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# OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research  
and Drafting

Legislative Budget  
Office

S.B. 27\*  
133rd General Assembly

## Bill Analysis

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**Version:** As Reported by House Civil Justice

**Primary Sponsor:** Sen. Uecker

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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 such disposition.
- Requires the pregnant woman, if she desires to exercise these rights, to certify prior to the performance of an abortion that she received the notification form and made a determination in writing using the bill’s detachable supplemental form to the abortion informed consent form.

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\* This analysis was prepared before the report of the House Civil Justice Committee appeared in the House Journal. Note that the legislative history may be incomplete.

- Provides that if the woman chooses not to exercise her rights, the abortion facility who 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 years of age, unmarried, and unemancipated, unless a court order authorizing consent to the abortion was issued.
- 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 (but not the pregnant woman's 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.
- 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 continuing law 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 physician to 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 current 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 necessary to carry out the bill’s provisions within 90 days of the effective date, 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 such 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;
  - 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 bill’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;
- 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 abortion informed consent.
- 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 bill’s prohibitions until the Director adopts the rules required under the bill.

## **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 bill’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 bill’s fetal remains disposition requirements;
  - Receives a copy of a properly executed detachable supplemental form to the abortion informed consent form;
  - 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 the continuing law requirements 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 bill requires that the final disposition of fetal remains from a surgical abortion at an abortion facility be by cremation or interment.<sup>1</sup>

The bill 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

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<sup>1</sup> R.C. 3726.02.

continuing law, “abortion” means the purposeful termination of a human pregnancy by 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.<sup>2</sup>

The bill 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.<sup>3</sup> Ambulatory surgical facilities are those that provide outpatient surgery or anesthesia, both of which (1) function separately from a hospital’s inpatient surgical services and from private physician, podiatrist, and dentist offices, and (2) are in a building distinct from another that provides inpatient care.<sup>4</sup> “Interment” means the burial or entombment of fetal remains.<sup>5</sup> “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.<sup>6</sup>

## **Disposition determination**

### **Pregnant woman’s right**

The bill 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 bill 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 such disposition.<sup>7</sup>

### **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 **“Supplemental detachable form to abortion informed consent,”** below).

If the woman does not desire to exercise the final disposition right, the bill requires the abortion facility to determine whether final disposition will be by cremation or interment.<sup>8</sup>

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<sup>2</sup> R.C. 3726.01(C); R.C. 2919.11, not in the bill.

<sup>3</sup> R.C. 3726.01(A).

<sup>4</sup> R.C. 3702.30, not in the bill.

<sup>5</sup> R.C. 3726.01(D).

<sup>6</sup> R.C. 3726.01(B); R.C. 4717.01, not in the bill.

<sup>7</sup> R.C. 3726.03.

<sup>8</sup> R.C. 3726.04(A)(2).

## Requirements for minor women to exercise right

Under the bill, 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 informed consent form (see “**Supplemental detachable form to abortion informed consent**,” below), if she also obtains parental consent or a court has issued an order authorizing the abortion without parental consent.

### Parental consent

The bill requires that the parental consent must be made in writing using a form prescribed by the Director of Health. The bill permits parental consent to be made by one of the woman’s parents, guardian, or custodian.<sup>9</sup>

### Court order

The bill also provides that parental consent to a final disposition is not required if the abortion was authorized by a court without parental consent.<sup>10</sup> Under continuing law, 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. Under continuing law there are two court processes for a minor to use to obtain an abortion without parental consent, with some confusion as to which one applies.<sup>11</sup> The bill addresses the confusion by permitting consent under either one.

Under one judicial process, if one or both of the following applies to the minor, a juvenile court may authorize the minor to consent to the abortion:

1. She is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian;
2. That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.<sup>12</sup>

Under the other judicial process, if one or both of the following applies to the minor, a juvenile court may do one of the following:

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<sup>9</sup> R.C. 3726.04(B)(1) and 3726.14(B).

