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SUMMARY

General requirement for cremation or interment

- Requires the final disposition of fetal remains from a surgical abortion to be by cremation or interment.
- Defines “fetal remains” as the product of human conception that is aborted and if a woman is carrying more than one zygote, blastocyte, embryo, or fetus, each one, or any of its parts that is aborted, is a separate product of human conception that has been aborted.

Disposition determination

- Grants a pregnant woman who has a surgical abortion the right to determine (1) whether the disposition of the fetal remains will be by cremation or interment, and (2) the location for the final disposition.
- Requires a pregnant woman who has a surgical abortion to be provided a notification form informing the pregnant woman of the right to determine the final disposition of fetal remains and the available methods and locations for disposition.
- Requires the pregnant woman, if she desires to exercise these rights, to certify before an abortion that she received the notification form and made a determination in writing using the act’s detachable supplemental form to the abortion informed consent form.
- Provides that if the woman chooses not to exercise her rights, the abortion facility that performed the surgical abortion will determine whether the final disposition will be by cremation or interment.

- Requires parental consent by a parent, guardian, or custodian for a final disposition determination if the pregnant woman is under 18, unmarried, and unemancipated, unless a court has issued an order authorizing consent to the abortion.
- Requires the Director of Health to prescribe the detachable supplemental form, appended to the abortion informed consent form, to include the following information:
 - Whether the pregnant woman has indicated a method of disposition, and the preferred method selected;
 - Whether the pregnant woman has indicated a preference as to the location of disposition of the fetal remains;
 - The signature of the physician inducing or performing the abortion;
 - A medical identification number for the woman (not a printed name or signature).
- Requires, if a pregnant woman is carrying more than one zygote, blastocyte, embryo, or fetus, that each one aborted must be represented on its own form for abortion informed consent and the determination of the disposition of the remains or parental consent to the disposition.

Abortion facility requirements

- Prohibits an abortion facility from releasing fetal remains until the facility obtains a final disposition determination or, if applicable, parental consent to the determination.
- Permits an abortion facility to arrange for the cremation or interment of fetal remains if the final disposition determination has been made or, if applicable, consented to.
- Requires an abortion facility to document in the woman's medical record the final disposition determination and, if applicable, parental consent to the determination.
- Requires an abortion facility to have written policies and procedures for cremation or interment of fetal remains from surgical abortions performed or induced in the facility.
- Requires an abortion facility to develop and maintain a written list of locations at which it provides or arranges for the final disposition of fetal remains from surgical abortions.
- Requires an abortion facility to pay for the cremation or interment of the fetal remains in locations provided by the facility.
- Provides that if the pregnant woman's final disposition determination specifies a location for final disposition that is not provided by the facility, she is responsible for the costs related to the disposition at her chosen location.

Abortion informed consent expansion

- Expands abortion informed consent requirements with respect to the 24-hour pre-abortion physician meetings and the consent forms to include zygote and blastocyte abortions.

Abortion report

- Requires the attending physician for the abortion, when completing an individual “abortion report” required under law retained by the act, to include the method of final disposition of the fetal remains from a surgical abortion.
- Expands the individual abortion report and annual abortion report to require a report on the number of zygotes, blastocytes, embryos, and fetuses aborted and the number for each woman, rather than just the number of abortions under previous law.
- Requires an abortion facility to maintain evidentiary documentation demonstrating the date and method of the disposition of all fetal remains from abortions performed or induced there.

Additional provisions regarding cremation

- Requires the cremation of fetal remains from a surgical abortion to be performed in a crematory facility subject to state regulation.

Rules

- Requires the Director to adopt rules by July 6, 2021, necessary to carry out the act’s provisions, including rules that prescribe the following:
 - The notification form informing the pregnant woman of the right to determine the final disposition of fetal remains and the available methods and locations for disposition;
 - The parental consent form;
 - A detachable supplemental form to the abortion informed consent form on which a pregnant woman is to make a final disposition determination; and
 - Procedures to complete the detachable supplemental form a reasonable time after a medical emergency or necessity has ended, when the emergency or necessity prevented the form’s completion.

