

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1184

2005 HOUSE JUDICIARY

HB 1184

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1184

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/12/05

Tape Number	Side A	Side B	Meter #
1		xx	3.6-20.2
2		xx	38

Committee Clerk Signature *D Penrose*

Minutes: 13 members present, 1 member absent (Rep. Maragos).

Chairman DeKrey: We will open the hearing on HB 1184.

Rep. Ekstrom: I am one of the sponsors of this bill (see written testimony).

Representative Onstad: This is a class B misdemeanor if you are living with someone, but you also have to try to be deceptive in either trying to acquire that property or somebody else's property.

Rep. Ekstrom: The purpose of taking it completely out of the sexual census part of the statute, putting it over in a Misc. Section. The only time someone can be prosecuted would be if they are purporting to be married and they are trying to perpetrate a fraud, both cases.

Representative Koppelman: There was an interesting court case that I believe that legislation resulted from, which came before this committee a few sessions ago. It involved a family in Fargo, an older couple, who rented space in their home as an apartment and apparently two people who were not married, attempted to rent from them. They said that that would be

against moral beliefs and we don't want you to rent in our home if you aren't married to each other. They challenged that over a fair housing issue, which is a separate section of law, but the court in ruling in the landlord's favor, based part of that decision on the fact that ND has a law against cohabitation; therefore, it must be lawful for a landlord to say, that under my roof I don't want this to happen. If this bill were passed, do you believe that that finding would be in jeopardy, at least in future such cases.

Rep. Ekstrom: I've had fairly lengthy discussions with Rep. Kasper, two sessions ago, where we did put some protections in the law for those sorts of situations. So under statute at the moment, they are completely protected and will continue to be. If you interpret my legislation directly, we're saying fraud. But it's not to say also certain deceptive practices. If you're lying in order to get an apartment, and the landlord finds out you're lying, Rep. Kasper's statute is still in force and I don't believe this upsets his statute in any way. In some ways, may even strengthen it. So we're not talking about rescinding that portion of the statute and in reality, the reason I brought this forward, was because of my little visit to UND. We talked around all the possibilities of what is the compelling state interest. The compelling state interest is to protect hospitals, landlords, and other people from somebody trying to pull a fast one on them, trying to defraud them of their property. I don't believe, in my interpretation, that we would not be affecting that in any way.

Representative Galvin: In the last session, our legislation was to repeal the law that made cohabitation illegal and that failed.

Rep. Ekstrom: It passed the House, but failed in the Senate, and that was a complete repeal of the entire statute.

Representative Galvin: Is this connected to that. What is the connection between this legislation and the repealing of that law.

Rep. Ekstrom: That is a wonderful question. What I was doing last time, was repealing that section of law completely. This time I am repealing that section of law that is unenforceable, and we are saying that if someone tried to defraud someone and cohabitating (pretending to be married), then we are saying that is a no go. You are a class B misdemeanor, you can get in trouble with the law for it. This section of law is either directly in front of or directly behind the laws against incest. This whole section of law is under sexual offenses. I do understand the moral issue here, but what I was trying to do with this legislation is to say what is the state's compelling interest. What is our interest in that. Common law marriages might need to be looked at in the future, as well. The state has a compelling interest in terms of the children. We have taken care of that in other places in the law.

Chairman DeKrey: Thank you. Further testimony in support of HB 1184.

Rep. Kathy Hawken: I am here in support of this particular piece of legislation for three reasons: 1) financial - there are a number of my constituents, who are elderly. As a result of Social Security and other reasons, there are a number of seniors who have chosen to live together. It is particularly stressing to them that it is illegal. Some have even gone so far as to have their living arrangement blessed by the church, but have not filed papers with the state. We are forcing something in this instance, that really we aren't going to enforce and shouldn't be there. Were these same people to try and do something fraudulent, this bill handle that situation. For the most part, these people are not, they are doing it strictly for companionship and financial stability. The same could be said on the financial end for students, or young working people for

sharing rent. It's strictly financial. Some places it may not be. The issue here is they are not doing anything fraudulent. 2) safety issue, with some of the younger students that come from smaller towns, and they are living in homes with mixed groups, there are parents who think this is a good idea. Safety is a concern in the bigger towns. 3) personal responsibility - individual rights, individual freedoms.

