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Privileges: 1983 Revisions to Evidence Law in North Carolina

As of October 1, 1983 any resident judge or presiding judge, if necessary for the proper administration of justice, may compel physicians, psychologists, school counselors, and marital therapists to disclose confidential information either at or before trial.¹ *House Bill 235* amended the provisos to North Carolina General Statutes sections 8-53 to 8-53.5—the physician-patient privilege;² the psychologist-client privilege;³ the school counselor privilege;⁴ and the marital therapist-client privilege.⁵ The provisos give judges discretion to override these privileges and compel disclosure of confidential information. The bill clarifies when a judge has jurisdiction to exercise his discretion to order disclosure, and specifically authorizes compelled pretrial disclosure. A new statutory provision, however, limits the judge's discretion to compel disclosure of confidential communications in divorce and alimony proceedings.⁶ An additional amendment,⁷ *House Bill 66*, made a more sweeping change in the law of privileges by declaring that a defendant's spouse is competent to testify against the defendant in criminal prosecutions.⁸ This note examines the amendments made by *House Bills 235* and *66*.

Privileges are recognized based on society's determination that certain confidential relationships are important and that preservation of their integrity outweighs society's interest in learning the truth.⁹ There are two general privilege categories: absolute privileges, such as the attorney-client privilege, and qualified privileges, such as the physician-patient privilege.¹⁰ In each privilege category, the interest in protection of the relationship is balanced against

1. Act of June 1, 1983, ch. 410, 1983 N.C. Sess. Laws 235 (amending N.C. GEN. STAT. §§ 8-53, -53.3, -53.4, and -53.5 (1981) and adding *id.* § 8-53.6) [hereinafter referred to as *House Bill 235*].

2. N.C. GEN. STAT. § 8-53 (Supp. 1983). For a general discussion of the physician-patient privilege see 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 63 (2d rev. ed. 1982).

3. N.C. GEN. STAT. § 8-53.3 (Supp. 1983).

4. *Id.* § 8-53.4.

5. *Id.* § 8-53.5.

6. *Id.* § 8-53.6.

7. Act of Apr. 13, 1983, ch. 170, 1983 Sess. Laws 66 (amending N.C. GEN. STAT. § 8-57 (1981)) [hereinafter referred to as *House Bill 66*].

8. N.C. GEN. STAT. § 8-57 (Supp. 1983). In most instances, however, the court may not compel the spouse to testify. *Id.*

9. Note, *Privileged Communications between Husband and Wife*, 15 N.C.L. REV. 282, 282-83 (1937) [hereinafter cited as Note, *Privileged Communications*]; see Note, *A Survey of the North Carolina Law of Relational Privilege*, 50 N.C.L. REV. 630, 630-31 (1972) [hereinafter cited as Note, *Relational Privileges*].

10. Note, *Relational Privileges*, *supra* note 9, at 631. See, e.g., N.C. GEN. STAT. § 8-53 (Supp. 1983). Qualified privileges generally are statutory privileges. See 1 H. BRANDIS, *supra* note 2, § 54, at 200 nn.93, 95 (psychologist-client and marital therapist-client privileges created by statute); *id.* § 63 at 250-51 nn.22-23 (no physician-patient privilege at common law—privilege created by statute); C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 98, at 212 & nn.1-3 and accompanying text (E. Cleary ed. 1972) (no physician-patient privilege at common law; New York passed the first statutory privilege in 1828). Absolute privileges, however, have their roots in long-standing common-law doctrines. See 1 H. BRANDIS, *supra* note 2 § 58, at 229 & nn.12-14; see also *infra* note 50 (discussing the common-law origins of the husband-wife privilege).

the need to discover the truth.¹¹ The absolute privilege gives priority to the importance of the relationship and does not waive it in the interests of justice.¹² The qualified privilege recognizes that the relationship is important, but that in some instances society's interest in learning the truth requires that the privilege be waived.¹³

Reflecting this balancing process, the North Carolina legislature long ago codified the physician-patient,¹⁴ psychologist-client,¹⁵ school counselor-student,¹⁶ and marital therapist-client¹⁷ privileges as qualified privileges.¹⁸ After defining what information is privileged and in what circumstances the privilege attaches,¹⁹ each privilege statute concludes with a qualifying or disclosure proviso that permits a judge to compel disclosure if he believes it necessary to

11. Note, *Relational Privileges*, *supra* note 9, at 630. See *Trammel v. United States*, 445 U.S. 40, 50 (1980) (testimonial exclusionary rules and privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principal of utilizing all rational means for ascertaining truth.'") (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

The balancing of these interests is one of the factors in Dean Wigmore's test for the validity of any confidential communications privilege. To be valid the privilege must meet all of the following criteria:

- 1) The communication must originate in a *confidence* that they [*sic*] 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*.
- 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 the litigation.

Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121, 135 (1980) (quoting 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (J. McNaughton rev. ed. 1961)) (the author contends that the marital communications privilege, considered *infra* at text accompanying note 50, fails the Wigmore test) [hereinafter cited as Note, *Pillow Talk*].

