, (Last accessed March 17, 2010).

[2] Merle Weiner, *Uniform Child Abduction Prevention Act: Understanding the Basics*, Summer 2009, http://www.haguedv.org/articles/Weiner%20&%20Mitchell%20UCAPA%20Synergy%202009.pdf, (Last accessed March 17, 2010).

[3] *Ibid.*

[4] Illinois General Assembly, *Uniform Child Abduction Prevention Act (UCAPA)*, http://www.ilga.gov/commission/lru/56.Abduction.pdf, (Last accessed March 17, 2010).

[5] Child abduction is defined as "wrongful removal" or "wrongful retention" of an unemancipated minor. State of New Jersey Law Revision Commission, *Final Report Relating to Uniform Child Abduction Prevention Act*, www.lawrev.state.nj.us/ucapa/ucapaFR122208.doc, (Last accessed March 17, 2010).

[6] *Op. cit.*, Illinois General Assembly. The UCCJEA is the law in 48 states. In 2002, Florida enacted the Uniform Child Custody Jurisdiction and Enforcement Act to replace the outdated Uniform Child Custody Jurisdiction Act. *See* ss. 61.501-61.542, F.S.

International Child Abduction (Hague Convention.)[7] The UCAPA is "premised on the general principle that preventing abduction is in a child's best interests."[8]

Thus, the UCAPA, "provides states with a valuable tool for deterring both domestic and international child abductions by parents and people acting on behalf of the parents."[9] The UCAPA will become the law of a state only if the state enacts it.[10] During its initial legislative year (2007), seven states enacted the UCAPA into law.[11]

Child Abduction Prevention in Florida

Section 61.45, F.S., provides that when imposing a parenting plan, the court will consider a variety of factors in determining whether there is a risk that the plan will be violated. The court may also impose a bond if they believe there is a risk that the plan will be violated. In a proceeding in which the court enters a parenting plan, if competent substantial evidence is presented that there is a risk one party may violate the court's parenting plan by removing the child from the state or country or concealing the whereabouts of the child, the court may impose the following preventative measures:

- Order that a parent may not remove the child from this state without the notarized written permission of both parents or further court order;
- Order that a parent may not remove the child from this country without the notarized written permission of both parents or further court order;
- Order that a parent may not take the child to a country that has not ratified or acceded to the Hague Convention unless the other parent agrees in writing that the child may be taken to the country;
- Require a parent to surrender the passport of the child; or
- Require a party to post bond or other security.

If the court enters a parenting plan that includes a provision that the party not remove the child from the country without notarized written permission of both parents or take the child to a country that has not ratified or acceded to the Hague Convention, a certified copy of the order should be sent by the parent who requested the restriction to the Passport Services Office of the U.S. Department of State requesting that the office not issue a passport to the child without the parents' signature or further court order.

In assessing the need for a bond or other security, the court may consider any reasonable factor bearing upon the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, including but not limited to whether:

- A court has found that a party previously removed a child from Florida or another state in violation of a parenting plan, or whether a court had found that a party has threatened to take a child out of Florida or another state in violation of a parenting plan;
- The party has strong family and community ties to Florida or to other states or countries, including whether the party or child is a citizen of another country;
- The party has strong financial reasons to remain in Florida or to relocate to another state or country;
- The party has engaged in activities that suggest plans to leave Florida, such as quitting employment; sale of a residence or termination of a lease on a residence, without efforts to acquire an alternative residence in the state; closing bank accounts or otherwise liquidating assets; or applying for a passport;

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[7] 81 countries have ratified the Hague Convention. *The Hague Convention on the Civil Aspects of International Child Abduction,* http://hcch.evision.nl/index_en.php?act=conventions.status&cid=24#nonmem, (Last accessed March 17, 2010).

[8] *Ibid.*

[9] The National Conference of Commissioners on Uniform State Laws, *Summary: Uniform Child Abduction Prevention Act,* http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucapa.asp, (Last accessed March 17, 2010).

[10] *Op. cit.*, Weiner.

[11] *Op. cit.*, Illinois General Assembly. The seven states include: Colorado; Kansas; Louisiana; Nebraska; Nevada; South Dakota; and Utah.

- Either party has had a history of domestic violence as either a victim or perpetrator, child abuse or child neglect evidenced by criminal history, including but not limited to, arrest, an injunction for protection against domestic violence issued after notice and hearing, medical records, affidavits, or any other relevant information; or
- The party has a criminal record.

Section 61.45, F.S., also makes provisions for the determination and forfeiture of the bond or security. It provides an exception to the bond requirements for a parent determined by the court to be a victim or potential victim of domestic violence. The statute also provides for allocation of the bond proceeds upon entry of a forfeiture order.

Effect of Proposed Changes
The bill adds additional risk factors for a judge to consider when deciding whether or not a child is at risk of parental abduction. The bill also clearly outlines and makes additions to preventative measures that a judge may order if the judge finds credible evidence that a child is at risk of abduction. The bill also provides that a violation of the parenting plan may subject the party to civil or criminal penalties or a federal or state warrant under federal or state law. The bill renames s. 61.45, F.S., to the "Child Abduction Prevention Act."

New Preventative Measures
Currently, preventative measures may be ordered by a judge if one of the parties presents competent substantial evidence there is a risk of abduction or if both parties agree there is a risk of abduction. The bill would also permit a judge to order preventative measures upon the motion of another individual or entity having a right under the laws of Florida. Additionally, the bill would allow the court to order preventative measures, if the court finds evidence that establishes credible risk of removal of the child.

In addition to the existing preventative measure for a parent to surrender the child's passport, the court may also require that:

- The petitioner place the child's name in the Children's Passport Issuance Alert Program of the U.S. Department of State;[12]
- The respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and child; and
- The respondent may not apply on behalf of the child for a new or replacement passport or visa.

