

MARITAL PRIVILEGE EXCEPTIONS

**House Bill 4837 with committee
amendment
First Analysis (11-4-97)**

**Sponsor: Rep. Laura Baird
Committee: Judiciary**

THE APPARENT PROBLEM:

The current statutory language establishing a marital privilege (for an explanation of the marital privilege see BACKGROUND INFORMATION) includes a number of exceptions that allow a witness-spouse to testify under certain circumstances. These exceptions allow a husband or wife to testify about the actions or communications of his or her spouse without that spouse's consent in, among other things, suits regarding crimes against the children of either or both spouses. Unfortunately, the exception regarding crimes against children is limited to instances where the child-victim is the offspring of one or both spouses. As a result, whenever a child-victim is not so related to the husband or wife, the witness-spouse may be prevented from testifying about his or her spouse's involvement in the crime by the defendant-spouse. In order to protect children, regardless of their parentage, from having the testimony of a potential witness blocked by the accused, legislation has been offered to expand the crimes committed against children exception to spousal privilege.

THE CONTENT OF THE BILL:

House Bill 4837 would amend the Revised Judicature Act to expand the circumstances under which an individual may testify against his or her spouse concerning that spouse's actions or communications without that spouse's consent. The bill would expand the exception for crimes against the children of either spouse to allow testimony against a spouse without permission where a crime was committed against the natural or adopted children, stepchildren, or foster children of either spouse or crimes against a minor under the age of 18, provided that either spouse was the guardian of, cared for, had custody of, or had authority over the minor regardless of the duration of that care, custody, or authority.

The bill would take effect January 1, 1998.

MCL 600.2162

BACKGROUND INFORMATION:

Although currently justified as means of preserving marital harmony which could be disrupted if spouses are required to testify for or against each other, the doctrine of marital privilege is a product of ancient common law rules of incompetency. The spousal disqualification from being able to testify arose, according to the Michigan Supreme Court in People v Love, 425 Mich 691 (1986), from "two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two long abandoned doctrines it followed that what was inadmissible from the lips of the defendant-husband was inadmissible from his wife."

Under current law, the doctrine of marital privilege exists in two forms. The first, the confidential communication privilege, prevents both spouses from testifying about any private conversations that occurred between the couple during the course of their marriage, whether or not the couple remains married at the time the testimony would occur. The other form of this privilege, called spousal privilege, prohibits one spouse, without the consent of the other, from testifying for or against the other spouse during the course of the marital relationship.

Both forms of the privilege are limited by a number of exceptions, under which a spouse may choose to testify in the case of confidential communications or may not be prevented from testifying in other cases. The current exceptions to the privilege include divorce cases, prosecution for bigamy, prosecution for a crime committed against the children of either spouse, personal injury cases where one spouse injured the other, cases arising out of refusal or neglect by one spouse to furnish the other spouse or children with suitable support, cases of desertion or abandonment, claims that one spouse is infected syphilis or gonorrhea, and certain property disputes. These exceptions apply to testimony regarding

a spouse's communications or actions; however, a witness-spouse has the choice of whether to invoke the exception to the privilege where the testimony concerns confidential marital communications.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill could result in additional activity on the part of the prosecution, leading to more expense in this area. However, because of uncertainty regarding the number of cases that could be affected by the bill, the amount of additional state expense is indeterminate. (10-20-97)

ARGUMENTS:

For:

The bill is needed to overcome a problem with the current law. Marital privilege can currently be misused by a defendant to bar the testimony of a potential witness in the prosecution of a crime committed against a child. The problem can occur in two situations: 1) where a spouse witnesses his or her partner abusing a child and 2) where the abusive spouse admits to his or her partner that he or she abused a child. In either case, the law prohibits a spouse from testifying unless the abuse was committed against a child that is the offspring of either spouse.

The Wayne County Prosecutor's Office offered several scenarios where the marital privilege has prevented the testimony of a spouse-witness and thereby protected a child abuser. For example, a step-grandmother beat her husband's four-year-old granddaughter to death. The husband had witnessed the abuse but was prevented from testifying against his wife because the child was his grandchild and not his child. In another situation, a foster father abused his two- and one-half-year-old son. The foster mother, who was married to the foster father, witnessed the assault but could not testify because the victim was not the child of either spouse. Often, without the testimony of a witness-spouse, the prosecutor has only the testimony of the child-victim as admissible evidence.

There is no good reason that the law should provide this sort of a shield to protect child abusers merely because the child-victim is not the offspring of one the two spouses. By extending the exception to essentially include all children that either spouse cares for, has custody of, or has authority over, the bill will protect not only adopted children, grandchildren, and step-children, but would also protect children who are under the care of either spouse as a teacher, coach, day care provider, or other situation of supervision or authority.

Against:

The bill does not go far enough. Spousal privilege is an antiquated doctrine with little or no current validity. Rather than continuing to hollow out the doctrine with ever increasing exceptions, marital privilege should be revoked entirely or, as with many other jurisdictions, should be reduced so that the decision whether to invoke the privilege is left to the witness-spouse, rather than the defendant-spouse.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bill. (10-29-97)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.