Prohibitions and penalty

- Prohibits any person from failing to comply with the act’s requirements regarding disposition of fetal remains.
- Prohibits an operator of a crematory facility from (1) disposing of, (2) arranging for the disposal of, or (3) arranging for the transfer and subsequent disposal of cremated fetal remains in a manner other than the following:
 - Placing them in a grave, crypt, or niche;
 - Scattering them in any dignified manner, including in a memorial garden, at sea, by air, or at a cemetery scattering ground; or
 - Any other lawful manner.

- Prohibits a crematory operator from cremating the fetal remains without receiving a copy of a properly executed supplemental detachable form to the abortion informed consent form.
- Provides that a person who knowingly violates the prohibitions is guilty of failure to dispose of fetal remains humanely, a misdemeanor of the first degree.

Delayed enforcement

- Delays the application of the act’s prohibitions until the Director adopts the rules.

Immunity

- Provides that a woman who has a surgical abortion is not guilty of failure to dispose of fetal remains humanely if the fetal remains are not disposed of in compliance with the act’s cremation or interment provisions.
- Provides that a person who buries or cremates fetal remains from a surgical abortion is not liable for or subject to damages in a civil action, prosecution in a criminal proceeding, or professional disciplinary action related to the disposal of fetal remains if the person does all of the following:
 - Acts in good faith compliance with the act’s fetal remains disposition requirements;
 - Receives a copy of a properly executed detachable supplemental form to the abortion informed consent form; and
 - Acts in furtherance of the final disposition of the fetal remains.
- Conditions the immunity granted to a person who buries or cremates fetal remains as described above on compliance with requirements unchanged by the act for fetal death certificates for the product of human conception of at least 20 weeks’ gestation.

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DETAILED ANALYSIS

General requirement for cremation or interment

The act requires that the final disposition of fetal remains from a surgical abortion at an abortion facility be by cremation or interment.¹

The act defines “fetal remains” as the product of human conception that has been aborted. If a woman is carrying more than one zygote, blastocyte, embryo, or fetus—such as in the incidence of twins or triplets— each zygote, blastocyte, embryo, or fetus, or any of its parts that is aborted, is a separate product of human conception that has been aborted. Under law unchanged by the act, “abortion” means the purposeful termination of a human pregnancy by

¹ R.C. 3726.02(A).

any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo.²

The act defines “abortion facility” as a facility in which abortions are induced or performed that is an ambulatory surgical facility or any other facility in which abortion is legally provided.³ Ambulatory surgical facilities are facilities (other than hospital emergency departments or physician, podiatrist, or dentist offices) that generally provide outpatient surgical services.⁴ “Interment” means the burial or entombment of fetal remains.⁵ “Cremation” means the technical process of using heat and flame to reduce human or animal remains to bone fragments or ashes or any combination thereof. “Cremation” includes processing and may include the pulverization of bone fragments.⁶

Disposition determination

Pregnant woman’s right

The act grants a pregnant woman who has a surgical abortion the right to determine the following, regarding the fetal remains:

1. Whether the final disposition shall be by cremation or interment; and
2. The final location for the final disposition.

The act requires that a pregnant woman who has a surgical abortion be provided with a notification form informing the pregnant woman of the right to determine the final disposition of fetal remains and the available methods and locations for disposition.⁷

Requirements for women to exercise right

To exercise the final disposition right, a pregnant woman must express the determination in writing, using a form prescribed by the Director of Health (see below).⁸

If the woman does not desire to exercise the final disposition right, the abortion facility must determine whether final disposition will be by cremation or interment.⁹

Requirements for minor women to exercise right

Under the act, a pregnant woman who is under 18, unmarried, and unemancipated may exercise the final disposition right by using the detachable supplemental form to the abortion

² R.C. 3726.01(C); R.C. 2919.11, not in the act.

³ R.C. 3726.01(A).

⁴ R.C. 3702.30(A)(1), not in the act.

⁵ R.C. 3726.01(D).

⁶ R.C. 3726.01(B); R.C. 4717.01(M), not in the act.

⁷ R.C. 3726.03 and 3726.14(A).