12. Note, *Relational Privileges*, *supra* note 9, at 631.

13. *Id.* See Note, *Physician-Patient Privilege—Compelling Disclosure of Privileged Information—Discretion of the Trial Judge*, 41 N.C.L. REV. 627, 628 (1963). See also N.C. GEN. STAT. §§ 8-53, -53.3, -53.4, -53.5 (Supp. 1983) (permitting judges to compel disclosure of information privileged under physician-patient, psychologist-client, school counselor, and marital therapist-client privileges when "necessary to a proper administration of justice").

14. N.C. GEN. STAT. § 8-53 (Supp. 1983).

15. *Id.* § 8-53.3.

16. *Id.* § 8-53.4.

17. *Id.* § 8-53.5.

18. At common law none of these relational privileges existed. See *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 36, 125 S.E.2d 326, 329 (1962); *State v. Bryant*, 5 N.C. App. 21, 25, 167 S.E.2d 841, 845 (1969); see also H. BRANDIS, *supra* note 2, §§ 54, 63; Note, *supra* note 13, at 627.

19. Generally, the relational privileges can be invoked only when the communications sought to be excluded are necessary for the professional to effectively render his services. 1 H. BRANDIS, *supra* note 2, § 63, at 252 & n.28; see *Metropolitan Life Ins. v. Boddie*, 194 N.C. 199, 139 S.E. 228 (1927); *In Re Johnson*, 36 N.C. App. 133, 243 S.E.2d 386 (1978). This necessitates that there be a valid confidential or professional relationship at the time the information was acquired. 1 H. BRANDIS, *supra* § 63, at 251-52 n.27; see *State v. Hollingsworth*, 263 N.C. 158, 139 S.E.2d 235 (1964); Barnhart, *Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377, 403-04 (1950). Because the communications must be confidential to qualify for the privilege, the presence of a third party invalidates the privilege. C. McCORMICK, *supra* note 10, § 101. The privilege belongs to the recipient of the services and only he can waive or assert it. 1 H. BRANDIS, *supra* note 2, § 63 at 251 nn.24-25; C. McCORMICK, *supra* note 10, § 102; Barnhart, *supra*, at 404-05. See

a proper administration of justice.²⁰ *House Bill 235* amended these provisos, clarifying under what circumstances a judge may exercise his discretion to compel disclosure and which judges have jurisdiction to so compel disclosure.²¹ In addition, by making physicians, psychologists, and marital therapists incompetent to testify in divorce and alimony proceedings "concerning information acquired while rendering [marital] counseling,"²² the bill limits a judge's discretion to compel disclosure in such actions.

The qualifying proviso to the pre-1983 section 8-53 stated that "the court . . . or the Industrial Commission" may order disclosure of privileged information.²³ Because only the trial judge "[was] so involved in the case as to be able adequately to protect the rights of a party who asserts his privilege,"²⁴ the courts held that this language applied only to the judge or Industrial Commission before which the action was pending.²⁵ As amended in 1983, however, section 8-53 permits any resident or presiding judge or the Industrial Commission to compel disclosure at or before trial.²⁶

House Bill 235's amendments to sections 8-53.3, 8-53.4, and 8-53.5 also permit compelled disclosure at or before trial.²⁷ This is a significant change. Although the old sections did not prohibit pretrial disclosure, they did not authorize it expressly.²⁸ There is little authority interpreting the pre-1983 sections, but they may have been subject to the same limitation imposed on section 8-53 prior to the 1969 amendment expressly permitting pretrial disclosure.²⁹ Courts had held that since section 8-53 did not authorize pretrial disclosure, there could be none.³⁰ When section 8-53 was amended in 1969, the other privilege sections were not. The court of appeals, however, determined that, by allowing pretrial disclosure under section 8-53, the legislature also had intended to allow disclosure under section 8-53.3.³¹ The 1983

Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962). See generally N.C. GEN. STAT. §§ 8-53 to -53.5 (Supp. 1983).

20. See N.C. GEN. STAT. §§ 8-53, -53.3 to -53.5 (Supp. 1983).

21. See *supra* note 1. See *infra* notes 26-37 and accompanying text.

22. See *supra* note 1. This act subjects the disclosure provisos in the physician-patient, psychologist-client, and marital therapist-client privileges to the limitations of § 8-53.6. Section 8-53.6 bars the testimony of these witnesses when their testimony concerns information gained while rendering marital counseling in divorce and alimony proceedings.

23. As amended in 1969 the disclosure proviso of N.C. GEN. STAT. § 8-53 (1981), amended by *id.* § 8-53 (Supp. 1983) provided that "the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure if in his opinion the same is necessary to a proper administration of justice." (emphasis added) The 1969 amendment added the words "or prior thereto."

24. Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 528, 278 S.E.2d 893, 897, *disc. rev. denied*, 304 N.C. 193, 285 S.E.2d 96 (1981).

25. See, e.g., *id.*

26. N.C. GEN. STAT. § 8-53 (Supp. 1983).

27. See *supra* note 1.

28. See N.C. GEN. STAT. §§ 8-53.3 to -53.5 (1981).

29. Act of June 19, 1969, ch. 914, 1969 N.C. Sess. Laws 1134 at 1059.

30. See, e.g., Johnston v. United Ins. Co. of Am., 262 N.C. 253, 256, 136 S.E.2d 587, 590 (1964); Lockwood v. McCaskill, 261 N.C. 754, 758-59, 136 S.E.2d 67, 70 (1964); Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 527-28, 278 S.E.2d 893, 897, *disc. rev. denied*, 304 N.C. 193, 285 S.E.2d 96 (1981).

