

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 4003 Repeal of a Prohibition on Cohabitation

**SPONSOR(S):** Rehwinkel Vasilinda; Stark and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 498

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 3 N	White	White
2) Judiciary Committee	16 Y, 0 N	White	Havlicak

### SUMMARY ANALYSIS

Florida's cohabitation law, s. 798.02, F.S., was created in 1868, and 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
- Man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior.

In recent years, states such as Arizona, Idaho, Maine, New Mexico, North Dakota, Virginia, and West Virginia, have repealed their cohabitation laws.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 the portion of s. 798.02, F.S., which 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.

The bill may have a negative jail bed impact, i.e., it may decrease the need for jail beds.

The bill is effective upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

Florida is one of only three states that criminalize cohabitation.<sup>1</sup> Section 798.02, F.S., created in 1868,<sup>2</sup> makes it a second degree misdemeanor<sup>3</sup> if any:

- Man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together; or
- Man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> In 2001, authorities in Virginia cited that state's cohabitation law to revoke a professional license of the owner of a day care center.<sup>7</sup>

In recent years, states such as Arizona, Idaho, Maine, New Mexico, North Dakota, Virginia, and West Virginia, have repealed their cohabitation laws.<sup>8</sup>

In addition, North Carolina's cohabitation law<sup>9</sup> was found unconstitutional as violating an individual's substantive due process rights.<sup>10</sup> In its ruling, the North Carolina court relied on *Lawrence v. Texas*,<sup>11</sup> 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. 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."<sup>12</sup> 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.<sup>13</sup>

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<sup>1</sup> The other states with cohabitation laws are Michigan (s. 750.335, M.C.L.A.) and Mississippi (s. 97-29-1, M.C.A.).

<sup>2</sup> Laws 1868, chapter 1637, subsection 8, section 6.

<sup>3</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

<sup>4</sup> 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."

<sup>5</sup> *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 if 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, have violated any law of this State.

<sup>6</sup> *Family denied compensation because victim lived with killer*, April 1, 1999, [http://lubbockonline.com/stories/040199/nat\\_040199068.shtml](http://lubbockonline.com/stories/040199/nat_040199068.shtml) (last visited on September 11, 2015).

<sup>7</sup> *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 September 11, 2015).

<sup>8</sup> 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).

<sup>9</sup> s. 14-184, N.C.G.S.

<sup>10</sup> *Hobbs v. Smith*, No. 05-CVS 267, 2006 WL 3103008 (N.S. Super. 2006).

<sup>11</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>12</sup> *Id.* at 562.

<sup>13</sup> *Id.* at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

### **Effect of the Bill**

The bill repeals the portion of s. 798.02, F.S., which 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.

#### **B. SECTION DIRECTORY:**

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

Section 2. Provides that the bill is effective upon becoming a law.

## **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 may have a negative jail bed impact, i.e., it may decrease the need for jail beds, because it repeals an offense punishable as a second degree misdemeanor.

#### **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**

None.