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BILL ANALYSIS

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House Bill 4684 (Substitute H-2 as reported with amendment)

Sponsor: Representative Jennifer Faunce

House Committee: Family and Civil Law

Senate Committee: Judiciary

Date Completed: 5-2-00

RATIONALE

The statutory spousal privilege precludes a husband or wife from testifying against his or her spouse without the spouse's permission. The law includes a number of exceptions that allow a witness-spouse to testify without the consent of his or her spouse under certain circumstances. For example, a person may testify about the actions or communication of his or her spouse without the spouse's consent in a prosecution for a crime against the child of either or both spouses.

Some people believe that the spousal privilege has gone from being a protection for marital relationships to an unnecessary and unfair hurdle for prosecutors. In some criminal cases, the testimony of the witness-spouse may mean the difference between conviction or acquittal. Sometimes, the witness-spouse may be 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 will testify against the other should be left to the witness-spouse rather than the accused. (For an explanation of the marital privilege regarding testimony and spousal communication and a review of one criminal case, see **BACKGROUND**.)

CONTENT

The bill would amend the Revised Judicature Act (RJA) to reverse the spousal privilege for testimony in criminal cases. That is, the bill would require the consent of the individual testifying, rather than the individual for or against whom his or her spouse would testify. The bill also would allow an individual to testify in a criminal prosecution about communication made during marriage.

Currently, a husband may not be required to testify for or against his wife without her consent and a wife may not be required to testify for or against her husband without his consent. Under the bill, in a criminal prosecution, a husband could not be examined as a witness for or against his wife without

his consent, and a wife could not be examined as a witness for or against her husband without *her* consent, except as otherwise specified. The bill would retain the current consent provision for spousal testimony in a civil action or administrative proceeding.

Similarly, under the RJA, a married person or a person who has previously been married may not be examined as to any communication made between that person and his or her spouse or former spouse during the marriage. Under the bill, a married person or a person who had previously been married could not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage without the consent of the person to be examined. The bill would retain the current spousal communication privilege for testimony in a civil action or administrative proceeding.

The RJA contains exceptions to the spousal privilege for both testimony and marital communication. The privilege does not apply to any of the following actions:

- A suit for divorce.
- A prosecution for bigamy.
- A prosecution for a crime committed against a child of either spouse or both spouses.
- A cause of action that grows out of a personal wrong or injury done by one spouse to the other or that grows out of the refusal or neglect to furnish the spouse or children with suitable support.
- A case of desertion or abandonment.
- A case arising out of Section 6 of Chapter 83 of the Revised Statutes of 1846, which prohibits an insane person, an idiot, or a person afflicted with syphilis or gonorrhea from entering a marriage contract, and requires that a husband or wife be examined as a witness against his or her spouse in a prosecution for that offense (MCL 551.6).
- A case in which the husband or wife is a party to a suit, action, or proceeding if the title to the

separate property of the husband or wife called or offered as a witness, or the title to property derived from, through, or under the husband or wife called or offered as a witness, is the subject matter in controversy or litigation in opposition to the claim or interest of the other spouse, who is a party to the suit, action, or proceeding.

The bill would retain all of the exceptions to spousal privilege listed above, and would expand the exception regarding crimes committed against spouses' children to include crimes committed against any individual who was younger than 18 years of age.

MCL 600.2162

BACKGROUND

Spousal Privilege

Although the spousal privilege is often justified as a means of preserving marital harmony that could be disrupted if spouses were required to testify against each other, the privilege is a product of ancient common law rules of incompetency that were codified in Michigan in 1846. According to the Michigan Supreme Court in *People v Love*, 425 Mich 691 (1986), which quoted from *Trammel v United States*, 445 US 40 (1980), the spousal disqualification from being able to testify arose 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 now 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 prohibits one spouse, without the consent of the other, from testifying in an action regarding the other spouse during the course of the marital relationship. The other form of this privilege prevents both spouses from testifying about 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.

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 exceptions to the privilege are described in

CONTENT, above.

People v Love

The Michigan Supreme Court overturned lower court rulings that the spousal privilege did not apply in a case in which a woman was present when her husband shot and killed another man and then kidnapped her. The trial court compelled the woman's testimony, over her objections, because she had offered testimony at the preliminary examination. The Court of Appeals allowed the wife's testimony to stand, because one crime (her kidnapping) was committed by her spouse against her and the other crime (the man's murder) grew out of the crime against her.