31. *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 299-300, 256 S.E.2d 818, 823

amendment removes any doubt that judges have discretion under each section to compel pretrial disclosure.

Unlike the proviso to section 8-53, the new provisos to sections 8-53.3, 8-53.4, and 8-53.5 do not grant the Industrial Commission power to compel disclosure; rather, they limit this power to resident or presiding judges in the district where the case is pending.³² Since section 8-53 does not use the words "in the district where the case is pending," it may permit an independent action to compel disclosure of privileged information.³³ On the other hand, sections 8-53.3 to 8-53.5 limit jurisdiction to the "judge in the district in which the action is pending."³⁴ Thus, these sections may foreclose independent actions to compel psychologists, school counselors, and marital therapists to make pretrial disclosure of confidential communications.³⁵ The limitation also may negate or restrict the express grant of authority to compel disclosure prior to trial.³⁶

The jurisdiction to compel disclosure granted in amended sections 8-53, 8-53.3, 8-53.4, and 8-53.5 may not be as broad as it appears. Each of the new disclosure provisos concludes: "[I]f the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge."³⁷ This language further restricts a judge's discretion to compel disclosure once an action has been commenced.

Although *House Bill 235* expanded the grant of jurisdiction in the disclosure provisos to sections 8-53, 8-53.3, and 8-53.5, the Bill also severely limited

(1979). The court thought it "wholly inconsistent to allow disclosure in the case of a physician-patient relationship while, in . . . the psychologist-patient relationship, precluding the required disclosure until the time of trial." *Id.* at 297, 256 S.E.2d at 822.

Without pretrial compelled disclosure, preparation for trial is difficult. The normal practice probably has been for parties to waive the privileges before trial to facilitate discovery and settlement negotiations. Blakey, *New Statutes and Old Problems in Marital and in Doctor-Patient and Psychologist-Patient and Other Therapist Privileges* in SECOND ANNUAL NORTH CAROLINA EVIDENCE SEMINAR JUNE 17-18, 1983 § 8 (available at University of North Carolina at Chapel Hill, Law Library).

32. See N.C. GEN. STAT. §§ 8-53.3 to -53.5 (Supp. 1983).

33. Blakey, *supra* note 31, § 8, at 13.

34. See *supra* note 32.

35. Prior to the current amendment, the court of appeals approved use of an *in camera* hearing to determine whether disclosure of confidential information by staff of a mental health center was "necessary to a proper administration of justice." *In re Albemarle Mental Health Center*, 42 N.C. App. at 298, 256 S.E.2d at 822; see *supra* note 31. The court stated that the use of a separate hearing to determine whether the administration of justice required disclosure was the most effective and practical way "to effectuate the intent of the [disclosure] proviso." *In re Albemarle Mental Health Center*, 42 N.C. App. at 296, 256 S.E.2d at 822.

36. Since only judges in the district where the action is pending can compel disclosure under §§ 8-53.3 to -53.5, it is implied that the action must be commenced before there can be any compulsion of disclosure. Consequently, pretrial disclosure may be restricted to actions that have been filed but have not yet come to trial.

37. N.C. GEN. STAT. §§ 8-53, -53.3, -53.5 (Supp. 1983). The statement of this restriction in § 8-53.4 differs slightly by substituting "the" for "a" in the phrase limiting cases in the district court. See *id.* §§ 8-53, -53.3 to -53.5. The phrase in § 8-53.4 addressing cases in superior court is identical to the limitations in the other sections. No explanation is given for this difference in treatment of cases in district and superior court. It illogically implies that only the judge before whom the case is pending may compel disclosure when the case is in district court, while any superior court judge may compel disclosure when the case is in superior court.

a judge's discretion to compel disclosure in divorce and alimony proceedings. *House Bill 235* added section 8-53.6, which provides:

No disclosure in alimony and divorce actions.—

In an action pursuant to G.S. 50-5, 50-6, 50-7, 50-16.2 and 50-16.3 if either or both parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, or certified marital family therapist, the person or persons rendering such counseling shall not be competent to testify in the action concerning information acquired while rendering such counselling.³⁸

This section expressly applies to sections 8-53, 8-53.3, and 8-53.5.³⁹

Incompetency to testify differs from privilege. Incompetency can be raised by either party to an action, while a privilege can be asserted only by the holder of the privilege.⁴⁰ Making physicians, psychologists, and marital therapists *incompetent* to testify in divorce proceedings will have two effects. First, objection now may be made by either party to prevent the witness from testifying about information acquired while giving marital counseling.⁴¹ Second, not only will the witness be prohibited from disclosing information concerning the marital relations, he also will be precluded from disclosing any information acquired as a marriage counselor.⁴²

Although codified as a privilege, section 8-53.6 is defined in terms of competency. Thus, it does not belong solely to the person receiving counseling; either spouse may invoke it regardless of whether he or she participated in the counseling session.⁴³ Nor may one spouse waive the privilege over the objection of the other. Even if there is no objection to the witness' testimony, the court may exclude the testimony on its own initiative.⁴⁴ Note also, the ordinary physician-patient or other relational privilege can be raised only if the information sought to be excluded was acquired in a valid physician-patient or

