

STORAGE NAME: h0041.jud
DATE: February 10, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 41
RELATING TO: Parent - Child Privileged Communications
SPONSOR(S): Representative Bloom
COMPANION BILL(S): SB 830(i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY
 - (2) LAW ENFORCEMENT & CRIME PREVENTION
 - (3) FAMILY LAW & CHILDREN
 - (4)
 - (5)
-

I. SUMMARY:

There is currently no parent - child privilege which permits a child or parent to refuse to disclose, or prevent another from disclosing certain communications intended to be made in confidence. This bill creates a new evidentiary privilege for communications between parent and child in certain circumstances.

Under the proposed legislation, either the parent or the child or the guardian of either of them may assert the privilege, and communications excluded from the privilege include:

- in proceedings brought by one family member against another family member
- in a prosecution or other criminal proceeding involving the commission of a crime or delinquent act or in an investigation of murder or sexual battery
- In Department of Juvenile Justice or Department of Children and Family Services matters as part of an established or institutional proceedings relating to the well being of the child or parent, including, but not limited to, matters alleging child abuse, child neglect, abandonment, nonsupport, or domestic violence.

The privilege may be waived by: (1) the express consent to disclose by either the parent or the child; (2) by the parent or child who made the communication; or (3) by failure to object to a request for the contents.

The act is effective July 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Under s. 90.501, F. S., no person may assert an evidentiary privilege or refuse to appear as a witness, unless it is specifically provided in statutory law. The Florida Evidence Code, Chapter 90, F.S., recognizes the lawyer-client privilege, the psychotherapist-patient privilege, the sexual assault-counselor privilege, the domestic violence advocate - victim privilege, the husband-wife privilege, the clergy privilege, the accountant-client privilege, and the trade secret privilege.

Section 90.501, F.S., recognizes that certain sections of the Florida Statutes, other than the Evidence Code, provide that certain matters are privileged. For example, s. 396.112, F.S., provides a privilege for certain records made during the treatment of alcoholics; s. 394.459 (9), F.S., provides a privilege for patients hospitalized under the Baker Act; s. 502.222, F.S., provides a privilege for certain information obtained during the inspection of dairy farms and milk plants; and s. 316.066(4), F.S., provides a privilege for accident reports.

The privileges included in the Evidence Code generally protect communication made during a privileged relationship. The privilege generally exists on behalf of the individual seeking the aid or benefit from one of the specified groups. For example, the attorney-client privilege exists to protect the client and belongs to the client. Generally, only confidential communications are protected; other matters are not.

At the present time, there is no statutory privilege concerning parent - child communications.

The current privilege most similar to the new privilege proposed is the Husband-Wife Privilege. The marital privilege is recognized to strengthen marital harmony. Section 90.504(1), F.S., recognizes that a party to a valid marriage has a privilege to prevent the disclosure of "communications which were intended to be made in confidence between the spouses when they were husband and wife." Thus, the husband-wife privilege belongs to both spouses and either may assert it. *Smith v. State*, 344 So.2d 915, 919 (Fla 1 DCA 1977), cert denied, 353 So.2d 679.

Either spouse who is testifying as a witness may assert the privilege to prevent disclosing privileged matters, or a spouse who is a party to an action may assert it in order to prevent the other spouse from testifying to privileged matters. Therefore, if a husband calls his wife as a witness, the wife may assert the privilege despite the husband's wishes that the testimony be disclosed. If the wife is called as a witness to testify against the husband, the husband could assert the privilege despite the willingness of the wife to testify.

Section 90.504(3), F.S., specifies three situations in which the husband-wife privilege does not exist, although all the other necessary requirements are satisfied:

(1) When one spouse sues the other in a civil action, s. 90.504(3)(a), F.S., provides that the privilege does not exist as to communications relevant to the action, because when spouses are adverse parties in litigation, no social policy is furthered by recognizing the privilege.

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(2) When one spouse is charged with a crime committed against the person or property of the other spouse, s. 90.504(3)(b), F.S., provides that the privilege is not recognized. There is no justifiable reason to allow the privilege to obstruct justice.

