

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

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ROLL NUMBER

DESCRIPTION

1462

2005 HOUSE JUDICIARY

HB 1462

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1462

House Judiciary Committee

Conference Committee

Hearing Date 1/31/05

Tape Number	Side A	Side B	Meter #
2	xx		23.6-end
2		xx	0-18.3
3	xx		18.8-20.2
Committee Clerk Signature <i>Aawn Penrose</i>			

Minutes: 14 members present.

Chairman DeKrey: We will open the hearing on HB 1462.

Paul Murphy: I'm not getting paid to be here today, and I'm not a lobbyist, I'm here as a private citizen. The reason why I'm here is that I requested this bill be introduced by Rep. Pollert, because of the abuse I see in the system, in my job as an attorney. The intent of the bill is to reduce the abuse that is going on. We've heard a lot about divorce this morning, heard a lot about abusive situations, I don't deny that abuse happens and it's a problem. In a domestic violence protection order scenario. Two parties that probably haven't been getting along for quite some time, and it may be combative, it may be abusive, one decides to leave. One gets a restraining order against the other, the other one says I don't want to see that person ever again, I'm not even going to go to the hearing, I don't care if they have a restraining order against me, and he doesn't show up to the hearing. Now one party as the restraining order and the other doesn't. So, this one cannot call this one, cannot contact, cannot be in the ?? Amount of feet,

whether 1,000 ft (1/4 mile), 500 ft., 300 ft whatever the judge writes on the order. Chances are there are probably children involved, property involved, any number of things we acquire as married people and so one without the restraining order can't call the other. But the one with the restraining order can call, can show up at work, do whatever they want to the other one and they either have to leave, they have to make arrangements, hang up, whatever. I'm not saying this happens all the time, but it happens a fair amount of times when the abuse of the system warrants a change. The change being proposed here is that unless there is a good cause, it needs to be mutual. You have to stay away from you and you have to stay away from you. It simplifies things. Even with this change being enacted there is a possibility of abuse going the other way. They both have mutual restraining orders and one is the aggressor and they show up at the passive person's work, or shows up before they have bowling, or before they have softball, and then the other one has to leave. The way to stop the abuse after this would be enacted, would be their stopping line and harassment laws that deal with that. But currently today as it stands, those laws are not available to you to protect yourself against someone who has a restraining order against you, but chooses to call you anyway. My only choice is to hang up or to leave. So that harassment and stalking, it doesn't hold any water. What I'm bringing forward for this committee, is not an easy thing to bring forth. People don't like to say that the system is being abused. Some people abuse the system and will deny that it is being abused because that's what they use to get a leg up, to get an advantage. Myself, I view courts as a place to air the facts, and get a just result. Other people in my profession, view the courts as a way to gain an advantage, whether it is tactical, knowing the rules, whatever. It is not factual, it is tactical to gain an advantage. What we have in this proposed bill, deals with the two parts where people gain the

advantage using tactics instead of facts to gain the advantage. The current law, I believe, fosters underhandedness in the system.

Representative Kretschmar: Under the bill, would the court be required to issue a restraining order against both parties in each instance.

Paul Murphy: I believe the bill as written basically says, you must sign a mutual restraining order against both parties unless good cause is showing. I know that right now a lot of judges do do that, even though I don't really think that they have the authority to do that. If I'm getting a restraining order against you and I'm the only one filing papers, technically, I am the only one who's entitled to one. If you don't file any paperwork you don't get one against me, even though you may have good grounds to do so. It's somewhat akin to protecting one's self against one's self. If you were abusing me, and I got a restraining order for you to stay away from me, the abusive situation doesn't necessarily end once the restraining order is put in place. If I go to you, or I seek you out, and be abused, basically I need protection against myself for putting myself in a dangerous situation.

Representative Klemin: You were talking about one party has a restraining order against the other one, but then the non-restrained party, knowing that the restrained party is going to be somewhere for some type of event, or whatever gets there first, to intentionally interfere with the restrained party from engaging in that activity. Is that what you see happening.

Paul Murphy: That's exactly what does happen. I'm not divulging any confidential information, I had one case which was particularly egregious in this way. The other side to the divorce got a restraining order, that party actually worked in an attorney's office. That person got the restraining order against the spouse. Eventually they somewhat reconciled and my client

moved into the basement of the house of the person who had the restraining order. But the order was still in place. They had worked it out, and then things fell apart again, and after it fell apart, the unrestrained person showed up prior to an activity of the restrained party, so the restrained party had to leave, even though that person knew their schedule and did it deliberately. It decreases the confidence in the court system.