38. N.C. GEN. STAT. § 8-53.6 (Supp. 1983); *supra* note 1. Although § 8-53.6 is stated in terms of "competency," the courts may treat it as a privilege. If N.C. R. EVID. 601(a) is interpreted as abolishing all rules of competency—as making all persons competent to be witnesses—§ 8-53.6 could be interpreted as creating a privilege. Rule 601(a) provides that all persons are competent to be witnesses unless one of the new rules of evidence makes them incompetent. There is no rule of incompetency comparable to § 8-53.6. New rule 501, however, explicitly preserves the current statutory and common-law privileges; thus, § 8-53.6 may fall under this heading. *See* N.C. R. EVID. 501. It is significant, however, that § 8-53.6 makes witnesses incompetent to testify, rather than merely granting a privilege to exclude the counselor's testimony. This indicates that the section should be treated as a rule of exclusion instead of as a mere privilege.

39. The provisos to these sections allow compulsion of disclosure subject to § 8-53.6. The school counselor privilege § 8-53.4, however, is not subject expressly to § 8-53.6.

40. C. McCORMICK, *supra* note 10, § 73. Although it makes the witnesses incompetent to testify, N.C. GEN. STAT. § 8-53.6 (1983) resembles a rule of privilege more than a rule of competency or exclusion—it rests upon the desire to protect and foster the confidentiality of a special relationship—rather than the desire to bar irrelevant or unreliable evidence.

41. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.25 (Supp. 1983).

42. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.27.

43. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.25.

44. The judge can exclude the testimony because the section makes the witness incompetent as opposed to merely granting a privilege. *See* 1 H. BRANDIS, *supra* note 2, § 63, at 73 n.24 (Supp. 1983). Admission of testimony if neither objects, however, is not prejudicial error. *Id.* *See also* Barnhart, *supra* note 19, at 404-05.

other professional relationship.⁴⁵ Section 8-53.6, however, probably can be used to exclude marriage counseling confidences irrespective of whether there was a formal physician-patient relationship.⁴⁶ The statute is silent about whether in actions other than divorce and alimony proceedings a judge may compel disclosure of information acquired during marital counseling. Presumably, such disclosure would be within a judge's discretion since the statute does not prohibit it.⁴⁷

House Bill 235 makes significant changes in the relational privileges statutes. It does not, however, resolve all the issues that have arisen under these privileges. Foremost among these issues is the scope of judicial discretion to compel disclosure.⁴⁸ Delineation of the bounds of a judge's discretion turns on the meaning of "necessary to a proper administration of justice." This definition has been left to the courts.

In addition to amending certain privileges, in 1983 the General Assembly rewrote the statute governing spousal testimony in criminal actions. *House Bill 66*⁴⁹ radically changed the scope of spousal testimony in criminal actions by permitting a defendant's spouse to testify against him. At common law, spouses could not testify for or against each other in a criminal action.⁵⁰ Exceptions to this rule permit spouses to testify for each other, and in some instances against one another.⁵¹ Nearly all the exceptions, judicial and

45. See 1 H. BRANDIS, *supra* note 2, § 63, at 251-52 nn.27-28.

46. 1 H. BRANDIS, *supra* note 2, § 63, at 75 n.27 (Supp. 1983).

47. If the privilege exists to encourage people to seek marital counseling and to make a complete and full disclosure of their marital and personal problems, then the privilege should be absolute. On the other hand, if society's interest in learning the truth outweighs the importance of this relationship, then the privilege should be qualified in all actions, even divorce and alimony proceedings.

48. The North Carolina Supreme Court has held that it is not abuse of discretion for a judge to refuse to compel disclosure of hospital records and medical reports that would have shown the insured had falsified her claim of good health and medical history on an application for a life insurance policy. See *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962). A student note criticizing this decision argues that it is abuse of discretion not to compel "disclosure of evidence which would materially alter the outcome of the litigation involved." Note, *supra* note 13, at 633. In *Sims* the jury found for the beneficiaries of the life insurance policy. *Sims*, 257 N.C. at 34, 125 S.E.2d at 328.

On occasion, the courts have held that a trial judge must enter a finding of necessity to justify compelling disclosure. *Id.* at 38, 128 S.E.2d at 321; *Metropolitan Life Ins. Co. v. Boddie*, 194 N.C. 199, 139 S.E. 228 (1927). Other decisions presume a finding of necessity when a judge compels disclosure and reject the premise that a judge must make such an entry in the record. *In re Johnson*, 36 N.C. App. 133, 243 S.E.2d 386 (1978); *State v. Bryant* 5 N.C. App. 21, 167 S.E.2d 841 (1969). See 1 H. BRANDIS, *supra* note 2, § 63, at 253 n.33.

