

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 935 w/CS Parent-child Privilege
SPONSOR(S): Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 90

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	16 Y, 1 N w/CS	Billmeier	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill creates a parent-child privilege in Florida. It provides that a “child and the parent of that child have a privilege, because of the family relationship, to refuse to disclose, and to prevent another from disclosing, communications that were intended to be made in confidence between them.” The bill permits either the child or the parent to claim the privilege. The bill provides that there is no privilege:

- (a) In any proceeding brought by or on behalf of the child against the child's parent;
- (b) In any proceeding brought by or on behalf of the child's parent against the child;
- (c) In a criminal proceeding in which the child is charged with a crime committed at any time against the person or property of the child's parent, or the person or property of any other child of the child's parent;
- (d) In a criminal proceeding in which the child's parent is charged with a crime committed at any time against the person or property of the child, or the person or property of a child of the child;
- (e) In any criminal or other governmental investigation involving allegations of sexual abuse, physical abuse, neglect, abandonment, or nonsupport of a child by a parent of that child;
- (f) In any criminal or other governmental investigation involving allegations of sexual or physical abuse of a parent by a child of that parent;
- (g) In any proceeding governed by the Florida Family Law Rules of Procedure or Florida Juvenile Rules of Procedure; and
- (h) In any criminal or civil proceeding in which the communications are alleged to be made in furtherance of a crime or a conspiracy to commit a crime.

This bill provides for waiver of the privilege if either the parent or the child expressly consent to the disclosure of the communications.

This bill takes effect on July 1, 2003.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0935a.ju.doc
DATE: April 18, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

HB 935 creates a parent-child privilege as part of the Florida Evidence Code. Under current law, a person may not assert an evidentiary privilege or refuse to testify as a witness unless the privilege is specifically provided in statutory or constitutional law.¹ The Florida Evidence Code² recognizes a number of privileges: the journalist’s privilege, the lawyer-client privilege, the psychotherapist-patient privilege, the sexual assault counselor-victim privilege, the domestic violence advocate-victim privilege, the husband-wife privilege, the clergy privilege, the accountant-client privilege, and the trade secret privilege.³ Other sections of law also provide that certain matters are privileged. Professor Ehrhardt notes that 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.⁴

The privileges included in the Evidence Code generally protect communications made during a privileged relationship. Professor Ehrhardt explains:

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 and other matters are not.⁵

Privileges, when they exist, generally apply to communications and are not generally applicable to facts or acts.⁶

There is no Florida or United States Supreme Court decision finding a parent-child privilege arising under constitutional or common law. The United States Court of Appeals, Third Circuit, surveyed federal and state law on the privilege and found:

- Neither the United States Supreme Court nor any federal Court of Appeals have recognized a parent-child privilege. Eight federal Courts of Appeals have declined to recognize the privilege;

¹ See s. 90.501, F.S.

² See ch. 90, F.S.

³ See ss. 90.5015 – 90.506, F.S.

⁴ Ehrhardt, Florida Evidence § 501.1 (2001 Edition).

⁵ Ehrhardt, Florida Evidence § 501.1 (2001 Edition).

⁶ See Ehrhardt, Florida Evidence § 501.1 (2001 Edition); *Kerlin v. State*, 352 So. 2d 45, 50 (Fla. 1977)(wife’s testimony regarding her observations of husband’s criminal activities not privileged).

- The “overwhelming majority of state supreme courts have declined to recognize the privilege; and
- Only four states have recognized any form of the privilege by statute.⁷

Effect of Proposed Changes

This bill creates a parent-child privilege in Florida. It provides that a “child and the parent of that child have a privilege, because of the family relationship, to refuse to disclose, and to prevent another from disclosing, communications that were intended to be made in confidence between them.

The bill permits either the child or the parent⁸, or by the guardian or conservator of the child or parent to claim the privilege. The authority of a child or the child's parent, or guardian or conservator of the child or parent, to claim the privilege is presumed in the absence of contrary evidence.

The bill provides that there is no privilege:

- (a) In any proceeding brought by or on behalf of the child against the child's parent;
- (b) In any proceeding brought by or on behalf of the child's parent against the child;
- (c) In a criminal proceeding in which the child is charged with a crime committed at any time against the person or property of the child's parent, or the person or property of any other child of the child's parent;
- (d) In a criminal proceeding in which the child's parent is charged with a crime committed at any time against the person or property of the child, or the person or property of a child of the child;
- (e) In any criminal or other governmental investigation involving allegations of sexual abuse, physical abuse, neglect, abandonment, or nonsupport of a child by a parent of that child;
- (f) In any criminal or other governmental investigation involving allegations of sexual or physical abuse of a parent by a child of that parent;
- (g) In any proceeding governed by the Florida Family Law Rules of Procedure or Florida Juvenile Rules of Procedure; and
- (h) In any criminal or civil proceeding in which the communications are alleged to be made in furtherance of a crime or a conspiracy to commit a crime.

This bill provides for waiver of the privilege if either the parent or the child expressly consent to the disclosure of the communications. However, if the child has not reached majority or been otherwise emancipated, the child's stated consent is invalid or ineffective unless it is approved by a court of competent jurisdiction. The court may only approve such child's consent after appointing a guardian ad litem to represent such child and after the guardian ad litem makes a recommendation to the court that the waiver of the privilege would be in the best interests of the child.

This bill takes effect on July 1, 2003.

⁷ See *In re Grand Jury*, 103 F.3d 1140, 1147-51 (3d Cir. 1997).

⁸ This bill defines “parent” as “a woman who gives birth to a child and a man whose consent to the adoption of the child would be required under s. 63.062(1). If a child has been legally adopted, the term “parent” means the adoptive mother or father of the child. The term does not include an individual whose parental relationship to the child has been legally terminated, or an alleged or prospective parent, unless the parental status falls within the terms of either s. 39.503(1) or s. 63.062(1).”

C. SECTION DIRECTORY:

Section 1. Creates s. 90.5045, F.S., which creates a parent-child privilege.

Section 2. Provides an effective date of July 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact on state government.

2. Expenditures:

This bill does not appear to have a fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local governments.

2. Expenditures:

This bill does not appear to have a fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article V, s. 2(a), Fla. Const., requires the Supreme Court of Florida to adopt rules for the practice and procedure in Florida courts. It can be argued that this modification to the Evidence Code encroaches on the court's rulemaking authority.

While the Legislature can enact substantive law, matters of procedure must be determined by the court. The Florida Supreme Court can strike down laws that conflict with court rules.

Accordingly, in Florida, if a matter is substantive in nature it is for the legislature to address; if procedural it is for the Florida Supreme Court to attend. However, determining the difference between the two is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure:

The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.⁹

In addition to the often difficult task of determining procedure versus substance, the courts have provided inconsistent treatment of the issue. The Florida Evidence Code ("Code") contains elements that are both substantive and procedural.¹⁰ The Florida Supreme Court has routinely adopted changes in the Code, to the extent that such changes are procedural, as court rule and has not defined which portions are substantive and which portions are procedural.¹¹

Florida courts have not explicitly held whether portions of the Code creating privileges and its exceptions are substantive or procedural. It can be argued that the Florida Supreme Court has implicitly found a privilege to be substantive, and thus subject to legislative modification, when it did not strike a statute creating an exception to a privilege as unconstitutional in 1993.¹² It is not, however, clear that the substantive/procedural issue was raised before the court in that case.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill defines "parent" but does not define "child". While it appears that this privilege might be intended, because of references to the Florida Rules of Juvenile Procedure and its procedures to determine how a minor may waive the privilege, to apply only to communications between a parent and minor children, it could be argued that the privilege would protect communications made between parents and their adult children.

The proposed ss. 90.5045(1) and 90.5045(2), F.S., provide that a child and the parent of that child have a privilege "to refuse disclose, and to prevent another from disclosing, communications that were intended to be made in confidence between them" and provide that the privilege "may be

⁹ See In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1973)(Adkins, J., concurring).

¹⁰ See In re Amendments to the Florida Evidence Code, 782 So. 2d 339, 341-342 (Fla. 2000).

¹¹ See e.g. Id., at 341-342; In re Fla. Evidence Code, 372 So. 2d 1369 (Fla. 1979) (adopting Evidence Code to the extent it is procedural), clarified, In re Florida Evidence Code, 376 So. 2d 1161 (Fla. 1979); In re Amendment of Fla. Evidence Code, 497 So. 2d 239 (Fla. 1986) (adopting amendments to Code to the extent they are procedural); In re Florida Evidence Code, 638 So. 2d 920 (Fla. 1993) (same); In re Florida Evidence Code, 675 So. 2d 584 (Fla. 1996) (same).

¹² See State v. Jett, 626 So. 2d 691 (Fla. 1993).

claimed by either the child or the parent.” Professor Ehrhardt explains how similar language should be applied in the context of the husband-wife privilege:

Either spouse who is testifying as a witness may assert the privilege to prevent disclosing privileged matters, or 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 a 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.¹³

However, proposed s. 90.5045(5), F.S., also states that the privilege “may be waived if either the parent or the child expressly consents to the disclosure of the communications.” This language arguably gives one party the ability to waive the privilege without regard to the wishes of the other.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Committee on Judiciary considered the bill on April 14, 2003. The committee adopted an amendment to create an exception to the privilege in any criminal or civil proceeding in which the communications are alleged to be made in furtherance of a crime or a conspiracy to commit a crime. The bill, as amended, was reported favorably with a committee substitute.

¹³ Ehrhardt, Florida Evidence § 504.4 (2001 Edition)