

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 544

INTRODUCER: Criminal Justice Committee and Senator Harrell

SUBJECT: Husband-Wife Communications Privilege

DATE: January 15, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Cellon</u>	<u>Jones</u>	<u>CJ</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 544 amends the Florida Evidence Code to create an additional exception to the husband-wife communication privilege. The husband-wife privilege generally prevents the disclosure of confidential communications that are made between spouses in certain legal contexts. The privilege may be claimed by either spouse and protects communications made during the marriage, even after the marriage relationship ends.

The Evidence Code contains three exceptions where the husband-wife privilege does not exist. This bill supplies a fourth exception. The bill provides that the marital privilege does not apply, in a civil or criminal proceeding, to a communication concerning the commission or attempt to commit acts that victimize children.

The bill takes effect July 1, 2020.

II. Present Situation:

Marital Privilege

Historical Overview

As English common law¹ developed rules of evidence centuries ago, protections were created to prevent the disclosure of certain confidential communications in legal proceedings. One such protection that developed was the marital privilege, or husband-wife privilege, which protected from disclosure communications made between spouses during a marriage. In *Henderson v. Chaires*,² an 1889 decision, the Florida Supreme Court noted, “No rule of law is better established than that which forbids disclosures by husband or wife as witnesses of matters or conversations occurring between them during coverture. The books abound in cases to support the rule.” The Court further recognized that “the rule holds good even after death or divorce.”³

In a 1977 decision, *Kerlin v. State*,⁴ the Florida Supreme Court reflected on its earlier 19th century opinion, *Mercer v. State*,⁵ which explained the rationale for the marital privilege. The Court stated that the rationale or public policy of the privilege rests in “the preservation of the peace, good order and limitless confidence between the heads of the family so as to promote a well-ordered, civilized society.”⁶

The *Kerlin* Court observed that even at common law, however, the marital privilege was not absolute. It was subject to exceptions and limitations that grew from the need to avoid a harsh injustice to the spouse who could not testify if the rule were strictly enforced. Quoting from a treatise, *Wigmore on Evidence*, the Court restated that “Anyone could see that an absolute privilege in a husband to close the mouth of the wife in testimony against him would be a vested license to injure her in secret with complete immunity.”⁷

The Privilege Described in Statute

Sections 90.504(1) and (2), F.S., state that a spouse, during and after the marriage, has a privilege to refuse to disclose, and prevent another from disclosing, communications made in confidence between them while they were married. The privilege may be claimed by either spouse or by the guardian or conservator of a spouse.

The privilege extends to protect communications made during the marriage even after the marriage relationship ends by death or dissolution. This is intended to preserve harmony in the marriage and prohibit a spouse from being forced to testify against the other spouse. The

¹ Common law is generally understood to be the body of law developed in England from judicial decisions, rather than from statutes or constitutions. These principles were adopted in the colonies and supplemented with local laws and cases to produce what would become the Americanized version of the common law. BLACK’S LAW DICTIONARY (11th ed. 2019).

² *Henderson v. Chaires*, 6 So. 164, 166 (1889).

³ *Id.*

⁴ *Kerlin v. State*, 352 So. 2d 45 (1977).

⁵ *Mercer v. State*, 24 So. 154 (1898).

⁶ *Kerlin*, 352 So. 2d at 48.

⁷ *Kerlin*, 352 So. 2d at 49.

privilege is limited to confidential communications; therefore, the privilege does not permit a spouse to “generally” refuse to testify as a witness against his or her spouse.⁸

Exceptions to the Husband-Wife Privilege

Section 90.504(3), F.S., establishes three situations where the privilege, if honored, would obstruct justice and defeat social policy. Accordingly, in these situations the marital privilege does not exist and the communications are not privileged:

- In a proceeding brought by or on behalf of one spouse *against* the other spouse. This proceeding would likely be a divorce or child custody matter when the spouses are adverse parties. The ability to resolve the conflict could be frustrated if one spouse were able to invoke the privilege and prevent the other spouse from giving testimony as to relevant facts.⁹
- In a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse, or the person or property of a child of either spouse. Section 39.204, F.S., specifically provides that the husband-wife communication privilege does not apply to any communication involving known or suspected child abuse, abandonment, or neglect.¹⁰
- In a criminal proceeding in which the communication is offered in evidence by a defendant-spouse who is one of the spouses between whom the communication was made. If a criminal defendant calls his or her spouse to testify as a witness, the privilege to avoid testifying may not be asserted by the witness-spouse.¹¹ The assertion of the privilege would possibly suppress evidence that is favorable to the defendant that he or she is entitled to offer. The privilege would not serve to benefit the marriage relationship under these circumstances.¹²

Potential Gap in Current Statutes

While the three exceptions discussed above prohibit the assertion of the marital privilege because it would obstruct justice, prosecuting attorneys have pointed to a situation where the exceptions, as written, do not appear to protect additional minor children who are harmed by the spouse seeking to assert the privilege.