49. Act of Apr. 13, 1983, ch. 170, 1983 N.C. Sess. Laws 39 (amending N.C. GEN. STAT. § 8-57 (1981)).

50. At common law the husband-wife privilege was absolute; neither could testify in a civil or criminal action in which the other was a party. See *State v. Hussey*, 44 N.C. 124, 127 (1852) ("[A] contrary rule would break down or weaken the great principles which protect the sanctities of the marriage state."). See also 1 H. BRANDIS, *supra* note 2, §§ 58-59; C. McCORMICK, *supra* note 10, § 78. For a discussion of the origins and evolution of the husband-wife privileges, see Trammel v. United States, 445 U.S. 40, 43-44 (1980); *State v. Freeman*, 302 N.C. 591, 593-94, 276 S.E.2d 450, 452-53 (1981); C. McCORMICK, *supra* note 10, § 78; Note, *State v. Freeman: Adverse Marital Testimony in a North Carolina Criminal Action—Can Spousal Testimony Be Compelled?*, 60 N.C.L. REV. 874, 877-78 (1982).

51. Spouses were made competent to testify on behalf of one another by statute. See N.C. GEN. STAT. § 8-57 (1981); 1 H. BRANDIS, *supra* note 2, § 59; C. McCORMICK, *supra* note 10, § 78

statutory, preserve in some form a privilege making spouses incompetent to testify as to confidential communications between them.⁵²

Typical of the statutory exceptions to the common-law prohibition on spousal testimony is former North Carolina General Statutes section 8-57,⁵³ which made a defendant's spouse competent to testify on his behalf, while allowing the defendant to prevent disclosure of confidential communications made during the marriage.⁵⁴ Section 8-57 also made a defendant's spouse compellable to testify against him regarding certain crimes against their children or the witness spouse.⁵⁵ Otherwise a defendant's spouse remained

(English Act of 1853). Adverse spousal testimony, however, continued to be prohibited although exceptions evolved making defendants' spouses competent to testify against them in a few situations. *See, e.g.*, *State v. Alford*, 274 N.C. 125, 129-30, 161 S.E.2d 575, 578 (1968) (adverse spousal testimony was permitted at common law when husband struck wife with ax; when wife tried to murder husband by poisoning; and when wife was charged with assault and battery with a dangerous weapon); *State v. Hussey*, 44 N.C. 127 (1852) (wife may be a witness against her husband in prosecution for felonies or attempted felonies perpetrated on her and for assault and battery, but only for those which inflict lasting and great bodily harm).

52. 1 H. BRANDIS, *supra* note 2, § 60; C. McCORMICK, *supra* note 10, § 78. *See State v. Brittain*, 117 N.C. 623, 625, 23 S.E. 433, 433 (1895) Communications before or after the marriage, however, are not protected. C. McCORMICK, *supra* note 10, § 81; *see* 1 H. BRANDIS, *supra* note 2, § 60. This protection of confidential communications is permanent and survives divorce and even death of one spouse. *Id.* § 60, at 240 n.72; C. McCORMICK, *supra* note 10, § 85; Note, *Pillow Talk*, *supra* note 11, at 132.

McCormick argues that the privilege should safeguard only those expressions (acts or statements) "intended by one spouse to convey a meaning or message to the other." C. McCORMICK, *supra* note 10, § 79, at 163-64 n.18. As McCormick points out, however, many courts let the privilege protect almost any acts done by one spouse solely in the presence of the other, regardless of whether intended to be communications and any information that would not have been acquired, but for the marriage. *Id.* § 79, at 164 nn.21-24; Note, *Pillow Talk*, *supra* note 11, at 128. *See State v. Alford*, 274 N.C. 125, 130, 161 S.E.2d 575, 579 (1968) (privilege protects all matters that occurred during the marriage). Despite the fact that the confidential communications shield is a privilege, many courts treat it as a rule of competency and allow any party to object and prohibit the revelation of confidential communications. *See, e.g.*, *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976) (treating privilege as competency); *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976) (failure to exclude evidence inadmissible because of this privilege is reversible error even if no objection made). When treated as a privilege it usually is held that the communicating spouse is the holder of the privilege and therefore the only one who can assert or waive it. 1 H. BRANDIS, *supra* note 2, § 60, at 240-41 nn.74-76; C. McCORMICK, *supra* note 10, § 83, at 169 nn.62-64; Note, *Pillow Talk*, *supra* note 11, at 130-31. *See Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967) (privilege belongs to communicating spouse and only he can waive); *see also infra* note 84 and accompanying text. *But see Hagedorn v. Hagedorn*, 211 N.C. 175, 179 S.E. 507, 509 (1937) (privilege belongs to witness spouse and she may waive); *see also* Note, *Privileged Communications*, *supra* note 9, at 282-85; *infra* note 54 & 77 and accompanying text.

53. *See generally* Note, *Relational Privileges*, *supra* note 9, at 636-38; Note, *Spousal Testimony in Criminal Proceedings—State v. Freeman*, 17 WAKE FOREST L. REV. 990, 999-1001 (1981).

54. N.C. GEN. STAT. § 8-57 (1981) only prohibits compulsion of confidential communications made during the marriage. It is not clear whether the privilege belongs to the communicating or hearing spouse, or both. *See supra* note 52; *infra* notes 77-79 and accompanying text. The witness spouse should be able to reveal confidential communications when testifying for the defendant spouse. When courts treat this privilege as a rule of competency, however, the State may be able to prevent such testimony even though both spouses are willing to waive the privilege. *See supra* note 52.

