

**SPOUSAL PRIVILEGE: RIGHT OF
WITNESS**

**House Bill 4684 (Substitute H-2)
First Analysis (11-2-99)**

**Sponsor: Rep. Jennifer Faunce
Committee: Family and Civil Law**

THE APPARENT PROBLEM:

The current statutory language establishing a marital privilege (for an explanation of the marital privilege see BACKGROUND INFORMATION) precludes one spouse from testifying against the other without the other spouse's permission. The law is not absolute and includes a number exceptions that allow a witness-spouse to testify without the permission of his or her spouse 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.

As time has passed and the original basis for the privilege has become shrouded by time, it has gone from being a protection for marital relationships to, in the eyes of many, an unnecessary and unfair hurdle for prosecutors. In some cases the testimony of the witness-spouse can mean the difference between conviction or acquittal in the case and often the witness-spouse may be more than willing to testify against his or her spouse, but the accused spouse has the ability to block that testimony. In order to prevent such situations, it has been suggested that the decision of whether one spouse should be able to testify against another should be left to the witness-spouse rather than the accused.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to reverse the spousal privilege in cases of criminal prosecutions, so that it would rest with the testifying witness rather than with the defendant. Under the bill, in a criminal case, a husband could not be compelled to testify for or against his wife against his will, and likewise, a wife could not be compelled to testify for or against her husband against her will. The spousal privilege would continue to exist in its current form - dependent upon the will of the non-witness spouse - for civil and administrative actions.

In addition, the confidential communications privilege would continue to exist as currently defined for civil actions and administrative proceedings. In criminal cases, as with the spousal privilege, the witness spouse could not be made to testify without his or her consent.

The existing exceptions to the spousal privilege and confidential communications privilege provisions would also continue to apply in civil, criminal, and administrative proceedings; in cases of divorce, bigamy, actions for personal injury, prosecution for a crime committed against the children of either or both, actions for personal injury by one spouse to the other, desertion or abandonment, certain property actions, and cases involving invalid marriages. Furthermore, the exception to the spousal privilege and the confidential communications privilege for prosecutions for crimes committed against a child of either or both spouses would be expanded to include crimes committed against any individual who was under the age of 18.

The bill would apply to any criminal prosecutions in which the complaint and warrant were authorized on or after the bill's effective date.

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 which were codified, in Michigan, in 1846. 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 remain 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 has no fiscal implications. (11-2-99)

ARGUMENTS:

For:

Under current law, marital privilege can be misused by a defendant to bar the testimony of a potential witness in the prosecution of a crime. As it exists, the law provides a criminal with a curtain that he or she may draw about him or herself - even where the witness-spouse is more than willing to testify. There is no good reason to protect criminals by allowing them to decide who may testify against them. The judicial system needs access to all of the relevant evidence and a willing witness should not be prohibited from testifying against his or her spouse.

Currently, only 12 other states maintain the archaic version of the spousal privilege maintained in Michigan. This is a decrease from the 24 states that allowed a person to prevent his or her spouse from testifying against him or her in 1980. The federal courts and 21 other states still recognize the spousal privilege but vest the right to make the decision in the witness-spouse.

While the purpose of the privilege -- to protect marital harmony -- is certainly valid, the bill will not obliterate the privilege, but rather will properly make it the right of the potential witness to decide whether or not to testify. The accused's right to refuse to testify against himself or herself should no longer be extended to cover his or her spouse on the grounds that they lack individual identity. It stands to reason that if the individual is willing to testify against his or her spouse, there is probably little harmony to preserve, and allowing the other spouse to block that testimony is unlikely to help preserve the marriage at that point.

Against:

The bill goes too far. Reversing the privilege may well make prosecutors' jobs easier, but it does so at the expense of marital relationships. There may be many cases where a spouse is willing to give testimony, but in addition to giving those spouses the right to testify, the bill could make it difficult for spouses who do not wish to testify to assert the privilege. It is possible that a zealous prosecutor might threaten to charge a witness with conspiracy, aiding and abetting, or other crimes if the witness refuses to testify against his or her spouse. Although under the bill the decision would be placed with the witness spouse, there is a strong likelihood that this sort of pressure would occur. As a result, if the bill becomes law, it will effectively serve to weaken, if not destroy, the marital relationship of many of those accused of crimes. Further, it should be noted that the current situation does not prohibit a witness-spouse from informing police, if he or she wishes, of what he or she may have witnessed. The privilege, if asserted, serves only to bar the testimony in court.

For:

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 who is the offspring of either spouse. In order to protect children, regardless of their parentage, from having the testimony of a potential witness blocked by the accused, the bill would expand the crimes committed against children exception to spousal privilege.

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 include all children, the bill would cover situations in which there is, for example, abuse of a child whom 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.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bill. (11-1-99)

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.