

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 90

SPONSOR: Senator Geller

SUBJECT: Parent-Child Privilege

DATE: January 17, 2003

REVISED: 3/10/03

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Roberts</u>	<u>JU</u>	<u>Fav/1 amend</u>
2.	<u>                    </u>	<u>                    </u>	<u>CF</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

This bill creates a statutory parent-child privilege. This evidentiary privilege allows a parent or child, or guardian or conservator thereof, to invoke the privilege to refuse to disclose, or prevent another from disclosing certain communications between the parent and child which were intended to be made in confidence. The parent-child privilege is not available in the following proceedings:

- Any proceedings brought by the child against the parent or vice versa;
- Any criminal proceeding in which the child is charged with a crime committed against the person or property of the child's parent or any other child of the parent;
- Any criminal proceeding in which the parent is charged with a crime committed against the person or property of the child or any child of the child;
- Any criminal or other governmental investigation involving allegations of certain types of abuse, neglect, abandonment, or nonsupport of a child by the parent;
- Any criminal or other governmental investigation involving allegations of certain types of abuse of a parent by a child of that parent; and
- Any proceeding governed by the Florida Family Law or Florida Juvenile Rules of Procedure

The privilege may be waived if both the child and the parent expressly consent to the disclosure of the communication. If the child has not reached majority or been otherwise emancipated, the child's consent is invalid unless approved by a court as being in the child's best interest.

This bill creates section 90.5045 of the Florida Statutes.

## II. Present Situation:

Under current law, a person may not assert an evidentiary privilege or otherwise refuse to testify as a witness unless it is specifically provided in statutory or constitutional law. In Florida, the Legislature abolished all common law privileges such that the creation of a privilege requires legislative action or rule-making by the Florida Supreme Court. See s. 90.501, F.S. The Florida Evidence Code, contained in Chapter 90 of the Florida Statutes, recognizes a number of privileges: the lawyer-client privilege, the psychotherapist-patient privilege, the sexual assault counselor-victim privilege, the domestic violence advocate - victim privilege, the husband-wife privilege, the clergy privilege, the accountant-client privilege, and the trade secret privilege. Other sections of law also provide that certain matters are privileged. For example, s. 396.112, F.S., provides a privilege for certain records made during the treatment of alcoholics; s. 394.459 (9), F.S., provides a privilege for patients hospitalized under the Baker Act; s. 502.222, F.S., provides a privilege for certain information obtained during the inspection of dairy farms and milk plants; and s. 316.066(4), F.S., provides a privilege for accident reports.

The privileges included in the Evidence Code generally protect communications made during a privileged relationship. The privilege generally exists on behalf of the individual seeking the aid or benefit from one of the specified groups. For example, the attorney-client privilege exists to protect the client and belongs to the client. Generally, only confidential communications are protected and other matters are not. The term “communications” means communications that are verbal, written, typed, recorded, and electronic. Furthermore, communications may also include physical actions and expressions that are intended to convey a meaning. However, the privilege is not generally applicable to facts or acts. *See, e.g., Kerlin v. State*, 352 So.2d 45, 50 (Fla. 1977)[wife’s testimony regarding her observations of husband’s criminal activities not privileged.]

At the present time, there is no statutory privilege concerning parent -child communications. There is no Florida court or United States Supreme Court decision finding such a privilege arising under constitutional or common law. *See, e.g., Hope v. State*, 449 So.2d 1319 (Fla. 2d DCA 1984)[absent legislative enactment no father-son privilege exists.]. However, it is contended that parent and children should not be compelled to testify against each other under specified circumstances. *See Parent-Child Loyalty and Testimonial Privilege*, 100 Harv. L. Rev. 910, 920 (Feb. 1987). “Confronted with competing demands—the tug of parental or filial loyalty on the one hand and the command of the government on the other—a person called upon to testify against his or her parent or child is placed in a painful conflict...Some parents and children will accede to the state’s demand and provide the requested testimony, but only at great emotional cost...Others will refuse to testify, but only by defying the state and risking imprisonment.” *Id.* at 920-921 (citations omitted.) On the other hand, opponents contend that the majority of federal and state courts have rejected the parent-child privilege and only 4 states have protected such communications in some matter. *See, e.g., In re Grand Jury*, 103 F.3d 1140 (3<sup>rd</sup> Cir. 1997)[court refused to recognize parent-child privilege.

A privilege most similar to a parent-child privilege is the husband-wife privilege. The underlying social policy is to strength marital harmony.<sup>1</sup> The law recognizes that a party to a valid marriage

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<sup>1</sup> Section 90.504, F.S.

has a privilege to prevent the disclosure of “communications which were intended to be made in confidence between the spouses when they were husband and wife.” Thus, the husband-wife privilege belongs to both spouses and either may assert it to refuse or to prevent disclosure of privileged matters.<sup>2</sup> Accordingly, if a husband calls his wife as a witness, the wife may assert the privilege despite the husband’s wishes that the testimony be disclosed. If the wife is called as a witness to testify against the husband, the husband could assert the privilege despite the willingness of the wife to testify. There are three scenarios in which the husband-wife privilege is not available:

- When one spouse sues the other in a civil action, the spouses are adverse parties in litigation, no social policy is furthered by recognizing the privilege.
- When one spouse is charged with a crime committed against the person or property of the other spouse, there is no justifiable reason to allow the privilege to obstruct justice.
- When a spouse is charged with a crime and needs the benefit of his or her spouse’s testimony, the other spouse should be permitted to deny the benefit of the witness testimony based on husband-spouse privilege.

