

1952

Marital Envidentiary Privileges in Minnesota

Minn. L. Rev. Editorial Board

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Recommended Citation

Editorial Board, Minn. L. Rev., "Marital Envidentiary Privileges in Minnesota" (1952). *Minnesota Law Review*. 2695.
<https://scholarship.law.umn.edu/mlr/2695>

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MARITAL EVIDENTIARY PRIVILEGES IN MINNESOTA

Courts have long recognized the rights of husband and wife to limit evidentiary disclosures in court by their spouses. The incompetency of one spouse at common law to testify for or against the other spouse in an action in which the other spouse was a party¹ was probably an outgrowth of the common law rule preventing interested persons from testifying² and of the concept of the identity of husband and wife.³ This incompetency extended even to criminal prosecutions.⁴ The common law tribunals also restrained disclosure of communications between the spouses.⁵ Waiver of these disqualifications was not permitted;⁶ however, exceptions based upon "necessity" were recognized, particularly in cases of crimes of personal violence against the wife.⁷

Although some of the common law bases have been abandoned the privilege exists today, the policy supporting it being the public interest in preserving domestic tranquility. To obtain full disclosure of facts for purposes of effective adjudication, the privilege as it stood at common law has been restricted by statutes. Because the statutes of other states vary, inquiry here will be limited to the Minnesota decisions. Since the Minnesota statute has not been substantially changed from the date of its adoption, the rules and reasons of the earlier decisions remain unimpaired except as modified by changed judicial attitudes.

Several variances from the common law may be found in Minnesota. The disqualification of interested parties, including that of married persons, no longer exists, having been removed by a gen-

1. See *State v. Frey*, 76 Minn. 526, 528, 79 N.W. 518 (1899); *Chamberlayne*, *Evidence* § 1155 (1919); 5 Jones, *Evidence* § 2129 (2d ed. 1926); 3 Vernier, *American Family Laws* § 226 (1935); *Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929).

2. See *National German-American Bank v. Lawrence*, 77 Minn. 282, 284, 79 N. W. 1016 (1899); Note, 3 Vand. L. Rev. 298 (1950); 36 Iowa L. Rev. 154 (1950). Wigmore states that the bases of the privilege are uncertain, 8 Wigmore, *Evidence* § 2227 (3d ed. 1940); 2 *id.* § 601.

3. See *National German-American Bank v. Lawrence*, 77 Minn. 282, 284, 79 N. W. 1016 (1899); 5 Jones, *Evidence* § 2129; Note, 3 Vand. L. Rev. 298 (1950); 18 Minn. L. Rev. 893 (1934); 36 Iowa L. Rev. 154 (1950).

4. *Chamberlayne*, *Evidence* § 1155; 5 Jones, *Evidence* § 2132; 18 Minn. L. Rev. 893 (1934); 48 Mich. L. Rev. 546 (1950).

5. See *Leppa v. Minnesota Tribune Co.*, 35 Minn. 310, 311, 29 N. W. 127, 128 (1886); 3 Vernier, *American Family Laws* 586; Note, 32 Minn. L. Rev. 262, 264 (1948).

6. See *Stein v. Bowman*, 13 Pet. 209, 222 (U.S. 1839); see 11 Minn. L. Rev. 575 (1927).

7. 8 Wigmore, *Evidence* § 2239 (discusses varying types of crimes against spouse); 48 Mich. L. Rev. 546 (1950).

eral competency statute;⁸ furthermore, the legal identity of husband and wife has been severed.⁹ Despite the jettisoning of these concepts, their influence has not been completely eradicated, as the court has several times stated that the Minnesota statute creating the marital privileges and exceptions to them is a codification of the common law.¹⁰

The abrogation of the common law testimonial disqualification of spouses in Minnesota results in a general competency of husband and wife and subjects them to the ordinary obligation of witnesses to disclose all facts within their knowledge.¹¹ However, the public interest in obtaining all relevant evidence is limited by the statutory privilege, which consists of a right of one spouse to prevent the other from testifying for or against the former without the former's consent and a general privilege to have confidential communications excluded.¹²

I. THE PRIVILEGE AGAINST ADVERSE TESTIMONY

Several reasons advanced for the rule preventing one spouse from testifying against the other without the other's consent are: the fear of marital discord if such testimony is required;¹³ the danger that secretive behavior between the spouses might result from requiring disclosure;¹⁴ and the notion that incrimination by one spouse of his consort is analogous to self-incrimination.¹⁵ Wigmore notes that the reasons presently advanced are the protection of marital peace and the avoidance of one spouse's being an instrument of the condemnation of the other.¹⁶ The Minnesota court has adopted the reasoning that marital harmony must be protected to avoid family strife which would weaken the social structure of the community.¹⁷

8. Minn. Stat. § 595.02 (1949).

9. Minn. Stat. § 519.01 (1949); Note, 32 Minn. L. Rev. 262, 264 (1948).

10. See *State v. Feste*, 205 Minn. 73, 74, 285 N. W. 85, 86 (1939); *Gjesdahl v. Harmon*, 175 Minn. 414, 420, 221 N. W. 639, 641 (1928); *State v. Frey*, 76 Minn. 526, 528, 79 N. W. 518, 519 (1899); *State v. Armstrong*, 4 Minn. 335 (251), 342 (259) (1860).

11. See *Cafritz v. Koslow*, 167 F. 2d 749, 751 (D.C. Cir. 1948); 8 Wigmore, *Evidence* § 2192. For a comparison of the English rules of competency and compellability see Phipson, *Evidence* 443 (8th ed., Burrows, 1942).