(3) In a criminal case an accused should be able to offer any relevant testimony in his or her own defense. Therefore s. 90.504(3)(c) recognizes that a criminal defendant who calls his or her spouse as a witness is entitled to the benefit of testimony from that spouse, and that the privilege may not be asserted by the witness.

New York is the only state which has a judicially recognized parent-child privilege: however, the privilege has only been recognized by inferior New York Courts.

Idaho and Minnesota have recognized a variant of the parent-child privilege through statute. See Idaho Code § 9-203(7) (1990 & Supp. 1995); Minn. Stat. §595.02 (1)(j) (1998 & Supp. 1996).

Massachusetts law prevents a minor child from testifying against a parent in a criminal proceeding. However, the statute does not go so far as to recognize a parent-child testimonial privilege; rather it is best described as a witness disqualification rule. Second, the testimonial bar is not of common-law origin but is statutory. Finally, the statute only bars a minor child, under certain circumstances, from testifying against a parent and does not extend to children of all ages in all circumstances. See Mass. Gen. L. Ch. 233, §20 (1986 & Supp. 1996).

In re Grand Jury, 103 F. 3d 1140 (C.A.3 1997), the Third Circuit exhaustively explored the issue of a judicially created parent-child privilege and concluded that the parent-child privilege was not warranted under the analysis of the four Wigmore factors, as confidentiality was not essential to successful parent-child relationship, and any injury to parent-child relationship caused by compelled testimony as to confidential communications would be necessarily and substantially outweighed by benefit to society of obtaining all relevant evidence in a criminal case. *Fed. Rules Evid.* Rule 501, 28 U.S.C.A.

Moreover, the court found that the child-privilege would be impractical, as parent owes a duty to a child to nurture and guide him, which might require disclosure of the child's confidential communications.

B. EFFECT OF PROPOSED CHANGES:

In limited areas, communications between parents and children would be protected from entry into evidence.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill would exempt from disclosure-- in certain types of litigation-- communications between parents and children; it might have the effect of increasing communications between parents and children and how they conduct their affairs.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

Yes. The bill will limit the evidentiary disclosure of certain parent-child communications which were intended to be confidential.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

N/A

E. SECTION-BY-SECTION ANALYSIS:

This bill is very brief and contains only two sections. Please see the Summary on page one.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

The proposed legislation provides for parent-child privilege. Should the privilege become law, proponents have suggested that a more specific definition of "parent" and "child" would prevent judicial interpretation of exactly who is included within the scope of the privilege. The current language is also unclear as to whether the parent or child may refuse to disclose, or prevent the other from disclosing communications intended to be held in confidence if either the child or the parent is willing to waive the privilege. This ambiguity may result in intense pressure being applied on the parent or child to waive the privilege.

Additional concerns exist that the exceptions are not broad enough for various proceedings concerning domestic violence where the child may be a witness to violence between the parents but unable to testify under the proposed bill.

Even though there are exceptions to the privilege for delinquency proceedings at Department of Juvenile Justice institutional proceedings, the Department notes that the exemption could create potential problems: (1) While there is an exemption for the prosecution or other criminal proceeding involving the commission of a crime or delinquent act, proceedings relating to a delinquent act are delinquency proceedings, not necessarily criminal proceedings. (2) There is no exception for "child in need of services" judicial proceedings. Without such an exemption, the parent might be precluded from explaining to the court the behaviors which make the child in need of services. (It is our understanding that these concerns will be addressed in an amendment offered by Representative Bloom.)

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The Code and Rules of Evidence Section of the Florida Bar has discussed HB 41. Although a formal position from the Florida Bar will not be available until approximately February 12, the comments from the Section indicate : (1) as the bill is drafted there are so many exceptions to the privilege so as to render the privilege largely ineffective; (2) the bill appears to be in response to a particular situation and the Section opposes the legislation as it may not be in the interest of justice; and (3) the Section is not opposed in theory to a child-parent privilege, but believes that the bill does not provide an effective privilege.

Since criminal proceedings are generally excluded from the privilege, the proceedings most likely to be effected would be family court hearings involving child custody and support, as well as civil proceedings for negligence and intentional torts.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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