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CPLR 4502(b): Spousal Privilege Waived by Commencement of Wrongful Death Action

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the amendment was made under subsection (a) or (b). Notions of fairness and expeditiousness, therefore, dictate permitting a party to exercise his sole opportunity to amend as of right upon the receipt of the last responsive pleading. To require leave to amend under CPLR 3025(b) would serve neither the interests of the litigants nor judicial economy.[118]

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ARTICLE 45—EVIDENCE

CPLR 4502(b): Spousal privilege waived by commencement of wrongful death action

CPLR 4502(b) generally prohibits compulsory disclosure of confidential interspousal communications made in reliance upon the marital relationship.[119] It is well settled, however, that the priv-

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[118] *See generally* S. NAGEL, IMPROVING THE LEGAL PROCESS 269-328 (1975). An amendment adding an additional theory of recovery based on the same transactions set forth in the original complaint, without alleging new and essential facts, is likely to be permitted under CPLR 3025(b). CPLR 3025(b), commentary at 479-80 (1974). The related claim, if otherwise stale for statute of limitations purposes, is nevertheless timely by virtue of CPLR 203(e) (1972). A claim that does not arise out of the transactions set forth in the original pleading, therefore, will generally not be deemed interposed at the time of the original pleading. *See, e.g.*, New York Tel. Co. v. County Asphalt, Inc., 86 Misc. 2d 958, 382 N.Y.S.2d 211 (Sup. Ct. Ulster County 1976); Werner Spitz Constr. Co. v. Vanderlinde Elec. Corp., 64 Misc. 2d 157, 314 N.Y.S.2d 567 (Monroe County Ct. 1970).

Although the issue has not arisen under the CPLR, several courts construing the CPA indicated that additional claims set forth in amendments as of right always relate back to the time of the original pleading, even if they arose from unrelated transactions. *See* Guntzer v. County of Westchester, 273 App. Div. 2d 966, 966, 78 N.Y.S.2d 70, 72 (2d Dep't), *aff'd*, 298 N.Y. 755, 83 N.E.2d 157 (1948); Webber v. Socony Mobil Oil Co., 41 Misc. 2d 153, 153, 244 N.Y.S.2d 830, 831 (Sup. Ct. N.Y. County 1963); Rusher Ford Sales, Inc. v. Glens Falls Ins. Co., 32 Misc. 2d 468, 469, 223 N.Y.S.2d 392, 394 (Sup. Ct. Erie County), *aff'd mem.*, 16 App. Div. 2d 1034, 230 N.Y.S.2d 680 (4th Dep't 1962); McNaught v. Rosenfeld, 168 Misc. 888, 889, 6 N.Y.S.2d 687, 688 (N.Y.C. Civ. Ct. N.Y. County 1938); *In re* Miller's Will, 162 Misc. 563, 570-71, 295 N.Y.S. 943, 952 (Sur. Ct. Kings County), *aff'd mem.*, 252 App. Div. 872, 300 N.Y.S. 798 (2d Dep't 1937). Commentators have argued that such a construction may continue to be applicable under the CPLR. H. WACHTELL, *supra* note 97, at 144; 3 WK&M ¶ 3025.09.

[119] CPLR 4502(b) (1963) provides:

> A husband or wife shall not be required, or, without the consent of the other if living, allowed, to disclose a confidential communication made by one to the other during the marriage.

At common law, spouses were considered incompetent to testify for or against each other. *See* RICHARDSON, EVIDENCE § 445 (10th ed. 1973); 8 WIGMORE, EVIDENCE §§ 2227, 2236 (McNaughton rev. ed. 1961). By statute, New York, along with the majority of other jurisdictions, removed the incompetency in most situations. *See* CPLR 4502(a), 4512 (1963). The

ilege can be waived either by the failure to object timely or by consent.[120] Recently, in *Prink v. Rockefeller Center, Inc.*,[121] the Court of Appeals recognized an additional means of waiver when it held that a spouse automatically waives the conjugal privilege by instituting an action for the wrongful death of her spouse.[122]

The plaintiff, as administratrix of the estate of her husband, Robert Prink, instituted a wrongful death action against the owners and architects of a building in which the decedent had occupied an office.[123] The plaintiff claimed that her husband's fatal fall from a thirty-six story window had been caused by negligence in the de-

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statutes of all other jurisdictions are collected at 2 WIGMORE § 488, *supra*.

