

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Health and Human Services Appropriations Committee

BILL: SB 2400

INTRODUCER: Senators Webster and Baker

SUBJECT: Abortion

DATE: April 14, 2008

REVISED: 4/9/2007

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stovall</u>	<u>Wilson</u>	<u>HR</u>	Favorable
2.	<u>Fabricant</u>	<u>Peters</u>	<u>HA</u>	Favorable
3.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
4.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
5.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
6.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

I. Summary:

Senate Bill 2400 modifies the requirements related to the termination of a pregnancy. The bill mandates that an ultrasound be performed to verify the gestational age of the fetus and that the woman be allowed to view, and have a health care professional explain to her, the live ultrasound images as a part of providing informed consent to an abortion. A woman is authorized to decline to view the ultrasound images. A woman who has documentation that evidences she is seeking the abortion because she is a victim of rape, incest, domestic violence, or human trafficking, or that she has been diagnosed with a condition that would create a serious risk of substantial and irreversible impairment of a major bodily function if termination of her pregnancy were delayed, need not be afforded the opportunity to view the live ultrasound images.

This bill substantially amends the following sections of the Florida Statutes: 390.0111 and 390.012, and creates one undesignated section of law.

II. Present Situation:

Abortion is the termination of a pregnancy prior to viability of the fetus. Viability is the ability of the fetus to live independently from the mother and is defined as occurring at 24 weeks of gestation. Induced abortion can be elective (performed for nonmedical indications) or therapeutic (performed for medical indications). Abortion can be performed by surgical or medical means.¹ An abortion in Florida must be performed by a physician licensed to practice medicine or osteopathic medicine who is licensed under ch. 458, F.S., ch. 459, F.S., or in the employment of

¹ *Surgical Management of Abortion*, eMedicine from WebMD, article last updated June 16, 2006, found at: <<http://www.emedicine.com/med/TOPIC3312.HTM>> (Last visited on April 6, 2008).

the United States.² No person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who states an objection to the procedure on moral or religious grounds is required to participate in the procedure. The refusal to participate may not form the basis for any disciplinary or other recriminatory action.

In 2006, a total of 95,586 abortions were performed in Florida: for 86,938 of those, the gestational age of the fetus was 12 weeks and under; for 8,633, the gestational age of the fetus was 13-24 weeks; for 4, the gestational age was over 25 weeks; and 11 were recorded as unknown.³ The federal Hyde Amendment, passed in 1977, bans state use of federal Medicaid dollars to pay for abortions unless the pregnancy is the result of rape or incest, or the abortion is "necessary to save the life of the woman." In fiscal year 2006-2007, the Florida Medicaid program reimbursed for 2 abortions.

Abortion Clinics

Abortion clinics are licensed and regulated by the Agency for Health Care Administration (Agency) under ch. 390, F.S., and part II of ch. 408, F.S. The Agency has adopted rules in Chapter 59A-9, Florida Administrative Code, related to abortion clinics. Section 390.012, F.S., requires these rules to address the physical facility, supplies and equipment standards, personnel, medical screening and evaluation of patients, abortion procedures, recovery room standards, and follow-up care. The rules relating to the medical screening and evaluation of each abortion clinic patient, at a minimum, require:

- A medical history including reported allergies to medications, antiseptic solutions, or latex; past surgeries; and an obstetric and gynecological history;
- A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa;
- The appropriate laboratory tests, including:
 - For an abortion in which an ultrasound examination is not performed before the abortion procedure, urine or blood tests for pregnancy performed before the abortion procedure,
 - A test for anemia,
 - Rh typing, unless reliable written documentation of blood type is available, and
 - Other tests as indicated from the physical examination;
- An ultrasound evaluation for patients who elect to have an abortion after the first trimester. If a person who is not a physician performs the ultrasound examination, that person must have documented evidence that he or she has completed a course in the operation of ultrasound equipment. If a patient requests, the physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant must review the ultrasound evaluation results and the estimate of the probable gestational age of the fetus with the patient before the abortion procedure is performed; and
- The physician to estimate the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding

² Section 390.0111(2), Florida Statutes.

³ Florida Vital Statistics Annual Report 2006, available at: <<http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx#>> (Last visited on April 6, 2008).

the estimation of fetal age and write the estimate in the patient's medical history. The physician must keep original prints of each ultrasound examination in the patient's medical history file.

Informed Consent⁴

A pregnant woman must provide voluntary and informed written consent prior to a physician performing an abortion on her. If a woman is mentally incompetent, her court-appointed guardian may provide the voluntary and informed written consent. Except in the case of a medical emergency, Florida law provides that the consent is voluntary and informed only if:

- The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, in person, informed the woman of the:⁵
 - Nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy,
 - Probable gestational age of the fetus at the time the termination of pregnancy is to be performed, and
 - Medical risks to the woman and fetus of carrying the pregnancy to term;
- Printed materials prepared and provided by the department have been provided to the pregnant woman, if she chooses to view these materials, including:⁶
 - A description of the fetus,
 - A list of agencies that offer alternatives to terminating the pregnancy, and
 - Detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care; and
- The woman acknowledges in writing, before the termination of pregnancy, that the information required to be provided has been provided.⁷

A physician may provide any additional information which he or she deems material to the woman's informed decision to terminate her pregnancy.

If a medical emergency exists and a physician cannot comply with the requirements for informed consent, the physician may terminate a pregnancy if he or she has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman. If a second physician is not available for a corroborating opinion, the physician may proceed and must document reasons for the medical necessity in the patient's medical records.

A physician who violates the informed consent requirements is subject to disciplinary action by the Board of Medicine or Board of Osteopathic Medicine under s. 458.331, F.S., or s. 459.015, F.S., respectively.

⁴ The Woman's Right to Know Act, Chapter 97-151, Laws of Florida, codified in s. 390.0111(3), F.S.

⁵ S. 390.0111(3)(a)1., F.S.

⁶ S. 390.0111(3)(a)2., F.S.

⁷ S. 390.0111(3)(a)3., F.S.

Relevant Case Law

In 1973, the landmark case of *Roe v. Wade* established that restrictions on a woman's access to secure an abortion are subject to a strict scrutiny standard of review. In *Roe*, the Court determined that a woman's right to have an abortion is part of the fundamental right to privacy guaranteed under the Due Process clause of the Fourteenth Amendment of the federal constitution, justifying the highest level of review.⁸

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court relaxed the standard of review in abortion cases involving adult women from strict scrutiny to unduly burdensome, while still recognizing that the right to an abortion emanates from the constitutional penumbra of privacy rights.⁹ In *Planned Parenthood*, the Court determined that prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference.¹⁰

The unduly burdensome standard, generally considered to be a hybrid between strict scrutiny and intermediate level scrutiny, shifted the Court's focus to whether a restriction creates a substantial obstacle to access. This is the prevailing standard today applied in cases in which abortion access is statutorily restricted.

However, the undue burden standard was held not to apply in Florida. The 1999 Legislature passed a parental notification law, the Parental Notice of Abortion Act, requiring a physician to give at least 48 hours of actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor. Although a judicial waiver procedure was included, the act was never enforced.¹¹ In 2003, the Florida Supreme Court¹² ruled this legislation unconstitutional on the grounds that it violated a minor's right to privacy, as expressly protected under Article I, s. 23 of the State Constitution.¹³ Citing the principle holding of *In re T.W.*,¹⁴ the Court reiterated that, as the privacy right is a fundamental right in Florida, any restrictions on privacy warrant a strict scrutiny review, rather than that of an undue burden. Here, the Court held that the state failed to show a compelling state interest.¹⁵

In 1997, the Florida Legislature enacted the Woman's Right to Know Act. This act essentially prohibits termination of pregnancy procedures from being performed or induced unless voluntary and informed consent is obtained. The Woman's Right to Know Act was challenged shortly after enactment. The Florida Supreme Court ruled on the constitutionality of one part of the informed consent, that portion in s. 390.0111(3)(a)1, F.S., related to the oral information required to be

⁸ 410 U.S. 113, 114, 152 (1973).

⁹ 505 U.S. 833, 834 (1992).

¹⁰ *Id.* at 837.

¹¹ See s. 390.01115, F.S. Subsequent legislation was enacted in s. 390.01114, F.S.

¹² *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So.2d 612, 619 (Fla. 2003)

¹³ The constitutional right of privacy provision reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

¹⁴ 551 So.2d 1186, 1192 (Fla. 1989).

¹⁵ *North Florida Women's Health and Counseling Services, supra* note 8, at 642.

provided to the patient by the referring physician or physician who is to perform the procedure.¹⁶ The court ruled that the informational requirements of s. 390.0111(3)(a)1., F.S., are comparable to those of the common law and other Florida informed consent statutes implementing the common law.¹⁷ The Court adopted the state's interpretation of the "reasonable patient" language to require a physician to consider only and exclusively the individual circumstances of each patient presenting herself for treatment in determining what information is material to that patient's decision, and therefore the statute is not unconstitutionally vague. The Court also adopted the state's contention that the risks that a physician must discuss with the patient is limited to medical risks pertaining to terminating or not terminating a pregnancy, not information with regard to social, economic, or any other risks. The Court noted that physicians are not sociologists, economists, theologians, or philosophers, and it is implausible to conclude that the Legislature intended that physicians be required to venture far beyond their professional specialty and expertise to advise patients of nonmedical matters.

One element of the Court's discussion related to informed consent included a footnote noting, "...to the extent that the [Women's Right to Know] Act permits only the performing physician or a referring physician to provide the informed consent information, we note that other informed consent statutes, including the general medical consent statute, require a physician to provide the informed consent information."

Other provisions of the Women's Right to Know Act, including the constitutionality of the written materials, are still under judicial review.

Ultrasound

Ultrasound imaging, also called ultrasound scanning or sonography, involves exposing part of the body to high-frequency sound waves to produce pictures of the inside of the body. The traditional ultrasound procedure involves placing gel on the abdomen to work as a conductor for the sound waves. The practitioner performing the ultrasound uses a transducer (probe) to produce sound waves into the uterus. The sound waves bounce off bones and tissue returning back to the transducer to generate black and white images of the fetus.¹⁸

An ultrasound may be used, among other purposes, to help determine the gestational age of the fetus. Under Florida law, an ultrasound is required for all women who elect to have an abortion after the first trimester.¹⁹ Some abortion clinics throughout the state require all women seeking abortions to have an ultrasound.²⁰ The price for an ultrasound is estimated between \$100 - \$200.²¹

¹⁶ *State of Florida v. Presidential Women's Center, et al.*, 937 So.2d 114 (Fla. 2006).

¹⁷ The Court referred to: s. 766.103, F.S. (2005) which addresses medical informed consent generally; s. 458.324, F.S. (2005) addressing breast cancer; s. 458.325, F.S., (2005) addressing electroconvulsive and psychosurgical procedures; and s. 945.48, F.S., (2005) addressing inmates receiving psychiatric treatment.

¹⁸ American Pregnancy Association, Ultrasound: Sonogram, found at: <http://www.americanpregnancy.org/prenataltesting/ultrasound.html> (Last visited on April 6, 2008).

¹⁹ S. 390.012(3)(d)4., F.S.

²⁰ See a listing of doctor's offices and facilities offering abortions for specific requirements of the facility listed, found at: http://www.abortion.com/abortion_clinics_state.php?country=United+States&state=Florida&city=> (Last visited on April 6, 2008).

²¹ *Id.*

Pelvic ultrasound is indicated prior to surgical abortion under the following circumstances:²²

- Dates of conception are uncertain,
- Uterine sizing by physical examination is inadequate,
- A discrepancy between the uterine size and date of conception exists,
- The pregnancy is in the second trimester,
- Uterine leiomyoma are present,
- Uterine anomalies are known or suspected,
- Adnexal or pelvic masses are know or suspected,
- The patient has vaginal bleeding,
- The patient has pelvic pain, and
- The patient has had a previous ectopic pregnancy.

At least 82 percent of the licensed abortion clinics in Florida require every woman seeking an abortion in the first trimester to have an ultrasound. The fee for the abortion includes the cost of the ultrasound.

Other State Laws

Currently 33 states have some law or policy specifically related to informed consent for abortion. Thirteen states have a requirement related to ultrasound. Alabama, Louisiana, and Mississippi require that an ultrasound be conducted on all patients prior to a termination of pregnancy and in Arkansas, Georgia, Idaho, Michigan, Oklahoma, Utah, and Wisconsin laws provide that if an ultrasound is provided as part of the preparation for the abortion, then the physician must offer the woman the opportunity to view it.²³

III. Effect of Proposed Changes:

Section 1. Amends s. 390.0111, F.S., to revise the conditions for informed consent related to the termination of a pregnancy. Specifically, the additional requirements include:

- The probable gestational age of the fetus must be verified by an ultrasound;
- The ultrasound must be performed by the physician who is to perform the abortion or by a trained assistant to the physician. The bill provides for rulemaking to clarify the criteria for the course the assistant must take related to training on the operation of ultrasound equipment;
- The woman must be allowed to view the live ultrasound images, and a practitioner must contemporaneously review and explain the live ultrasound images to the woman prior to the woman giving informed consent to having an abortion procedure performed. The practitioner must be a physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, or a physician assistant working in conjunction with the physician; and

²² *Supra*, 1.

²³ Guttmacher Policy Review, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent* by Rachel Benson Gold and Elizabeth Nash, Fall 2007, available at: <http://www.guttmacher.org/pubs/gpr/10/4/gpr100406.html> (Last visited on April 6, 2008).

- The woman must be provided printed materials, if she chooses to view the materials, that include, among other things, a description of the various stages of development of a fetus.

The woman has a right to decline to view the ultrasound images after she is informed of her right and offered an opportunity to view them. If the viewing is declined, the woman must complete a form acknowledging that she was offered an opportunity to view her ultrasound but that she rejected that opportunity of her own free will, absent any undue influence from any third party to discourage her from viewing the images.

The person performing the ultrasound is not required to review and explain the live ultrasound images to a woman prior to a woman giving informed consent to have an abortion procedure performed if, at the time the woman schedules or arrives for her appointment to obtain an abortion, a copy of a restraining order, police report, medical record, or other court order or documentation is presented that evidences that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking, or that she has been diagnosed with a condition that, on the basis of a physician's good faith clinical judgment would create a serious risk of substantial and irreversible impairment of a major bodily function if the woman delayed terminating her pregnancy.

Section 2. Amends s. 390.012, F.S., to conform a cross-reference and revise the Agency's rulemaking authority for medical screening and evaluation of each abortion clinic patient as follows:

- Require urine or blood tests for pregnancy to be performed before the abortion procedure for all patients seeking an abortion, as opposed to the current requirement if an ultrasound is not performed, and
- Require an ultrasound evaluation for all patients, not just those terminating a pregnancy after the first trimester, and the opportunity for the woman to view and have explained the live ultrasound images unless the woman declines to view the live ultrasound images.

Section 3. Provides a severability provision.

Section 4. Provides the act will take effect on July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution..

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution..

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

All women seeking an abortion in the first trimester will be required to have an ultrasound performed as a part of providing informed consent for the abortion. The ultrasound could increase the cost of the procedure by an estimated \$100 - \$200, although over 80 percent of the Florida licensed abortion clinics require an ultrasound in the first trimester so women are already paying the fee. Practitioners and clinics performing abortions will need to implement revised informed consent procedures, including a form to document compliance with the offer to view and explain the ultrasound when a woman declines to view the live ultrasound.

C. Government Sector Impact:

The Department of Health is required to prepare printed materials and the Agency will be responsible for taking appropriate action to enforce the provisions related to the mandatory ultrasound and compliance with the live viewing opportunity for informed consent. The department has indicated there is no fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.