

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

House Bill 185
Judiciary

(Delegate Shewell, *et al.*)

Marriage - Confidential Communications - Child Abuse or Sexual Crime
Involving a Minor Victim

This bill eliminates the ability of a witness to invoke spousal privilege when disclosing confidential marital communications or providing adverse testimony in cases involving the abuse of a child or minor, or sexual offenses involving a child or minor.

Fiscal Summary

State Effect: Any increase in State expenditures to handle increased judicial proceedings could be handled with existing resources.

Local Effect: Any increase in local expenditures to handle increased judicial proceedings as could be handled with existing resources.

Small Business Effect: None.

Analysis

Bill Summary: This bill provides that a spouse is competent to disclose a confidential communication between the spouses occurring during the marriage if the communication regards the commission of:

- child abuse in the first or second degree;
- sexual abuse of a minor;
- rape of a minor in the first or second degree; or
- sexual offense in the first or second degree involving a minor victim.

The bill also adds the following to the list of charges for which the spouse of a person on trial may be compelled to testify as an adverse witness:

- child abuse in the first or second degree;
- sexual abuse of a minor;
- rape of a minor in the first or second degree; or
- sexual offense of a minor in the first or second degree.

Current Law: This bill involves two types of evidentiary spousal privileges – marital communications and adverse spousal testimony.

Marital Communications

Under the marital communications privilege, one spouse is not competent to disclose any confidential communication between the spouses occurring during the marriage. This privilege does not render the spouse-witness incompetent, but is rather a privilege that the spouse-witness can exercise or waive. *See Brown v. State*, 359 Md. 180, 753 A.2d 84 (2000). The privilege is held by the spouse who seeks to prevent the disclosure of the confidential marital communication. The presumption that marital communications are confidential is rebuttable. Maryland courts have ruled that the presumption can be rebutted if it can be shown that a communication was not intended to remain confidential, was made to a third party, or was made in the presence of a third party. *See Coleman v. State*, 281 Md. 538, 380 A.2d 49 (1977).

The marital communications privilege applies so long as the spouses were in a valid marriage at the time the communication was made, even if the spouses are no longer married at trial. This privilege also applies if the communication was made in furtherance of a crime. *See Coleman v. State*, 281 Md. 538, 380 A.2d 49 (1977).

Adverse Spousal Testimony

The spouse of a person on trial for a crime may not be compelled to testify against that person unless the charge involves the abuse of a child under 18 or assault in any degree in which the spouse is a victim and certain conditions are met. The adverse spousal testimony privilege is unavailable when the charge is assault against the spouse under the following circumstances:

- the person on trial was previously charged with assault in any degree or assault and battery of the spouse;
- the spouse was sworn to testify at the previous trial; and
- the spouse refused to testify at the previous trial by asserting adverse spousal testimony privilege.

If the spouse of the person on trial for assault in any degree against the spouse refuses to testify on the basis of spousal privilege, the clerk of the court must make and maintain a record of the refusal, including the name of the spouse refusing to testify. When an expungement order is presented to the clerk of the court involving assault in any degree against a spouse, the clerk must check the record to determine whether the defendant's spouse refused to testify on the basis of spousal privilege. If the record shows a refusal, the clerk must make and keep a separate record of the refusal, including the defendant's name, the spouse's name, the case file number, a copy of the charging document, and the trial date when the spouse refused to testify. The separate record is not subject to expungement and must be made available only to the court, a State's Attorney's office, and the defendant's attorney.

The adverse spousal testimony privilege only applies if the spouses are married to each other at the time the spouse-witness is called to the stand.

Background: State law allows investigative or law enforcement officers to intercept a wire, oral, or electronic communication ("wiretap") in order to provide evidence of child abuse, provided that the officer is a party to the communication or one of the parties to the communication has given prior consent to the wiretap. However, the communication remains privileged and the officer cannot testify about the contents of the communication, even though the wiretap was legally obtained. *See Mazzone v. State*, 336 Md. 379, 648 A.2d 978 (1994).

According to the National Clearinghouse on Child Abuse and Neglect Information's *Child Maltreatment 2003 Report*, approximately 906,000 children were determined to be victims of child abuse or neglect in the U.S. in 2003.

State Expenditures: The disclosures permitted by this bill could generate additional criminal charges and Child In Need of Assistance petitions, and extend judicial proceedings. However, because the offenses exempted from spousal privilege under this bill are traditionally reported through sources other than spousal disclosures, any potential increase in State expenditures for increased judicial proceedings resulting from this bill could be handled with existing resources.

Local Expenditures: For the reasons stated above, any increase in local expenditures as a result of this bill could be handled with existing resources.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Human Resources; Judiciary (Administrative Office of the Courts); *Maryland Evidence Handbook* (Third Edition), Joseph F. Murphy, Jr.; Department of Legislative Services

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