> The marital privilege . . . was founded upon a wise public policy, adopted and pursued for the purpose of encouraging to the utmost that mutual confidence between husband and wife which is the strongest guarantee of a happy marriage. . . . The law appreciated the fact that even truth itself might be pursued too keenly and might cost too much. The general evil of infusing reserve and dissimulation between parties occupying such relations to each other, would be too great a price to pay for the chance of obtaining the truth in regard to some matter under investigation.

People v. Hayes, 140 N.Y. 484, 495-96, 35 N.E. 951, 954-55 (1894).

Although the conjugal privilege generally is not lost by the termination of the marital relationship, whether by divorce or death of one of the parties, *see* 5 WK&M ¶ 4502.22, not all the "daily and ordinary" conversations between spouses are protected. Only disclosures that would not have been made "but for the absolute confidence in . . . the marital relationship" are covered by the privilege. People v. Melske, 10 N.Y.2d 78, 80, 176 N.E.2d 81, 83, 217 N.Y.S.2d 65, 67 (1961). Moreover, the courts have narrowly construed the meaning of "confidential communications." *See, e.g.*, People v. Ressler, 17 N.Y.2d 174, 179, 216 N.E.2d 582, 584, 269 N.Y.S.2d 414, 416 (1966) (communications made in presence of third parties not privileged); Poppe v. Poppe, 3 N.Y.2d 312, 315, 144 N.E.2d 72, 74, 165 N.Y.S.2d 99, 102 (1957) (communication injuring spouse not privileged); Parkhurst v. Berdell, 110 N.Y. 386, 394, 18 N.E. 123, 127 (1888) (business matters discussed by spouses not privileged); People v. Watkins, 63 App. Div. 2d 1033, 1034, 406 N.Y.S.2d 343, 345 (2d Dep't), *cert. denied*, 439 U.S. 1033 (1978) (communications between spouses jointly advancing criminal conspiracy or aiding commission of ongoing crime not privileged); *The Survey*, 51 ST. JOHN'S L. REV. 786, 810 (1977).

The marital privilege has been the focus of sharp attack. *See, e.g.*, Hines, *Privileged Testimony of Husband and Wife in California*, 19 CAL. L. REV. 390, 410-14 (1931); Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of The Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1375 (1973). Those who view the privilege as unjustified argue that the detrimental effect of the loss of evidence occasioned by the invocation of the privilege is greater than the uncertain benefits provided marital harmony. *See* Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682-86 (1929); Note, *The Husband-Wife Evidentiary Privilege: Is Marriage Really Necessary?*, 1977 ARIZ. ST. L.J. 411, 426-29.

[120] *See, e.g.*, Parkhurst v. Berdell, 110 N.Y. 386, 394, 18 N.E. 123, 127 (1888); Grobin v. Grobin, 184 Misc.2d 996, 999, 55 N.Y.S.2d 32, 35 (Sup. Ct. Bronx County 1945).

[121] 48 N.Y.2d 309, 398 N.E.2d 517, 422 N.Y.S.2d 911 (1979).

[122] *Id.* at 317, 398 N.E.2d at 522, 422 N.Y.S.2d at 916.

[123] *Id.* at 313, 398 N.E.2d at 519, 422 N.Y.S.2d at 913.

sign and maintenance of the building.[124] It was noted on Prink's death certificate that his psychiatrist had reported to the medical examiner that the decedent had been "acutely tense and depressed," thereby raising the possibility that the death resulted from suicide.[125] During an examination before trial, the plaintiff admitted that her husband had been seeing a psychiatrist, but invoked the marital privilege when questioned about any conversations she had had with her husband concerning his reasons for having sought such treatment.[126] Additionally, the plaintiff conceded that she had spoken with her husband's psychiatrist following the accident, but refused to reveal the substance of the conversation, claiming the physician-patient privilege.[127] Upon the defendants' motion, special term ordered the plaintiff to answer the questions concerning her conversations with her husband and his psychiatrist.[128] The Appellate Division, First Department, affirmed, but certified the question to the Court of Appeals.[129]

A divided Court of Appeals affirmed.[130] Writing for the majority, Judge Meyer[131] initially determined that the information withheld by Mrs. Prink was protected by both the physician-patient and the marital privileges unless they had been waived.[132] Noting

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[124] *Id.* at 313, 398 N.E.2d at 519-20, 422 N.Y.S.2d at 913-14.

