Spousal Privilege Analysis

Overall: Adding the Proposed language to the spousal privilege rules will not substantively change the operation of the current law already in place. However, adding the language may demonstrate a commitment to protecting survivors of sexual violence, and may create a more efficient pathway for courts to permit spousal testimony regarding sex offenses by simply reading the language directly from the statute.

Current Ohio law: Currently, Ohio has both a spousal privilege statute and a rule of evidence regarding competency of spousal testimony.

1. Ohio’s Competency rule: A witness-spouse must be competent in order to testify against their spouse. A witness-spouse is competent (and therefore, permitted to testify) when 1. the witness-spouse or a child of either spouse is the VICTIM of the crime shared AND/OR 2. The testifying spouse elects to testify voluntarily. (Evid.R.601)

Key: the victim of the crime is competent to testify against their spouse.

Once a court establishes that a testifying spouse is competent to testify, the court must determine whether the accused spouse is protected by the spousal privilege. If the spousal privilege does apply, the witness-spouse is not permitted to testify against their spouse.

There are several exceptions to the spousal privilege written into the law permitting witness-souses to testify against a spouse. Case law/precedent has continually expanded the reach of these exceptions further. The courts have leaned toward a policy of permitting witness-testimony (by finding that the circumstances in a case meet an exception to privilege where not otherwise clear by the language in the law alone), rather than a policy of preventing spousal testimony.

2. Ohio’s Spousal Privilege: A witness-spouse cannot testify against their spouse if their testimony is about a confidential communication made or act done during the marriage, UNLESS one of the following is true: (RC 2945.42)
   - The witness-spouse is the victim of the crime charged/ in a case of personal injury by the spouse to the witness-spouse
   - The child of either spouse is the victim of the crime charged/ in a case of personal injury by spouse on the child
   - The communication the witness-spouse will testify about is not the type of confidential marital communication the law intends to protect.
Key: the victim of the crime can testify against their spouse – spousal privilege does not apply.

Ohio’s spousal privileges rules in practice (based upon court interpretation of the statutes/purposes of legislation/case law, etc.):

- There is a list of specific crimes that a victim-spouse can testify about. However, in practice, the courts have expanded the right of a victim to testify regarding most any criminal offense. For example, courts allow victims of sex crimes, indirect crimes like threats/intimidation, and attempted crimes to testify – even if not listed in statute. The courts have determined that a victim suffers personal injury when they are the victim of most any criminal offense and, therefore, privilege does not apply.
- The courts have explained that the spousal privilege was originally intended to protect confidential communications that promote marital peace, preserve marital confidence, are made in reliance of the special trust and confidence in the relationship, etc.
  o The courts have determined that not all communications between married spouses are confidential of this nature, so not all communications are protected by privilege.
  o The courts lean toward permitting testimony about a communication where there is no martial peace to protect/aimed at destroying marital relationship (like, when one spouse threatens another for cooperating with law enforcement, etc.).
- The spousal privilege does not apply when spouses are living separate and apart. This does not mean the spouses have to be legally separated. But, a witness-spouse must demonstrate that they have been living in separate places for a period of time/not in frequent communication/etc.
- The spousal privilege does not apply to former/divorced spouses.

Takeaway: The new bill will not substantively change the application of Ohio’s spousal privilege rules. Victims of sex offenses are already permitted to testify against the perpetrating spouse. However, there is no negative effects of modifying the language in the statute.

Looking ahead: Both current and proposed law only permits a witness-spouse to testify against their spouse when they (or their child) is the victim of the sex offense. Could language be amended further to permit a witness-spouse to testify against their spouse in any case of sexual violence, no matter who the victim is, as long as they have material/relevant testimony to provide?