Chairman DeKrey: Thank you. Further testimony in support of HB 1184.

Carol Two Eagles: I'm a pipe carrier and sun dancer, so that makes me a spiritual leader of my people, but I am also the presiding bishop of a 501(c)3 church under the white man's law. Our church is nondenominational and nonsectarian. I end up doing counseling on this matter of cohabitation and I have routinely counseled people, that as long as you are not trying to defraud anybody of any property, this is your personal responsibility. The only people you have to answer to don't have physical bodies. There are many good reasons for this bill. It is not the responsibility of the state to mandate morality. I am hoping that you will pass this bill and leave the repealed in place.

Chairman DeKrey: Thank you. Further testimony in support of HB 1184. Testimony in opposition to HB 1184.

Rep. Jim Kasper: I'm not hear to testify hard against this bill. I want to point out a couple of things and ask for a potential amendment if I could. Under the current statute, where you have the unlawful cohabitation statement in statute, reading the case law which is below the statute, it says cohabit as husband and wife merely meant having intercourse with each other the same as husband and wife would have. The first thing if we repeal the cohabitation law as it is, we are going to take that out of the statute and it's going to say that the legislature has no business

dictation whether a man and a woman should have sexual intercourse whether they are married or not, and I don't disagree with that. I just want to point that out for the record. The one thing I am concerned about is on line 12 of the bill, where it states, going back to line 11, "and purports to be married to the other individual in order to obtain the property or services of another by deception". My concern is with the word "another". I think part of the intent of this bill in the past, was that a man and a woman could not live together to obtain government services, unless you were husband and wife that you would be able to obtain as husband and wife. My concern is that the word "another" does not address illegally or deceptively obtaining government services as if you were husband and wife. Maybe there needs to be an addition to the bill on line 12, not only "another" but possibly state and government agencies or something along those lines.

Representative Delmore: So other than that, you are all right with this bill, you don't have any questions about the other sections of this bill.

Rep. Kasper: I'm taking Rep. Ekstrom totally at her word, about the fact that the landlord's rights to not have to rent to cohabitating adults is not changed in any way by this bill. And if that is the fact, with the modest change, I will probably not oppose the bill.

Chairman DeKrey: Thank you. Further testimony in opposition. We will close the hearing.
(Reopened in the same session)

Chairman DeKrey: What are the committee's wishes in regard to HB 1184.

Representative Koppelman: I move to amend HB 1184, on page 1, line 11, remove the second "the" and replace "or" with an underscored comma and page 1, line 12, replace "of another" with ", or benefits".

Representative Delmore: Second.

Page 6
House Judiciary Committee
Bill/Resolution Number HB 1184
Hearing Date 1/12/05

Chairman DeKrey: Motion carried. We now have the bill before us as amended.

Representative Meyer: I move a Do Pass as amended.

Representative Zaiser: Second.

12 YES 1 NO 1 ABSENT DO PASS AS AMENDED CARRIER: Rep. Meyer

YK
1/13/05

HOUSE . AMENDMENTS TO HOUSE BILL NO. 1184JUD 1-14-05

Page 1, line 11, remove the second "the" and replace "or" with an underscored comma

Page 1, line 12, replace "of another" with ". or benefits"

Renumber accordingly

Date: 1/12/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1184

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *No Pass as Amended*

Motion Made By *Rep Meyer* Seconded By *Rep Zaiser*

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

Total (Yes) 12 No 1

Absent 1

Floor Assignment

Rep. Meyer

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

REPORT OF STANDING COMMITTEE

HB 1184: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1184 was placed on the Sixth order on the calendar.

Page 1, line 11, remove the second "the" and replace "or" with an underscored comma

Page 1, line 12, replace "of another" with ", or benefits"

Renumber accordingly

2005 TESTIMONY

HB 1184

HB 1184 Unlawful Cohabitation
ND House / Judiciary
Prairie Room / Chair Duane DeKrey
January 12, 2005

Good Morning, I am Representative Mary Ekstrom from District 11 in Fargo. Chair DeKrey and members of Judiciary Committee, I am here to introduce HB 1184 for your consideration.