55. N.C. GEN. STAT. § 8-57 (1981) made a defendant's spouse competent and compellable to give evidence against the defendant in any criminal action or proceeding,

to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation . . . and . . . for an assault upon the other spouse . . . for communicating a threat to the other spouse . . . for trespass upon the separate residence of the other spouse . . . for any criminal offense

neither competent nor compellable to give evidence against him in any criminal prosecution.⁵⁶ The rationale for excluding adverse spousal testimony was to preserve marital harmony.⁵⁷

The 1983 revision of section 8-57⁵⁸ makes a defendant's spouse competent to testify for the State in any criminal action. Although subsection (a) was reworded slightly, it continues the rule of old section 8-57—competence to testify on behalf of a defendant spouse—and preserves the prohibition against prejudicial use of a defendant's failure to call his spouse as a witness.⁵⁹ As in former section 8-57,⁶⁰ subsection (a) of the revised section subjects a defendant's spouse who testifies on behalf of the defendant to potential cross-examination.⁶¹

Before the current amendment, section 8-57 had been interpreted as preserving, except for the statutory exceptions, the common-law rules against adverse spousal testimony.⁶² It followed from this interpretation that the common-law exceptions were preserved as well.⁶³ Consequently, in *State v.*

against a . . . minor child of either spouse or . . . for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse

Id. See 1 H. BRANDIS, *supra* note 2, § 59.

The purpose of these exceptions was to permit a spouse to testify when one spouse committed a felony against the other or a child of either of them. The narrowness of the exceptions, however, caused the anomalous result of preventing adverse spousal testimony in many cases involving serious crimes perpetrated by one against the other. See Blakey, *Moving Towards An Evidence Law of General Principles: Several Suggestions Concerning An Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1, 32 (1981). See, e.g., *State v. Reavis*, 19 N.C. App. 497, 199 S.E.2d 139 (1973) (because arson is not one of the exceptions to § 8-57 it was error to permit wife to testify against her husband for allegedly burning her mobile home even though they had been living apart).

56. N.C. GEN. STAT. § 8-57 (1981).

57. See *State v. Freeman*, 302 N.C. 591, 595, 276 S.E.2d 450, 452 (1981). This privilege, it is argued, protects society from the distasteful drama of a wife testifying against her husband. See C. McCORMICK, *supra* note 10, § 78; Note, *Pillow Talk*, *supra* note 11, at 125.

58. See *supra* note 7.

59. N.C. GEN. STAT. § 8-57 (Supp. 1983). Section 8-57 contains two privileges: one against compulsion of adverse spousal testimony and one for confidential communications.

60. Compare *id.* § 8-57 (1981) ("but the failure of such witness to be examined shall not be used to the prejudice of the defense") with *id.* § 8-57 (Supp. 1983) ("but the failure of the defendant to call such spouse as a witness shall not be used against him"). Although the language has been changed, the meaning seems to be the same. 1 H. BRANDIS, *supra* note 2, § 59, at 70 n.59 (Supp. 1983). This language prohibits the prosecution from commenting on a spouse's failure to testify for the defendant. See *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976); *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976); 1 H. BRANDIS, *supra* note 2, § 59, at 238-39 nn.59-64. N.C. GEN. STAT. § 8-57 (1981) (defendant not authorized to compel his spouse to testify for him—neither before nor after the current amendment). 1 H. BRANDIS, *supra* note 2, § 59, at 70 n.59 (Supp. 1983).

61. See N.C. GEN. STAT. § 8-57 (1981); *id.* (Supp. 1983); 1 H. BRANDIS, *supra* note 2, § 59, at 239 nn.65-66. Both versions of § 8-57 provide that a spouse called as a witness is subject to cross-examination.

62. No statute provides that a wife is not a competent witness against her husband in any criminal action or proceeding. Section 8-57, and statutes on which it is based, simply provide that rules of the common law with reference to whether a husband is competent to testify against his wife or a wife is competent to testify against her husband in a criminal action or proceeding are unaffected by those statutes. *State v. Alford*, 274 N.C. 125, 129, 161 S.E.2d 575, 577-78 (1968). See also *State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981); 1 H. BRANDIS, *supra* note 2, § 59, at 234 n.45.

63. *State v. Overton*, 60 N.C. App. 1, 38, 298 S.E.2d 695, 717 (1982) (§ 8-57 "is a codification of a common-law rule" and, therefore, subject to common-law exceptions).

*Freeman*⁶⁴ the North Carolina Supreme Court determined that the common-law rule against adverse spousal testimony no longer complied "with the purposes for which it was created,"⁶⁵ and held that "spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage."⁶⁶ This decision abolished all rights of a criminal defendant to prevent adverse spousal testimony except with regard to confidential communications.⁶⁷ The *Freeman* court approved the reasoning of the United States Supreme Court in *Trammel v. United States*,⁶⁸ but adopted a different rule.⁶⁹ In *Trammel*, a spouse was willing to testify against her husband,⁷⁰ and the Court altered the common-law rule against adverse spousal testimony by holding that the spouse was competent but not compellable to testify.⁷¹

The *Freeman* court did not explain its reasoning, perhaps because the question of compellability was not directly before it.⁷² As a result, although *Freeman* clarified that a witness spouse was only incompetent to testify to "confidential communications," the decision left unclear whether the spouse could be compelled to testify.

64. 302 N.C. 591, 276 S.E.2d 450 (1981).

