HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 633 Informed Patient Consent
SPONSOR(S): Sullivan
TIED BILLS: **IDEN./SIM. BILLS:** SB 724

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	9 Y, 4 N	McElroy	O'Callaghan
2) Judiciary Committee	12 Y, 6 N	Weber	Havlicak
3) Health & Human Services Committee		McElroy	Calamas

SUMMARY ANALYSIS

Section 390.0111, F.S., currently requires a physician performing an abortion, or a referring physician, to obtain the woman's written and informed consent before performing the procedure. To obtain informed consent, the physician, or referring physician, must orally and in person, inform the woman of the nature and risks of undergoing or not undergoing the proposed procedure and the probable gestational age of the fetus.

HB 633 requires the physician performing the abortion, or the referring physician, to be present in the same room as the woman when providing information to obtain informed consent. The bill also requires this information to be provided to the woman at least 24 hours before the procedure is performed.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Case Law on Abortion

Right to Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*[1], was decided by the U.S. Supreme Court. Using strict scrutiny, the Court determined that a woman's right to an abortion is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest and must be narrowly drawn.[2] In 1992, the fundamental holding of *Roe* was upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey*.[3]

The Viability Standard

In *Roe v. Wade*, the U.S. Supreme Court established a rigid trimester framework dictating when, if ever, states can regulate abortion.[4] The Court held that states could not regulate abortions during the first trimester of pregnancy.[5] With respect to the second trimester, the Court held that states could only enact regulations aimed at protecting the mother's health, not the fetus's life. Therefore, no ban on abortions is permitted during the second trimester. The state's interest in the life of the fetus becomes sufficiently compelling only at the beginning of the third trimester, allowing it to prohibit abortions. Even then, the Court requires states to permit an abortion in circumstances necessary to preserve the health or life of the mother.[6]

The current viability standard is set forth in *Planned Parenthood v. Casey*.[7] Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than the third trimester, the U.S. Supreme Court rejected the trimester framework and, instead, limited the states' ability to regulate abortion pre-viability. Thus, while upholding the underlying holding in *Roe*, which authorizes states to "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother[,]"[8] the Court determined that the line for this authority should be drawn at "viability," because "there may be some medical developments that affect the precise point of viability . . . but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter."[9] Furthermore, the Court recognized that "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[10]

Undue Burden

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Id.*
[3] *Casey*, 505 U.S. 833 (1992).
[4] *Roe*, 410 U.S. 113 (1973).
[5] *Id.* at 163-64.
[6] *Id.* at 164-165.
[7] *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).
[8] *See Roe*, 410 U.S. at 164-65.
[9] *See Casey*, 505 U.S. at 870.
[10] *Id.*

In *Planned Parenthood v. Casey*, the U.S. Supreme Court established the undue burden standard for determining whether a law places an impermissible obstacle to a woman's right to an abortion. The Court held that health regulations which impose undue burdens on the right to abortion are invalid.[11] State regulation imposes an "undue burden" on a woman's decision to have an abortion if it has the purpose or effect of placing a substantial obstacle in the path of the woman who seeks the abortion of a nonviable fetus.[12] However, not every law, which makes the right to an abortion more difficult to exercise, is an infringement of that right.[13]

Informed Consent

A state may require informed consent prior to an abortion unless it creates an undue burden. The Court in *Casey* held that a state, in order to promote its profound interest in potential life throughout pregnancy, may enact measures to ensure that the woman's choice to have an abortion is informed.[14] However, these measures will only be valid as long as the state's purpose is to persuade the woman to choose childbirth over abortion and does not create an undue burden on her right to an abortion.[15]

The informed consent requirement at issue in *Casey* required a 24-hour period[16] between the provision of the information deemed necessary for informed consent and the abortion. The Court held that facially the waiting period was a reasonable measure to implement a state's interest in protecting the life of the unborn and does not amount to an undue burden.[17] Whether the waiting period created an undue burden in application was a question of fact. The Court, relying on the district court's findings, acknowledged that the 24-hour requirement would:[18]

- Require a woman seeking an abortion to make at least two visits[19] to the doctor. For a woman traveling long distances this could often result in a delay of greater than 24 hours;
- Increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic;"
- Be "particularly burdensome" for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others; and
- Limit a physician's discretion.