As noted above, the court may require the party to post bond or other security in an amount sufficient to serve as a financial deterrent to abduction. The bill specifies that the bond may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney's fees and costs, if the child is abducted.

In addition to the existing preventative measure for a court to order a party not to remove the child from the state or country without notarized written permission, a court may order:

- An imposition of travel restrictions that require that a party traveling with the child outside a designated geographic area provide the other party with the travel itinerary of the child; a list of physical addresses and telephone numbers at which the child can be reached at specified times; and copies of all travel documents;

[12] The Children's Passport Issuance Alert Program of the U.S. Department of State allows a parent to register his or her U.S. citizen children under the age of 18 in the Department of State's Passport Lookout System. The parent or parents receive an alert from the Department of State if an application is submitted for a child that is registered in the program. The passport lookout system gives all U.S. passport agencies as well as U.S. embassies and consulates abroad an alert on a child's name if a parent or guardian registers an objection to passport issuance for his or her child. U.S. Passport Service Guide, *The Children's Passport Issuance Alert Program,* available at: http://travel.state.gov/family/abduction/resources/resources_554.html. (Last accessed March 17, 2010).

- A prohibition of the respondent from, directly or indirectly:
  - Removing the child from the state, country or specified region without the court's permission or the petitioner's written consent;
  - Removing or retaining a child in violation of a child custody determination;
  - Removing the child from school, child care or similar facility; or
  - Approaching the child at any location other than a site designated for supervised visitation.
- A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;
- As a prerequisite to exercising custody or visitation, a court may order a requirement that the respondent provide the following:
  - Authenticated court order detailing passport and travel restrictions for the child to the Office of Children's Issues within the Bureau of Consular Affairs of the U.S. Department of State and relevant foreign consulate or embassy;
  - Proof to the court that the respondent has provided the information as noted above;
  - An acknowledgement to the court in a record from the relevant foreign consulate or embassy that no passport application has been made or issued on behalf of the child;
  - Proof to the petitioner and court of registration with the U.S. embassy or other U.S. diplomatic presence in the destination country and with the destination country's central authority for the Hague Convention, if that convention is in effect between this country and the destination country, unless one of the parties objects;
  - A written waiver under the Privacy Act, 5 U.S.C. s. 552(a), as amended, with respect to any document, application, or other information pertaining to the child or party authorizing its disclosure to the court;
  - A written waiver with respect to any document application, or other information pertaining to the child or respondent in records held by the U.S. Bureau of Citizenship and Immigration Services authorizing its disclosure to the court;
  - Upon the court's request, a requirement that the party obtain an order from the relevant foreign country, containing terms identical to the child custody determination issued in this country; or
  - Upon the court's request, a requirement that the child be entered into the Prevent Departure Program of the U.S. Department of State[13] or a similar federal program designed to prevent unauthorized departure into foreign country.
- The court may impose conditions on the exercise of custody or visitation that limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and orders the respondent to pay the costs of supervision.

New Risk Factors

The bill imposes additional risk factors that a party has engaged in activities that suggest that he or she may violate the parenting plan by abducting the child. The new factors include whether:

- The party has engaged in activities that suggest plans to leave Florida such as applying for a passport or visa or obtaining travel documents for the respondent or the child;
- The party is likely to take the child to a country that:
  - Is not a party to the Hague Convention and does not provide for the extradition of an abducting parent or for the return of an abducted child;
  - Is a party to the Hague Convention, but:
    - The Hague Convention is not in force between this country and that country;
    - Is noncompliant or demonstrating patterns of noncompliance according to the most recent compliance report issued by the U.S. Department of State; or
    - Lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention;

[13] The Department of Homeland Security's Prevent Departure Program prevents non-U.S. citizens from leaving the U.S. The program only applies to aliens. It is not available to stop U.S. citizens or dual U.S./foreign citizens from leaving the country. Office of Juvenile Justice and Delinquency Prevention. *A Family Resource Guide on International Parental Kidnapping.* http://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf. (Last accessed March 17, 2010).

- Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;
- Has laws or practices that would:
  - Enable the respondent, without due cause, to prevent the petitioner from contacting the child;
  - Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or
  - Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;
- Is included by the U.S. Department of State on a current list of state sponsors of terrorism;
- Does not have an official U.S. diplomatic presence in the country; or
- Is engaged in active military action or war, including a civil war, to which the child may be exposed.

- The party is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in this country legally;
- The party has had an application for U.S. citizenship denied;
- The party has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, or travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the U.S. government;
- The party has used multiple names to attempt to mislead or defraud;
- The party has been diagnosed with a mental health disorder the court considers relevant to the risk of abduction; or
- The party is engaged in any other conduct the court considers relevant to the risk of abduction.

A violation of the court-ordered parenting plan may subject the party committing the violation to civil or criminal penalties or a federal or state warrant under federal or state laws, including the International Parental Kidnapping Crime Act,[14] and may subject the violating parent to apprehension by a law enforcement officer.

The bill provides an effective date of January 1, 2011.

B. SECTION DIRECTORY:

Section 1. Names the act as the "Child Abduction Prevention Act."

Section 2. Amends s. 61.45, F.S., relating to court-ordered parenting plan; risk of violation; bond.

Section 3. Provides an effective date of January 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See "Fiscal Comments."

