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# SETTING LIMITS ON SPOUSAL PRIVILEGES IN MARYLAND'S FEDERAL COURTS: THE VIRTUES AND VICES OF BRIGHT-LINE RULES

by Eric H. Singer, Esq.

## I. INTRODUCTION

Under federal common law, in criminal cases a would-be witness spouse holds the exclusive privilege to refuse to testify against the other spouse with respect to matters that might incriminate the non-testifying spouse.<sup>1</sup> This privilege, known as the adverse spousal testimonial privilege or the "anti-marital facts privilege," is supposed to apply not simply to conduct or events occurring during the marriage, but to pre-marital events as well.<sup>2</sup> But Maryland's district court has split on the question of premarital applicability in two relatively recent, yet unnoticed decisions, with one district judge ruling embracing a *per se* rule against the privilege, and another decidedly, but respectfully, rejecting such a rule.

This split, which is discussed in Part II of this Comment, leads one to question how Maryland's federal courts will decide a facet of the "confidential marital communications privilege," a sibling of the anti-marital facts privilege. The confidential marital communications privilege, which may be asserted by either spouse notwithstanding one spouse's willingness to testify against the other, bars testimony concerning intra-spousal confidential expressions made during the marital relationship.<sup>3</sup> But should the privilege still apply when the communications at issue occur between spouses who, though still legally married, are separated, and if not, at precisely what degree of separation should the privilege yield? This issue, which has not yet been addressed by any reported Fourth Circuit opinion, is the focus of Part III.

## II. THE ADVERSE SPOUSAL TESTIMONIAL PRIVILEGE: THE DISTRICT COURT'S SPLIT ON PREMARITAL CONDUCT

In *In re Grand Jury Subpoena of [Witness]*,<sup>4</sup> the potential witness spouse, or "Ms. Witness," as the court referred to her, invoked the adverse spousal testimonial privilege in a move to quash a grand jury subpoena for her testimony in a fraud investigation of her new husband, "Mr. Target."<sup>5</sup> Mr. Target and Ms. Witness, who had been romantically involved for several years, married one month after Ms. Witness was served with the subpoena and just before her expected grand jury appearance.<sup>6</sup> The court found that the timing, if not the fact, of their marriage, was substantially motivated by the couple's desire to acquire the spousal privilege protection.<sup>7</sup> Although the court held that the marriage did not qualify as an outright "sham," which would have precluded any use of the marital privilege,<sup>8</sup> it denied the motion to quash, or, as the court termed it, the "wedding gift" they had most sought—the spousal privilege to block the wife's grand jury testimony against her husband with respect to pre-marriage acts.<sup>9</sup>

In so holding, the court did not limit its decision to the particular facts of the case. Rather, the court adopted a *per se* rule from the Seventh Circuit case, *United States v. Clark*,<sup>10</sup> which held that the adverse spousal testimonial

<sup>4</sup> 884 F. Supp. 188 (D. Md. 1995).

<sup>5</sup> *See id.* at 189.

<sup>6</sup> *See id.* at 190.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* (citing *United States v. Apodaca*, 522 F.2d 568 (10th Cir. 1975)).

<sup>9</sup> *See id.* at 192.

<sup>10</sup> 712 F.2d 299 (7th Cir. 1983).

<sup>1</sup> *See Trammel v. United States*, 445 U.S. 40, 53 (1980).

<sup>2</sup> *See* 2 WEINSTEIN'S EVIDENCE § 505-41 (1990).

<sup>3</sup> *See id.*

privilege does not cover acts occurring prior to marriage.<sup>11</sup> The court in *Clark* believed such a categorical rule would be salutary as courts could avoid “mini-trials” on the sincerity of the couple’s marriage.<sup>12</sup> Further, the ruling in *Clark* was in accord with the Supreme Court doctrine calling for privileges to be narrowly construed and subordinated to the greater interest of fact-finding.<sup>13</sup>

The second Maryland federal district court case to address the adverse spouse testimonial privilege was *A. B. v. United States*.<sup>14</sup> In *A. B.*, “Ms. A.B.” moved to quash a grand jury subpoena for her testimony in an investigation of her husband, a drug trafficking suspect.<sup>15</sup> The subject of pre-marital collusion was not at issue in this case. However, the government did seek to question Ms. A.B. about events that occurred before her marriage, and Ms. A.B. did assert the adverse spousal testimonial privilege.<sup>16</sup> In support of its request, the government offered the holding in *In re Grand Jury Subpoena of [Witness]*, and argued that the privilege did not apply to premarital events.<sup>17</sup> The court in *A. B.*, however, rejected the bright line rule in *In Re Grand Jury Subpoena of [Witness]*, and granted Ms. A.B.’s motion to quash.<sup>18</sup>