This bill rescinds Century Code Section 12.1-20-10 which deals with Unlawful Cohabitation. You might remember this bill from last Session. This year I am proposing to take Unlawful Cohabitation out of the sexual offenses section of the code and place a restriction on Unlawful Cohabitation in cases where someone is planning to perpetrate fraud by purporting to be married. This was one of the primary objections raised in the Senate with regard to the statute.

To give you an example, a man and woman could go the Meritcare Hospital and claim that they are married. If one of the individuals dies, the other would claim not to be married in reality and be able to get out of paying the bill. For obvious reasons, the state has an interest in not allowing that to happen.

I had the opportunity last Fall to speak at the UND Law School about this topic. We were fortunate to have Judge Rodney Webb in the audience. The discussion became very protracted because Judge Webb was part of a group who attempted sometime ago to frame legislative intent with regard to Section 12.1-20-10. The intent of the law as it stands now is not clear. Do we wish to outlaw cohabitation or prevent fraud?

There are a variety of reasons why the law as it stands now, is unenforceable. In fact, the last time that it was enforced was 1938. First, there is the implied right to freedom of association granted by the First Amendment of the U.S. Constitution. To paraphrase various court opinions: anyone may associate with anyone else as long as they are not engaged in criminal activity.

The Fair Lending Act of 1974 states that any two persons may apply jointly for a loan (including mortgages). The law further states that they may not be denied a loan based solely on their marital status. This law has been used and adopted nationally.

The Fourth Amendment of the U.S. Constitution grants an implied right to privacy. And as my good friend, the late Senator Linda Christenson said during her floor speech in the ND Senate. We would need sex police to prove what is actually going on behind closed doors.

Here in North Dakota, we have college students sharing apartments - we can only speculate on the relationship between these young men and women. We have seniors sharing living arrangements in order to hang onto their maximum social security benefits. I am not ready to call these people criminals.

Allowing the law to stand simply because it is not enforced also creates problems. I have heard of several divorce cases where one spouse wants the judge to go after the other because they are "breaking the law." There is no need to allow this to stand. We almost got there last Session when this bill passed the House by 60 YEAS and 32 NAYS. We got held up in the Senate with a very close

page(s) missing

HB 1175: A BILL for an Act to amend and reenact subdivision b of subsection 1 of section 23-07-07.5 and section 23-07.7-01 of the North Dakota Century Code, relating to sexual offenses; and to repeal section 12.1-20-10 of the North Dakota Century Code, relating to unlawful cohabitation.

ROLL CALL

The question being on the final passage of the bill, which has been read, and has committee recommendation of DO PASS, the roll was called and there were 60 YEAS, 32 NAYS, 0 EXCUSED, 2 ABSENT AND NOT VOTING.

YEAS: Aarsvold; Amerman; Berg; Boe; Boehning; Boucher; Brusegaard; Clark; DeKrey; Delmore; Devlin; Drovdal; Eckre; Ekstrom; Froelich; Glassheim; Grosz; Gulletson; Haas; Hanson; Hawken; Headland; Hunsakor; Johnson, N.; Keiser; Kelsch, R.; Kelsh, S.; Kingsbury; Klemin; Kreidt; Kroeber; Maragos; Martinson; Metcalf; Mueller; Nelson; Nicholas; Niemeier; Norland; Nottestad; Onstad; Pietsch; Pollert; Porter; Potter; Price; Sandvig; Schmidt; Severson; Svedjan; Thorpe; Tieman; Timm; Uglem; Warner; Wieland; Williams; Winrich; Zaiser; Acting Speaker Wentz

NAYS: Bellew; Belter; Carlisle; Carlson; Delzer; Dosch; Froseth; Galvin; Grande; Herbel; Iverson; Johnson, D.; Kasper; Kempenich; Kerzman; Klein, F.; Klein, M.; Koppelman; Kretschmar; Meier; Rennerfeldt; Ruby; Sitte; Skarphol; Solberg; Thoreson; Wald; Warnke; Weiler; Weisz; Wikenheiser; Wrangham

ABSENT AND NOT VOTING: Bernstein; Monson

HB 1175 passed and the title was agreed to.

SECOND READING OF HOUSE BILL

HB 1175: A BILL for an Act to amend and reenact subdivision b of subsection 1 of section 23-07-07.5 and section 23-07.7-01 of the North Dakota Century Code, relating to sexual offenses; and to repeal section 12.1-20-10 of the North Dakota Century Code, relating to unlawful cohabitation.