[14] The International Parental Kidnapping Crime Act (IPKCA) of 1993 provides that a criminal arrest warrant can be issued for a parent who takes a juvenile under 16 outside of the U.S. without the other custodial parent's permission. Federal Bureau of Investigation, *Crimes Against Children*, http://www.fbi.gov/hq/cid/cac/family.htm, (Last accessed March 17, 2010).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill provides that law enforcement officers may be required to take a child into custody in certain situations, which could cause an increase in workload. However, to the extent that this bill could prevent the abduction of a child, courts and law enforcement officers are likely to see a reduction in litigation and enforcement costs respectively.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

This bill allows a court to evaluate certain risk factors, and, if it decides that a credible risk exists that a child may be abducted, the court may enter an order containing provisions and measures meant to prevent abduction. For example, the court may impose travel restrictions, such as prohibiting an individual from removing the child from the state, country, or other geographic area.

The right to travel has been found to be a basic and fundamental right recognized by the United States Constitution through the privileges and immunities clause, the due process clause, the equal protection clause, the commerce clause, and the First Amendment.[15] Typically, when a fundamental right is involved, the government must show a compelling state interest for its action and that it has used the least intrusive means to further that interest.[16] Courts have generally found that a person's constitutional right to travel may be restricted when that person is the custodial parent of a child. One court stated:

> [w]hile we recognize that citizens of this nation ordinarily have the constitutional right to travel from one state to another and to take up residence in the state of one's choice, we also recognize a

[15] 16A C.J.S. *Constitutional Law* s. 690.

[16] See *A.W. v. Dep't of Children and Families*, 969 So. 2d 496, 504 (Fla. 1st DCA 2007) (citing *North Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 625 n. 16 (Fla. 2003)).

legitimate state interest in restricting the residence of a custodial parent.[17]

A court may impose travel restrictions on a custodial parent because "[t]he best interest of the child standard is a compelling state interest that can restrict the constitutional right of a custodial parent to travel, and is the most appropriate way to fairly balance parents' competing interests, when a custodial parent seeks to relocate with a child."[18]

A court may not infringe on a constitutional right without a legitimate state interest, and it must do so in the least restrictive means. The bill allows a court to restrict a party's right to travel with the person's child based on a possibility that there is a risk that the respondent may abduct the child. This is determined by examining certain factors enumerated in statute. However, one factor that a court may consider is whether the respondent is obtaining travel documents for himself or herself or the child. This in and of itself, is not illegal or suspect, yet a court may consider it when deciding whether to restrict the respondent's constitutional rights. Additionally, by including the fact that the respondent obtained travel documents for himself or herself as a risk factor, it may preclude the respondent from traveling because of the fear that he or she will be considered a "risk" for abducting the child. This could also be considered an infringement on a person's right to travel. To the extent a court finds that the state has a legitimate interest in protecting a child from abduction, the bill may pass a constitutional challenge. However, if a court finds that the bill is not using the least restrictive means to infringe on the respondent's constitutional right to travel, the bill may be subject to a constitutional challenge.

The bill also permits a court to require a written waiver by the respondent of his or her privacy rights with respect to "*any* document, application, or other information pertaining to the child or the respondent." Florida has an explicit constitutional right to privacy under article I, section 23, of the Florida Constitution. In right of privacy cases where a reasonable expectation of privacy exists, the Florida Supreme Court has applied the compelling state interest standard of review.[19] The bill's provision appears to be broadly written and may raise constitutional concerns.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Several states have considered adopting the UCAPA, but declined to do so. One of the reasons some states did not adopt the UCAPA is that they believe that the measures to prevent abduction took away certain fundamental liberties, such as the right to travel.[20] Some states have rectified some of the problems by modifying the UCAPA to apply only to international child abductions.[21]

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 22, 2010, the Public Safety & Domestic Security Policy Committee adopted an amendment to the bill. The amendment:

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[17] Child Custody Prac. & Proc. s. 17:27 (quoting *Carlson v. Carlson*, 661 P.2d 833 (Kan. Ct. App. 1983)); *but see* Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 68-81 (1995-96) (providing an argument for why it is against a custodial parent's constitutional right to travel to place relocation restrictions in a custody order).

[18] 16B Am. Jur. 2d *Constitutional Law* s. 665.

[19] *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985).

[20] *Op. cit.*, State of New Jersey Law Revision Commission.

[21] *Ibid.* Louisiana is one state that has adopted a version of UCAPA that applies exclusively to international abductions.

- Removes "delusional paranoiac" and "severely sociopathic" from the risk factors the court can consider; and

- Adds to the list of risk factors: "The party has been diagnosed with a mental health disorder the court considers relevant to the risk of abduction."

The bill was reported favorably as a Committee Substitute.

On April 9, 2010, the Policy Council adopted a strike-all amendment to the Committee Substitute. The amendment made the following changes:

- Changed the effective date from July 1, 2010 to January 1, 2011;

- Removed making of travel plans for a family member and obtaining birth certificate or medical records as risk factors; and

- Made technical changes.

The bill was reported favorably as a Council Substitute for the Committee Substitute. This analysis reflects the Council Substitute for the Committee Substitute.

A bill to be entitled

An act relating to child abduction prevention; providing a short title; amending s. 61.45, F.S.; authorizing additional persons to move to have certain restrictions placed in parenting plans upon showing of a risk that one party may violate the court's parenting plan by removing a child from this state or country or by concealing the child's whereabouts; authorizing courts to impose certain restrictions in parenting plans upon a specified finding; authorizing a court to impose certain restrictions in addition to or in lieu of a requirement that a child's passport be surrendered; authorizing a court to impose specified restrictions upon entry of an order to prevent removal of a child from this state or country; providing additional factors that may be considered in assessing the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the child's whereabouts; providing that violations may subject a violator to specified penalties or other consequences; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act may be cited as the "Child Abduction Prevention Act."