The *A. B.* court noted that two cases decided by the Seventh Circuit after *Clark* specifically stated, albeit in dicta, that the general rule was that the adverse testimonial privilege includes matters that occurred prior to the marriage.<sup>19</sup> Following these decisions, the court in *A. B.*

stated that the purpose of the spousal testimonial privilege was to protect “family harmony by preventing spouses from becoming adversaries in criminal proceedings.”<sup>20</sup> Furthermore, the court noted that the purpose of the privilege would be undermined and that “the effect on a marriage would be equally damaging whether the facts about which the witness testified occurred before or after the marriage.”<sup>21</sup> The court concluded that if a valid marriage exists, then the privilege against adverse spousal testimony should apply to all matters, whether they occurred before or after the marriage.<sup>22</sup> Although the court in *A. B.* appeared sensitive to concerns about the *bona fides* of the marriage, it believed that the bright-line rule of *In re Grand Jury Subpoena of [Witness]* had gone too far and stated that “[a]lthough it may be necessary for a court to delve occasionally into peripheral issues in determining the legitimacy of a marriage, this is a far more satisfactory outcome than simply eliminating all premarital matters from the scope of the privilege.”<sup>23</sup>

Of course, the United States Court of Appeals for the Fourth Circuit will be the penultimate arbiter of the conflict between *In re Grand Jury Subpoena of [Witness]* and *A. B.* In *In re Grand Jury Subpoena of [Witness]*, the court went so far as to predict that the Fourth Circuit would agree with its conclusion and that of the Seventh Circuit in *Clark*.<sup>24</sup> In fact, however, the rejection of the bright line rule in *A. B.* in favor of an ad hoc factual inquiry seems more likely to prevail in light of the Fourth Circuit’s warning that the marital privilege should not become an “empty promise.”<sup>25</sup>

Predictions aside, the court in *A. B.* does seem to have the better argument. As one federal court has found,

<sup>11</sup> See *id.* at 302.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> 24 F. Supp.2d 488 (D. Md. 1998).

<sup>15</sup> See *id.* at 489.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 491.

<sup>18</sup> See *id.* at 494.

<sup>19</sup> See *id.* (citing *United States v. Byrd*, 750 F.2d 585, 590 (7th Cir. 1984); *United States v. Lofton*, 957 F.2d 476, 477 (7th Cir. 1992)).

<sup>20</sup> See *id.* n.1 (quoting *In re Grand Jury Proceedings*, 640 F.Supp. 988, 989 (E.D. Mich. 1986)).

<sup>21</sup> *Id.* at 492.

<sup>22</sup> See *id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *In re Grand Jury Subpoena of Witness*, 884 F. Supp. at 191.

<sup>25</sup> See *United States v. Morris*, 988 F.2d 1335, 1339 (4th Cir. 1991).

the rejection of the Proposed Federal Rule of Evidence 505(c)(2) in 1975, which would have precluded the spousal privilege for premarital acts, signals the rejection of a *per se* premarital acts exception.<sup>26</sup> Furthermore, at least one other federal district court has concluded that the categorical premarital acts exception found in *In re Grand Jury Subpoena of [Witness]* simply cannot be harmonized with the policy behind the adverse spousal testimonial privilege.<sup>27</sup> Finally, although the bright-line rule in *In re Grand Jury Subpoena of [Witness]*, like all bright-line rules, has the virtue of being easy to administer and does spare the courts a "mini-trial" in the marital arena, "sham marriages are not common enough to make the occasional mini-trial a great burden."<sup>28</sup> In short, the court's holding in *A.B.* seems to strike the proper balance between maintaining a privilege that remains socially valued and protecting against the strategic maneuver of marrying to suppress testimony.