Representative Klemm: The present system offers an opportunity to be vindictive.

Paul Murphy: Yes.

Representative Charging: Can't the restrained person bring this to the attention of the court.

Paul Murphy: There is law behind it, but the system we have in place, the civil and criminal, and the criminal system which costs nothing to enforce is available to the person who is holding the restraining order against the other one. The civil system, the pay as you go, so if you have one against me and I want to bring this up, it is a civil action, it costs money.

Representative Charging: This has been in place for a long time, and although they're always looking to find a way around it, and obviously there are people doing it, it is better than nothing.

Paul Murphy: The people I deal with everyday, I would say it is not necessarily perfect, that's the only reason I bring this forward because I think there is a problem and I feel that something needs to change. I hear people that come to me and they'll get done with their hearing and they'll say, next time I am going to just take the law into my own hands. The confidence in the judicial system, I think, is lowered every day. She's got one against me, or he's got one against her, why do they get to show up and I have to leave. Everybody knows I'm here all the time and it's just fueling the fire. When there is conflict, in most cases, it involves both parties escalating it

somehow. Chances are it's not just one person escalating it. They are both pouring gas on it, and they both need to stop. It takes two to tango, it takes two to stop.

Representative Charging: So that's probably a very good idea in the first part of the bill. But in the domestic violence, because if somebody goes that far, there must be some concern for their safety.

Paul Murphy: I agree, I'm not saying that there shouldn't be protection orders in place. Judges err on the side of protecting the victim.

Representative Delmore: Does this address the problem of he or she who gets the papers first, sometimes there is a race to the courthouse to deliver a restraining order and both people may want a restraining order.

Paul Murphy: Yes, that is what the attempt is. Earlier we talked about a waiting period. The way the law is now, it doesn't always fosters standing back and waiting for it. It's get your stuff to the courthouse first, I'll get mine, and if you try and come in later, first of all, your credibility is diminished because you are just getting it because they have one on you; and the system is not working, I feel.

Representative Boehning: Basically, the bill is going to do, I get a restraining against a spouse and a spouse gets one against me, it applies to both equally.

Paul Murphy: Yes, correct. Unless there is good grounds to not have it mutual, it will be issued.

Representative Boehning: Then if Johnny has something at school, what happens then. I want to go, she wants to go. Can we show up together, can we be in the same place, do I have to

go to court to get the restraining order lifted in order to go and see Johnny or what happens in that situation.

Paul Murphy: That occurs now, when one has one and the other doesn't. A lot of times that forces exclusion of one parent from the life of the child. Basically, what this will do is it forces them to work through. Sometimes the school will have an afternoon and evening school choir concert so that parents can come at different times. I'm trying to make it equal power. The reason I say that the child needs to see both parents, is that each parent instills in the child certain traits. Fathers tend to teach their children that it's okay to take risks, mothers tend to teach their kids other things. You're giving the child a more balanced view of the world, instead of just one side or the other.

Representative Boehning: If you want to go and see Johnny, and they have one program, do the two parties have to go to a mediator, or can they mutually agree probably ahead of time that, church functions, school functions, etc. that both are allowed to come without excluding the other. I think this is probably some good legislation to a certain point, where it's going to allow both parties to come.

Representative Meyer: Would this address a situation, for example, we have a hired man who is truly one of the kindest, gentlest people I know. He had a restraining order filed against him, that happens. Then she would call him to have him come over and change a flat tire on her car. He would go over and do that and when the tire was fixed, the second time the engine on her car broke down, and I know there is no state law against stupidity in this, but I had to bail him out of jail twice. She called the police after he had fixed the car. Would this provision in the law, would this protect him and give him some recourse against her doing that.

Paul Murphy: Yes, sometimes laws make sense and sometimes they don't. Sometimes the laws that do make sense, don't get enforced the way they make sense. If it's her car in the middle of nowhere and he comes there, if I'm a police officer, there's only one restraining order here, I have to take you to jail because I don't care how you got here, I have to take you to jail.

Representative Charging: But the law is the law. Here he broke the law by even responding to that. There was a restraining order filed, that is the law, you are not to have any contact.

Paul Murphy: I agree. If there was a law against stupidity, we'd all take our turn at being charged. You are dealing with emotions too. People don't keep that away from the kids.

Representative Charging: But the law is the law.

Paul Murphy: I understand. But there might be times where certain facts weren't brought to the attention of the court, he said I'm flat broke and I can't afford the time to go to the hearing, I don't care if I don't talk to her and I can't afford the time to go to the hearing and I'll deal with it when I deal with it. But this kindhearted person got a restraining order against him, and he didn't bring his side of the story to the court's attention.

