

# 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.)

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Prepared By: Judiciary Committee

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BILL: CS/SB 154

INTRODUCER: Judiciary Committee and Senator Geller

SUBJECT: Parent-child Privilege

DATE: February 21, 2007

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Fav/CS
2.	_____	_____	CF	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill creates a parent-child privilege that protects, with some exceptions, communications made in confidence between parents and children from disclosure in connection with judicial proceedings.

This bill creates section 90.5045, Florida Statutes.

## II. Present Situation:

Under Florida law, a person may not: refuse to be a witness, refuse to disclose a matter, refuse to produce any object or writing, or prevent another from doing so, unless the person is the holder of an evidentiary privilege.<sup>1</sup> These privileges are created by statute, the state and federal constitutions, and court rules.<sup>2</sup> Chapter 90, F.S., the Florida Evidence Code, “recognizes privileges when the legislature judges the protection of an interest or a relationship is sufficiently important to justify the sacrifice of facts which might be needed for the administration of justice.”<sup>3</sup>

Under the Florida Evidence Code, the Legislature has recognized the following evidentiary privileges:

- Journalist’s privilege;<sup>4</sup>

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<sup>1</sup> See s. 90.501, F.S.; CHARLES W. EHRHARDT, FLORIDA EVIDENCE 338-339 (2006 ed.).

<sup>2</sup> See *id.*

<sup>3</sup> EHRHARDT, *supra* note 1, at 338-339.

<sup>4</sup> Section 90.5015, F.S. The statute states in part that:

- Lawyer-client privilege;<sup>5</sup>
- Psychotherapist-patient privilege;<sup>6</sup>
- Sexual assault counselor-victim privilege;<sup>7</sup>
- Domestic violence advocate-victim privilege;<sup>8</sup>
- Husband-wife privilege;<sup>9</sup>
- Privilege with respect to communications with clergy;<sup>10</sup>
- Accountant-client privilege;<sup>11</sup> and
- Privilege with respect to trade secrets.<sup>12</sup>

Florida has not recognized the existence of a parent-child privilege.<sup>13</sup> The privilege, however, has been recognized by statute in Idaho, Minnesota, and Massachusetts and by court ruling in

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A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news. This privilege applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes.

<sup>5</sup> Section 90.502, F.S. The substantive portion of the lawyer-client privilege provides that “[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.”

<sup>6</sup> Section 90.503, F.S. The substantive portion of the psychotherapist-patient privilege provides that “[a] patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist.”

<sup>7</sup> Section 90.5035, F.S. The substantive portion of the sexual assault counselor-victim privilege provides that “[a] victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim.”

<sup>8</sup> Section 90.5036, F.S. The substantive portion of the domestic violence advocate-victim privilege provides that “[a] victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim.”

<sup>9</sup> Section 90.504, F.S. The substantive portion of the husband-wife privilege provides that “[a] spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.”

<sup>10</sup> Section 90.505, F.S. The substantive portion of the privilege with respect to communications with clergy provides that “[a] person has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication by the person to a member of the clergy in his or her capacity as spiritual adviser.”

<sup>11</sup> Section 90.5055, F.S. The substantive portion of the accountant-client privilege provides that “[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client.”

<sup>12</sup> Section 90.506, F.S. The substantive portion of the privilege with respect to trade secrets provides that “[a] person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice.”

<sup>13</sup> See *Hope v. State*, 449 So. 2d 1319, 1320 (Fla. 2d DCA 1984) (stating that the Florida Legislature has not created a son-father privilege). However, the Legislature passed SB 90 (2003) to provide for a parent-child privilege, but it was vetoed by Governor Bush. Veto of Fla. SB 90 (2003) (letter from Gov. Bush to Sec’y of State Glenda Hood, June 26, 2003) (on file with Sec’y of State, The Capitol, Tallahassee, Fla.). Governor Bush found the privilege created by the bill overly broad because it was not limited to communications between parents and minor children.

New York and by one federal district court.<sup>14</sup> Most courts that have considered the existence of a parent-child privilege have found that no such privilege exists.<sup>15</sup> Nevertheless, numerous law review articles call for the adoption of a parent-child privilege.

### Tests to Recognize a New Privilege

Tests have been suggested by judges and commentators to determine whether a new evidentiary privilege should be recognized. The Legislature may also wish to consider these tests to evaluate whether to adopt a proposed privilege.