*See s. 90.504(3)(a)-(c), F.S.*

### **III. Effect of Proposed Changes:**

The bill creates a parent-child privilege in s. 90.5045, F.S. The privilege would allow a child or parent to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the parent and the child. The privilege may be claimed by the child, parent, or guardian or conservator of either. Presumably, the privilege exists and continues whether or not the parent and child reside together.

A waiver of the privilege requires the consent of the parent *or* the child, *or* his or her guardian or conservator. If the waiver is by a child who has not reached majority or been otherwise emancipated, the child’s stated consent necessitates court approval as being in the child’s best interest.<sup>3</sup> Accordingly, in most instances, a child may waive the privilege on his or her own volition if he or she is 18 or over, or where the child is 16 or over and has a court order removing the disability of nonage. The bill expressly provides that the parent-child privilege does not exist in the following proceedings:

- Any proceeding brought by or on behalf of the child against the child’s parent or vice versa;
- A criminal proceeding in which the child is charged with a crime committed at any time against the person or property of the child’s parent, or the person or property of any other child of the child’s parent;
- A criminal proceeding in which the child’s parent is charged with a crime committed at any time against the person or property of the child, or the person or property of a child of the child;

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<sup>2</sup> *See, e.g., Smith v. State*, 344 So.2d 915, 919 (Fla. 1st DCA 1977), cert denied, 353 So.2d 679.

<sup>3</sup> Current law places the age of majority at 18. See s. 743.07, F.S. Additionally, the disability of nonage may be removed by other acts or means. See s. 743.015, F.S., allows for the removal of the disability of nonage under certain circumstances for persons 16 or older..

- Any criminal or other governmental investigation involving allegations of sexual abuse, neglect, abandonment, or nonsupport of a child by a parent of that child;
- Any criminal or other governmental investigation involving allegations of sexual or physical abuse of a parent by a child of that parent; and
- Any proceeding governed by the Florida Family Law Rules or Florida Juvenile Rules of Procedure.

The proceedings most likely to involve claims of the parent-child privilege are criminal proceedings not involving crimes committed by children/parents against parents/children, probate proceedings, and civil proceedings such as negligence, intentional torts, and commercial disputes. The privilege is **not applicable** in the following proceedings: dissolution of marriage; annulment; support unconnected with dissolution of marriage; custodial care of or access to children; adoption; emancipation of a minor; declaratory judgment actions related to premarital, marital, or post-marital agreements; injunctions for domestic and repeat violence; delinquency; dependency and termination of parental rights; and proceedings for families and children in need of services.

Finally, the bill provides an effective date of July 1, 2003. Absent clear legislative intent, a substantive statute will only apply prospectively whereas a procedural or remedial statute operates retroactively. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994). Statutes that relate only to procedure or remedy generally apply to all pending cases. *See, e.g., Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475, 477 (Fla. 1995). Procedural statutes concern the means and methods to apply and enforce duties and rights. *See Alamo*, 632 So.2d at 1358. Since this bill pertains to a rule of evidence, it is procedural in nature and, accordingly, will apply to all proceedings pending on or after July 1, 2003.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Proponents of the parent-child privilege contend that it would preserve relationships that would otherwise be shattered by a parent's or child's compelled testimony, especially when the testimony is compelled in criminal proceedings. Opponents of the parent-child privilege contend the privilege may thwart the truth finding process, hamper prosecutions of criminal actions and resolution of civil proceedings, contrary to federal and state court practice denying recognition to such privilege and would not benefit the parent-child relationship or serve any other social policy.

**C. Government Sector Impact:**

The privilege may hamper some civil and criminal proceedings where the only evidence may be that which is protected by the privilege. The exact impact is unknown.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill does not specify who may be considered the parent for purposes of asserting the privilege. The bill does not specify address whether the privilege is valid when another parent or child is present at the time the privileged communication is made between a parent and a child.

**VIII. Amendments:**

#1 by Judiciary

The strike-all amendment incorporates the original bill with following differences:

Creates a definition for "parent" as a biological mother, the father by cross-reference to a provision in the adoption law setting forth whose consent is required for an adoption of a child, and an adoptive parent. The term does not include a parent whose parental relationship with a child is terminated and an alleged or prospective parent except as provided in ss. 39.503(1) and s. 63.062(1), F.S, relating to categories of persons whose consent are required before termination of parental rights and subsequent adoption. It appears that a step-parent who has not formally adopted a child or a step-child who has been formally adopted may not be able to invoke the privilege.

Provides that the waiver of the parent-child privilege requires consent by the parent or the child in lieu of consent from both the parent and the child.

Requires a recommendation by an appointed guardian ad litem that the child's waiver of the parent-child privilege is in the child's best interest prior to court approval in those scenarios in which the child is under the age of majority or has not been otherwise emancipated. (WITH TITLE AMENDMENT)