ROLL CALL

The question being on the final passage of the bill, which has been read, and is PLACED ON THE CALENDAR WITHOUT RECOMMENDATION, the roll was called and there were 21 YEAS, 26 NAYS, 0 EXCUSED, 0 ABSENT AND NOT VOTING.

YEAS: Bercier; Christenson; Espgaard; Every; Fairfield; Fischer; Flakoll; Grindberg; Heitkamp; Holmberg; Krebsbach; Kringstad; Lee, J.; Lindaas; Nelson; Nichols; Polovitz; Seymour; Syverson; Taylor; Trenbeath

NAYS: Andrist; Bowman; Brown; Christmann; Cook; Dever; Erbele; Freborg; Kilzer; Klein; Krauter; Lee, G.; Lyson; Mathern; Mutch; Nething; O'Connell; Robinson; Schobinger; Stenehjerm; Tallackson; Thane; Tollefson; Traynor; Urlacher; Wardner

HB 1175 lost.

plained, *State v. Beck*, 52 N.D. 391, 202 N.W. 857 (1925).

The provisions of adultery statute were mandatory, but when the prosecution was commenced, on the complaint of the husband or wife, the general criminal procedure of the court was invoked, and the husband or wife had no further control of the prosecution. *State v. Beck*, 52 N.D. 391, 202 N.W. 857 (1925).

Definition.

The term adultery had no technical meaning in law distinct from its significance in its ordinary and popular sense. *State v. Hart*, 30 N.D. 368, 152 N.W. 672 (1915).

Information Sufficient.

In an information charging the crime of adultery it was not necessary to allege that

the prosecution was commenced by the husband or wife. *State v. Beck*, 52 N.D. 391, 202 N.W. 857 (1925).

Collateral References.

Adultery \Rightarrow 1 et seq.

2 Am. Jur. 2d, Adultery and Fornication, § 1 et seq.

2 C.J.S. Adultery, § 1 et seq.

Mistaken belief in existence, validity, or effect of divorce or separation as defense to prosecution for adultery, 56 A.L.R.2d 915.

Reversal of divorce decree: cohabitation under marriage contracted after divorce decree as adultery, where decree is later reversed, or set aside, 63 A.L.R.2d 816.

Validity of statute making adultery and fornication criminal offense, 41 A.L.R.3d 1338.

12.1-20-10. Unlawful cohabitation. A person is guilty of a class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

Source: S.L. 1973, ch. 117, § 1.

DECISIONS UNDER PRIOR LAW

"Open and Notorious."

In a prosecution for openly and notoriously living and cohabiting together as husband and wife, without being married, it was not necessary that the living together should be more open and notorious than the living together of a married couple, but it should have partaken of the same quality. *State v. Hoffman*, 68 N.D. 610, 282 N.W. 407 (1938).

The terms "open" and "openly" meant undisguised and unconcealed as opposed to hidden and secret; the term "notoriously" meant generally known, as a matter of common knowledge in the community where the defendants were living; and the term "cohabit as husband and wife" merely meant having intercourse with each other the same as husband and wife would have. *State v. Hoffman*, 68 N.D. 610, 282 N.W. 407 (1938).

Under a charge of cohabitation, the state had to prove the parties were not married to each other, but this could be proved by circumstantial evidence. *State v. Hoffman*, 68 N.D. 610, 282 N.W. 407 (1938).

Collateral References.

Fornication \Rightarrow 1 et seq.; Lewdness \Rightarrow 1 et seq.

2 Am. Jur. 2d, Adultery and Fornication, § 1 et seq.

37 C.J.S. Fornication, § 1 et seq.; 53 C.J.S. Lewdness, § 1 et seq.

Mistaken belief in existence, validity, or effect of divorce or separation as defense to prosecution for unlawful cohabitation, 66 A.L.R.2d 915.

Validity of statute making adultery and fornication criminal offense, 41 A.L.R.3d 1338.

12.1-20-11. Incest. A person who intermarries, cohabits, or engages in a sexual act with another person related to him within a degree of consanguinity within which marriages are declared incestuous and void by section 14-03-03, knowing such other person to be within said degree of relationship, is guilty of a class C felony.