Under s. 90.504(3)(b), F.S., unless the child harmed is *the child of either one of the spouses*, the communication between the spouses involving the abuse is currently protected by the husband-wife communication privilege in a criminal proceeding. If the child harmed is in any other familial relationship to one spouse, for example a grandchild, or is a child who is not related in any way to either spouse, the statute allows the assertion of the privilege and the communication is protected from disclosure. The offending spouse has the ability to invoke the privilege and prevent the other spouse from testifying.

Although s. 39.204, F.S., provides that the marital privilege does not apply in a case of suspected child abuse, abandonment, or neglect, the exception to the privilege in s. 90.504(3)(b), F.S., is

⁸ Charles W. Ehrhardt, *Florida Evidence*, s. 504.1 (2019 Edition).

⁹ Law Revision Council Note—1976, West’s F.S.A., s. 90.504, *Husband-Wife Privilege*.

¹⁰ No social policy is furthered by suppressing the testimony and allowing the marital privilege to impede justice. Ehrhardt, s. 504.5.

¹¹ *Id.*

¹² Law Revision Council Note—1976, West’s F.S.A., s. 90.504, *Husband-Wife Privilege*.

narrower and specifically addresses a criminal proceeding. Some prosecuting attorneys believe that the differences between the statutes allow a defendant to argue that, in a criminal case, s. 39.204, F.S., is limited by s. 90.504(3)(b), F.S., to communications regarding the abuse of a child of either spouse.

III. Effect of Proposed Changes:

The bill creates a fourth exception to the husband-wife communication privilege in s. 90.504, F.S. Under the bill, the privilege does not exist in a civil or criminal proceeding if the communication between the spouses concerns any commission of or the attempt to commit:

- Any act of child abuse;
- Any act of aggravated child abuse;
- Any act of child neglect;
- Any act of manufacture, production, transmission, or possession of child pornography;
- Any act of human trafficking of a child;
- Any act of sexual abuse against a child;
- Any offense involving an unlawful sexual act, contact, or penetration performed in the presence of, with, by, or on any child; or
- Any act which is related to a child and prohibited under:
 - Chapter 39 – Proceedings Related to Children;
 - Chapter 782 – Homicide;
 - Chapter 784 – Assault; Battery; Culpable Negligence;
 - Chapter 787 – Kidnapping; Custody Offenses; Human Trafficking; and Related Offenses;
 - Chapter 794 - Sexual Battery;
 - Chapter 796 – Prostitution;
 - Chapter 800 – Lewdness; Indecent Exposure;
 - Chapter 826 – Bigamy; Incest;
 - Chapter 827 – Abuse of Children; and
 - Chapter 847 – Obscenity.

By stating that the husband-wife privilege does not exist in civil or criminal proceedings, the bill clarifies that there is no evidentiary privilege for someone who victimizes a child, regardless of the type of proceeding.

Hypotheticals where this new exception could apply in civil proceedings are set forth below.

- If a camp counselor abuses a child and the counselor admits committing the abuse to his or her spouse. The child's parents sue the counselor for damages. The new exception to the privilege would allow the counselor's spouse to testify about the abuse allegations.
- If the spouse of the counselor brings an action to limit or terminate the counselor's right to have unsupervised contact with their own children because of the known abuse to the victim. The spouse would be permitted to testify about the counselor's abuse communications.
- If the state petitions a court under the Jimmy Ryce Act, which is an involuntary civil commitment proceeding, the communication could be used to indefinitely commit someone who is to be released from prison and is a high risk to sexually reoffend.¹³

¹³ Chapter 394, Part V, F.S.

In the criminal context, a defendant who is alleged to have committed or attempted to commit any criminal act listed above where a child is the victim of the act or attempted act should not be able to claim the husband-wife communications privilege to prevent his or her spouse from testifying in a criminal proceeding.

The bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 90.504 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 14, 2020:

The committee substitute:

- Removes the terms “sexual abuse,” “physical abuse,” or “neglect” of any minor child from the bill;
- More precisely defines the various acts by re-stating some of them, by listing the chapters within which criminal law violations against children appear in the Florida Statutes, as well as the civil Proceedings Relating to Children, chapter 39, F.S.;
- The criminal law chapters cited by the bill are:
 - Chapter 782, F.S. – Homicide;
 - Chapter 784, F.S. – Assault; Battery; Culpable Negligence;
 - Chapter 787, F.S. – Kidnapping; Custody Offenses; Human Trafficking; and Related Offenses;
 - Chapter 794, F.S. - Sexual Battery;
 - Chapter 796, F.S. – Prostitution;
 - Chapter 800, F.S. – Lewdness; Indecent Exposure;
 - Chapter 826, F.S. – Bigamy; Incest;
 - Chapter 827, F.S. – Abuse of Children; and
 - Chapter 847, F.S. – Obscenity.

- B. **Amendments:**

None.