⁸ R.C. 3726.04(A)(1) and 3726.14(C).

⁹ R.C. 3726.04(A)(2).

informed consent form (see below), if she also obtains parental consent or a court has issued an order authorizing the abortion without parental consent.

Parental consent

The act requires that the parental consent must be made in writing using a form prescribed by the Director of Health. One of the woman's parents, guardian, or custodian may give parental consent.¹⁰

Court order

The act does not require parental consent if the abortion was authorized by a court without parental consent.¹¹ Under law unchanged by the act, a pregnant woman who is under 18, unmarried, and unemancipated generally needs consent of a parent, guardian, or custodian for her abortion. But, the minor may seek a court order authorizing the minor to consent, or the court to consent on behalf of the minor, to the abortion. Continuing law provides two court processes for a minor to use to obtain an abortion without parental consent, with some confusion as to which one applies.¹² The act addresses the confusion by permitting consent under either process.

Supplemental detachable form to abortion informed consent

The act appends the final disposition determination to the abortion informed consent requirements under continuing law. Under this law, retained by the act, a woman must sign a form consenting to the abortion and certifying that she received certain information and materials and that she consents to the particular abortion voluntarily, knowingly, intelligently, and without coercion. The act adds that she must, if the abortion is to be performed or induced surgically, also certify, the following:¹³

- That she has been provided with the notification form informing her of the right to determine the final disposition of fetal remains and the available methods and locations for such disposition; and
- That, if she desires to exercise her right to make a final disposition, she has completed the final disposition determination using a supplemental detachable form.

¹⁰ R.C. 3726.04(B)(1) and 3726.14(B).

¹¹ R.C. 3726.04(B)(2).

¹² R.C. 2151.85(A), 2919.12, 2919.121(C), and 2919.122, not in the act. Ohio law states that if the operation of R.C. 2919.121, one of the statutes providing for parental and judicial consent, is enjoined, then R.C. 2919.12(B), the other statute that provides for parental consent and refers to another judicial consent statute under R.C. 2151.85, applies in its place (R.C. 2919.122). A single provision of R.C. 2919.121 was held unconstitutional. But, the court found that the unconstitutional provision was severable from the rest of the statute (see *Cincinnati Woman's Services v. Taft*, 468 F.3d 361 (6th Cir. 2006)).

¹³ R.C. 2317.56(B)(4)(c) and (d).

Form requirements

The act requires the Director of Health to prescribe the detachable supplemental form to meet the following requirements:

- Indicates whether the pregnant woman indicated a preference for the method of disposition of the fetal remains and the preferred method selected;
- Indicates whether the pregnant woman indicated a preference for the location of disposition of the fetal remains;
- Provides for the signature of the physician who is to perform or induce the abortion;
- Provides for a medical identification number for the pregnant woman but does not provide for the pregnant woman's printed name or signature.¹⁴

Medical emergency

The act also requires the Director to prescribe procedures for when a medical emergency or medical necessity prevents the pregnant woman from completing the detachable supplemental form. The procedures must provide for completion of the form a reasonable time after the medical emergency or medical necessity has ended.¹⁵

Disposition of more than one zygote, blastocyte, embryo, or fetus

The act requires a pregnant woman carrying more than one zygote, blastocyte, embryo, or fetus, who desires to exercise her right to determine disposition of the remains, to complete a detachable supplemental form to the abortion informed consent form for each zygote, blastocyte, embryo, and fetus that will be aborted. If parental consent to the determination is required (see above), the pregnant woman obtaining the consent must use one consent for each zygote, blastocyte, embryo, and fetus. A disposition determination form that covers more than one zygote, blastocyte, embryo, or fetus is invalid.¹⁶

Abortion facility requirements

Limitations on releasing remains

Under the act, an abortion facility is prohibited from releasing the fetal remains from a surgical abortion, or arranging for their cremation or interment, until it obtains a final disposition determination and, if applicable, parental consent.¹⁷

Required documentation

The act requires an abortion facility to document in the pregnant woman's medical record the final disposition determination made and, if applicable, the parental consent for the

¹⁴ R.C. 3726.14(C)(1).

¹⁵ R.C. 3726.14(C)(2).

¹⁶ R.C. 3726.041 and 3726.042.

¹⁷ R.C. 3726.05.

disposition determination. A facility also must maintain evidentiary documentation demonstrating the date and method of the disposition of all fetal remains from surgical abortions performed or induced in the facility.¹⁸

Facility written policies and procedures

The act requires an abortion facility to have written policies and procedures for cremation or interment of fetal remains from surgical abortions performed or induced in its facility.¹⁹

List of locations

An abortion facility must also develop and maintain a written list of locations at which it provides or arranges for the final disposition of fetal remains from surgical abortions.²⁰

Financial responsibility

Under the act, an abortion facility must pay for the cremation or interment of fetal remains from a surgical abortion performed at that facility. However, if the disposition determination identifies a location for final disposition other than one provided by the abortion facility, the pregnant woman is responsible for the costs related to the final disposition of the fetal remains at her chosen location.²¹

Abortion informed consent expansion

The act makes changes to the law governing abortion informed consent. First, it requires a physician to meet with the pregnant woman 24 hours before abortion inducement or performance to inform her: (1) of the probable gestational age of the zygote or blastocyte to be aborted, and (2) that the family planning and gestational development material given to her at the meeting also describes the zygote and blastocyte. Previous law only required that information be provided in each instance about an embryo or fetus, but not the zygote or blastocyte. The probable gestational age is the age at the time of the meeting, in the judgment of the physician, with reasonable probability.²²

Second, the act requires the abortion informed consent form, including the detachable supplemental form to the abortion informed consent form, to be completed for each zygote, blastocyte, embryo, or fetus to be aborted and requires the pregnant woman to sign each one.²³

¹⁸ R.C. 3726.10 and 3726.11.

¹⁹ R.C. 3726.12.

²⁰ R.C. 3726.13.

²¹ R.C. 3726.09.

²² R.C. 2317.56(A)(3), (B)(1)(b), and (B)(2)(c).

²³ R.C. 2317.56(B)(4)(d).

Abortion report

For each abortion

When the attending physician for a surgical abortion completes an “abortion report,” the act requires the physician to also include the method of final disposition of the fetal remains. Additionally, the act amends the report requirements to specify gestational stages. For example, a physician must report the number of zygotes, blastocytes, embryos, or fetuses a woman has previously aborted, rather than simply the number of abortions, as was previously specified in the law. The act retains requirements that this report must be completed for each abortion the physician performs. The report must be confidential and not contain the woman’s name.²⁴

Annual abortion report

Under law unchanged by the act, by October 1 of each year, the Department of Health must issue an annual report of the abortion data reported for the previous calendar year. The act requires that the annual report include the total number of zygotes, blastocytes, embryos, or fetuses that were aborted. Previously, the law simply required the report to include the total number of abortions. The act also requires that the number of abortions performed be sorted by the number of zygotes, blastocytes, embryos, or fetuses previously aborted by the woman on whom the abortion was performed. Previous law only required that the sorting be of the number of abortions performed on the woman.²⁵

Additional provisions regarding cremation

Cremation by crematory facility

The act requires that the cremation of fetal remains from a surgical abortion at an abortion facility must be performed in a crematory facility, in compliance with R.C. Chapter 4717 (prescribing crematory facility regulation).²⁶ A “crematory facility” is defined as the physical location at which a cremation chamber is located and the cremation process takes place. “Crematory facility” does not include an infectious waste incineration facility having a license under Ohio law governing hazardous and solid wastes. Nor does it include a solid waste incineration facility having a license under that law and is also authorized to treat infectious wastes, in connection with incineration of body parts other than dead human bodies that were donated for medical education or research.²⁷

²⁴ R.C. 3701.79(C).

²⁵ R.C. 3701.79(l)(1)(a) and (c)(ix).

²⁶ R.C. 3726.02(B).

²⁷ R.C. 3726.02(C); R.C. 4717.01(K), not in the act.