[125] *Id.*

[126] *Id.* at 313, 398 N.E.2d at 519-20, 422 N.Y.S.2d at 914. *See* CPLR 3101(b) (1970) ("upon objection by a party privileged matter shall not be obtainable"); 3a WK&M ¶ 3101.40.

[127] 48 N.Y.2d 309, 313-14, 398 N.E.2d 517, 520, 422 N.Y.S.2d 911, 914. CPLR 4504 statutorily embodies the physician-patient privilege. CPLR 4504(c) creates sweeping exceptions to the privilege, however, in cases where the mental condition of a deceased is in issue. *See id.* In addition, it has been suggested that the Court's holding in Koump v. Smith, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969), *see* note 138 and accompanying text *infra*, has left the privilege with little, if any, practical use. *See* Barker, *Toward a New York Evidence Code: Some Notes on the Privileges*, 19 N.Y.L.F. 791, 796-97 (1974).

[128] 48 N.Y.2d at 314, 398 N.E.2d at 520, 422 N.Y.S.2d at 914.

[129] *Id.*

[130] *Id.*

[131] In addition to Judge Meyer, the majority consisted of Judges Jasen, Jones and Wachtler. Chief Judge Cooke dissented in part in an opinion joined by Judge Gabrielli and Judge Fuchsberg. Judge Fuchsberg also filed a brief separate opinion.

[132] 48 N.Y.2d at 314, 398 N.E.2d at 520, 422 N.Y.S.2d at 914. Since Mr. Prink's discussion with his wife concerning his psychiatric treatment "would not have been made but for the confidence induced by the marital relationship," *id.*, Judge Meyer concluded that, in the absence of waiver, the marital privilege was applicable. *Id.* The more difficult issue whether the psychiatrist's conversation with his patient's wife was covered by the physician-patient privilege also was answered in the affirmative because the psychiatrist's information had been "acquired in attending a patient in a professional capacity" and was "necessary to enable [the psychiatrist] to act in that capacity." *Id.; see* CPLR 4504(a) (Pam. 1964-1979).

that neither privilege is terminated by death[133] and that the psychiatrist's disclosures to the medical examiner and to Mrs. Prink did not constitute a waiver of the physician-patient privilege,[134] the majority nevertheless held that both privileges had been waived by the commencement of the wrongful death action.[135] The Court observed that the personal representative in a wrongful death action essentially stands in the same posture as the decedent[136] and therefore concluded that since Mr. Prink could not have asserted the privileges had he survived and sued the defendant for his injuries, neither could the plaintiff.[137] Judge Meyer reasoned that the physician-patient privilege had been waived by relying upon the rule that the "bringing [of] a personal injury action in which mental or physical condition is affirmatively put in issue, . . . waives the privilege."[138] Balancing the unfairness of subjecting a defendant to

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[133] 48 N.Y.2d at 314, 398 N.E.2d at 520, 422 N.Y.S.2d at 914 (citing Davis v. Supreme Lodge, Knights of Honor, 165 N.Y. 159, 58 N.E. 891 (1900); Southwick v. Southwick, 49 N.Y. 510, 518, (1872); CPLR 4504(c); RICHARDSON, EVIDENCE § 455 (10th ed. 1973); 8 WIGMORE, EVIDENCE § 2341 (McNaughton rev. ed. 1961)).

[134] 48 N.Y.2d at 314-15, 398 N.E.2d at 520, 422 N.Y.S.2d at 914. The majority observed that since the physician-patient privilege belongs to the patient, the psychiatrist, "by his sole fiat," could not effectuate a waiver without the consent of the holder of the privilege. *Id.* at 314-15, 398 N.E.2d at 520, 422 N.Y.S.2d at 914-15.

[135] *Id.* at 315-18, 398 N.E.2d at 519-23, 422 N.Y.S.2d at 913-17.