### III. THE MARITAL COMMUNICATIONS PRIVILEGE: A RULE FOR SEPARATED SPOUSES?

As noted above, the confidential communications privilege bars "one spouse from testifying as to conversations or communications with the other spouse made in confidence during their marriage."<sup>29</sup> Unlike the adverse testimonial privilege, the marital communications privilege belongs to both spouses and may be asserted by either one. The privilege looks not to the particular marriage, but rather "seeks to protect the institution of marriage generally as a haven for confidential communication."<sup>30</sup> The privilege is "premised on the assumption that confidences will not be sufficiently

encouraged unless the spouses are assured that their statements will never be subjected to forced disclosures."<sup>31</sup>

The Fourth Circuit, however, has not addressed whether a defendant who has confidentially conveyed information to his or her spouse when the two had been separated can still rightfully assert the privilege. At the state level in Maryland, the defendant may still assert the privilege. In *Coleman v. State*,<sup>32</sup> the Court of Appeals of Maryland held that the marital communications privilege applied, even though, for all practical purposes, the defendant's marriage had ended at the time of the confidential communication. The court in *Coleman* found that courts would generally have trouble determining the viability of the marriage, and that since the legislature had codified the marriage privilege without qualification, it was up to the legislature, and not the courts, to provide clarification.<sup>33</sup> At least one commentator has suggested that the federal courts should adopt precisely this kind of categorical rule of non-inquiry into the viability of marriages.<sup>34</sup>

It seems, however, far too late for the federal courts to adopt such a rule. Tasked with interpreting common law privileges, including the marital privileges, "in light of reason and experience" under Federal Rule of Evidence 501, federal courts have clearly decided that the *de jure* validity of a marriage cannot *per se* "reasonably" trump the quest for full and complete fact-finding. The question for Maryland's federal district court and all other courts in the Fourth Circuit is not whether the marital communications privilege yields when the communications at issue occurred when the spouses were separated, but at what point in the separation (prior to divorce) it should yield.

The Fourth Circuit will have to choose between the relatively easily applied rule of "permanent separation" adopted by the Seventh Circuit in *Byrd*, and the more detail-oriented and apparently higher threshold of "separation plus irreconcilability" created by the Ninth

<sup>26</sup> See *United States v. Owens*, 424 F. Supp. 421 (E.D. Tenn. 1976).

<sup>27</sup> See *In re Grand Jury Proceedings*, 640 F. Supp. 988, 992 (E.D. Mich. 1986).

<sup>28</sup> Note, "Honey, The Judge Says We're History": Abrogating the Marital Privileges, 77 Cornell L. Rev. 843, 868 n.127 (1992) [hereinafter *Abrogating the Marital Privileges*].

<sup>29</sup> 2 WEINSTEIN'S EVIDENCE, *supra* note 2, at § 505-6.

<sup>30</sup> *United States v. Byrd*, 750 F.2d 585, 591-92 (7th Cir. 1984).

<sup>31</sup> *Id.*

<sup>32</sup> 281 Md. 538, 544-55, 380 A.2d 49, 53-54 (1977).

<sup>33</sup> *Id.*

<sup>34</sup> See *Abrogating the Marital Privileges*, *supra* note 28, at 843.

Circuit in *United States v. Roberson*.<sup>35</sup>

In *Byrd*, the Seventh Circuit ruled that:

[S]ociety's interest in protecting the confidentiality of the relationships of permanently separated spouses is outweighed by the need to secure evidence in the search for truth that is the essence of a criminal trial, and that proof of permanent separated status at the time of the communication between the defendant and the defendant's spouse renders the communications privilege automatically inapplicable.<sup>36</sup>

In *Byrd*, the defendant, who was charged with arson, and his wife had been separated for approximately one year when Mr. Byrd uttered some cryptic yet inculpatory remarks to her.<sup>37</sup> The couple had lived in separate homes during the separation, although the wife allowed the defendant to use her basement as a workroom.<sup>38</sup> Prior to the defendant's trial, the wife filed for divorce.<sup>39</sup> Although the court in *Byrd* never defined "permanent separation," it remarked that the "defendant's conversations are unprivileged because they were all made during a long-term separation of the spouses . . . ."<sup>40</sup> Though *Byrd's* standard of "permanent separation" is imprecise, clearly it is not synonymous with the notion of "irreconcilability." As the court in *Byrd* stated, "[w]e refuse to extend the communications privilege to permanently separated couples on the theory a guaranteed protection of

confidentiality at this stage might save some troubled marriages."<sup>41</sup>

In *United States v. Roberson*, the Ninth Circuit rejected what it called *Byrd's* "categorical rule of 'permanent separation'"<sup>42</sup> when it created a rule allowing the spouse to assert the marital communication privilege unless at the time of the communication the couple was irreconcilably separated.<sup>43</sup> In *Roberson*, two months after the husband left the marital home, the defendant/husband told his wife about a rape he had committed.<sup>44</sup> Immediately upon leaving the marital home, the husband had initiated an action for dissolution of the marriage.<sup>45</sup> At the same time, the wife had obtained a temporary restraining order preventing the husband from re-entering the home or from contacting her.<sup>46</sup> At trial, the wife testified, and the husband agreed, that the marriage had failed before the time of communication.<sup>47</sup> After considering the *Roberson's* pending divorce action, the temporary restraining order, and the testimony, the trial judge concluded that at the time of the communication the marriage was all but defunct.<sup>48</sup> The appeals court affirmed and held that the trial judge had correctly concluded that at the time of the communication the marriage was effectively over and that the marital communications privilege should not apply.<sup>49</sup>