The U.S. Supreme Court has stated that the test to determine whether a new evidentiary privilege should exist is whether the proposed privilege “promotes sufficiently important interests to outweigh the need for probative evidence.”<sup>16</sup> To satisfy this test, the proponent of a privilege has a heavy burden. According to the Court:

The common-law principles underlying the recognition of testimonial privileges can be stated simply. “For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” *United States v. Bryan*, 339 U.S. 323, 331, 70 S. Ct. 724, 730, 94 L. Ed. 884 (1950) (quoting 8 J. Wigmore, *Evidence* § 2192, p. 64 (3d ed. 1940)). See also *United States v. Nixon*, 418 U.S. 683, 709, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974). Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Trammel*, 445 U.S., at 50, 100 S. Ct., at 912 (quoting *Elkins v. United States*, 364 U.S. 206, 234, 80 S. Ct. 1437, 1454, 4 L. Ed. 2d 1688 (1960) (Frankfurter, J., dissenting)).<sup>17</sup>

At least one court and many commentators have suggested that the “Wigmore test” should be used to determine whether a privilege should be recognized. Under the test, a privilege should be recognized if the following four elements are satisfied:

- 1) The communication must originate in a *confidence* that it will not be disclosed.
- 2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- 3) The *relation* must be one which, in the opinion of the community, ought to be sedulously *fostered*.

<sup>14</sup> See Idaho Code Ann. s. 9-203; Minn Stat. Ann. s. 595.02; Mass Gen. Laws Ann. ch. 233 s. 20; *People v. Fitzgerald*, 422 N.Y.S.2d 309 (Westchester County Ct. 1979); *In re Agosto*, 553 F. Supp 1928 (D. Nev. 1983).

<sup>15</sup> Matthew S. Dunn, *Evidence—Massachusetts Explains “Living with a Parent” Requirement of Parent-Child Testimonial Exclusion—In the Matter of a Grand Jury Investigation*, 819 N.E.2D 171 (Mass. 2004), 39 SUFFOLK U. L. REV. 613, note 17 (2006).

<sup>16</sup> *Trammel v. United States*, 445 U.S. 40, 51 (1980).

<sup>17</sup> *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

4) The injury that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>18</sup>

### **Husband-Wife Privilege**

The husband-wife privilege is the evidentiary privilege most similar to a parent-child privilege. The substantive portion of this privilege provides that “[a] spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.”<sup>19</sup> “The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship.”<sup>20</sup>

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

This bill creates a parent-child privilege that protects, with some exceptions, communications made in confidence between parents and children from disclosure in connection with judicial proceedings. The privilege may be claimed and waived by either the child or the parent.

The parent-child privilege, however, does not apply to the following:

- a proceeding brought by or on behalf of the child against the child’s parent;
- a proceeding brought by or on behalf of the child’s parent against the child;
- 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.
- a criminal or other governmental investigation involving allegations of abuse, neglect, abandonment, or nonsupport of a child by a parent of that child;
- a criminal or other governmental investigation involving allegations of sexual or physical abuse of a parent by a child of that parent; or
- a proceeding governed by the Florida Family Law Rules of Procedure or the Florida Rules of Juvenile Procedure.<sup>21</sup>

<sup>18</sup> *In re Agosto*, 553 F. Supp. at 1308 (quoting 8 J. Wigmore, Evidence s. 2285 (McNaughton rev. 1961)); J. Tyson Covey, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879 (1990); see also David A Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 ST. MARY’S L.J. 35 (1987).

<sup>19</sup> Section 90.504, F.S.

<sup>20</sup> *Trammel*, 445 U.S. at 44.

<sup>21</sup> The Family Law Rules of Procedure apply to:

all actions concerning family matters, including actions concerning domestic, repeat, dating, and sexual violence, except as otherwise provided by the Florida Rules of Juvenile Procedure or the Florida Probate Rules. “Family matters,” “family law matters,” or “family law cases” as used within these rules include, but are not limited to, matters arising from dissolution of marriage, annulment, support unconnected with

This bill takes effect on July 1, 2007.

**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:

The creation of a parent-child privilege may prevent harm to parent-child relationships in which adverse testimony would be compelled against family members. On the other hand, some criminal prosecutions and civil lawsuits may not be justly resolved due to the unavailability of testimony protected by the parent-child privilege.

C. Government Sector Impact:

Some criminal prosecutions or investigations may be impeded due to the unavailability of testimony protected by a parent-child privilege.

**VI. Technical Deficiencies:**

None.

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dissolution of marriage, paternity, child support, custodial care of or access to children (except as otherwise provided by the Florida Rules of Juvenile Procedure), adoption, proceedings for emancipation of a minor, declaratory judgment actions related to premarital, marital, or post-marital agreements (except as otherwise provided, when applicable, by the Florida Probate Rules), injunctions for domestic, repeat, dating, and sexual violence, and all proceedings for modification, enforcement, and civil contempt of these actions.

Fla. Fam. L. R. P. 12.010(a)(1).

The Rules of Juvenile Procedure govern procedures in juvenile court relating to delinquency, families and children in need of services, and dependency. Fla. R. Juv. P. 8.000.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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