[136] *Id.* at 215-16, 398 N.E.2d at 521, 422 N.Y.S.2d at 915. Wrongful death actions may be brought only pursuant to EPTL 5-4.1 (1967):

> [f]or a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.

[137] 48 N.Y.2d at 316, 398 N.E.2d at 521, 422 N.Y.S.2d at 915. The *Prink* Court first examined the decedent's use of the privilege against self-incrimination as a possible aid, *see* CPLR 4501 (1963), but concluded that the privilege does not allow a plaintiff to seek relief and at the same time withhold information relevant to his right to maintain an action. *Id.* at 316, 398 N.E.2d at 521, 422 N.Y.S.2d at 915; *see* Steinbrecher v. Wapnick, 24 N.Y.2d 354, 363, 248 N.E.2d 419, 425, 300 N.Y.S.2d 555, 563 (1969); Laverne v. Incorporated Village of Laurel Hollow, 18 N.Y.2d 635, 638, 219 N.E.2d 294, 295, 272 N.Y.S.2d 780, 782, *appeal dismissed*, 386 U.S. 682 (1966); Levine v. Bornstein, 6 N.Y.2d 892, 893, 160 N.E.2d 921, 921-22, 190 N.Y.S.2d 702, 702 (1959); Cronk v. Cayuga County Patrons' Fire Relief Ass'n, 90 Misc. 2d 945, 948, 396 N.Y.S.2d 587, 589 (Sup. Ct. Oswego County 1977); 3 WK&M ¶ 3104.38-40. "For essentially the same reason," the majority concluded that Mr. Prink could have invoked neither the physician-patient nor the marital privileges. 48 N.Y.2d at 316, 398 N.E.2d at 521, 422 N.Y.S.2d at 915.

[138] 48 N.Y.2d at 316-17, 398 N.E.2d at 522, 422 N.Y.S.2d at 916; *see* Koump v. Smith, 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969). The Court took judicial notice that "many apparently accidental deaths are in fact suicides." 48 N.Y.2d at 316-17, 398 N.E.2d at 522, 422 N.Y.S.2d at 916. The majority determined that an alleged fall from a 36th story window was "sufficiently equivocal" so that a wrongful death action based upon that act necessarily put the decedent's mental condition in issue. *Id.; see* Beeler v. Hildan Crown Container Corp., 26 App. Div. 2d 163, 164-65, 271 N.Y.S.2d 373, 375 (3d Dep't

liability without providing him an opportunity to establish his inculpability[139] against the "real source" of the marital privilege,[140] the *Prink* majority declared that "the better policy" would be to hold that the spousal privilege also had been waived.[141]

Chief Judge Cooke dissented in part,[142] arguing that the majority's "abrogation" of the conjugal privilege "seriously undermines the strong social policy supporting the privilege and marks an unexplained departure from prior precedent."[143] The dissent disputed the majority's emphasis on the unfairness of permitting a party seeking affirmative relief to invoke the privilege, since the legislative intent behind CPLR 4502(b) was that the preservation of the marital relationship should outweigh any inequities that might result from the suppression of relevant evidence.[144] Observing that the statute does not require the privilege to be asserted only defensively,[145] Chief Judge Cooke stated that the majority's decision anomalously precludes plaintiffs from invoking the spousal privilege but leaves defendants free "to defeat a meritorious claim by

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1966).

[139] 48 N.Y.2d at 316-18, 398 N.E.2d at 521-23, 422 N.Y.S.2d at 915-17; *see* Chambers v. Mississippi, 410 U.S. 284 (1973).

[140] 48 N.Y.2d at 318, 398 N.E.2d at 522, 422 N.Y.S.2d at 916-17. Addressing the justifications for the marital privilege, the majority adopted the theory set forth in McCORMICK, EVIDENCE § 86 (Cleary 2d ed. 1972):

> [W]hile the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony, is at best doubtful and marginal.
>
> Probably the policy of encouraging confidences is not the prime influence in creating and maintaining the privilege. It is really a much more natural and less devious matter. It is a matter of emotion and sentiment. All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife. It is important to recognize that this is the real source of the privilege. When we do, we realize at once that this motive of delicacy, while worthy and desirable, will not stand in the balance with the need for disclosure in court of facts upon which a man's life, liberty, or estate may depend.

