

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4015 Lewd and Lascivious Behavior

SPONSOR(S): Stark

TIED BILLS: **IDEN./SIM. BILLS:** SB 434

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 1 N	Cunningham	Cunningham
2) Judiciary Committee			

SUMMARY ANALYSIS

Florida's cohabitation law (s. 798.02, F.S.) was created in 1868, and makes it a second degree misdemeanor for any man and woman:

- Not being married to each other, to lewdly and lasciviously associate and cohabit together; or
- Married or unmarried, to engage in open and gross lewdness and lascivious behavior.

Florida is one of only three states with a law criminalizing cohabitation. In recent years, states such as Arizona, Idaho, Maine, New Mexico, North Dakota, Virginia, and West Virginia, have repealed their cohabitation laws. In 2006, North Carolina's cohabitation law was found unconstitutional as violating one's substantive due process rights.

The bill repeals s. 798.02, F.S., in its entirety, and makes conforming changes to several other statutes.

The bill may have a positive jail bed impact.

The bill is effective July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida's Cohabitation Law

Florida is one of only three states with a law criminalizing cohabitation.¹ Section 798.02, F.S., created in 1868,² makes it a second degree misdemeanor if any man and woman:

- Not being married to each other, lewdly and lasciviously associate and cohabit together; or
- Married or unmarried, engages in open and gross lewdness and lascivious behavior.³

While rarely used in the criminal context, cohabitation laws have been used as a rationale to sanction people in a civil context. For example, in 1979, the Florida Department of Business and Professional Regulation suspended a company's liquor license after finding that six of the company's agents, servants or employees violated s. 798.02, F.S.⁴ In 1999, North Carolina officials refused to grant victim's compensation to an unmarried victim of domestic violence because she was cohabiting with her boyfriend, and was therefore a criminal.⁵ In 2001, authorities in Virginia cited that state's cohabitation law to revoke a professional license of the owner of a day care center.⁶

Other States' Cohabitation Laws

In recent years, states such as Arizona, Idaho, Maine, New Mexico, North Dakota, Virginia, and West Virginia, have repealed their cohabitation laws.⁷

It should also be noted that North Carolina's cohabitation law⁸ was found unconstitutional as violating one's substantive due process rights.⁹ In its ruling, the North Carolina court relied on *Lawrence v. Texas*, which held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹⁰ Writing for the United States Supreme Court, Justice Kennedy said "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."¹¹ Justice Kennedy also stated that the following quote by Justice Stevens' in an earlier case should be controlling:

[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.¹²

Effect of the Bill

The bill repeals s. 798.02, F.S., in its entirety.

¹ The other states with cohabitation laws are Michigan (Section 750.335, M.C.L.A.) and Mississippi (Section 97-29-1, M.C.A.).

² Laws 1868, chapter 1637, subsection 8, section 6.

³ The statute was last amended in 1971 by ch. 71-136, L.O.F., which made the offense a misdemeanor of the second degree, punishable as provided in ss. 775.082 or 775.083, F.S., in lieu of punishment "by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars."

⁴ *G & B of Jacksonville, Inc. v. State, Dept. of Business Regulation, Division of Beverage*, 371 So.2d 139 (Fla. 1st DCA 1979). Section 561.29, F.S., gives the Division authority to suspend a beverage license when the Division finds sufficient cause that a licensee or its agents, officers, servants or employees, on the licensed premises, while in the scope of employment, has violated any law of this State.

⁵ *Family denied compensation because victim lived with killer*, April 1, 1999, http://lubbockonline.com/stories/040199/nat_040199068.shtml (last visited on March 18, 2014).

⁶ *Antiquated, unconstitutional law held up day care license for nearly a year*, March 19, 2002, <http://acluva.org/1746/social-services-reinstates-license-for-day-care-operator-accused-of-violating-virginia-cohabitation-law/> (last visited on March 18, 2014).

⁷ E-mail from Rochelle Finzel, Group Director of the National Conference of State Legislatures, dated February 14, 2014 (on file with the Criminal Justice Subcommittee).

⁸ Section 14-184, N.C.G.S.

⁹ *Hobbs v. Smith*, No. 05-CVS 267, 2006 WL 3103008 (N.S. Super. 2006).

¹⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹ *Id.* at 562.

¹² *Id.* at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

The bill removes references to s. 798.02, F.S., in the following statutes:

- Section 39.0139, F.S. (creating a rebuttable presumption, for purposes of dependency proceedings, that detriment to a child is created when a parent or caregiver has been found guilty of specified offenses);
- Section 39.509, F.S. (permitting the court, when determining whether grandparental visitation is in the child's best interest, to consider whether the grandparent has been found guilty of specified offenses); and
- Section 435.04, F.S. (listing disqualifying offenses for purposes of a Level 2 background screening).

B. SECTION DIRECTORY:

Section 1. Repeals s. 798.02, F.S., relating to lewd and lascivious behavior.

Section 2. Amends s. 39.0139, F.S., relating to visitation or other contact; restrictions.

Section 3. Amends s. 39.509, F.S., relating to grandparents rights.

Section 4. Amends s. 435.04, F.S., relating to Level 2 screening standards.

Section 5. Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill repeals an offense punishable as a second degree misdemeanor. This may have a positive jail bed impact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

As discussed above, a North Carolina court, relying on *Lawrence v. Texas*, recently found North Carolina's cohabitation law unconstitutional as violating one's substantive due process rights. It could be argued that Florida's cohabitation statute is also unconstitutional on the same grounds.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES