

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 167 Parent-Child Privilege  
**SPONSOR(S):** Sachs and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 154

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution &amp; Civil Law</u>	<u>6 Y, 0 N</u>	<u>Davis</u>	<u>Birtman</u>
2) <u>Safety &amp; Security Council</u>	<u></u>	<u></u>	<u></u>
3) <u></u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
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### SUMMARY ANALYSIS

The bill creates §90.5045, F.S., regarding "Parent-Child privilege."<sup>1</sup> It provides that because a family relationship exists between parents and their children, there is a privilege to refuse to disclose, and to prevent another from disclosing, communications that were intended to be made in confidence. Specifically, that confidence exists between:

1. A child who is 25 years old or younger and their parent.
2. A parent who is 65 years old or older and their child.

The privilege may be claimed by either party. See §90.5045(2). However, the privilege may be waived by the disclosing party if the disclosing party expressly consents to disclosure or discloses the communication to another party not specified within another privilege. See §90.5045(5).

The bill exempts several circumstances where no parent-child privilege will exist and they include:

- Any proceeding brought by or on behalf of the child against the child's parent.
- Any proceeding brought by or on behalf of the child's parent against the child.
- In a criminal proceeding in which the child is charged with a crime against the parent or the parent's property or of any other child of the parent.
- In a criminal proceeding in which the parent is charged with a crime against the child or the child's property or the person or property of grandchild.
- In a criminal investigation involving allegations of abuse, neglect, abandonment, sexual abuse, physical abuse, or nonsupport of a child by a parent of that child.
- In any proceeding governed by the Florida Family Law Rules of Procedure or the Florida Rules of Juvenile Procedure.

The bill provides for an effective date of July 1, 2007.

On March 7, 2007, the Constitution and Civil Law Committee adopted an amendment to remove the age requirements in the bill that apply to parent-child privilege. See *Amendments Section* of the analysis for examination of the amendment.

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<sup>1</sup> Hereinafter referred to as "§90.5045".

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government:** The bill adds a statute that may allow specified defendants to prevent specified witnesses from testifying in criminal trials.

**Safeguards Individual Liberty:** The proposed statute may prevent law enforcement from compelling testimony from specified witness.

**Promotes personal responsibility:** The bill may allow individuals accused of crime to prevent witnesses from testifying, and may permit knowledgeable witnesses from disclosing material information.

**Empower Families:** The bill provides specified parents and children with the opportunity to assist each other in resolving criminal matters. Permitting children to confide in their parents with the assurance their confidence cannot be broken by police investigations may increase the security and nurturing of minor children to their parents.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

An evidentiary privilege is a legal axiom which allows the holder of the privilege to refuse to disclose and prevent others from disclosing the contents of a privileged communication at trial.<sup>2</sup> Virtually no cases involving claims of a parent-child privilege arose until the late 1970's, apparently because prosecutors were generally reluctant to compel parent-child testimony.<sup>3</sup> It remains uncommon for prosecutors to call parents or children to testify against each other.<sup>4</sup> However, in some cases, information is sought from children or their parents regarding statements made to each other; and law enforcement has compelled the party to the disclosure to testify or face being held in contempt of court.<sup>5</sup>

Scholars and other legal commentators have studied the expansion of extending privileges to communications between parents and children.<sup>6</sup> They suggest that recognition of such a privilege would advance important public policy interests such as strong and trusting parent-child relationships; the preservation of the family; safeguard against governmental intrusion; and promote the healthy psychological development of children.<sup>7</sup>

It is contended, with the protection of a privilege, children will be more likely to confide in their parents and reveal some indiscretion, legal or illegal.<sup>8</sup>

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<sup>2</sup> See Charles Ehrhardt, Florida Evidence, §90.501 (West 2006).

<sup>3</sup> "Parent-Child Loyalty and Testimonial Privilege", 100 Harv. L. Rev. 910, 912 (1987).

<sup>4</sup> See "Id.," fn. 15.