[141] 48 N.Y.2d at 317, 398 N.E.2d at 522, 422 N.Y.S.2d at 916.

[142] *Id.* at 318-21, 398 N.E.2d at 523-25, 422 N.Y.S.2d at 917-19 (Cooke, C.J., dissenting). Chief Judge Cooke agreed with the affirmance of that part of special term's order requiring the plaintiff to disclose the contents of her discussion with the psychiatrist. *Id.* at 318, 398 N.E.2d at 523, 422 N.Y.S.2d at 917 (Cooke, C.J., dissenting).

[143] *Id.* at 319, 398 N.E.2d at 523, 422 N.Y.S.2d at 917 (Cooke, C.J., dissenting) (citing Warner v. Press Pub. Co., 132 N.Y. 181, 30 N.E. 393 (1892)).

[144] 48 N.Y.2d at 320-21, 398 N.E.2d at 524, 422 N.Y.S.2d at 918 (Cooke, C.J., dissenting).

[145] *Id.* Chief Judge Cooke stated that the majority's decision leaves litigants confronted with a "Hobson's choice" of either "betray[ing] the trust and confidence of one's spouse or forego[ing] one's right to seek redress for a grievous wrong." *Id.*

hiding behind the same privilege."[146]

It appears that the *Prink* holding nullifies the availability of the conjugal privilege to any party in a civil action seeking affirmative relief.[147] Although *Prink* involved an action sounding in tort, it would seem that the scope of the decision could embrace all categories of litigation. For example, a party seeking to recover for breach of contract could be compelled, under *Prink*, to disclose any statement, otherwise protected by the marital privilege, that may have a bearing on the outcome of the controversy. It is suggested, however, that marital harmony should not be disturbed when the information sought can be derived from other sources or where it is neither dispositive of the case nor crucial to a party's defense.[148]

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[146] *Id.* Judge Fuchsberg concurred in Chief Judge Cooke's dissent, but added a separate memorandum to note that continued support of the marital privilege is mandated by the "psychological and sociological human need for someone in whom to confide and the growing recognition of the constitutional right of privacy." *Id.* at 322, 398 N.E.2d at 525, 422 N.Y.S.2d at 919 (Fuchsberg, J., dissenting). *See* Doe v. Bolton, 410 U.S. 179, 211-15 (1973); Roe v. Wade, 410 U.S. 113, 152-56 (1973); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965); Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48; Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1375 (1973). Professor Krattenmaker maintains that privileges are protectors of the right of privacy and that they play a substantial role in effectuating the underlying rights of both privacy and freedom of speech. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L. REV. 613, 651-57 (1976).

[147] 48 N.Y.2d at 320, 398 N.E.2d at 524, 422 N.Y.S.2d at 918. (Cooke, C.J., dissenting); *see id.* at 316-18, 398 N.E.2d at 521-23, 422 N.Y.S.2d at 915-17. Prior to *Prink*, the courts made no distinctions based upon the spouse's position in the litigation. *See* People v. Hayes, 140 N.Y. 484, 496, 35 N.E. 951, 954 (1894); Warner v. Press Pub. Co., 132 N.Y. 181, 183, 30 N.E. 393, 394 (1892). Although the physician-patient privilege is waived by any party who affirmatively places his mental or physical condition in issue, Koump v. Smith, 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969), it is submitted that a similar rule is inappropriate where the conjugal privilege is involved. The marital privilege was derived from the common-law notion that spouses were incompetent witnesses against one another. RICHARDSON, *supra* note 119, § 445. By statute, New York abrogated the incompetency except as to confidential communications. *See id.* § 446. The physician-patient privilege, however, had no basis in the common law. *Id.* § 426. Indeed, New York was the first jurisdiction to enact a statute creating the privilege. *See id.* Furthermore, it is suggested that the justification for the physician-patient privilege—to encourage full disclosure in order to promote effective medical treatment—is not as compelling as that for the spousal privilege—to strengthen and preserve the institution of marriage. *Id.* §§ 428, 447. Thus, it is submitted that, unlike the physician-patient privilege, the historical and policy considerations underlying the conjugal privilege outweigh the need for relevant evidence so that the mere commencement of an action should not require a spouse to reveal communications made in reliance upon the trust inherent in the marital relationship.

