University of Baltimore Law Forum

Volume 10
Number 2 *Spring 1980*

Article 13

4-1-1980

Supreme Court Decisions: Witness May Testify Against Spouse

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Witness May Testify Against Spouse

by Brad Sures

On February 27, 1980, the Supreme Court ruled unanimously that a witness spouse alone has the privilege to testify adversely. In *Trammel v. United States*, No. 78-5705 (U.S., filed Feb. 27, 1980), the Court agreed that the modern justification for the privilege against adverse spousal testimony is no longer valid, that the privilege against adverse spousal testimony is vested in the witness-spouse alone, and that the witness may be neither compelled to testify nor foreclosed from testifying.

In March of 1976, Otis Trammel was indicted for importing heroin into the United States. The indictment alleged that he and his wife, Elizabeth Ann Trammel flew from the Philippines to California in August 1975, carrying heroin. On November 3, 1975, Elizabeth Trammel, while boarding a plane in Thailand, was searched and four ounces of heroin were found on her person. She was arrested and after being told that she would not be prosecuted for her role in a conspiracy if she would testify against her husband, she agreed to cooperate with the Government. Prior to his trial, Otis Trammel notified the District Court that he wished to assert a privilege to prevent his wife from testifying. The District Court ruled that only confidential communications between husband and wife were held to be privileged and inadmissible. Testimony concerning any act observed during the marriage and any communication made in the presence of a third person would be admissible, however. Primarily on the basis of his wife's testimony, Otis Trammel was convicted. The United States Court of Appeals for the Tenth Circuit affirmed. 583 F.2d 1166.

In *Hawkins v. United States*, 358 U.S. 74 (1958), there was a similar issue of whether there exists a privilege against adverse spousal testimony in the federal courts. There, a unanimous Court held the wife's testimony inadmissible because "the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." *Id.* at 79. Thus, the rule in *Hawkins* was that one spouse cannot testify against the other unless both consent. In so ruling, however, the Court was not foreclosing "whatever changes in the rule may eventually be dictated by 'reason and experience.' " *Id.* at 79. Thus, the door was left ajar for future consideration concerning the privilege against adverse spousal testimony. In *Trammel*, the door was taken right off its hinges.

Writing the opinion for the Court in *Trammel*, Chief Justice Burger gave three basic reasons why the *Hawkins* privilege should be abated. First, when *Hawkins* was decided, 31 states allowed an accused a privilege to prevent adverse spousal testimony. Now, only 24 states allow this privilege. Thus, the trend in state law has been toward divesting the accused of the privilege to bar adverse spousal testimony. (In Maryland, the witness-spouse alone may assert a privilege against adverse spousal testimony. MD. CTS. & JUD. PROC. CODE ANN. §§9-101, 9-106 (1980).)

Second, no other testimonial privilege sweeps so broadly. "The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications." *Trammel v. United States, supra* at 11. The *Hawkins* rule, on the other hand, is not limited to confidential communications. It permits an accused to exclude all adverse spousal testimony.

Third, the ancient foundations for so sweeping a privilege, established when a woman was regarded as chattel and denied a separate legal identity, are well behind us. The contemporary justification for affording an accused such a privilege, *i.e.*, to preserve marital harmony, is also unpersuasive:

> 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.

Id. at 12. Therefore, allowing the privilege would probably do more "to frustrate justice than to foster family peace." *Id.* at 12.

Thus, Chief Justice Burger concluded in *Trammel* that the witness spouse alone has the privilege to refuse to testify adversely. Such testimony is admissible even where the witness spouse testified only after a grant of immunity and assurances of lenient treatment.

While eight of the justices agreed with this rationale, Justice Stewart, in a concurring opinion, stated that the reasons for the privilege had disappeared well before *Hawkins* was decided in 1958. Therefore, to argue that the privilege's disappearance occured "in the few years that have elapsed between the *Hawkins* decision and this one" was incorrect. *Id.* at 2 (concurring opinion).

Chief Justice Burger argued that the privilege against adverse spousal testimony set forth in *Hawkins* had become outdated and may be changed if dictated by reason and experience. The only change since *Hawkins* cited by the Chief Justice, however, is that seven of the thirty-one states that had allowed an accused a privilege to prevent adverse spousal testimony in 1958, now no longer afford the accused such privilege. All of Burger's other reasons were also valid in 1958 when *Hawkins*, in a unanimous decision held the privilege to be valid.

This case was brought by the United States in a federal court. Surely, the actions of seven states in promulgating

laws entitling the witness-spouse alone to assert the privilege, or abolishing the privilege in criminal cases altogether over a period of 22 years, is not sufficient reason and experience to dictate a reversal of the unanimous Court's holding in *Hawkins*. Since Burger was unwilling to state that *Trammel* overturns *Hawkins* outright, his rationale will be deemed weak and poorly reasoned, even if the effect of his opinion is accepted without further challenge.

Real Estate Brokers May Be Guilty of Sherman Act Violations

by Edwin Bayo

In an opinion announced January 8, 1980, *McLain v. Real Estate Board of New Orleans,* 100 S. Ct. 502, the Supreme Court held that the Sherman Antitrust Act extends to an agreement among real estate brokers in a given market area to conform to a fixed rate of commissions on sales of residential property. A broker's commission is usually stated as a percentage of the sales price. The average rate on sales of residential property is between five and seven percent.

Petitioner's main claim in District Court was that respondent brokers had engaged in a price-fixing conspiracy in violation of Section One of the Sherman Act by means of an agreement to adopt a uniform rate of commissions on sales of residential property. To establish the requisite interstate commerce component necessary for jurisdiction under the act, petitioners claimed that the brokerage activities of respondents "were within the flow of interstate commerce and have an effect upon that commerce." *McLain, supra* at 506. In support of this, it was alleged that respondents assisted persons moving in and out of the state in buying or selling houses, and that they also assisted clients in securing financing and title insurance from sources out of state.

Both parties and the District Court agreed that *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), is the controlling precedent. In *Goldfarb,* the Supreme Court held that Section One of the Sherman Act had been violated by conformance with a bar association's minimum fee schedule which provided for a title search fee of one percent of the value of the property. Although the title search was a purely local activity, it was a prerequisite to obtaining financing and title insurance. Since a significant amount of funds for financing the purchase of homes came from out of state, the Court stated: "Given the substantial volume of commerce involved and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected." *Goldfarb,* supra at 785.

In applying the rationale of *Goldfarb* to the present case, the District Court held that petitioners could establish federal jurisdiction only by showing that a 'substantial' volume of interstate commerce was involved in the overall real estate transaction and that the broker's services were an essential, integral part of the transaction, inseparable from the interstate aspect. Since a real estate broker is not indispensible or necessary in order to buy or sell a house, the District Court dismissed the complaint. The Court of Appeals affirmed, holding that the Sherman Act jurisdiction did not exist because petitioners had failed to demonstrate that real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and title insurance.

The Supreme Court held that the complaint should not have been dismissed at this stage of the proceedings. "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." *McLain, supra* at 509. The Supreme Court disagreed with the restrictive interpretation of *Goldfarb* given by the District Court and the Court of Appeals. The Court stated "[t]he *Goldfarb* holding was not addressed to the 'effect on commerce' test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce." *McLain, supra at 510.*

McLain is the latest case in a long line of cases upholding the broad authority of Congress to regulate activities that, while local in nature, have an effect on interstate commerce. Whether this holding will mean monetary savings to those who employ the services of a real estate broker in selling or buying a house remains to be seen.