<sup>5</sup> See In re Grand Jury, 103 F.3d 1140, 1147- 1148, (3<sup>rd</sup> Cir., 1997).

<sup>6</sup> See In re Grand Jury, 103 F.3d 1140, 1146, (3<sup>rd</sup> Cir., 1997).

<sup>7</sup> Id.

<sup>8</sup> Id., at 1153.

## **Compelled Disclosure**

The Sixth Amendment of the U.S. Constitution and Article I, Section 16, of the Florida Constitution provides that those accused of crimes have the right to compel witnesses in their favor to testify on their behalf. Florida law also provides that reluctant witnesses may be compelled to testify in trial, disclose information, and produce evidence.<sup>9</sup>

Relevant information may be sought from a parent if a parent is unwilling to disclose a communication<sup>10</sup> made by his child that is relevant to a criminal investigation. The process requires the State Attorney to move the court to compel the information sought. Should the court order the parent to comply and the parent refuse, the parent may state his or her reasons for refusal and “show cause” as to why he or she should not be adjudged guilty of contempt and sentenced accordingly.<sup>11</sup> The parent will be given the opportunity to present evidence of excusing or mitigating circumstances prior to the judge pronouncing the sentence.<sup>12</sup> It is within the broad power of the judge to design a sentence according to the severity of the offense.<sup>13</sup> Rarely do courts sentence in excess of six months imprisonment in a county jail.<sup>14</sup>

The same process applies for communications made by the parent to the child, however it should be noted that children under the age of 12 are not commonly ruled to have the mental capacity necessary to be held criminally responsible.<sup>15</sup>

## **Voluntary Disclosure**

A parent may voluntarily disclose confidential communications made by their children. The parent may assist in the prosecution of their child and the action could result in criminal punishment, (i.e. jail, prison, drug rehabilitation, community service, etc.). In the case of juvenile proceedings, the purpose of the proceeding is solely the “best interests of the child.”<sup>16</sup> The U.S. Third Circuit Court of Appeals has stated (although in dicta) that a parent has the “right” to take such action as the parent deems appropriate in the interest of the child.<sup>17</sup>

A child may also voluntarily seek the assistance of law enforcement and disclose communications made to them by their parents.

## **Other States**

Only four jurisdictions recognize a similar measure to HB 167, and only one actually refers to the measure as a “parent-child privilege.” However, other than the title, they bear little resemblance to the provisions of HB 167.

New York: There is no statutory parent-child privilege in New York; and the state’s highest court, The Court of Appeals, has not recognized the validity of such a privilege. Some lower courts in New York have applied a common law privilege to allow parents of either minor<sup>18</sup> or adult<sup>19</sup> children from testifying

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<sup>9</sup> §90.501, F.S. (2006).

<sup>10</sup> “Communications” have been interpreted to include all conversations, writings, and physical actions or expressions intended to convey meaning. Charles Ehrhardt, Florida Evidence 450 (West 2006).

<sup>11</sup> Fla. Rule. Crim. Pro. 3.830 (2006).

<sup>12</sup> Id.

<sup>13</sup> See State v. Boyer, 166 So.2d 694, 696 (2<sup>nd</sup> DCA 1964).

<sup>14</sup> Thiede v. State, 189 So.2d 490, 492 (2<sup>nd</sup> DCA 1966).

<sup>15</sup> Florida Prosecuting Attorney’s Association, Inc.

<sup>16</sup> In re Grand Jury, 103 F.3d 1140, 1153, (Third Cir. U.S. Ct. of App., 1997).

<sup>17</sup> See. Id., at 1153-1154.

<sup>18</sup> New York v. Doe, 61 A.D.2d 426, 434 (Fourth Dept., 1978).