Representative Klemin: Under the example talked about a few minutes ago, abuse of the system, I'm not quite sure how a mutual restraining order is going to correct that. One party can still get someplace first. Then the other party comes there, then what happens. Is this just going to mean that they both have to stay home all the time.

Paul Murphy: No, and like I said, no bill is perfect. I'm just trying to correct the abuses that I'm seeing.

Representative Klemin: How would a mutual restraining order correct that example.

Paul Murphy: As far as showing up early, it won't solve that. The first one there is the first one there. But it's the contact and the calling by the person who's not restrained to the person that is restrained. It at least gives law enforcement the opportunity to say, what are you doing here, it's his regular bowling night, why did you show up here, you know that he is here. You're throwing gas on the fire. Hopefully this would help alleviate some of the court hearings that we do have because it puts everybody on an even playing field. Don't be vindictive with these orders.

Representative Boehning: When you have a restraining order, isn't the one who filed it, basically sets the parameters. You can't be there if I'm there, correct? Can you walk us through a typical restraining order would be.

Paul Murphy: Basically, the paperwork is up at the courthouse. You can fill it in for domestic violence or disorderly conduct. You put the paperwork in front of the judge, generally the judge will grant a temporary restraining order and then you have to have a hearing within 14 days or continuing one. The judge will probably set the parameters on the temporary restraining order. Then you have the hearing, after service of both parties, saying the hearing will be this, this is the matter we are taking up, these are the two participants, this is what has been alleged. It will be decided if one should be issued or not. At the hearing, the judge will say, you get one against this one, but what this bill would do is say yes, you get one, but I'm also restraining the other way too, because maybe you need protection against yourself. Maybe it's not a good relationship for you to be in anyway. It's not good for the kids.

Representative Boehning: Can the judge set the parameters regarding the children's programs, etc. Can the judge say you can both be there at the same time, or anything on that

order where we can come and do a mutual thing or is it pretty much one-sided, where if I show up, you better not be here, because I've got a restraining order against you.

Paul Murphy: The judge can do whatever they want. They can tailor the order however they want to. If they want to say Saturdays and Sundays, or school programs, generally public areas aren't where stalkers and abusers tend to their work. In public arenas, they tend to behave themselves. They don't really tailor make it especially when they have only one party going up and giving testimony, they just say stay away a certain number of feet.

Representative Galvin: I'd be really surprised if the restraining order didn't apply to a specific place. I don't think you have to predict in advance where someone is going to be, if you just run into each other by chance. Would that be a violation of the restraining order?

Paul Murphy: Chance meetings, in small towns, chance meetings are likely to occur. This addresses the problem of the unrestrained party showing up on purpose, planned meetings. It's the abuse that comes from planning, I'm going to make life rough for this person, I am going to show up early and they have to leave. Chance meetings, depending on the size of the town, occur a lot, but most times the other party sees the other's car and just comes back later.

Chairman DeKrey: Thank you. Further testimony in support.

Rep. Chet Pollert: I am the sponsor of this bill and brought it forward on behalf of Paul Murphy. I support this bill.

Chairman DeKrey: Thank you. Further testimony in support. We will recess until this afternoon and take the testimony in opposition to HB 1462.

(Reopened in the afternoon session).

Chairman DeKrey: We will reopen the hearing on HB 1462. Testimony in opposition.

Bonnie Palacek, ND Council on Abused Women's Services Coalition Against Sexual

Assault in ND: Opposed (see written testimony).

Representative Klemin: If a restrained party believes that the unrestrained party is abusing the system, can't the restrained party go back to court and tell the judge what she is doing and how she is abusing this, and the court would do something about it.

Bonnie Palacek: The civil protections, I would think in terms of harassment and both kinds of remedies would be available. Also, protection orders are rarely forever, protection orders expire. At that point, in order to get a new order or to remove the order, the parties would have to go back into court and get a new order, at which time that case could be made on the part of the restrained party.

Representative Klemin: In the meantime, if there is a problem, the party that is being abused by this, they can go back to court.

Bonnie Palacek: I'm trying to think of what process there would be to go back into court to challenge the order, basically. It seems to me that it would be the behavior, either it wasn't a valid order in the first place because that behavior didn't happen, then it would be a false charge of domestic violence.

Representative Klemin: I'm not thinking of challenging the order, but because of the conduct of the unrestrained person, maybe asking the court to issue a dual protection order.

