

**1999 HOUSE HUMAN SERVICES**

**HB 1062**


1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1062

House Human Services Committee

Conference Committee

Hearing Date 01-12-99

Tape Number	Side A	Side B	Meter #
2	x		4.6
Committee Clerk Signature 			

Minutes:

Representative Frank Wald, Introduced and explained the bill. He supports the bill. The bill was drafted because it was intended to protect victims of abuse. The attorney general's office pointed out some possible problems with the language. Some language contradicts some of the language. He suggests to the committee to make any changes necessary to make it workable.

Representative Mary Eckstrom, District II, supports the bill in general principal. New legislation is being written which should help the efforts of this bill. She answered several questions from the committee members.

Mr. Jonathan Beyers, Attorney Generals Office, is neutral on the bill. He spoke about 3 different results that come from abuse. The accused can have visitation if they can show clear and

convincing evidence that the accused has been rehabilitated. The second kind of result is physical abuse with this child. The third kind of result that if substantial abuse or if weapon than the visitation must be supervised. He said some of the language may be conflicting. Basically, the language states that there can be no contact until treatment is done, is contradicted by further stating that contact must occur during treatment. Page 4 also has a language discrepancy. The overall bill appears to be a good bill.

Ms. Sandy Tabor, Executive Director of State Bar Association, her group is neutral to the bill and asks the committee not to take action on the bill. She clarified reason not to pass bill now. The problems in the bill are very technical. Ms. Tabor is replacing Ms. Sherry Mills Moore, who could not attend today. There are important issues that a judge must consider when a decision is being made. Domestic violence means physical harm or fear of harm. The court also has some limitations and blind spots when protecting victims. In 1997, some of the protective language in the bill was changed. Courts were having difficulty in determining protection for victims.

Ms. Bonnie Paleack, Director of ND Council on Abused Women's Services, they are neutral on the bill. In the past, struggles occurred with the bill because of technical languages. The concern her group has is what mechanisms take place after abuse. There is disparities with sex offenders and general abuse of victims. Its not clear with who has visitation rights and who doses not. Physical abuse is easier to overcome than some of the other abuses. Emotional abuse is another arena that physical abuse. The potential cost must be borne by someone and its not clear who will pick up those costs.

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House Human Services Committee  
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Chairwomen Price closed the hearing on HB 1062

Representative Devlin moved to do not pass HB 1062, Second by Representative Kliniske

by roll vote, 15 yes, 0 no, motion carried.

Representative Devlin will carry the bill.

Date: 1-12-99  
Roll Call Vote #: HB 1062

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

House House Human Services Committee

Subcommittee on \_\_\_\_\_

or

Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Not Pass

Motion Made By Devlin Seconded By Kliniske

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	X		Bruce A. Eckre	X	
Robin Weisz - Vice Chairwoman	X		Ralph Metcalf	X	
William R. Devlin	X		Carol A. Niemeier	X	
Pat Galvin	X		Wanda Rose	X	
Dale L. Henegar	X		Sally M. Sandvig	X	
Roxanne Jensen	X				
Amy N. Kliniske	X				
Chet Pollert	X				
Todd Porter	X				
Blair Thoreson	X				

Total (Yes) 15 No 0

Absent 0

Floor Assignment Devlin

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

REPORT OF STANDING COMMITTEE (410)  
January 15, 1999 1:37 p.m.

Module No: HR-05-0711  
Carrier: Devlin  
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1062: Human Services Committee (Rep. Price, Chairman) recommends **DO NOT PASS** and **BE PLACED ON THE CONSENT CALENDAR** (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1062 was placed on the Eleventh order on the calendar.

*signed by chair Price*

**1999 TESTIMONY**

**FB 1062**



# State Bar Association of North Dakota

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## Testimony of Sandi Tabor Executive Director State Bar Association of North Dakota

### HB 1062

The following is the testimony presented on HB 1062 for your record.

The State Bar Association does not support or oppose HB 1062, but has some serious concerns about the drafting of the legislation. Let me start by providing some basic information about the definitions of domestic violence. Section 14-07.1-01 defines domestic violence as:

“Physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense on the complaining family or household member.”

In the same section, “family member” is defined as:

“A spouse, family member, former spouse, parent, child, persons related by blood or marriage, persons who are in a dating relationship, person who are presently residing together or who have resided together in the past, ...”

Presently, section 14-05-22 deals with allegations of domestic violence in custody situations. This section was amended in the 1997 session to clarify when the court should order supervised visitation. Prior to 1997, several problems existed regarding what proof had to be presented to the court in order to allow the court to order supervised visitation.