Section 2. Section 61.45, Florida Statutes, is amended to read:

61.45 Court-ordered parenting plan; risk of violation;

bond.—

(1) In any proceeding in which the court enters a parenting plan, including a time-sharing schedule, including in a modification proceeding, upon the presentation of competent substantial evidence that there is a risk that one party may violate the court's parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, ~~or~~ upon stipulation of the parties, upon the motion of another individual or entity having a right under the law of this state, or if the court finds evidence that establishes credible risk of removal of the child, the court may:

(a) Order that a parent may not remove the child from this state without the notarized written permission of both parents or further court order;

(b) Order that a parent may not remove the child from this country without the notarized written permission of both parents or further court order;

(c) Order that a parent may not take the child to a country that has not ratified or acceded to the Hague Convention on the Civil Aspects of International Child Abduction unless the other parent agrees in writing that the child may be taken to the country;

(d) Require a parent to surrender the passport of the child or require that:

1. The petitioner place the child's name in the Children's Passport Issuance Alert Program of the United States Department of State;

2. The respondent surrender to the court or the

petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

3. The respondent not apply on behalf of the child for a new or replacement passport or visa; or

(e) Require that a party ~~to~~ post bond or other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay the reasonable expenses of recovery of the child, including reasonable attorney's fees and costs, if the child is abducted.

(2) If the court enters a parenting plan, including a time-sharing schedule, including in a modification proceeding, that includes a provision entered under paragraph (1)(b) or paragraph (1)(c), a certified copy of the order should be sent by the parent who requested the restriction to the Passport Services Office of the United States Department of State requesting that they not issue a passport to the child without their signature or further court order.

(3) If the court enters an order under paragraph (1)(a) or paragraph (1)(b) to prevent the removal of the child from this state or country, the order may include one or more of the following:

(a) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographic area provide the other party with the following:

1. The travel itinerary of the child.

2. A list of physical addresses and telephone numbers at which the child can be reached at specified times.

3. Copies of all travel documents.

(b) A prohibition of the respondent directly or indirectly:

1. Removing the child from this state or country or another specified geographic area without permission of the court or the petitioner's written consent;

2. Removing or retaining the child in violation of a child custody determination;

3. Removing the child from school or a child care or similar facility; or

4. Approaching the child at any location other than a site designated for supervised visitation.

(c) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state.

(d) As a prerequisite to exercising custody or visitation, a requirement that the respondent provide the following:

1. An authenticated copy of the order detailing passport and travel restrictions for the child to the Office of Children's Issues within the Bureau of Consular Affairs of the United States Department of State and the relevant foreign consulate or embassy.

2. Proof to the court that the respondent has provided the information in subparagraph 1.

3. An acknowledgment to the court in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child.

4. Proof to the petitioner and court of registration with the United States embassy or other United States diplomatic presence in the destination country and with the destination country's central authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that convention is in effect between this country and the destination country, unless one of the parties objects.

5. A written waiver under the Privacy Act, 5 U.S.C. s. 552a, as amended, with respect to any document, application, or other information pertaining to the child or the respondent authorizing its disclosure to the court.

6. A written waiver with respect to any document, application, or other information pertaining to the child or the respondent in records held by the United States Bureau of Citizenship and Immigration Services authorizing its disclosure to the court.

7. Upon the court's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child custody determination issued in this country.

8. Upon the court's request, a requirement that the respondent be entered in the Prevent Departure Program of the United States Department of State or a similar federal program designed to prevent unauthorized departures to foreign countries.

(e) The court may impose conditions on the exercise of custody or visitation that limit visitation or require that visitation with the child by the respondent be supervised until

the court finds that supervision is no longer necessary and orders the respondent to pay the costs of supervision.

(4) ~~(3)~~ In assessing the need for a bond or other security, the court may consider any reasonable factor bearing upon the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, including but not limited to whether:

(a) A court has previously found that a party previously removed a child from Florida or another state in violation of a parenting plan, or whether a court had found that a party has threatened to take a child out of Florida or another state in violation of a parenting plan;

(b) The party has strong family and community ties to Florida or to other states or countries, including whether the party or child is a citizen of another country;

(c) The party has strong financial reasons to remain in Florida or to relocate to another state or country;

(d) The party has engaged in activities that suggest plans to leave Florida, such as quitting employment; sale of a residence or termination of a lease on a residence, without efforts to acquire an alternative residence in the state; closing bank accounts or otherwise liquidating assets; ~~or~~ applying for a passport or visa; or obtaining travel documents for the respondent or the child;

(e) Either party has had a history of domestic violence as either a victim or perpetrator, child abuse or child neglect evidenced by criminal history, including but not limited to, arrest, an injunction for protection against domestic violence

issued after notice and hearing under s. 741.30, medical records, affidavits, or any other relevant information; ~~or~~

(f) The party has a criminal record;~~.~~

(g) The party is likely to take the child to a country that:

1. Is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

2. Is a party to the Hague Convention on the Civil Aspects of International Child Abduction, but:

a. The Hague Convention on the Civil Aspects of International Child Abduction is not in force between this country and that country;

b. Is noncompliant or demonstrating patterns of noncompliance according to the most recent compliance report issued by the United States Department of State; or

c. Lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

3. Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

4. Has laws or practices that would:

a. Enable the respondent, without due cause, to prevent the petitioner from contacting the child;

b. Restrict the petitioner from freely traveling to or

exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or

c. Restrict the child's ability to legally leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;

5. Is included by the United States Department of State on a current list of state sponsors of terrorism;

6. Does not have an official United States diplomatic presence in the country; or

7. Is engaged in active military action or war, including a civil war, to which the child may be exposed;

(h) The party is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in this country legally;

(i) The party has had an application for United States citizenship denied;

(j) The party has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(k) The party has used multiple names to attempt to mislead or defraud;

(l) The party has been diagnosed with a mental health disorder that the court considers relevant to the risk of abduction; or

(m) The party has engaged in any other conduct that the

court considers relevant to the risk of abduction.

(5) ~~(4)~~ The court must consider the party's financial resources prior to setting the bond amount under this section. Under no circumstances may the court set a bond that is unreasonable.