The court in *Roberson* rejected *Byrd* and prescribed a two-step inquiry. After the trial court determines whether the husband and wife have separated at the time of the communication, it must then "undertake a more detailed

<sup>35</sup> 859 F.2d 1376 (9th Cir. 1988).

<sup>36</sup> *Byrd*, 750 F.2d at 593.

<sup>37</sup> *See id.* at 588.

<sup>38</sup> *See id.*

<sup>39</sup> *See id.*

<sup>40</sup> *Id.* at 592 n.3. The Second Circuit has also held that the duration of physical separation is the primary factor in determining "permanent separation." *See In re Witness Before Grand Jury*, 791 F.2d 234, 238 (2d Cir. 1986).

<sup>41</sup> *Id.* at 593.

<sup>42</sup> *Roberson*, 859 F.2d at 1381.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.* at 1377.

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* at 1378.

<sup>49</sup> *See id.* at 1382.

investigation into the irreconcilability of the marriage” at that time and into whether the couple “had abandoned all hope.”<sup>50</sup> Factors that the trial court must consider when making its determination include the stability of the marriage at the time of the communication, any divorce actions filed at the time, divorce pleadings, settlement agreements or proposed property agreements, allegations of gross misconduct or grievances over a period of time, reasons given by the parties for prolonged absence from the home, and the couple’s statements as to irreconcilability.<sup>51</sup>

When deciding whether the privilege applies, other federal circuits have referred to both *Byrd* and *Roberson* without choosing the standard from either case.<sup>52</sup> The Fourth Circuit, however, should affirmatively select the Seventh Circuit’s marital communications privilege rule of “permanent separation” over the Ninth Circuit’s rule of “irreconcilability” for three reasons.

First, it is relatively easy for couples to follow and rely upon the “permanent separation” standard. While it is true that the “[marital communication] privilege only weakly serves the purpose for which it exists, in that few couples presumably know of this privilege or rely on it when making marital confidences[,]”<sup>53</sup> the permanent separation standard would generate less uncertainty than would “irreconcilability” as to when spousal communications will remain confidential. Second, if the courts are to continue assessing marital viability, determining whether a couple is substantially physically estranged is far easier for the courts than determining whether their marriage is irrevocably defunct.<sup>54</sup> Third, and more important, this bright-line rule, unlike that adopted in *Clark* and *In re Grand Jury Subpoena of [Witness]*, does little violence to the specific purposes of the marital

communications privilege itself. Because evidentiary privileges impede the truth-seeking process, they are meant to be construed narrowly.<sup>55</sup> In *Roberson*, however, the Ninth Circuit struck a balance between privilege and fact-finding unduly favorable to spouses.

#### IV. CONCLUSION

“[S]ociety has little interest in protecting the confidentiality of separated couples whose marriage has failed by the time of the communication.”<sup>56</sup> However true, whether the marital communications privilege should give way to society’s truth-seeking interests *only* when irreconcilability is established is open to serious doubt. Do separated couples actually maintain an expectation of confidentiality up until the time they view their marriages as defunct, as opposed to when they are permanently separated? Should the community’s interest in truth-seeking in criminal trials really be suspended until marriage has failed, as opposed to when the couple has permanently separated? It will be interesting to see just how solicitous of the privilege the Fourth Circuit will prove to be.

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<sup>50</sup> See *id.* at 1381.

<sup>51</sup> See *id.*

<sup>52</sup> See *e.g.*, *United States v. Frank*, 869 F.2d 1177, 1179 (8th Cir. 1989), *cert. denied*, 493 U.S. 839 (1989); *United States v. Treff*, 924 F.2d 975 (10th Cir. 1991), *cert. denied*, 500 U.S. 958 (1991).

<sup>53</sup> *Byrd*, 750 F.2d at 593.

<sup>54</sup> See *id.* at 592-93.

<sup>55</sup> See *United States v. Nixon*, 418 U.S. 683, 710 (1974).

<sup>56</sup> *Roberson*, 859 F.2d at 1380 (citing *United States v. Byrd*, 750 F.2d 585, 593 (7th Cir. 1984)).