



**House
Legislative
Analysis
Section**

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SPOUSAL COMMUNICATION PRIV.

House Bill 4024 as enrolled
Revised Second Analysis (7-21-94)

Sponsor: Rep. Maxine Berman
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Under the Revised Judicature Act, husbands and wives (and former husbands and wives) cannot testify about what either spouse said to the other during the course of the marriage unless both consent to the testimony. Case law has refined this spousal communication privilege to apply it to statements made in confidence.

Unlike the related general spousal privilege (which limits when one spouse can testify for or against the other), the communication privilege continues to operate after the marriage has ended, and, according to the Michigan Supreme Court, carries no exceptions. Thus, while one spouse may testify against the other when a crime against the couple's children is alleged, testimony on what the defendant spouse said in confidence to the other is barred.

This scenario played itself out in the case of People v. Hamacher (432 Mich 157; 438 NW2d 43 [1989]), where a husband was alleged to have admitted to his wife that he had sexually abused his eight-year-old stepdaughter, was convicted with the help of the wife's testimony, and later saw his conviction overturned by the supreme court, which noted that statute allowed no exceptions to the spousal communication privilege. A second trial, in which parts of his by now ex-wife's testimony were barred, was granted to Mr. Hamacher, who was found not guilty. Among some who had been following the case, concern turned to alarm when Mr. Hamacher subsequently sought visitation privileges with the couple's daughter, who by this time was ten years old.

Whether Mr. Hamacher was or was not wrongly accused, the case has served to illustrate the shortcomings of the spousal communication privilege as it now exists. It has been proposed that the spousal communication privilege be amended to

allow the same exceptions now allowed for the general spousal privilege.

THE CONTENT OF THE BILL:

The Revised Judicature Act (MCL 600.2162) says that husbands and wives (and former husbands and wives) cannot testify about what either spouse said to the other during the course of the marriage unless both consent to the testimony. The bill would instead allow a person to testify about what a spouse or former spouse had said during the marriage, if the circumstances of the testimony were any of those under which the law now allows a husband or wife to be a witness for or against the other. The testimony could not be compelled, but rather would have to be with the consent of the person being examined.

Thus, the spousal communication privilege would be lifted in divorce actions, bigamy prosecutions, prosecutions for crimes committed against the children of either, actions for personal injury by one spouse to the other, actions for failure to pay support, in cases of desertion or abandonment, in certain property actions, and in certain cases dealing with the marriage of someone with syphilis or gonorrhea or the marriage of someone who was mentally incompetent.

The bill would apply to criminal cases in which a complaint and warrant were authorized on or after July 1, 1994, and to civil cases pending or filed on or after July 1, 1994.

FISCAL IMPLICATIONS:

With regard to an earlier version of the bill, the Senate Fiscal Agency said that the bill would have no fiscal impact on state or local government. (3-3-94)

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ARGUMENTS:***For:***

The bill would lift the spousal communication privilege for matters in which the state has an overriding interest, such as when abuse of a child or spouse is alleged. In thus allowing a person to testify about what a spouse or former spouse had said, the bill would aid the interests of justice and help to prevent wrongdoers from escaping the consequences of their actions. The spousal communication privilege has its roots in the notion that a woman has no legal existence apart from her husband's, and serves to obscure the truth. It should not be allowed to stand as is.

Against:

Testimonial privileges in general and spousal privileges in particular have historically been defended on several grounds. Some have noted that such privileges are justified by the public interest in encouraging the communications upon which relationships rely. Others argue that marital privacy interests apply. There may be legitimate interests in maintaining the communication privilege as it now exists.

Response:

As noted by Justice Boyle in her dissent in Hamacher, "the justification for the communication privilege is to protect marital harmony and encourage marital communication," but "preservation of marital harmony becomes mere rubric where one spouse is willing to testify against another" in the circumstances described by statute (and proposed by the bill).