
Judiciary Committee

HB 1207

Title: An act relating to privileged communications between spouses.

Brief Description: Revising provisions relating to privileged communications between spouses.

Sponsors: Representatives O'Brien and Ormsby.

Brief Summary of Bill

- Allows a witness to testify for or against his or her spouse even if the spouse does not consent.
- Creates a joint participant exception to the marital privileges in felony criminal proceedings.

Hearing Date: 2/4/05

Staff: Christopher Abbott (786-7119).

Background:

The marital privilege law actually contains two privileges: the marital communications privilege and the spousal testimony privilege. These roughly parallel the federal marital privileges, but contain some important differences.

Spousal Testimony Privilege

The spousal testimony privilege bars testimony by one spouse (the witness spouse) for or against the other spouse (the non-testifying spouse) in several ways:

(1) *Compelled Testimony.* The witness spouse may not be compelled to testify for or against the non-testifying spouse without the non-testifying spouse's consent. If the non-testifying spouse consents, however, the witness spouse may be required to testify against his or her will.

(2) *Voluntary Testimony.* Even if willing, the witness spouse may not voluntarily testify without the non-testifying spouse's consent.

The non-testifying spouse controls exercise of the privilege. It does not depend on whether the testimony relates to communications and applies even if the testimony is based on communications or events occurring before the marriage. The privilege, however, doesn't prevent a witness from testifying to his or her own acts.

The spousal testimony privilege does not survive divorce. A witness may therefore testify for or against a former spouse, including testimony concerning non-confidential communications.

Marital Communications Privilege

The marital communications privilege bars testimony by a spouse regarding communications made between spouses that (1) occurred during the marriage and (2) were intended to be confidential. "Communications" includes both oral statements and acts witnessed by the spouse if they were intended to be confidential.

The spouse who made the communications controls the privilege. The non-communicating spouse may not testify about the communications without the other's consent and does not waive the privilege by providing the information to a third party only the communicating spouse may waive the privilege.

The marital communications privilege survives divorce, but it *only* protects communications made during the marriage.

Exceptions

There are four statutory exceptions to the marital privileges:

(1) *Action brought by one spouse against the other.* This exception applies when the spouses are adverse parties in a civil action and in proceedings for crimes where the witness spouse is a victim of a crime committed by the non-testifying spouse. This exception is not limited to violent crimes.

(2) *Crimes against children of spouse.* This exception applies in proceedings where a crime has been committed against a child for whom the defendant spouse is a parent or guardian. Washington courts interpret "guardian" liberally to include anyone who discharges parental duties, including stepparents, grandparents, and even overnight hosts.

(3) *Nonsupport and family desertion.* This exception applies in proceedings for child support or family desertion.

(4) *Involuntary civil commitment.* A limited exception exists in civil commitment proceedings against the defendant spouse. The witness spouse may voluntarily testify despite the non-testifying spouse's objections, but may not be forced to testify.

Federal Marital Privileges

Federal courts recognize both marital privileges. The federal spousal testimony privilege, however, differs from state law.

The spousal testimony privilege is limited to adverse testimony by the witness spouse in criminal proceedings. Additionally, the witness spouse controls exercise of the privilege. Consequently, a witness spouse may voluntarily testify even if the nontestifying spouse objects. The witness spouse, however, may not be compelled to testify against his or her spouse.

Federal courts, including the Ninth Circuit, recognize a "joint participant" exception to both marital privileges. In these cases, the adverse testimony privilege and marital communications privilege do not apply when the testimony or communications concern criminal activity in which both spouses participated. Federal courts generally require evidence that the witness spouse had

at least a minor role in the underlying criminal activity before they will hold the privilege inapplicable.

Summary of Bill:

Spousal Testimony Privilege

The spousal testimony privilege is amended in cases where the witness spouse consents to testify against the other spouse. The witness spouse controls exercise of the privilege. Therefore, the witness spouse may voluntarily testify for or against the defendant spouse even without his or her consent.

Exceptions

A new exception is added. In felony criminal proceedings involving both spouses in an allegation of either criminal conspiracy or joint criminal activity, the privilege does not apply. This exception applies to both the spousal testimony privilege and the marital communications privilege.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.