As you can read on page 1, lines 19-21, the judge must now find:

- 1) one incident of domestic violence which resulted in serious bodily injury; or
- 2) an incident involving the use of a dangerous weapon; or
- 3) a pattern of domestic violence within a reasonable time



proximate to the proceeding.

If the court finds any one of these three, supervised visitation is ordered, unless the abusive parent can show by clear and convincing evidence that unsupervised visitation would not endanger the child's physical or emotional health. The three listed factors were added in 1997 to clarify prior problems in the statute. The proposed amendments are not consistent with the 1997 factors.

And that is the status of the law at this time. Clearly it covers issues involving the physical abuse of a child.

Our major concern with HB 1062 is the way in which it changes the burdens of proof that must be met in order for unsupervised visitation to be awarded. This bill creates a disputable presumption and a conclusive presumption. First let me explain presumptions, and then I will try to explain the impact of the two new presumptions on existing law.

Chapter 31-11 discusses conclusive presumptions and disputable presumptions. A presumption is a rule of law that requires a judge to draw a particular inference from a particular fact, unless the truth of the inference is disproved. For instance, it is presumed that we are innocent of a crime until the state's attorney proves that we are guilty.

Presumptions are used to determine who must prove an issue and to what degree it must be proved. For instance, on page 3 of HB 1062, line 22, you will see the phrase "rebuttable presumption." This section of the code deals with the factors the court must follow when determining who should be awarded custody of a child. One of the factors is domestic violence. If the court finds the factors we discussed earlier, a rebuttable presumption is created..... that the parent who has perpetrated the domestic violence may not be awarded sole or joint custody.

Once a rebuttable presumption has been created, the only way the parent can be awarded sole or joint custody is by showing clear and convincing evidence that the best interests of the child require a parent's participation as a custodial parent.

Presumptions are tied to a burden of proof. The burden of proof must be met to overcome the presumption.

For a **rebuttable presumption** you must show clear and

convincing evidence to defeat the presumption.

A **disputable presumption** (as found on page 2, line 11) can be overcome by a showing of contrary evidence.

A **conclusive presumption** (as found on page 2, line 15) can not be refuted. It is a fact.

Now let me try to explain the different standards for the burden of proof.

**Beyond a reasonable doubt** - is the highest burden. It is the one which must be met in a criminal case.

**Clear and convincing** - is the next highest and means that you must have quite a bit of convincing evidence to overcome the presumption.

**Preponderance of the evidence** - means that you must show more evidence than the other party. Sometimes we say that you must have 51% of the evidence on your side.

**Contrary evidence** - appears to mean that you can show evidence contrary to that being presented by the other party. It appears to be a far lesser standard than clear and convincing evidence, and is perhaps even less stringent than by a preponderance of the evidence.

What it appears that HB 1062 does is lower the standard that a parent who has physically abused a child must show in order to get unsupervised visitation. I say this because presently the existing law (page 1, line 23) requires the abusive parent to show clear and convincing evidence that unsupervised visitation would not endanger the child. On page 2 of HB 1062, however, the presumption (and consequently the standard of proof) is changed to a disputable presumption which is overcome by contrary evidence. I do not believe this was the bill sponsor's intent.

So under HB 1062, if there is spousal abuse, then the abusive spouse must show clear and convincing evidence to receive unsupervised visitation. But an abusive parent must only show contrary evidence to get unsupervised visitation.

The bill also provides on lines 12 -16 on page 2 that if the court finds credible evidence of a pattern of physical abuse resulting in serious bodily injury or involved the use of a weapon, there must be supervised visitation forever. I say this because you can not overcome a conclusive presumption. So if an abusive parent undergoes some type of therapy to control anger, and is found by a doctor or therapist to be in control of his or her anger, and no longer a threat, it does not matter when it comes to visitation because of the conclusive presumption.

Ironically, if you look on page 2, lines 1-8, you will see that existing law provides a mechanism for a sexually abusive parent to receive unsupervised visitation after undergoing therapy, and receiving the approval of the appropriate experts. The Committee will need to decide if the different standards are appropriate.

Section One of the bill deals with determining visitation, and we have discussed how the bill changes some very carefully drafted provisions for the court to follow when awarding supervised versus unsupervised visitation. Section Two of the bill provides guidance to the court when determining custody. The language on page 4, lines 7-27, inserts the visitation language into the custody section. This unnecessarily muddles the best interest factors, and we believe the changes should be deleted.