The Court found that, although the waiting period has the effect of creating a particular burden by "increasing the cost and risk of delay of abortions," it does not constitute an undue burden.[20] The Court

[11] *Id.* at 878.
[12] *Id.* at 877.
[13] *Id.* at 873.
[14] *Id.* at 878.
[15] *Id.*
[16] Currently 25 states have waiting periods of 24 hours or greater. The states are: Alabama (Ala. C. §§ 26-23A-4); Arizona (Ariz. Rev. Stat. § 36-2153); Arkansas (Ark. C. § 20-16-903); Georgia (Ga. C. § 31-9A-3); Idaho (Id. C. §§ 18-604, 609); Kansas (Kan. Stat. § 65-6709); Kentucky (Ken. Rev. Stat. § 311.725); Louisiana (Louis. Rev. Stat. § 1299.35.6); Michigan (Mich. Compiled L. § 333.17015); Minnesota (Minn. Stat. § 145.4242); Mississippi (Miss. C. § 41-41-33); Missouri (§§ 188.027, 188.039); Nebraska (Neb. Rev. Stat. § 28-327); North Carolina (N. Car. Gen. Stat. § 90-21.82); North Dakota (N. Dak. C. §§ 14-02.1-02, 1-03); Ohio (Ohio Rev. C. § 2317.56); Oklahoma (Okl. Stat. 63 § 1-738.2); Pennsylvania (Penn. Stat. 18 § 3205); South Carolina (Cod. L. S. Car. § 44-41-330); South Dakota (S. Dak. Cod. L. § 34-23A-10.1); Texas (Tex. Health & Safety C. § 171.012); Utah (Utah Code Ann. 76-7-305); Virginia (Va. C. § 18.2-76); West Virginia (W. Va. C. § 16-2I-2); and, Wisconsin (Wis. Stat. § 253.10). However, 4 states have enjoined laws requiring a waiting period before performance or inducement of an abortion –Delaware (*Planned Parenthood of Del. v. Brady* (D. Del. 2003)); Massachusetts (*Planned Parenthood League of Mass. v. Bellotti* (1st Cir. 1981)); Montana; and Tennessee (*Planned Parenthood of Middle Tenn. v. Sundquist* (Tenn. 2000).
[17] *See Casey*, 505 U.S. at 885.
[18] *Id.* at 885-86.
[19] 11 states currently have waiting period requirements that necessitate two visits to the clinic. Arizona (Ariz. Rev. Stat. § 36-2153); Indiana (Ind. C. § 16-34-2-1.1); Louisiana (Louis. Rev. Stat. § 1299.35.6); Mississippi (Miss. C. § 41-41-33); Missouri (§§ 188.027, 188.039); Ohio (Ohio Rev. C. § 2317.56); South Dakota (§ 34-23A-10.1); Texas (Tex. Health & Safety C. § 171.012); Utah (Utah Code Ann. 76-7-305); Virginia (Va. C. § 18.2-76); and, Wisconsin (Wis. Stat. § 253.10).
[20] *Casey*, 505 U.S. at 886-87.

thus held that a 24-hour waiting period was permissible as it did not create an undue burden facially or in application based upon the record before it.[21]

The Medical Emergency Exception

In *Doe v. Bolton*, the U.S. Supreme Court was faced with determining, among other things, whether a Georgia statute criminalizing abortions (pre- and post-viability), except when determined to be necessary based upon a physician's "best clinical judgment," was unconstitutionally void for vagueness for inadequately warning a physician under what circumstances an abortion could be performed.[22] In its reasoning, the Court agreed with the district court decision that the exception was not unconstitutionally vague, by recognizing that:

> [T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.[23]

This broad interpretation of what constitutes a medical emergency was later tested in *Casey*[24], albeit in a different context. One question before the Supreme Court in *Casey* was whether the medical emergency exception to a 24-hour waiting period for an abortion was too narrow in that there were some potentially significant health risks that would not be considered "immediate."[25] The exception in question provided that a medical emergency is:

> [T]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[26]

In evaluating the more objective standard under which a physician is to determine the existence of a medical emergency, the Court in *Casey* determined that the exception would not significantly threaten the life and health of a woman and imposed no undue burden on the woman's right to have an abortion.[27]

Florida Law on Abortion

Right to Abortion

Florida affords greater privacy rights to its citizens than those provided under the U.S. Constitution. While the federal Constitution traditionally shields enumerated and implied individual liberties from state or federal intrusion, the federal Court has long held that the state constitutions may provide even greater protections.[28] In 1980, Florida amended its Constitution to include Article I, s. 23 which creates an express right to privacy:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be

[21] *Id.*
[22] *Doe*, 410 U.S. at 179 (1973). Other exceptions, such as in cases of rape and when, "[t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect." *Id.* at 183. *See also, U.S. v. Vuitich*, 402 U.S. 62, 71-72 (1971) (determining that a medical emergency exception to a criminal statute banning abortions would include consideration of the mental health of the pregnant woman).
[23] *Doe*, 410 U.S. at 192.
[24] *Casey*, 505. U.S. 833 (1992).
[25] *Id.* at 880.
[26] *Id.* at 879 (quoting 18 Pa. Cons. Stat. § 3203 (1990)).
[27] *Id.* at 880.
[28] *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989).