(6) ~~(5)~~ Any deficiency of bond or security does ~~shall~~ not absolve the violating party of responsibility to pay the full amount of damages determined by the court.

(7) ~~(6)~~(a) Upon a material violation of any parenting plan by removing a child from this state or ~~this~~ country or by concealing the whereabouts of a child, the court may order the bond or other security forfeited in whole or in part.

(b) This section, including the requirement to post a bond or other security, does not apply to a parent who, in a proceeding to order or modify a parenting plan or time-sharing schedule, is determined by the court to be a victim of an act of domestic violence or provides the court with reasonable cause to believe that he or she is about to become the victim of an act of domestic violence, as defined in s. 741.28. An injunction for protection against domestic violence issued pursuant to s. 741.30 for a parent as the petitioner which is in effect at the time of the court proceeding shall be one means of demonstrating sufficient evidence that the parent is a victim of domestic violence or is about to become the victim of an act of domestic violence, as defined in s. 741.28, and shall exempt the parent from this section, including the requirement to post a bond or other security. A parent who is determined by the court to be exempt from the requirements of this section must meet the

requirements of s. 787.03(6) if an offense of interference with the parenting plan or time-sharing schedule is committed.

(8) ~~(7)~~ (a) Upon an order of forfeiture, the proceeds of any bond or other security posted pursuant to this subsection may only be used to:

1. Reimburse the nonviolating party for actual costs or damages incurred in upholding the court's parenting plan.

2. Locate and return the child to the residence as set forth in the parenting plan.

3. Reimburse reasonable fees and costs as determined by the court.

(b) Any remaining proceeds shall be held as further security if deemed necessary by the court, and if further security is not found to be necessary; applied to any child support arrears owed by the parent against whom the bond was required, and if no arrears exists; all remaining proceeds will be allocated by the court in the best interest of the child.

(9) ~~(8)~~ At any time after the forfeiture of the bond or other security, the party who posted the bond or other security, or the court on its own motion may request that the party provide documentation substantiating that the proceeds received as a result of the forfeiture have been used solely in accordance with this subsection. Any party using such proceeds for purposes not in accordance with this section may be found in contempt of court.

(10) A violation of this section may subject the party committing the violation to civil or criminal penalties or a federal or state warrant under federal or state laws, including

the International Parental Kidnapping Crime Act, and may subject the violating parent to apprehension by a law enforcement officer.

Section 3. This act shall take effect January 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1399 Religious Freedom
SPONSOR(S): Precourt and others
TIED BILLS: **IDEN./SIM. BILLS:** SJR 2550

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Criminal & Civil Justice Policy Council		Thomas	Havlicak
2)	Rules & Calendar Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

The Joint Resolution amends Article I, Section 3 of the Florida Constitution relating to religious freedom. The resolution:

- Repeals a limit on the power of the state and its subdivisions to spend funds "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."
- Adds language that prohibits the state and its subdivisions from excluding individuals and entities from participating in any public program on the basis of religion.

The joint resolution must be adopted by a three-fifths vote of the membership of each house of the Legislature. If adopted by the Legislature, the proposed amendment would be placed on the ballot at the November 2, 2010, general election. Sixty percent voter approval is required for adoption. If adopted by the voters, the amendment will take effect on January 4, 2011.

The Department of State has projected a non-recurring fiscal impact of $16,000 to comply with the constitutional publication requirements for the joint resolution.

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:

Present Situation

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause and a Free Exercise Clause. The Establishment Clauses are based on the clause including the words "establishment of religion." The Free Exercise Clauses are based on the clause including the words "free exercise."

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an **establishment of religion**, or prohibiting the **free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances (emphasis added).

Similarly, Article I, Section 3 of the Florida Constitution states:

> There shall be no law respecting the **establishment of religion** or prohibiting or penalizing the **free exercise thereof**. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. **No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution** (emphasis added).

Blaine Amendments

The last sentence of Article I, Section 3 of the Florida Constitution is known as the "Blaine Amendment" or "no-aid" provision.[1] The U.S. Constitution **does not** contain a similar provision. "Blaine Amendments" are provisions adopted in the latter part of the nineteenth century as part of many state constitutions in an attempt to restrict the use of state funds at "sectarian" schools. Florida's "Blaine

[1] *Bush v. Holmes*, 886 So.2d 340, 344, 348-349 (Fla. 1st DCA 2004).

Amendment" imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the Florida or U.S. Constitutions.[2]

In 1875, President Ulysses S. Grant, in his State of the Union Address, called for an amendment to the U.S. Constitution to mandate free public schools and prohibit the use of public money for sectarian schools. President Grant laid out his agenda for "good common school education." He attacked government support for "sectarian schools" run by religious organizations, and called for the defense of public education "unmixed with sectarian, pagan or atheistical dogmas." President Grant declared that "Church and State" should be "forever separate." Religion, he said, should be left to families, churches, and private schools devoid of public funds.[3]

After President Grant's speech, Congressman James G. Blaine proposed the President's suggested amendment to the U.S. Constitution. In 1875, the proposed amendment passed by a vote of 180 to 7 in the House of Representatives, but failed by four votes to achieve the necessary two-thirds vote in the U.S. Senate. The proposed text of Blaine's amendment was:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.[4]

While the amendment failed at the federal level, in the following years a majority of states adopted amendments similar to that of Blaine's and such amendments became known as "Blaine Amendments."[5] During this time period, there was a large increase in Catholic immigration to the United States. Catholic families resisted sending their children to public schools where the Protestant bible was read and Protestant prayers were used. This led many Catholic organizations to organize their own school systems, and created concern among Protestants that the government would begin funding Catholic schools. Some commentators believe the "Blaine Amendments" were a reaction to this fear.[6] Today, 37 states have provisions placing some form of restriction on government aid to "sectarian" schools that goes beyond any limits in the U.S. Constitution.[7]

