

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 544

INTRODUCER: Senator Harrell

SUBJECT: Husband-Wife Communications Privilege

DATE: November 8, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	<b>Favorable</b>
2.	_____	_____	CJ	_____
3.	_____	_____	RC	_____

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**I. Summary:**

SB 544 amends the Florida Evidence Code to create an additional situation where communications between a husband and wife are not privileged from disclosure in a legal proceeding. In its most general terms, the husband-wife privilege prevents the disclosure of confidential communications that are made between spouses during the marriage. 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 to a communication concerning the commission or attempted commission of sexual abuse, physical abuse, or neglect of a minor in a civil or criminal proceeding.

The bill takes effect July 1, 2020.

**II. Present Situation:**

**Marital Privilege**

*Historical Overview*

As English common law<sup>1</sup> 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.*

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<sup>1</sup> 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).

*Chaires*,<sup>2</sup> 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.”<sup>3</sup>

In a 1977 decision, *Kerlin v. State*,<sup>4</sup> the Florida Supreme Court reflected on its earlier 19th century opinion, *Mercer v. State*,<sup>5</sup> 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.”<sup>6</sup>

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.”<sup>7</sup>

### ***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. It 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 privilege is limited to confidential communications such that there is no privilege that permits a spouse the ability to “generally” refuse to testify as a witness against his or her spouse.<sup>8</sup>

### ***When the Husband-Wife Privilege Does Not Exist***

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:

- (a) 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.)<sup>9</sup>

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<sup>2</sup> *Henderson v. Chaires*, 6 So. 164, 166 (1889).

<sup>3</sup> *Id.*

<sup>4</sup> *Kerlin v. State*, 352 So. 2d 45 (1977).

<sup>5</sup> *Mercer v. State*, 24 So. 154 (1898).

<sup>6</sup> *Kerlin*, 352 So. 2d at 48.

<sup>7</sup> *Kerlin*, 352 So. 2d at 49.

<sup>8</sup> Charles W. Ehrhardt, *Florida Evidence*, s. 504.1 (2019 Edition).

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

- (b) 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.,<sup>10</sup> also provides that the husband-wife communication privilege does not apply to any communication involving known or suspected child abuse, abandonment, or neglect. No social policy is furthered by suppressing the testimony and allowing the marital privilege to impede justice.<sup>11</sup>)
- (c) 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.<sup>12</sup> 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.<sup>13</sup>)

### Potential Gap in Current Statutes

While the three situations 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 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 protected in a criminal proceeding. If the child harmed is in any other familial relationship to one spouse, for example a grandchild, the statute prohibits 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 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.

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<sup>10</sup> Section 39.204, F.S., is set forth below:

Abrogation of privileged communications in cases involving child abuse, abandonment, or neglect.—The privileged quality of communication between husband and wife and between any professional person and his or her patient or client, and any other privileged communication except that between attorney and client or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect and shall not constitute grounds for failure to report as required by s. 39.201 regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect.

<sup>11</sup> Ehrhardt, s. 504.5.

<sup>12</sup> *Id.*

<sup>13</sup> Law Revision Council Note—1976, West's F.S.A., s. 90.504, *Husband-Wife Privilege*.

### 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 when the communication between the spouses involves committing or attempting to commit upon any minor child, any act of:

- Sexual abuse;
- Physical abuse; or
- Neglect.

By stating that the husband-wife privilege does not exist in civil or criminal proceedings, the statutes clarify that there is no evidentiary privilege for someone who harms 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, involving 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.

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 s. 90.504 of the Florida Statutes.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

## B. Amendments:

None.