[148] *See* 48 N.Y.2d at 321, 398 N.E.2d at 524, 422 N.Y.S.2d at 919 (Cooke, C.J., dissenting). It is submitted that in order to preserve the legislative policy considerations supporting the conjugal privilege, the majority could have adopted Chief Judge Cooke's suggestion to

By redefining the rationale underlying the adoption of the spousal privilege,[149] it is submitted that the *Prink* majority substituted its judgment for that of the legislature and thereby produced an unfortunate precedent.[150] Perhaps legislative action reaffirming the social policies supporting the privilege is necessary. In the absence of such corrective legislation, however, it appears unlikely that the marital privilege will afford a significant amount of protection to future litigants.[151]

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allow the factfinder to draw an adverse inference from the plaintiff's invocation of the privilege. *See id.*

[149] *See id.* at 317-18, 398 N.E.2d at 522, 422 N.Y.S.2d at 916-17. Both legislative and historical support for the privilege, *see Joint Legislative Committee on Matrimonial and Family Laws,* [1962] N.Y. LEG. Doc. No. 34, at 119, 145; RICHARDSON, note 119 *supra,* § 477, as well as prior case law, *see* Poppe v. Poppe, 3 N.Y.2d 312, 315, 144 N.E.2d 72, 73, 165 N.Y.S.2d 99, 101 (1957); People v. Hayes, 140 N.Y. 484, 496, 35 N.E. 951, 954-55 (1894); Warner v. Press Publication Co., 132 N.Y. 181, 183, 30 N.E. 393, 394 (1892), recognized that the conjugal privilege grew out of the desire to protect the marital relationship. *See* note 119 *supra. Prink,* however, indicates that the privilege was based more on an "emotion[al]" or "sentiment[al]" reluctance to "pr[y] into the secrets of [a] husband and wife." 48 N.Y.2d at 317-18, 398 N.E.2d at 522, 422 N.Y.S.2d at 916-17 (quoting MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 86 (Cleary 2d ed. 1972)).

[150] Although the legislature does not possess exclusive substantive lawmaking power within the New York constitutional framework, legislative lawmaking takes precedence over judicial lawmaking. *See* N.Y.CONST. art. III, § 1. *See also* CRAWFORD, CONSTRUCTION OF STATUTES § 158, at 245 (1940); DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 7-12 (1975). Thus, once the legislature has spoken, a court may not substitute its will for that of the legislature. Thompson v. Wallin, 301 N.Y. 476, 488, 95 N.E.2d 806, 811, *aff'd sub nom.* Adler v. Board of Educ., 342 U.S. 485 (1950); *see* Dandridge v. Williams, 397 U.S. 471, 478 (1970); Bryant Park Building, Inc. v. Frutkin, 10 Misc. 2d 198, 202, 167 N.Y.S.2d 184, 189 (N.Y.C. Mun. Ct. 1957). Rather, a court must interpret a statute so as to further the "policies which [the] legislature evidently had in mind." Maida v. State Farm Mut. Auto. Ins. Co., 66 App. Div. 2d 852, 853, 411 N.Y.S.2d 386, 388 (2d Dep't 1978). *See* SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.03 (4th ed. 1972).

There exist specific statutory exceptions to the marital privilege. *See* N.Y. FAMILY CT. ACT § 1046(a)(vii) (McKinney 1975) (privilege not available in proceeding involving child abuse or neglect); N.Y. MENTAL HYG. LAW § 23.01(b) (McKinney 1978) (privilege not available in hearing for involuntary admission of drug dependent person); N.Y. SOC. SERV. LAW § 384-b(3)(h)(McKinney Supp. 1979-1980) (privilege not available in proceeding to terminate parental rights). It is submitted that these statutes represent a legislative determination that only in such situations does public policy mandate a restriction of the spousal privilege.

[151] It is conceivable that the *Prink* holding may survive future judicial scrutiny by being restricted to its facts. For instance, it would seem plausible that the Court later may interpret *Prink* as precluding the invocation of the spousal privilege in wrongful death actions only where either the physical or mental condition of a deceased spouse is in issue.