<sup>19</sup> New York v. Fitzgerald, 101 Misc. 2d 712,720 (N.Y. Co. Ct., Westchester, 1979).

regarding confidential communications. Unlike a marital privilege, one court has stated the privilege should not prevent a parent from voluntarily disclosing the information obtained from the child.<sup>20</sup>

Massachusetts: In Massachusetts, the legislature has disqualified un-emancipated minor children from testifying against their parents in criminal prosecutions. Rather than providing for a privilege from confidential communications, the Massachusetts law disqualifies children on the grounds they are not competent to testify to actions or communications.<sup>21</sup>

Idaho: In Idaho, the legislature has enacted a law that prohibits compelled disclosure of any communication by a minor child to a parent.<sup>22</sup> The law disqualifies a parent-witness from giving testimony regarding the disclosure of any communications by the minor child.

Minnesota: Minnesota statutorily disqualifies a parent or minor child based on the parent or minor child lacking competency to being examined as to any communications made in confidence by the minor to the parent.<sup>23</sup>

### **Effect of Bill**

HB 167 creates a parent-child privilege that protects, with some exceptions, communications made in confidence between parents and children from disclosure in connection with judicial proceedings. Specifically, that confidence exists between:

- A child who is 25 years old or younger and their parent.
- A parent who is 65 years old or older and their child.

In a proceeding that meets the appropriate requirements the privilege may be claimed by either party. See §90.5045(2). Effectively a child may prevent a parent or a parent may prevent a child from disclosing confidential communications between the two.

The bill defines “parent” as a woman who gives birth to a child or a man whose consent is required to place the child in adoption proceedings pursuant to Fla. Stat. §63.062(1).<sup>24</sup> The term also applies to adoptive parents and those whose parental status falls within the terms of §39.503(1), F.S. (2006), the “Unknown Parent Statute” which confers parental status in limited situations. The bill provides that a person does not qualify as a parent if the parental relationship has been legally terminated.

The privilege may be waived by the disclosing party if the disclosing party expressly consents to disclosure or discloses the communication to another party not specified within another privilege. See §90.5045(5).

### **Exemptions**

The bill exempts several circumstances where the parent-child privilege will not exist and they include:

- Any proceeding brought by or on behalf of the child against the child’s parent.
- Any proceeding brought by or on behalf of the child’s parent against the child.
- In a criminal proceeding in which the child is charged with a crime against the parent or the parent’s property or of any other child of the parent.

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<sup>20</sup> In the Matter of Mark G., 65 A.D.2d 917 (Fourth Dept., 1978).

<sup>21</sup> Mass. Gen. Laws. ch. 233, §20 (2006).

<sup>22</sup> Idaho Code §9-203(7) (2006).

<sup>23</sup> Minn. Stat. §595.02 (2006).

<sup>24</sup> See §90.5045(3).

- In a criminal proceeding in which the parent is charged with a crime against the child or the child's property or the person or property of grandchild.
- In a criminal investigation involving allegations of abuse, neglect, abandonment, sexual abuse, physical abuse, or nonsupport of a child by a parent of that child.
- In any proceeding governed by the Florida family Law Rules of procedure or the Florida Rules of Juvenile Procedure.

The bill provides for the statute to take effect July 1, 2007.

C. SECTION DIRECTORY:

Section 1: Provides for the creation of Florida Statute §90.5045, the "parent-child privilege".

Section 2: Establishes the statute will take effect on July 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenue; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

It appears the age of 25 years old and younger and 65 years and older is arbitrary. The Florida Prosecuting Attorney's Association, Inc., suggested lowering the age to 12 from 25 as those 12 years old and younger are commonly not held criminally responsible.

**D. STATEMENT OF THE SPONSOR**

No statement of sponsor.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 7, 2007, the Constitution and Civil Law Committee adopted an amendment to remove the age requirements in the bill that apply to parent-child privilege.

Specifically, the bill removes the following two age requirements:

- 1.) A child who is 25 years old or younger and their parent.
- 2.) And a parent who is 65 years old or older and their child.

The effect of this amendment makes specified communications privileged between parents and their children regardless of age.