Florida adopted its "Blaine Amendment" in 1885, later than most other states.[8] It was readopted in the 1968 rewrite of the Florida Constitution as part of Article I, Section 3. It has been reported that:

> As elsewhere in the United States, the history of Florida's Blaine Amendment is irrevocably linked to the progress of the common school movement and immigration, urbanization, and industrialization. The common school movement, in Florida and elsewhere, taught a "common religion" that was essentially Protestant in character, requiring until the 1960s, daily reading from the King James Bible, prayer, and other Protestant religious observances in the public schools.[9]

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[2] *Holmes*, at 344.
[3] Deforrest; Mark Edward. "*An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*," Harvard Journal of Law and Public Policy, Vol. 26, 2003.
[4] *Id.*
[5] *The Blaine Game: Controversy Over the Blaine Amendments and Public Funding of Religion.* Pew Forum on Religious and Public Life. July 24, 2008. Available at: http://pewforum.org/Church-State-Law/The-Blaine-Game-Controversy-Over-the-Blaine-Amendments-and-Public-Funding-of-Religion.aspx (last visited April 12, 2010).
[6] *Id.*
[7] The Becket Fund for Religious Liberty, What are Blaine Amendments? http://www.blaineamendments.org/Intro/whatis.html (last visited April 12, 2010).
[8] *Holmes* at 351-352.
[9] Adams, Nathan. *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education.* 30 Nova L. Rev. 1, Fall 2005.

Florida Court Cases

Bush v. Homes

Taxpayers challenged the constitutionality of a school voucher program entitled the Opportunity Scholarship Program (OSP). The trial court found the OSP in violation of the free public school system provision in Article IX, Section 1 of the Florida Constitution, relying on the principle of "expressio unius est exclusio alterius"[10] in finding that the expression in the Florida Constitution of a public school system prohibits the Legislature from funding private schools.[11] On appeal, the First District Court of Appeal reversed and remanded, holding that the OSP was not unconstitutional on its face under this provision.[12]

On remand, the circuit court found the OSP unconstitutional again, this time based on the State Constitution's "no-aid" provision ("Blaine Amendment") in Article I, Section 3. On appeal, a divided 3-judge panel of the First District Court of Appeal affirmed the trial court's order.[13] The First District subsequently withdrew the panel opinion and issued an en banc decision in which a majority of the First District again affirmed the trial court's order.[14] The Court found that the "no-aid" provision involves three elements:

> (1) the prohibited state action must involve the use of state tax revenues;
> (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and
> (3) the prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[15]

In interpreting the "no-aid" provision, the Court commented that:

> [W]e cannot read the entirety of article I, section 3 of the Florida Constitution to be substantively synonymous with the federal Establishment Clause... For a court to interpret the no-aid provision of article I, section 3 as imposing no further restrictions on the state's involvement with religious institutions than the Establishment Clause, it would have to ignore both the clear meaning and intent of the text and the unambiguous history of the no-aid provision... Finally, based upon the recent United States Supreme Court decision in Locke v. Davey, 540 U.S. 712 (2004), we hold that the no-aid provision does not violate the Free Exercise clause of the United States Constitution.[16]

On appeal of the First District's 2004 opinion interpreting the "no-aid" provision, the Supreme Court struck the OSP on other grounds.[17] The Court found "it unnecessary to address whether the OSP is a violation of the "no aid" provision in article I, section 3 of the Constitution, as held by the First District."[18]

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[10] "The mention of one person is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th edition 1990).
[11] *Bush v. Holmes*, 767 So.2d 668, 672 (Fla. 1st DCA 2000).
[12] *Id.*
[13] *Bush v. Holmes*, 29 Fla. L. Weekly D1877 (Fla. 1st DCA Aug.16, 2004).
[14] *Bush v. Holmes*, 886 So.2d 340 (Fla. 1st DCA 2004).
[15] *Id.* at 352.
[16] *Id.* at 344.
[17] *Bush v. Holmes*, 919 So.2d 392, 399 (Fla. 2006). The Florida Supreme Court agreed with the original trial court's opinion that the OSP was in violation of the free public school system provision in Article IX, Section 1 of the Florida Constitution, thus overturning the First District's opinion to the contrary.
[18] *Id.* at 398.

Council for Secular Humanism, Inc. v. McNeil, Florida 1st DCA 2009

The Council for Secular Humanism (CSH) brought suit against the Department of Corrections (DOC) challenging the use of state funds to support the faith-based substance abuse transitional housing programs of Prisoners of Christ, Inc. (Prisoners) and Lamb of God Ministries, Inc. (Lamb of God).[19] The Council for Secular Humanism (CSH) alleged that payments to these organizations by DOC constituted payments to sectarian institutions contrary to the "no-aid" provision in Article I, Section 3 of the Florida Constitution. The trial court found in favor of DOC.

On appeal, the First District Court of Appeal found:

> As this court explained in *Holmes I*, Article I, section 3 of the Florida Constitution is not "substantively synonymous with the federal Establishment Clause." While the first sentence of Article I, section 3 is consistent with the federal Establishment Clause by "generally prohibiting laws respecting the establishment of religion," the no-aid provision of Article I, section 3 **imposes "further restrictions on the state's involvement with religious institutions than [imposed by] the Establishment Clause.**" Specifically, the state may not use tax revenues to "directly or **indirectly**" aid "any church, sect, or religious denomination or any sectarian institution." As we noted in *Holmes I*, the United States Supreme Court has recognized that state constitutional provisions such as Florida's no-aid provision are "far stricter" than the Establishment Clause and "draw [ ] a more stringent line than that drawn by the United States Constitution." [Citations omitted; emphasis added].

The case was remanded to the trial court for a hearing on whether Prisoners and Lamb of God are sectarian institutions and a determination if the DOC contracts are in violation of Article I, Section 3 of the Florida Constitution. The remanded case is not yet on the court's docket for rehearing as of April 12, 2010.

Effect of Proposed Changes

The bill repeals a limit on the power of the state to spend funds directly or indirectly in aid of sectarian institutions. Specifically, the measure repeals the "Blaine Amendment" or "no-aid" provision of Article I, Section 3 of the Florida Constitution.

The bill also replaces the "Blaine Amendment" with the following statement:

> An individual or entity may not be barred from participating in any public program because of religion.

Accordingly, the measure prevents the state from excluding individuals and entities from a public program or benefit on the basis of religion.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, Article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate, which is January 4, 2011.

B. SECTION DIRECTORY:

As this legislation is a joint resolution proposing a constitutional amendment, it does not contain bill sections.

[19] *Council for Secular Humanism, Inc. v. McNeil*, 2009 WL 4782384 (Fla.1st DCA 2009).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The joint resolution does not appear to have a fiscal impact on state revenues.

2. Expenditures:

The State Constitution requires the proposed amendment to be published, once in the tenth week and once in the sixth week immediately preceding the week of the election, in one newspaper of general circulation in each county where a newspaper is published.[20] The Department of State executes this requirement and has projected a non-recurring fiscal impact of $16,000 for the publication of the Joint Resolution if placed on the ballot.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The joint resolution does not appear to have a fiscal impact on local revenues.

2. Expenditures:

The joint resolution does not appear to have a fiscal impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private religious institutions could benefit from receiving public funds.

D. FISCAL COMMENTS:

The cost to publish the amendment is estimated at $16,000.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

Article XI, Section 1 of the State Constitution provides for proposed changes to the Constitution by the Legislature:

> SECTION 1: **Proposal by legislature.** – Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

If passed by the Legislature, the proposed amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records.[21] The proposed amendment must be published, once in the tenth week and once in the sixth week immediately preceding the week of the election, in one newspaper of general circulation

[20] Article XI, s. 5(d) of the State Constitution.
[21] Article XI, s. 5(a) of the State Constitution.

in each county where a newspaper is published.[22] Submission of a proposed amendment at an earlier special election requires the affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.[23]

Article XI, Section 5(e) of the State Constitution requires 60 percent voter approval for a proposed constitutional amendment to pass.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[22] Article XI, s. 5(d) of the State Constitution.
[23] Article XI, s. 5(a) of the State Constitution.

House Joint Resolution

A joint resolution proposing an amendment to Section 3 of Article I of the State Constitution to prohibit individuals and entities from being barred from participating in public programs because of religion and to repeal a prohibition on the use of public revenues in aid of religious organizations and entities.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 3 of Article I of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. An individual or entity may not be barred from participating in any public program because of religion. ~~No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.~~

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION 3

RELIGIOUS FREEDOM.—Proposing an amendment to the State Constitution to provide that an individual or entity may not be barred from participating in any public program because of religion and to delete the prohibition against using revenues from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

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

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[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 legal 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, HB1449 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.

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[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).

A bill to be entitled

An act relating to parental notice of abortion; amending s. 390.01114, F.S.; revising the definition of the term "constructive notice"; revising notice requirements relating to the termination of a pregnancy of a minor; providing exceptions to the notice requirements; revising procedure for judicial waiver of notice; providing for the minor to petition for a hearing within a specified time; providing that in a hearing relating to waiving the requirement for parental notice, the court consider certain additional factors, including whether the minor's decision to terminate her pregnancy was due to undue influence; providing procedure for appeal if judicial waiver of notice is not granted; requiring Supreme Court reports to the Governor and Legislature to include additional information; requiring mandatory reporting of child abuse; providing for construction of the act and Legislative intent; providing for severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 390.01114, Florida Statutes, is amended to read:

390.01114 Parental Notice of Abortion Act.—

(1) SHORT TITLE.—This section may be cited as the "Parental Notice of Abortion Act."

(2) DEFINITIONS.—As used in this section, the term:

(a) "Actual notice" means notice that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files.

(b) "Child abuse" has the same meaning as s. 39.0015(3).

(c) "Constructive notice" means notice that 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 first class mail and by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred.

(d) "Medical emergency" means 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.

(e) "Sexual abuse" has the meaning ascribed in s. 39.01.

(f) "Minor" means a person under the age of 18 years.

(3) NOTIFICATION REQUIRED.—

(a) Actual notice shall be provided by the physician performing or inducing the termination of pregnancy before the performance or inducement of the termination of the pregnancy of a minor. The notice may be given by a referring physician. The

physician who performs or induces the termination of pregnancy must receive the written statement of the referring physician certifying that the referring physician has given notice. If actual notice is not possible after a reasonable effort has been made, the physician performing or inducing the termination of pregnancy or the referring physician must give constructive notice. Notice given under this subsection by the physician performing or inducing the termination of pregnancy must include the name and address of the facility providing the termination of pregnancy and the name of the physician providing notice. Notice given under this subsection by a referring physician must include the name and address of the facility where he or she is referring the minor and the name of the physician providing notice. If actual notice is provided by telephone, the physician must actually speak with the parent or guardian, and must record in the minor's medical file the name of the parent or guardian provided notice, the phone number dialed, and the date and time of the call. If constructive notice is given, the physician must document that notice by placing copies of any document related to the constructive notice, including, but not limited to, a copy of the letter and the return receipt, in the minor's medical file. Actual notice given by telephone shall be confirmed in writing, signed by the physician, and mailed to the last known address of the parent or legal guardian of the minor, by first class mail and by certified mail, return receipt requested, with delivery restricted to the parent or legal guardian.

