

HB 1558
69th Legislative Assembly
House Judiciary Committee
Neutral Testimony of Travis W. Finck
January 29, 2025

Mr. Chairman, members of the House Judiciary Committee, my name is Travis Finck and I am the Executive Director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of public defense services in the state of North Dakota. We rise today to provide neutral testimony on HB 1558.

The Commission wishes to point out Section 1 of HB 1558 creates an unnecessary hurdle to this bill passing. Surprisingly, legislative council did not ask the North Dakota Department of Corrections, Parole and Probation, to provide a fiscal note. Under section 1 of this bill, a defendant convicted of criminal vehicular homicide could be on supervised probation for a term of 3 years up until the remainder of their life.

An offender sentenced under NDCC 39-08-01.2 – Criminal Vehicular Homicide, is guilty of a Class A Felony. There is a minimum sentence of 3 years in prison for a first offense and if any prior convictions for driving under the influence, a mandatory 10-year sentence. Once released from their sentence, a defendant would be placed on 3 years supervised probation. The probation is required to be supervised under NDCC 12.1-32-07 because it is a felony.

Section 1 of this act allows probation to continue as long as necessary to make the parental loss restitution payments. In the case of indigent individual, this could be a lifetime depending on the amount ordered. As such, would section 1 make the probation supervised? I don't believe the bill is clear.

If section 1 were to be removed, the judge could still order restitution, a defendant would still be placed on supervised probation, and if not complete at the end of the three years of supervised probation, the court would still have options. NDCC 12.1-32-06.1(3) provides "If the defendant has pled or been found guilty of an offense for which the court imposes a sentence of restitution or reparation for damages resulting from the commission of the offense, the court may, following a restitution hearing pursuant to section 12.1-32-08, impose additional periods of **unsupervised probation** not to exceed five years for each additional period imposed". **Emphasis added.** This statute would allow probation to continue similar to section 1, but mandates the probation be unsupervised. Alternatively, if the defendant has completed all other aspects of the probation, the court could reduce the amount of restitution to a civil judgment. These are commonly used in courts all across our state.

Leaving a defendant on probation to try and coerce payments may cause equal protection problems. The U.S. Supreme Court in Bearden v. Georgia held a defendant's probation may not be revoked for failure to pay restitution, absent a finding the defendant was responsible for the failure to pay. 461 U.S. 660, 672 (1983). The North Dakota Supreme Court has been dealing with this concept since Bearden. The passage of Article I, Section 25 of the North Dakota Constitution complicated restitution laws even further. Eventually, the North Dakota Supreme Court determined NDCC 12.1-32-08(1) requiring the court to assess ability to pay when setting restitution was unconstitutional. See State v. Strom, 2019 ND 9. However, the North Dakota Supreme Court was clear although ability to pay is not considered in setting the amount of restitution, it is still required in assessing the failure to pay when considering revocation of probation. Id., at ¶ 9. The North Dakota 66th Legislative Assembly then changed NDCC 12.1-32-08 in HB 1252 and SB 2068 that session to remove the ability to pay consideration when setting probation. The restitution statute was further amended in 2023 session with HB 1041. The result is the current statute.

Although six states have recently enacted these statutes the Commission believes the purpose of this act can already be achieved under Article 1, Section 25 of the North Dakota Constitution. Article 1, Section 25(1)(n) provides "the right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct." Furthermore, Article 1, Section 25(4) provides who is defined as a victim. A child of a decedent in a criminal vehicular homicide case would be a victim. See Art.I, Sec. 25(4), (providing If a victim is deceased, incompetent, incapacitated, or a minor, the victim's spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, may also exercise these rights).

The Commission does not take a position on the concept of parental responsibility this bill seeks to implement. Rather, the Commission has questions relating to the lengths of probation and whether or not this bill is necessary to achieve the intent of the bill.

Respectfully submitted:



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