> construed to limit the public's right of access to public records and meetings as provided by law. [29]

This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy and provides greater privacy rights then those implied by the federal Constitution.[30]

The Florida Supreme Court has recognized Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[31] In *In re T.W.,* the Florida Supreme Court ruled that:

> [P]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests . . . Under our Florida Constitution, the state's interest becomes compelling upon viability . . . Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures. [32]

The court recognized that after viability, the state can regulate abortion in the interest of the unborn child if the mother's health is not in jeopardy.[33]

Abortion Regulation

In Florida, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[34] An abortion must be performed by a physician[35] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[36]

Florida law prohibits abortions after viability, as well as during the third trimester, unless a medical exception exists. Section 390.01112(1), F.S., prohibits an abortion from being performed if a physician determines that, in reasonable medical judgment, the fetus has achieved viability. Viability is defined as the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures.[37] Section 390.0111, F.S., prohibits an abortion from being performed during the third trimester.[38] Exceptions to both of these prohibitions exist if:

- Two physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition; or
- One physician certifies in writing that, in reasonable medical judgment, there is a medical necessity for legitimate emergency medical procedures for termination of the pregnancy to save the pregnant woman's life or avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the

[29] *Id.*
[30] *Id.* at 1191-92.
[31] *Id.* at 1192.
[32] *Id.* at 1193-94.
[33] *Id.* at 1194.
[34] Section 390.011(1), F.S.
[35] Section 390.0111(2), F.S.
[36] Section 390.011(8), F.S.
[37] Section 390.011(12), F.S.
[38] Section 390.011(11), F.S., defines the third trimester to mean the weeks of pregnancy after the 24th week of pregnancy.

pregnant woman other than a psychological condition, and another physician is not available for consultation.[39]

A physician must obtain an informed and voluntary consent for an abortion from a woman before an abortion is performed, unless an emergency exists. Consent is considered voluntary and informed if the physician who is to perform the procedure, or the referring physician, orally and in person, informs the woman of the nature and risks of undergoing or not undergoing the proposed procedure and the probable gestational age of the fetus at the time the termination of pregnancy is to be performed.[40] The probable gestational age must be verified by an ultrasound.[41] The woman must be offered the opportunity to view the images and hear an explanation of them.[42] If the woman refuses this right, she must acknowledge the refusal in writing.[43] The woman must acknowledge, in writing and prior to the abortion, that she has been provided with all information consistent with these requirements.[44]

Anyone who violates laws applicable to an abortion during viability or in the third trimester commits a third degree felony.[45] Additionally, any health care practitioner who fails to comply with such laws is subject to disciplinary action under the applicable practice act and under s. 456.072, F.S.[46]

The Agency for Health Care Administration (AHCA) licenses and regulates abortion clinics in the state, pursuant to ch. 390, F.S., and part II of ch. 408, F.S.[47] All abortion clinics and physicians performing abortions are subject to the following requirements:

- An abortion may only be performed in a validly licensed hospital, abortion clinic, or in a physician's office;[48]
- An abortion clinic must be operated by a person or public body with a valid and current license;[49]
- An abortion performed during viability or in the third trimester may only be performed in a hospital;[50]
- If a termination of pregnancy is performed in the third trimester, the physician performing the termination of pregnancy must exercise the same degree of professional skill, care, and diligence to preserve the life and health of the fetus which the physician would be required to exercise in order to preserve the life and health of a fetus intended to be born and not aborted, unless doing so conflicts with preserving the life and health of the pregnant woman;[51]
- Experimentation on a live fetus is prohibited prior to or subsequent to any termination of pregnancy procedure;[52]
- Except when there is a medical emergency, an abortion may only be performed after a patient has given voluntary and written informed consent;[53]
- Consent includes verification of the probable gestational age via ultrasound imaging;[54]
- Fetal remains are to be disposed of in a sanitary and appropriate manner;[55] and

[39] Sections 390.0111(1)(a) and (b) and 390.01112(1)(a) and (b), F.S.
[40] Section 390.0111(3)(a), F.S. This requirement applies except in the case of a medical emergency.
[41] Section 390.0111(3)(a)1.b.II, F.S.
[42] Section 390.0111(3)(a)1.b.III, F.S.
[43] Section 390.0111(3)(a)(3), F.S.
[44] *Id.*
[45] Section 390.0111(10)(a), F.S.
[46] Section 390.0111(13), F.S. The Department of Health and its professional boards regulate health care practitioners under ch. 456, F.S., and various individual practice acts. The range of disciplinary actions taken by a board includes citations, suspensions, reprimands, probations, and revocations.
[47] Section 408.802(3) provides for the applicability of the Health Care Licensing Procedures Act to abortion clinics.
[48] Section 797.03 (1), F.S.; this section provides an exception for an emergency care situation.
[49] Section 797.03 (2), F.S.
[50] Section 797.03(3), F.S. Per s. 797.03(4), F.S., the violation of any of these provisions results in a second degree misdemeanor.
[51] Section 390.0111(4), F.S.
[52] Section 390.0111(6), F.S.
[53] Section 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.
[54] Section 390.0111(3)(a)1.b., F.S.
[55] Section 390.0111(7), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.

- Actual notice[56] must be given 48 hours before performing an abortion on a minor or constructive notice[57] must be given at least 72 hours before performing an abortion on a minor, unless waived by a parent or otherwise ordered by a judge. [58]

In addition, pursuant to s. 390.012, F.S., AHCA must prescribes by rule standards for clinics that perform or claim to perform abortions after the first trimester that include:

- Adequate private space for interviewing, counseling, and medical evaluations;
- Dressing rooms for staff and patients;
- Appropriate lavatory areas;
- Areas for preprocedure hand washing;
- Private procedure rooms;
- Adequate lighting and ventilation for procedures;
- Surgical or gynecological examination tables and other fixed equipment;
- Postprocedure recovery rooms that are equipped to meet the patients' needs;
- Emergency exits to accommodate a stretcher or gurney;
- Areas for cleaning and sterilizing instruments;
- Adequate areas for the secure storage of medical records and necessary equipment and supplies; and
- Conspicuous display of the clinic's current license issued by AHCA.[59]

AHCA has the authority to impose a fine against clinics that are in violation of ch. 390, part II of ch. 408, or agency rules.[60]

Florida Abortion Statistics

In 2014, DOH reported that there were 220,138 live births in the state of Florida.[61] In the same year, AHCA reported that there were 72,073 abortion procedures[62] performed in the state.[63] Of those performed:

- 65,902 were performed in the first trimester (12 weeks and under);
- 6,171 were performed in the second trimester (13 to 24 weeks); and
- None were performed in the third trimester (25 weeks and over). [64]

The majority of the procedures (65,210) were elective.[65] The remainder of the abortions were performed due to:

[56] Section 390.01114(2)(a), F.S., defines "actual notice as" 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.
[57] Section 390.01114(2)(c), F.S., defines "constructive notice" as 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.
[58] Section 390.01114(3), F.S. A physician who violates this provision is subject to disciplinary action.
[59] Section 390.012(3)(a)1., F.S. Rules related to abortion are found in ch. 59A-9, F.A.C.
[60] Section 390.018, F.S.
[61] Correspondence from the Department of Health to the House of Representatives Health Quality Subcommittee dated February 26, 2015, on file with Health Quality Subcommittee Staff.
[62] There are currently 65 licensed abortion clinics in Florida, of which 44 (67.7%) are licensed to provide both 1st and 2nd trimester abortions and 21 (32.3%) are licensed to provide only 1st trimester abortions. *Id.*
[63] Section 390.0112(1), F.S., currently requires the director of any medical facility in which any pregnancy is terminated to submit a monthly report to AHCA that contains the number of procedures performed, the reason for same, the period of gestation at the time such procedures were performed, and the number of infants born alive during or immediately after an attempted abortion.
[64] Reported Induced Terminations of Pregnancy (ITOP) by Reason, By Weeks of Gestation for Calendar Year 2014, AHCA, on file with the Health Quality Subcommittee Staff.
[65] *Id.*

- Emotional or psychological health of the mother (76);
- Physical health of the mother that was not life endangering (158);
- Life endangering physical condition (69);
- Rape (749);
- Serious fetal genetic defect, deformity, or abnormality (560); and
- Social or economic reasons (5,115). [66]

Effect of Proposed Changes

HB 633 requires the physician performing the abortion, or the referring physician, to be physically present in the same room as the pregnant woman when providing information to obtain informed consent. The bill also requires this information to be provided to the woman by the physician while the physician is physically present in the same room as the woman at least 24 hours before the termination of pregnancy is performed.

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1: Amends s. 390.0111, F.S., relating to termination of pregnancies.
Section 2: Provides for an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

[66] *Id.*

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The 24-hour waiting period could have an indeterminable negative fiscal impact on women seeking abortions associated with traveling to the clinic on separate occasions.

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 of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES