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A primer on when the federal marital privilege is waived

At common law, confidential communications between a husband and wife were protected to ensure that spouses felt free to communicate their deepest feelings to each other without fear of disclosure in a court of law.

This marital privilege is recognized in Illinois as well as in the federal system. In Illinois, the husband and wife privilege extends to all kinds of communications between them and to any fact or transaction, the knowledge of which was obtained by means of the marital relationship. See 725 ILCS 115-16. Like other privileges, this marital privilege can be waived by the defendant’s failure to invoke it when his or her spouse testifies.

Federal law recognizes two distinct marital evidentiary privileges: the marital communications privilege and the adverse spousal testimonial privilege.

The two privileges are different in scope and in terms of how and by whom they may be asserted or waived.

The marital communications privilege covers “information privately disclosed between husband and wife in the confidence of the marital relationship.” Trammel v. U.S., 445 U.S. 40, 51 (1980). The marital communications privilege belongs to both spouses, so either spouse may invoke the privilege to avoid testifying or to prevent the other from testifying about the privileged communications.

The second marital privilege recognized in the federal system is the spousal testimonial privilege. This privilege applies to any adverse testimony one spouse may provide as a witness against the other in a criminal case. This privilege covers testimony on any adverse fact no matter how it might have become known to the witness’ spouse. U.S. v. Byrd, 750 F.2d 585 (7th Cir. 1984).

While both of the federal privileges can be waived, what constitutes a valid waiver can often present a troubling question.

Recently the 7th U.S. Circuit Court of Appeals analyzed this very issue. In United States v. Michael L. Brock, No. 11-3473, decided July 30 of this year, that court concluded that a wife’s testimony at her husband’s detention hearing constituted a valid waiver of both privileges.

The facts of this case can be briefly stated.
Michael L. Brock, a convicted felon, tried to go straight following his release from the penitentiary. He got married, started a business and purchased a home in rural Indiana, where he lived with his family.

In 2009, a federal informant tipped off agents that guns were present in the Brock home. Because Brock was a convicted felon and possession of virtually any firearm that has crossed a state or national border is prohibited under federal law, agents executed a search warrant at Brock’s home.

Several firearms including a 12-gauge shotgun, a 22-caliber rifle and a 38-caliber pistol were recovered. Brock was subsequently charged with possessing a firearm as a convicted felon. 18 U.S.C, Section 922(g)(1).

At Brock’s detention hearing his retained counsel called Brock’s wife to testify in support of his release pending trial. The import of her direct testimony was that her husband should be released because he was the family’s sole provider.

On cross-examination, however, the government asked Brock’s wife whether her husband knew the firearms were in the house.

Defense counsel immediately objected. However, his objection was based on the speculative nature of the evidence and not because of the application of either marital privilege.

After the objection was overruled, Brock’s wife testified that she had seen her husband handle at least one of the weapons and that shortly before the government search, he had asked her to remove the firearms from the home.

At the defendant’s subsequent jury trial, the government subpoenaed Brock’s wife to testify for the prosecution.

Through counsel, Brock’s wife moved to quash the subpoena invoking the two marital privileges. However, the trial court denied the motion finding that Brock’s wife had waived the spousal testimonial privilege and that both her and her husband had waived the marital communications privilege by her testimony at the detention hearing.

As it turned out, Brock’s wife’s testimony proved to be critical, as it was the only evidence presented by the government that the defendant knowingly possessed the weapons. Brock was subsequently convicted and sentenced to a mandatory minimum term of 15 years under the Armed Career Criminal Act. 18 U.S.C., Section 924(e)(1).

On appeal, Brock challenged his conviction based on the admission of his wife’s testimony against him at trial. His argument was straightforward; his wife’s testimony at the detention hearing did not constitute a waiver of either marital privilege.

The court’s first order of business was to note that as with other privileges governing communications, such as the attorney-client privilege, an unprivileged disclosure amounts to a waiver.

A review of other circuits discussing the federal law of privilege disclosed a finding of implied waiver of the marital communications privilege when the witness’ spouse testifies to marital confidences in a pretrial proceeding such as a suppression motion or deposition testimony and the party’s spouse fails to object.

Therefore, the wife’s testimony at the defendant’s detention hearing constituted an implied waiver of this marital privilege.

The defendant also contended that no waiver occurred because his wife’s conduct in testifying was not “knowing, voluntary and intentional.”
However the court quickly rejected this argument, concluding that a waiver of the marital communications privilege must be voluntary only in the sense that the holder must realize that this once confidential communication is being disclosed, even without realizing the impact of the disclosure on the privilege.

Therefore, what happened at the detention hearing amounted to a clear waiver of the marital communications privilege as to Brock’s wife’s statements that the defendant told her to remove the firearms from the home.

The court then addressed the second federal marital privilege: the spousal testimonial privilege. Broader than the marital communications privilege, the court noted this evidentiary privilege covers testimony on any adverse fact no matter how that might have become known to the witness’ spouse.

This privilege could have applied to any of Brock’s wife’s testimony, including that she had seen her husband handle at least one of the weapons kept in the house. However, this privilege only belongs to the witness’ spouse, in this case Brock’s wife, and, therefore, the defendant lacked standing to raise this issue on appeal.

Because the defendant could not prevail on either of his challenges to his wife’s testimony at trial, his conviction was affirmed.