



Report #73 – Bigamy

(First Draft)

SUBMITTED FOR PUBLIC COMMENT
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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This Report contains draft revisions to a District criminal statute. These draft revisions are part of the D.C. Criminal Code Reform Commission’s (CCRC) efforts to issue recommendations for comprehensive reform of District criminal statutes.

Written comments on the revisions in this report are welcome from government agencies, criminal justice stakeholders, and the public. Comments should be submitted via email to ccrc@dc.gov with the subject line “Comments on Report #73.” The Commission will review all written comments that are timely received. The deadline for the written comments on this Report #73 – *Bigamy*, is November 16, 2021 (six weeks from the date of issue). Written comments received after November 16, 2021 may not be reviewed or considered in the agency’s next draft (if another draft is deemed necessary) or final recommendations.

This Report has two main parts: (1) draft statutory text for inclusion in the Revised Criminal Code (RCC) as recommended by the CCRC on March 31, 2021; and (2) commentary on the draft statutory text.

The Report’s draft statutory text is designed for inclusion in the RCC (online at <https://ccrc.dc.gov/node/1531361>) and uses the system of statutory numbering, the general provisions, definitions, penalty classification system, and other relevant aspects of the RCC as recommended by the CCRC on March 31, 2021. (Please note that the agency’s September 30, 2021 proposed legislation, the “Revised Criminal Code Act of 2021” (RCCA), uses a different system of statutory numbering and makes various non-substantive changes as compared to the RCC.)

The Report’s commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and may address the provision’s relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Appendices to this report are:

- Appendix A – Black Letter Text of Draft Revised Statute. (No commentary.)
- Appendix B – Redlined Text Comparing Draft Revised Statute with Current D.C. Code Statute. (No commentary.)

A copy of this document and other work by the CCRC is available on the agency website at www.ccrc.dc.gov.

Report #73 – Bigamy
Draft RCC Text and Commentary
Corresponding D.C. Code statutes in {}

§ 22E-4602. Bigamy. {D.C. Code § 22-501}

§ 22E-4602. Bigamy.

- (a) *Offense.* An actor commits bigamy when the actor knowingly misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia:
 - (1) Marriage license application; or
 - (2) Domestic partnership declaration.
- (b) *Exclusion from liability.* It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more, immediately prior to the application or declaration:
 - (1) Has had no contact with the spouse or domestic partner; and
 - (2) Is not aware that the spouse or domestic partner is living.
- (c) *Affirmative defense.* It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the spouse or domestic partner is deceased.
- (d) *Penalties.* Bigamy is a Class A crime, subject to a maximum term of imprisonment of [1 year], a maximum fine of [\$250], or both.
- (e) *Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for false statements under RCC § 22E-32XX shall merge when the convictions arise from the same act or course of conduct and the same complainant.
- (f) *Merger procedure and rule of priority.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.
- (g) *Definitions.* The term “knowingly” has the meaning specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “domestic partner,” and “domestic partnership” have the meanings specified in RCC § 22E-701.

Explanatory Note. This section establishes the bigamy offense in the Revised Criminal Code (RCC). Bigamy covers conduct that results in misrepresenting the existence or status of a previous marriage or domestic partnership on a District of Columbia marriage license application or domestic partnership declaration. The revised bigamy offense replaces the bigamy statute¹ in the current D.C. Code.

Subsection (a) specifies the prohibited conduct – misrepresenting the existence or status of a previous marriage or domestic partnership. “Domestic partnership” is a defined term in RCC § 22E-701 that has the meaning specified in D.C. Code § 32-701(4). Subsection (a) also specifies the culpable mental state for subsection (a) to be “knowingly,” a term defined in RCC § 22E-206 that here requires the accused be aware to a practical certainty that the actor is misrepresenting the existence or status of a previous marriage or domestic partnership.

Subparagraph (a)(1) and subparagraph (a)(2) state that the misrepresentation must be either on a marriage license application or a domestic partnership declaration. The last words of subsection (a) clarify that the documents must be those produced by the District of Columbia. Per the rules of interpretation in RCC § 22E-207, the “knowingly” culpable mental state in subsection (a) also applies to the elements in subparagraph (a)(1) and subparagraph (a)(2), here requiring the

¹ D.C. Code § 22-501.

accused to be aware to a practical certainty that the misrepresentation is on a District of Columbia marriage license application or domestic partnership declaration.

Subsection (b) establishes an exception to liability for bigamy when three requirements are met. Subsection (b) specifies that these requirements exist “in fact,” a defined term in RCC § 22E-207 that indicates there is no culpable mental state required for a given element. Per the rules of interpretation in RCC § 22E-207, “in fact” applies to all three requirements of the exclusion from liability: that the actor (1) for 5 or more years immediately prior to the application or declaration, (2) had no contact with the spouse or domestic partner, and (3) is not aware that the spouse or domestic partner is living. “Domestic partner” is a defined term in RCC § 22E-701 that has the meaning specified in D.C. Code § 32-701(3).

Subsection (c) provides an affirmative defense to bigamy if the defendant, in fact, reasonably believes that the spouse or domestic partner is deceased. “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state required for a given element. Similarly, any circumstance element or result element that is the object of the phrase “reasonably believes” need not be proven to actually exist. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.² RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Even if the defense applies and there is no liability under this section, depending on the facts of the case, a defendant may still be liable for false statements.³

Subsection (d) specifies relevant penalties for the offense. [See RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) provides that convictions for bigamy and false statements⁴ merge when the convictions arise from the same act or course of conduct and the same complainant.

Subsection (f) specifically requires the sentencing court engaged in the merger procedure under subsection (e) of this section to follow the procedures in subsections (b) and (c) of RCC § 22E-214.

Subsection (g) cross-references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised bigamy statute changes current District law in two main ways.*

First, the revised bigamy offense requires a “knowingly” culpable mental state for the elements of the offense. The current D.C. Code bigamy statute does not specify a culpable mental state for the comparable elements.⁵ However, District case law from the 1940s, while not

² See, e.g., Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). “...these questions are asked not in terms of what the actor’s perceptions actually were, but in terms of an objective view of the situation as it actually existed. ... The standard for ultimate judgement invites consideration of the ‘care that a reasonable person would observe in the actor’s situation.’ There is an inevitable ambiguity in ‘situation.’ If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.”

³ RCC § 22E-32XX.

⁴ *Id.*

⁵ D.C. Code § 22-501 (“Whoever, having a spouse or domestic partner living, marries or enters a domestic partnership with another shall be deemed guilty of bigamy”).

specifying what, if any, culpable mental state is required for the offense, rejected the defendant’s claim that he believed he was innocent because such a belief, even if honestly held, was not reasonable.⁶ In contrast, the revised statute requires a person knowingly “misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia marriage license application or domestic partnership declaration.” The requirement of a knowing mental state means that an honest but unreasonable mistake as to marital status would make the conduct innocent.⁷ Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁸ A knowingly culpable mental state also makes the revised bigamy offense consistent with many other statutes in the RCC, which generally require that the defendant act knowingly with respect to the elements of the offense.⁹ This revision improves the clarity, completeness, and consistency of the revised statute.

Second, the revised bigamy statute merges with the revised false statements offense. Both the current D.C. Code false statements offense¹⁰ and the revised false statements offense¹¹ criminalize making material false statements in writing to the District of Columbia government, but only when the document specifically notes that a false statement is subject to a criminal penalty. The current D.C. Code bigamy statute contains different elements—a person must “marr[y] or enter[] a domestic partnership” while already having a spouse or domestic partner, with no specific reference to a misrepresentation.¹² Both the current D.C. Code bigamy and false statements statutes clearly cover, in different ways, providing false statements about a previous marriage or domestic partnership on a District of Columbia marriage license application or domestic partnership declaration. Despite this overlap, there is no statutory provision or legislative history indicating whether a person is subject to prosecution for both offenses for the same conduct. While the current D.C. Code does not include a general merger provision, the DCCA has held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.¹³ In contrast, the revised statute codifies a merger provision that allows charging of both the RCC bigamy and false statements offenses for the same conduct, but prevents multiple convictions and sentences for such conduct. The merger procedure in bigamy follows the general merger provisions in RCC § 22E-214. This change reduces unnecessary overlap and improves the overall consistency and proportionality of the revised statutes.

⁶ *Alexander v. United States*, 136 F.2d 783, 784 (D.C. Cir. 1943) (“The great weight of authority sustains the Government’s position, though there is respectable authority that an honest and reasonable belief that the first marriage has been terminated is a defense. So far as we know, the question is new in the District of Columbia. In the light of the undisputed facts of this case it is not necessary that we answer it. The rule which denies the defense of good faith is a harsh one and in a proper case where the information is such that a reasonable person, after an honest and thorough investigation, would have been justified in remarrying in reliance on it, we should be slow to hold that such a remarriage constituted a felony.” (internal citations omitted)).