Relief from securing certain forms

Under the act, a crematory operator that cremates fetal remains for an abortion facility is not required to secure a death certificate, burial or burial-transit permit, or a cremation authorization form to cremate fetal remains.²⁸

Rules

The act requires the Director of Health, in accordance with the Administrative Procedure Act (R.C. Chapter 119), to adopt certain rules necessary to carry out the act's fetal remains disposition provisions, by July 6, 2021. Specifically, the Director must adopt rules that prescribe the following:²⁹

- The notification form informing pregnant women who seek surgical abortions of the following:
 - The right to determine final disposition of fetal remains; and
 - The available options for locations and methods for the disposition of fetal remains.
- The parental consent form;
- The detachable supplemental form to the abortion informed consent form; and
- Procedures for subsequent completion of the detachable supplemental form in cases of medical emergency or necessity.

Under law retained by the act, the Director must adopt rules relating to abortions and the humane disposition of the product of human conception. The act requires these rules to be consistent with the act's requirements for cremation and interment.³⁰

Prohibitions and penalty

Prohibitions applicable to any person

The act prohibits any person from failing to comply with the following provisions:³¹

- The requirement that final disposition of fetal remains from a surgical abortion must be by cremation or interment;
- The requirement that cremation of fetal remains must be in a crematory facility, in compliance with R.C. Chapter 4717 (including compliance with the prohibitions applicable to crematory operators discussed below);

²⁸ R.C. 4717.271(B).

²⁹ R.C. 3726.14.

³⁰ R.C. 3701.341.

³¹ R.C. 3726.99(A).

- The limitation that an abortion facility may not release fetal remains, or arrange for their cremation or interment, until it obtains a final disposition determination made and, if applicable, the parental consent;
- The requirement that an abortion facility must document in the pregnant woman's medical record the final disposition determination made and, if applicable, the parental consent made; and
- The requirement that an abortion facility must maintain evidentiary documentation demonstrating the date and method of the disposition of all fetal remains.

Prohibitions applicable to crematory operators

The act prohibits a crematory operator that cremates fetal remains (for an abortion facility regulated by the act) from disposing, arranging for disposal, or arranging for the transfer for disposal of the cremated fetal remains if the disposal is by means other than:

- Placing them in a grave, crypt, or niche;
- Scattering them in any dignified manner, including a memorial garden, at sea, by air, or at a cemetery scattering ground; or
- Any other lawful manner.

The act also prohibits such a crematory operator from cremating those remains without receiving a copy of a properly executed supplemental detachable form to abortion informed consent.³²

Penalty

Whoever knowingly violates any of the above prohibitions is guilty of failure to dispose of fetal remains humanely, a misdemeanor of the first degree.³³

Delayed enforcement

The act provides that the prohibitions described above will not apply until the Director adopts the rules required under the act.³⁴

Immunity

Pregnant woman not liable

The act provides that a pregnant woman is not guilty of committing, attempting to commit, complicity in the commission of, or conspiracy in the commission of a violation of the

³² R.C. 3726.02(B) and 4717.271(A).

³³ R.C. 3726.99(B).

³⁴ Section 3.

act's prohibition, if she has a surgical abortion and the fetal remains are not disposed of in compliance with the act.³⁵

General immunity

The act provides that a person who buries or cremates fetal remains from a surgical abortion is not liable for or subject to damages in a civil action, prosecution in a criminal proceeding, or professional disciplinary action related to the disposal of fetal remains if the person does all of the following:

- Acts in good faith compliance with the act's fetal remains disposition requirements;
- Receives a copy of a properly executed detachable supplemental form to the abortion informed consent form; and
- Acts in furtherance of the final disposition of the fetal remains.³⁶

Further, the act provides that no conflicting provision of the Revised Code or procedure of any agency or board applies regarding a person who has secured the general immunity as described above. There is one exception to this "no conflict" provision, however. The act specifically provides that the fetal death certificate requirements for the product of human conception of at least 20 weeks gestation continues to apply. This may have the effect of making the general immunity inapplicable regarding a person who violates those fetal death certificate provisions.³⁷

HISTORY

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³⁵ R.C. 3726.95.

³⁶ R.C. 3726.15.

³⁷ R.C. 3726.16; R.C. 3705.20, not in the act.