<sup>10</sup> R.C. 3726.04(B)(2).

<sup>11</sup> R.C. 2151.85(A), 2919.12, 2919.121(C), and 2919.122, not in the bill. 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).

<sup>12</sup> R.C. 2151.85(C) and 2919.12, neither in the bill.

1. Permit the minor to consent to the abortion if the court finds she is sufficiently mature and well enough informed to decide intelligently whether to have an abortion;
2. Give its consent to the abortion if it is in her best interests.<sup>13</sup>

### **Supplemental detachable form to abortion informed consent**

The bill appends the final disposition determination to the abortion informed consent requirements under current law. Under continuing law, 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 bill adds that she must, if the abortion is to be performed or induced surgically, also certify, the following:<sup>14</sup>

- 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.

### **Form must include**

The bill 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.<sup>15</sup>

### **Medical emergency**

The bill 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.<sup>16</sup>

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<sup>13</sup> R.C. 2919.121(C)(3), not in the bill.

<sup>14</sup> R.C. 2317.56(B)(4)(c) and (d).

<sup>15</sup> R.C. 3726.14(C)(1).

<sup>16</sup> R.C. 3726.14(C)(2).



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

The bill 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 (as described above), the pregnant woman obtaining the consent must use one consent for each zygote, blastocyte, embryo, and fetus.<sup>17</sup> A disposition determination form that covers more than one zygote, blastocyte, embryo, or fetus is invalid.<sup>18</sup>

## **Abortion facility requirements**

### **Limitations on releasing remains**

Under the bill, 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.<sup>19</sup>

### **Required documentation**

The bill 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 disposition determination.<sup>20</sup> 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.<sup>21</sup>

### **Facility written policies and procedures**

The bill 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.<sup>22</sup>

### **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.<sup>23</sup>

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<sup>17</sup> R.C. 3726.041.

<sup>18</sup> R.C. 3726.042.

<sup>19</sup> R.C. 3726.05.

<sup>20</sup> R.C. 3726.10.

<sup>21</sup> R.C. 3726.11.

<sup>22</sup> R.C. 3726.12.

<sup>23</sup> R.C. 3726.13.

## Financial responsibility

Under the bill, 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.<sup>24</sup>

## Abortion informed consent expansion

The bill makes the following changes to the law governing abortion informed consent:

- Requires a physician, 24 hours before abortion inducement or performance, to meet with the pregnant woman and to also inform her of the probable gestational age of the zygote or blastocyte to be aborted. Current law only requires that information to be provided about an embryo or fetus. The probable gestational age is the age at the time of the meeting, in the judgment of the physician, with reasonable probability.<sup>25</sup>
- Requires the physician performing or inducing the abortion, 24 hours before the abortion, to meet with the pregnant woman to inform her that the family planning and gestational development material given to her at the meeting also describes the zygote or blastocyte. Current law only requires that information to be provided about an embryo or fetus.<sup>26</sup>
- 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.<sup>27</sup>

## Abortion report

### For each abortion

The bill requires the attending physician for a surgical abortion, when completing an “abortion report” under continuing law, to also include the method of final disposition of the fetal remains. Additionally, the bill 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 current law of simply the number of abortions. Under continuing law, this report must be completed for each abortion the physician performs. The report must be confidential and not contain the woman’s name.<sup>28</sup>

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<sup>24</sup> R.C. 3726.09.

<sup>25</sup> R.C. 2317.56(A)(3) and (B)(1)(b).

<sup>26</sup> R.C. 2317.56(B)(2)(c).

<sup>27</sup> R.C. 2317.56(B)(4)(c).

<sup>28</sup> R.C. 3701.79(C).

## **Annual abortion report**

Not later than October 1 of each year, the Department must issue an annual report of the abortion data reported for the previous calendar year. The bill requires that the annual report include the total number of zygotes, blastocytes, embryos, or fetuses that were aborted, rather than the current law requirement of simply the total number of abortions. The bill also requires, regarding the continuing law requirement of sorting information in the report regarding the number of abortions performed, that the information be sorted by the number of zygotes, blastocytes, embryos, or fetuses previously aborted by the woman on whom the abortion was performed (instead of the current law requirement that the sorting be of the number of abortions performed on the woman).<sup>29</sup>

## **Additional provisions regarding cremation**

### **Cremation by crematory facility**

The bill 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.<sup>30</sup>

R.C. Chapter 4717 contains the professional regulations for crematory facilities. 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 for which a license is held under Ohio law governing Hazardous and Solid Wastes, or a solid waste incineration facility for which a license is held under that law and is also authorized to treat infectious wastes, in connection with the incineration of body parts other than dead human bodies that were donated to science for purposes of medical education or research.<sup>31</sup>

### **Relief from securing certain forms**

The bill provides that 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.<sup>32</sup>

## **Rules**

The bill 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 bill’s fetal remains

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<sup>29</sup> R.C. 3701.79(I)(1).

<sup>30</sup> R.C. 3726.02(B).

<sup>31</sup> R.C. 3726.02(C); R.C. 4717.01(K), not in the bill.

<sup>32</sup> R.C. 4717.271(B) and 3726.15.

disposition provisions, not later than 90 days after the bill's effective date. Specifically, the Director must adopt rules that prescribe the following:<sup>33</sup>

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

Under current law, the Director must adopt rules relating to abortions and the humane disposition of the product of human conception. The bill requires these rules to be consistent with the bill's requirements for cremation and interment.<sup>34</sup>

## **Prohibitions and penalty**

### **Prohibitions applicable to any person**

The bill prohibits any person from failing to comply with the following provisions:<sup>35</sup>

- 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);
- 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.
- The requirement that an abortion facility must maintain evidentiary documentation demonstrating the date and method of the disposition of all fetal remains.

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<sup>33</sup> R.C. 3726.14.

<sup>34</sup> R.C. 3701.341.

<sup>35</sup> R.C. 3726.99(A).

## Prohibitions applicable to crematory operators

The bill prohibits a crematory operator that cremates fetal remains (for an abortion facility regulated by the bill) 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.<sup>36</sup>

The bill 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 (see **“Supplemental detachable form to abortion informed consent,”** above).<sup>37</sup>

## 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.<sup>38</sup>

## Delayed enforcement

The bill provides that the prohibitions described under **“Prohibitions and penalty”** will not apply until the Director adopts the rules required under the bill.<sup>39</sup>

## Immunity

### Pregnant woman not liable

The bill 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 bill’s prohibition under **“Prohibitions and penalty”** (above), if she has a surgical abortion and the fetal remains are not disposed of in compliance with the bill’s provisions for fetal remains disposition.<sup>40</sup>

### General immunity

The bill 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

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<sup>36</sup> R.C. 3726.02(B) and 4717.271(A)(2) to (4).

<sup>37</sup> R.C. 3726.02(B) and 4717.271(A)(1).

<sup>38</sup> R.C. 3726.99(B).

<sup>39</sup> Section 3.

<sup>40</sup> R.C. 3726.95.

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 bill’s fetal remains disposition requirements;
- Receives a copy of a properly executed detachable supplemental form to the abortion informed consent form;
- Acts in furtherance of the final disposition of the fetal remains.<sup>41</sup>

Further, the bill 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 bill specifically provides that the fetal death certificate provisions 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.<sup>42</sup>

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## HISTORY

Action	Date
Introduced	02-12-19
Reported, S. Health, Human Services & Medicaid	03-26-19
Passed Senate (24-7)	03-27-19
Reported, H. Civil Justice	---

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S0027-RH-133/ar

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<sup>41</sup> R.C. 3726.15.

<sup>42</sup> R.C. 3726.16; R.C. 3705.20, not in the bill.