The Supreme Court held, "Defendant properly asserted his spousal privilege...to prevent Mrs. Love's testimony concerning the murder and felony-firearm charges." The defendant's second-degree murder and felony-firearm convictions were reversed.

In regard to the conviction for kidnapping, the Supreme Court held that, even though the crime constituted an exception to the spousal privilege, "a witness-spouse who voluntarily refuses to testify for or against the other spouse cannot be compelled to testify". There was some uncertainty from the record whether the wife's testimony at the preliminary examination was compelled. According to the Supreme Court, "If Mrs. Love voluntarily testified at the examination, her recorded testimony would have been admissible at trial as substantive evidence... If Mrs. Love indicated before or at the examination that she did not wish to testify, and the refusal did not stem from her fear of the defendant, she should not have been compelled to testify." The court remanded the case to the trial court for a determination of whether the defendant's wife voluntarily testified at the preliminary examination, and ordered that the conviction for kidnapping be affirmed or reversed accordingly.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Under current law, the spousal privilege can be misused by a defendant to bar the testimony of a potential witness in the prosecution of a crime, even if the witness-spouse is willing to testify. Reportedly, for example, in a case in Oakland County, a woman

discovered that her husband was sexually abusing her invalid mother. Since the victim was incapable of providing testimony, the offender's wife evidently was the only witness to the criminal activity and was willing and eager to testify. The defendant prevented his wife from testifying against him by invoking the spousal privilege. 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.

Reportedly, only 12 other states maintain the strict and archaic version of the spousal privilege used in Michigan--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 apparently still recognize the spousal privilege, but vest in the witness-spouse the right to invoke it.

Response: It should be noted that the spousal privilege applies only to testimony, not to cooperation with law enforcement investigations. The wife in the Oakland County case cited above, for example, was free to cooperate with police and aid in their criminal investigation even though she was barred from courtroom testimony.

Supporting Argument

The spousal privilege can 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 types of situations: 1) a spouse witnesses his or her partner abusing a child and 2) 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. The law should not provide this sort of a shield to protect child abusers merely because the child-victim is not the offspring of one of the two spouses.

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 spousal privilege exception for crimes committed against children. By extending the exception to include all children, the bill would cover situations in which there was, for example, abuse of a child whom either spouse cared for, had custody of, or had authority over. The bill thus would protect foster children, grandchildren, and children under the care of either spouse (e.g., as a teacher or day care provider).

Opposing Argument

By reversing the spousal privilege, the bill could result in governmental intrusion into the marital

relationship. Removing the bar to spousal testimony would effectively serve to weaken, if not destroy, the marital relationship of many of those accused of crimes. Although testifying technically would be the choice of the witness-spouse under the bill, those spouses who desired not to testify could be intimidated into doing so by police and prosecutors, rather than being protected against being forced to testify as is now the case. An overly zealous investigator or prosecutor could threaten to charge a person who knew of his or her spouse's criminal transgressions with conspiracy, aiding and abetting, or other crimes if the witness refused to testify against his or her wife or husband. This situation would invite the State to drive a wedge between husband and wife.

Response: While the widely recognized purpose of the spousal privilege--to protect marital harmony--is laudable, the bill would address situations in which there likely is no such harmony. The bill would not eliminate the spousal privilege, but merely make it the right of the potential witness to decide whether to testify. It stands to reason that if an individual is willing to testify against his or her spouse, there is probably little marital harmony to preserve, and allowing the other spouse to block the testimony is unlikely to help preserve the marriage at that point. For instance, in the case in which the wife discovered that the husband was sexually abusing her bedridden mother, the marital relationship had already been shattered by the husband's criminal activity.

As to compelling a spouse's testimony against his or her wishes, the Michigan Supreme Court addressed that issue in the *Love* case (discussed above in **BACKGROUND**). Even though the man's conviction for kidnapping his wife constituted an exception to the spousal privilege, the Court held that the wife could not be compelled to testify against her wishes.

Opposing Argument

The spousal privilege is simply outdated. In today's society, the accused's right to refuse to testify against himself or herself should not continue to be extended to his or her spouse on the ground that the spouse lacks individual identity, as was the case with the law's medieval origins.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have an indeterminate impact on State and local government. There are no statewide data that suggest the number of criminal prosecutions that could be affected under the bill.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.