65. *Id.* at 594, 276 S.E.2d at 452.

66. *Id.* at 596, 276 S.E.2d at 453.

67. See 1 H. BRANDIS, *supra* note 2, § 59, at 234-35 n.46-48; Blakey, *supra* note 58, at 33; Note, *supra* note 50, at 874. The *Freeman* court's interpretation of § 8-57 and its assertion of authority to change the common-law privilege against adverse spousal testimony is criticized in Note, *supra* note 53, at 990.

68. 445 U.S. 40 (1980).

69. The Supreme Court changed the rule of *Hawkins v. United States*, 358 U.S. 74 (1958) (defendant can bar his spouse's adverse testimony) by vesting the adverse spousal testimony privilege in the witness spouse. "[T]he witness spouse alone has a privilege to refuse to testify [adversely]; the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel*, 445 U.S. at 53. The court reasoned that:

When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.

Id. at 52.

The North Carolina court also determined that the rule "sweeps more broadly than its justification." *Freeman*, 302 N.C. at 595, 276 S.E.2d at 453. See *Trammel*, 445 U.S. at 51. The court was not convinced that refusing to allow Mrs. Freeman to testify that her husband shot her brother would bolster defendant's marriage. Unlike the rule in *Trammel*, the rule announced by the court in *Freeman* adopted no position as to whether the adverse spousal testimony was compellable.

70. Their reasons for testifying, however, differed. Mrs. Freeman was estranged from her husband and was present when he shot her brother. *Freeman*, 302 N.C. at 592, 276 S.E.2d at 451. Mrs. Trammel agreed to testify against her husband in exchange for a grant of immunity in a narcotics prosecution. *Trammel*, 445 U.S. at 42.

71. *Trammel*, 445 U.S. at 53; see *supra* note 71.

72. See 1 H. BRANDIS, *supra* note 2, § 59, at 235 n.48; Blakey, *supra* note 31, at 4; Note, *supra* note 50, at 876.

In the recent case of *State v. Waters*, 308 N.C. 348, 302 S.E.2d 188 (1983), the court again was faced with a spouse willing to testify against her husband. The court reaffirmed the *Freeman* rule and stated that it would not address the issue of whether the spouse could be compelled to testify for the prosecution. *Id.* at 356, 302 S.E.2d at 193-94. Thus, compulsion of adverse spousal testimony remained an open question.

Subsection (b) of the new section 8-57 resolved this question by vesting the privilege in the witness spouse.⁷³ A defendant's spouse remains competent and compellable to testify against the defendant in the same instances as under former section 8-57. Under the new rule, however, the spouse of a defendant is competent, but not compellable, to testify for the State in a criminal trial. A witness now can choose whether to testify against his or her spouse. Like the rule announced in *Trammel*, subsection (b) brings the privilege within the scope of its justification. If the privilege against adverse spousal testimony exists to promote and preserve marital harmony,⁷⁴ it is now available to the person best able to determine whether there is any harmony to preserve. No longer is adverse testimony prohibited to promote marital harmony regardless of whether such harmony exists.

Section 8-57(b) has been criticized for allowing a spouse to choose whether to testify in most actions for crimes of which she was the victim, while making her compellable only in cases of assault, threat, or trespass upon her separate residence.⁷⁵ Making a witness compellable to testify to crimes against the children or failure to support them is sound policy; society's interest in ensuring the safety and support of children outweighs concern for the preservation of marital harmony.⁷⁶

Although it abolishes a defendant's absolute privilege to prevent adverse spousal testimony, revised section 8-57 fortifies the confidential communications privilege.⁷⁷ Subsection (c) provides that "[n]o husband or wife shall be compellable *in any event* to disclose any confidential communication made by one to the other during their marriage."⁷⁸ The "in any event" language makes it clear that the confidential communications privilege applies in all circumstances.⁷⁹ In another change, the confidential communications privilege is

73. By making a defendant's spouse competent but not compellable to testify against him, *House Bill 66* prevents a defendant from barring his spouse's testimony, and gives the decision to testify to the witness spouse. The defendant, however, still has a privilege for confidential communications. See N.C. GEN. STAT. § 8-57 (Supp. 1983).

74. See *Trammel*, 445 U.S. at 52; *Freeman*, 302 N.C. at 595, 276 S.E.2d at 452-53; *supra* notes 60, 67.

75. Blakey, *supra* note 31, at 5. The effect of giving the spouse the option of testifying may make the spouse compellable to testify adversely. When spouses are codefendants, the offer of leniency or immunity in exchange for adverse testimony leaves a spouse with little choice at all. See, e.g., *Trammel*, 445 U.S. at 42; *supra* note 70.

76. *Id.*

77. See N.C. GEN. STAT. § 8-57 (Supp. 1983); 1 H. BRANDIS, *supra* note 2, § 60, at 70 n.67 (Supp. 1983); Blakey, *supra* note 31, at 5. The test for whether something is a confidential communication is "whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *Freeman*, 302 N.C. at 598, 276 S.E.2d at 454. See *supra* notes 52-54.

78. N.C. GEN. STAT. § 8-57 (Supp. 1983).

79. See 1 H. BRANDIS, *supra* note 2, § 60, at 71 n.79 (Supp. 1983) (" 'in any event' was intended to make it clear that this privilege still applies in the situations in which . . . testimony of a spouse is compellable").