⁷ For further discussion of what types of mistakes negate which culpable mental states, see commentary to RCC § 22E-208.

⁸ See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime. (Internal citation omitted)”).

⁹ See, e.g., RCC § 22E-2102.

¹⁰ D.C. Code § 22-2405.

¹¹ RCC § 22E-32XX.

¹² D.C. Code § 22-501.

¹³ *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991). Notably, however, the DCCA has not always strictly applied the “elements test” in *Byrd* to require that all elements of one offense be necessarily included in the elements of another. For further discussion, see Commentary on RCC § 22E-214, Merger of Related Offenses.

The revised bigamy statute may substantively change current District law in one way.

The revised bigamy statute codifies an affirmative defense where the actor reasonably believes that the spouse or domestic partner is deceased. No comparable defense exists in the current D.C. Code. However, District case law from the 1940s indicates that, while an unsettled question in the District, a reasonable mistake by the defendant as to their marital status may constitute a defense.¹⁴ To resolve this ambiguity, the revised statute provides this affirmative defense in recognition that there are situations in which a person does not meet the time or other requirements in the exception to liability, but still could hold a reasonable belief that their spouse or domestic partner is deceased. As an affirmative defense, the defendant has a significant burden of production to show that their belief is reasonable. This revision improves the proportionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

¹⁴ *Alexander v. United States*, 136 F.2d 783, 784 (D.C. Cir. 1943) (“The great weight of authority sustains the Government's position, though there is respectable authority that an honest and reasonable belief that the first marriage has been terminated is a defense. So far as we know, the question is new in the District of Columbia. In the light of the undisputed facts of this case it is not necessary that we answer it. The rule which denies the defense of good faith is a harsh one and in a proper case where the information is such that a reasonable person, after an honest and thorough investigation, would have been justified in remarrying in reliance on it, we should be slow to hold that such a remarriage constituted a felony.” (internal citations omitted)).

Appendix A – Black Letter Text of Draft Revised Statutes.

§ 22E-4602. Bigamy.

- (a) *Offense.* An actor commits bigamy when the actor knowingly misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia:
 - (1) Marriage license application; or
 - (2) Domestic partnership declaration.
- (b) *Exclusion from liability.* It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more, immediately prior to the application or declaration:
 - (1) Has had no contact with the spouse or domestic partner; and
 - (2) Is not aware that the spouse or domestic partner is living.
- (c) *Affirmative defense.* It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the spouse or domestic partner is deceased.
- (d) *Penalties.* Bigamy is a Class A crime, subject to a maximum term of imprisonment of [1 year], a maximum fine of [\$250], or both.
- (e) *Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for false statements under RCC § 22E-32XX shall merge when the convictions arise from the same act or course of conduct and the same complainant.
- (f) *Merger procedure and rule of priority.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.
- (g) *Definitions.* The term “knowingly” has the meaning specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “domestic partner,” and “domestic partnership” have the meanings specified in RCC § 22E-701.

Appendix B – Redlined Text
Comparing Draft Revised Statute with Current D.C. Code Statute.

§ 22E-4602. Bigamy.

- (a) *Offense.* An actor commits bigamy when the actor knowingly misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia:
 - (1) Marriage license application; or
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- (b) *Exclusion from liability.* It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more, immediately prior to the application or declaration:
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~~(a) Whoever, having a spouse or domestic partner living, marries or enters a domestic partnership with another shall be deemed guilty of bigamy, and on conviction thereof shall suffer imprisonment for not less than 2 nor more than 7 years; provided, that this section shall not apply to any person whose:~~

~~(1) Spouse or domestic partner has been continually absent for 5 successive years next before such marriage or domestic partnership without being known to such person to be living within that time;~~

~~(2) Marriage to said living spouse shall have been dissolved by a valid decree of a competent court, or shall have been pronounced void by a valid decree of a competent court on the ground of the nullity of the marriage contract; or~~

~~(3) Domestic partnership with said living domestic partner has been terminated in accordance with § 32-702(d), or § 16-904(e).~~

~~(a-1) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.~~

~~(b) For the purposes of this section, the term:~~

~~(1) “Domestic partner” shall have the same meaning as provided in § 32-701(3).~~

~~(2) “Domestic partnership” shall have the same meaning as provided in § 32-701(4).~~