(b) 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 requirements. If a medical emergency exists, the physician should make reasonable attempts, whenever possible without endangering the minor, to contact the parent or legal guardian. The physician may proceed but must document reasons for the medical necessity in the patient's medical records and must provide notice directly, in person or by telephone, to the parent or legal guardian, including details of the medical emergency and any additional risks to the minor. If the parent or legal guardian has not been notified within 24 hours after the termination of the pregnancy, the physician must provide notice in writing, including details of the medical emergency and any additional risks to the minor, signed by the physician, to the last known address of the parent or legal guardian of the minor, by first class mail and by certified mail, return receipt requested, with delivery restricted to the parent or legal guardian;

2. Notice is waived in writing by the person who is entitled to notice and such waiver is notarized, dated not more than 30 days before the termination of pregnancy, and contains a specific waiver of the right of the parent or legal guardian to notice of the minor's termination of pregnancy;

3. Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015 or a similar statute of another state;

4. Notice is waived by the patient because the patient has

a minor child dependent on her; or

5. Notice is waived under subsection (4).

(c) Violation of this subsection by a physician constitutes grounds for disciplinary action under s. 458.331 or s. 459.015.

(4) PROCEDURE FOR JUDICIAL WAIVER OF NOTICE.—

(a) A minor may petition any circuit court ~~in a judicial circuit within the jurisdiction of the District Court of Appeal~~ in which the minor ~~she~~ resides for a waiver of the notice requirements of subsection (3) and may participate in proceedings on her own behalf. The petition may be filed under a pseudonym or through the use of initials, as provided by court rule. The petition must include a statement that the petitioner is pregnant and notice has not been waived. The court shall advise the minor that she has a right to court-appointed counsel and shall provide her with counsel upon her request at no cost to the minor.

(b)1. Court proceedings under this section ~~subsection~~ must be given precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly. The court shall rule, and issue written findings of fact and conclusions of law, within 3 business days ~~48 hours~~ after the petition is filed, except that the 3-business-day ~~48-hour~~ limitation may be extended at the request of the minor. If the court fails to rule within the 3-business-day ~~48-hour~~ period and an extension has not been requested, the minor may then immediately petition for a hearing upon the expiration of the 3-business-day period to the chief judge of the circuit, who must

ensure a hearing is held within 48 hours after receipt of the minor's petition and an order is entered within 24 hours after the hearing ~~the petition is granted, and the notice requirement is waived~~.

2. If the circuit court does not grant judicial waiver of notice, the minor has the right to appeal. An appellate court must rule within 7 days after receipt of appeal, but a ruling may be remanded with further instruction for a ruling within 3 business days after the remand. The reason for overturning a ruling on appeal must be based on abuse of discretion by the court and may not be based on the weight of the evidence presented to the circuit court since the proceeding is a nonadversarial proceeding.

(c) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court shall issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. If the court does not make the finding specified in this paragraph or paragraph (d), it must dismiss the petition. Factors the court shall consider include:

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.

(d) If the court finds, by a preponderance of the evidence, that the petitioner is the victim ~~there is evidence~~ of child abuse or sexual abuse inflicted ~~of the petitioner~~ by one or both of her parents or her guardian, or by clear and convincing evidence that the notification of a parent or guardian is not in the best interest of the petitioner, the court shall issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. The best-interest standard may not include financial best interest or financial considerations or the potential financial impact on the minor or the minor's family if the minor does not terminate the pregnancy. If the court finds evidence of child abuse or sexual abuse of the minor petitioner by any person, the court shall report the evidence of child abuse or sexual abuse of the petitioner, as provided in s. 39.201. If the court does not make the finding specified in this paragraph or paragraph (c), it must dismiss the petition.

(e) A court that conducts proceedings under this section shall:

1. Provide for a written transcript of all testimony and

proceedings; ~~and~~

2. Issue a final written order containing ~~and specific~~ factual findings and legal conclusions supporting its decision, including factual findings and legal conclusions relating to the maturity of the minor as provided under paragraph (c); and ~~shall~~

3. Order that a confidential record be maintained, as required under s. 390.01116. ~~At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, and all other relevant evidence.~~

(f) All hearings under this section, including appeals, shall remain confidential and closed to the public, as provided by court rule.

(g) ~~(f)~~ An expedited appeal shall be made available, as the Supreme Court provides by rule, to any minor to whom the circuit court denies a waiver of notice. An order authorizing a termination of pregnancy without notice is not subject to appeal.

(h) ~~(g)~~ ~~No~~ Filing fees or court costs may not ~~shall~~ be required of any pregnant minor who petitions a court for a waiver of parental notification under this subsection at either the trial or the appellate level.

(i) ~~(h)~~ A ~~No~~ county is not ~~shall be~~ obligated to pay the salaries, costs, or expenses of any counsel appointed by the court under this subsection.

(5) PROCEEDINGS.—The Supreme Court is requested to adopt rules and forms for petitions to ensure that proceedings under subsection (4) are handled expeditiously and in a manner

consistent with this act. The Supreme Court is also requested to adopt rules to ensure that the hearings protect the minor's confidentiality and the confidentiality of the proceedings.

(6) REPORT.—The Supreme Court, through the Office of the State Courts Administrator, shall report by February 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of petitions filed under subsection (4) for the preceding year, and the timing and manner of disposal of such petitions by each circuit court. For each petition resulting in a waiver of notice, the reason for the waiver shall be included in the report.

(7) MANDATORY CHILD ABUSE REPORTING.—The requirements of s. 39.201, relating to mandatory reports of child abuse, apply to this section.

Section 2. 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.

Section 3. If any provision of this act or its application

to any individual or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. This act shall take effect upon becoming a law.