If confidential communications are not subject to the compulsion exceptions there is a direct conflict between § 8-57 and the child abuse statute. N.C. GEN. STAT. § 8-57.1 (1981). Under § 8-57.1 the confidential communications privilege cannot be claimed in actions for the neglect or abuse of a child. *Id.* § 8-57.1; 1 H. BRANDIS, *supra* note 2, § 60, at 241 n.79. Since *House Bill 66* does not repeal § 8-57.1, confidential communications still should be subject to the limitation in

now codified after rather than before the exceptions making spouses compella-ble to testify in certain criminal prosecutions. From this change in placement, it can be inferred that the privilege remains in effect even when the testimony of the spouse is compellable; thus, a spouse never can be compelled to reveal confidential communications made during the marriage.

Because section 8-57 gives a defendant's spouse the option to testify in most instances, the statute arguably can be read as vesting the confidential communications privilege in the witness spouse as well.⁸⁰ Under this interpretation the witness spouse could testify about confidential communications if she chose to; only compulsion of confidential communication, not voluntary disclosure, would be prohibited by revised section 8-57. In *Hagedorn v. Hagedorn*,⁸¹ decided under an earlier version of section 8-57, the North Carolina Supreme Court adopted just such a position, giving the witness spouse alone the choice of testifying about confidential communications.⁸² For seventy-five years prior to *Hagedorn*, the court consistently had interpreted the statute as preserving the common-law rule that only the communicating spouse could waive the privilege, and that the hearing spouse could not reveal such communications over the objection of the communicating spouse.⁸³ Subsequent decisions have refused to follow *Hagedorn* and have held that the privilege belongs solely to the communicating spouse; the hearing spouse cannot waive the privilege over his objection.⁸⁴ This interpretation is consistent with the rule in most jurisdictions,⁸⁵ and appears correct in view of the justification of the privilege—to allow "marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation."⁸⁶

The full impact of the changes in section 8-57 will not be known until the courts interpret them. One possible effect is that "confidential communications" will be given a broader meaning to afford the defendant some protection since he can no longer prevent his spouse from testifying against him.⁸⁷

that section. See 1 H. BRANDIS, *supra* note 2, § 59, at 69-70 n.51, § 60, at 71 n.79 (Supp. 1983) (there is no repeal clause but statutes creating exceptions to § 8-57 may be repealed to the extent they are inconsistent); Blakey, *supra* 31, at 5 (even if confidential communications are not subject to the subsection (b) exceptions they are subject to § 8-57.1).

80. Blakey, *supra* note 31, at 5-6.

81. 211 N.C. 175, 189 S.E. 507 (1937).

82. *Id.* at 177, 189 S.E. at 509.

83. 1 H. BRANDIS, *supra* note 2, § 60; Note, *Privileged Communications*, *supra* note 9, at 284-85.

84. *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967). See 1 H. BRANDIS, *supra* note 2, § 60, at 240 n.76 ("For all practical purposes, *Hicks* . . . overruled *Hagedorn*."); Blakey, *supra* note 31, at 6. *But see* Biggs v. Biggs, 253 N.C. 10, 116 S.E.2d 178 (1960) (approves rule of *Hagedorn*) (dictum).

85. 1 H. BRANDIS, *supra* note 2, § 60. See, e.g., ARIZ. STAT. ANN. §§ 12-2231, -2232 (1980); FLA. STAT. ANN. §§ 90:509, :504 (West 1979); N.H. REV. STAT. ANN. § 516: 27 (1974). See also *Freeman*, 302 N.C. at 594 n.1, 276 S.E.2d at 453 n.1 (statutes collected); *Trammel*, 445 U.S. at 40.

86. *Freeman*, 302 N.C. at 594-95, 276 S.E.2d at 453-54.

87. See Blakey, *supra* note 55, at 33 (privilege for confidential communications not broad enough); Blakey, *supra* note 31, at 7 ("It is possible . . . that the abolition of the separate privilege for criminal defendants by *Freeman* and new N.C.G.S. § 8-57 will lead to a broad interpretation of the term 'confidential communication' in marital situations.").

This will depend on how the courts interpret the choice given to a spouse in subsection (b) and the function of the confidential communications privilege in subsection (c). If the courts adopt a position similar to *Hagedorn*⁸⁸ and allow the witness spouse to choose to reveal confidential communications, a broader definition of such communications will have little effect unless the spouse was compelled to testify. On the other hand, if section 8-57 continues to vest the privilege in the communicating spouse, a broader definition of "confidential communications" will go far in limiting a spouse's choice under subsection (b).

Although the biggest change in North Carolina evidence law in 1983 was the adoption of a code of evidence, certain lesser changes may have a major impact on North Carolina law. *House Bill 235* revised the statutory privileges accorded certain professionals and clarified when a judge may override those privileges in the interest of justice. The bill also limited the judge's discretion to compel disclosure of confidential communications in proceedings for divorce or alimony. *House Bill 66* articulated a revised standard for when a person can choose to testify, or be compelled to testify, against his spouse. These statutes eliminate some of the confusion surrounding the prior law. At the same time, however, they create new uncertainties.

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88. See *supra* notes 81-85 and accompanying text.