Bonnie Palacek: It would seem to me that in those cases, if the unrestrained party was acting inappropriately, probably a disorderly conduct order, which is a much broader kind of behavior, like invading privacy, or unwanted acts, those kinds of things, that would be the behavior of the unrestrained party, he or she could get a disorderly conduct order.

Representative Klemin: My point is, that person who feels the other side is abusing the system, does have some recourse.

Bonnie Palacek: Absolutely, we feel there is recourse.

Representative Charging: You brought up earlier, that federal law would not agree with the mutual orders, correct. And I understand that federal jurisdiction is on the Indian Reservation. But if there was an order saying the non-Indian off the reservation, spouse on the reservation, how would this apply.

Bonnie Palacek: What full faith and credit does is put, I don't need to tell you the jurisdictional issues of enforcement, but what it says in terms of the federal law is that, in terms of states courts, the tribal orders will be honored, and tribal orders will be honored by the state courts. Clearly, we know that doesn't happen all the time, but that is the framework of the federal law.

Representative Charging: So if this law were to pass, that would be a huge problem.

Bonnie Palacek: I think it would throw it all for grabs in terms of what would be honored anywhere.

Chairman DeKrey: Thank you. Further testimony in opposition in HB 1462. We will close the hearing.

(Reopened the same session).

Chairman DeKrey: What are the committee's wishes in regard to HB 1462.

Representative Delmore: I move a Do Not Pass.

Representative Kretschmar: Seconded.

12 YES 0 NO 2 ABSENT DO NOT PASS CARRIER: Rep. Kretschmar

Date: 1/31/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1462

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Delmore Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	A		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	A				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 1, 2005 7:54 a.m.

Module No: HR-21-1514
Carrier: Kretschmar
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1462: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS
(12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1462 was placed on the
Eleventh order on the calendar.

2005 TESTIMONY

HB 1462

**NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES
COALITION AGAINST SEXUAL ASSAULT IN NORTH DAKOTA**

418 East Rosser #320 • Bismarck, ND 58501 • Phone: (701) 255-6240 • Fax 255-1904 • Toll Free 1-888-255-6240 • ndcaws@ndcaws.org

Testimony on HB 1462
House Judiciary Committee
January 31, 2005

Chair DeKray and Members of the Committee:

My name is Bonnie Palecek and I am speaking this morning in opposition to HB 1462.

In 1991, the ND Legislature took action amending 14-07.1, the Domestic Violence statute, in order to clarify conditions under which so-called "mutual orders" can be issued. The statute that has governed the issuance of such orders for the last fourteen years allows them under the following circumstances: "A court of competent jurisdiction may issue a dual protection order restricting both parties involved in a domestic violence dispute if each party has commenced an action pursuant to subsection 1 and the court, after a hearing, has made specific written findings of fact that both parties committed acts of domestic violence and that neither party acted in self-defense." 14-07.1-02 (5).

In other words, a "dual order" may be issued if there is evidence that the threat of physical harm extends both ways and both sides file a petition for an order. It is a pretty clear cut due process issue. HB 1462 leaves the above current language in the statute (p. 5 ll - 12-16), but then proceeds to contradict it in ll 19-21, which shifts the presumption to the stance that all orders should be mutual unless "good cause" exists to indicate otherwise. This will cause great confusion and leave the statute internally inconsistent.

A second concern is the fact that under the federal Violence Against Women Act, the respondent part of mutual orders cannot be honored in any other jurisdiction. This means that mutual orders issued by District Courts in Bismarck won't be enforced in Arizona or on Ft. Berthold Reservation. HB 1462 would turn the clock back on full faith and credit efforts on protection orders, and again cause great confusion for the enforcing officer, who must rely on "findings against each party" to enforce the order.

A third concern would include all of the implications of the rebuttable presumption statute dealing with child custody and visitation. This statute would be virtually muted if 1462 became law.

Basic due process and fairness require that a party be given notice of the fact that their actions may lead to a restraining order against them. That is why the petition must be served at least 5 days before the hearing. A person must be given a chance to get witnesses and other evidence. The way this bill is written, only one side would be given notice of the specific conduct they must deal with at the hearing.

Fairness also dictates that if a person has done nothing but be on the receiving end of domestic violence, they should not be ordered to do anything. The justice system should offer protection from violence while holding perpetrators accountable in these situations. Mutual orders, when issued routinely, have the effect of empowering perpetrators and

threatening victims, exactly what we don't want to happen if our goal is to break the cycle of violence.

We understand the frustration over enmeshed cases of family violence which are difficult to sort out and seem to go on forever. The answer, however, is not to circumvent due process and threaten victims. We urge a Do Not Pass on HB 1462.