12. Minn. Stat. § 595.02 (1949).

13. Note, 3 Vand. L. Rev. 298 (1950); 18 Minn. L. Rev. 893 (1934).

14. Note, 3 Vand. L. Rev. 298, 299 (1950).

15. *Ibid.*

16. 8 Wigmore, *Evidence* § 228. Note the difference between the present reasons advanced for the privilege and earlier bases. See Hutchins and Slesinger, *supra* note 1, at 675.

17. See *State v. Feste*, 205 Minn. 73, 74, 285 N. W. 85, 86 (1939).

The statutory provision excludes testimony against one spouse by the other unless there is consent by the first.¹⁸ Written statements of a spouse, as well as oral testimony, may be excluded under this privilege.¹⁹ A possible exception to the privilege arises where the spouses are co-parties to the action, for an admission against interest by one spouse will be admitted over the objection of the other.²⁰ Testimony by the wife of a defendant to a criminal prosecution is inadmissible even though they are separated and a divorce is then pending.²¹ If family harmony is the primary basis for the privilege, then such a result is questionable, depending on the weight to be accorded the possibility of reconciliation. Where the spouses are legally divorced, the idea of protecting family harmony is anomalous, and courts have allowed adverse testimony.²²

If in a multi-party suit one spouse testifies neither for the other spouse nor for a party opposing him but rather for a co-party of the spouse, a problem arises whether such testimony, which may be favorable or at least not unfavorable, can be excluded. The objection of the party spouse might be motivated by fear of possible adverse testimony on cross-examination or of the detrimental effect of the spouse's demeanor. The language of the statute, referring to testimony "for or against,"²³ would appear to dictate a very broad privilege, which might require exclusion of such testimony.

II. PRIVILEGED COMMUNICATIONS

The policy grounds supporting the well-recognized privileged communications doctrine include the preservation of the marital relationship through the avoidance of family dissension,²⁴ the encouragement of confidence between spouses²⁵ and the avoidance of perjury.²⁶ To be balanced against these is the argument that the extent of actual reliance upon these rules is uncertain and may not be extensive.²⁷ Its critics notwithstanding, the privilege is

18. Minn. Stat. § 595.02 (1949).

19. Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976 (1904).

20. Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25 (1912).

21. See State v. Kampert, 139 Minn. 132, 139, 165 N. W. 972, 975 (1918).

22. See note 48 *infra*.

23. Minn. Stat. § 595.02 (1949).

24. Note, 32 Minn. L. Rev. 262, 264 (1950).

25. 3 Vernier, American Family Laws § 226 (author recognizes this as one reason that is given but criticizes its validity); 8 Wigmore, Evidence § 2332; 34 Minn. L. Rev. 257 (1950).

26. Note, 32 Minn. L. Rev. 262, 264 (1948).

27. 3 Vernier, American Family Laws 589; Hutchins and Slesinger, *supra* note 1, at 682. The latter also observe that marital harmony among attorneys does not appear to be noticeably higher by virtue of their knowledge of the privilege. *Ibid*.

generally upheld throughout the United States.²⁸ The Minnesota statute expressly provides that the privilege extend to "any communication made by one to the other during the marriage."²⁹ The privilege is usually considered to include not only oral declarations between spouses but writings as well.³⁰

The intent that the disclosure remain confidential is often considered an element of the privilege.³¹ Such intent might be indicated by the manner of disclosure or by the subject matter. Wigmore agrees that the element of confidentiality should be required, and he suggests a presumption of confidentiality attaching to communications between husband and wife, subject to a contrary showing.³² The Minnesota court has taken the position that all communications are privileged whether confidential by nature or not.³³ The court reasoned that to decide whether a communication was confidential would result in the harm which the statute was intended to prevent.³⁴ However, the court suggested the possibility that the wife's being an agent for her husband in the conduct of business might give rise to an exception to the privilege.³⁵ The policy of including within the privilege nearly every communication may be questionable, but, admittedly, drawing the line is difficult. In a later decision, the court again indicated by dictum the possibility that certain communications might be outside the scope of the privilege if their nature indicated an intent to have them publicized.³⁶ Making a disclosure in the presence of third persons would seem to indicate such intent.³⁷

Though it is possible to consider acts by one spouse in the presence of the other as confidential communications,³⁸ there is a conflict of state authority as to whether such acts constitute communications within the privilege.³⁹ The Wigmorean view is that

28. 3 Vernier, *American Family Laws* 587; Note, 3 Vand. L. Rev. 298, 299 (1950).

29. Minn. Stat. § 595.02 (1949).

30. Chamberlayne, *Evidence* § 1166, 5 Jones, *Evidence* § 2146.

31. 8 Wigmore, *Evidence* § 2336; see 34 Minn. L. Rev. 257 (1950).

32. 8 Wigmore, *Evidence* § 2336.

33. *Leppa v. Minnesota Tribune Co.*, 35 Minn. 310, 29 N. W. 127 (1886).

34. *Id.* at 311, 29 N. W. at 128.

35. *Id.* at 312, 29 N. W. at 128.

36. See *Newstrom v. St. Paul & Duluth R. R.*, 61 Minn. 78, 83, 63 N. W. 253, 254 (1895).

37. See Chamberlayne, *Evidence* § 1166; 5 Jones, *Evidence* § 2145; 8 Wigmore, *Evidence* § 2336.

38. 5 Jones, *Evidence* § 2144.

39. 3 Vernier, *American Family Laws* 587; 34 Minn. L. Rev. 257 (1950); 36 Iowa L. Rev. 154 (1950); 35 Va. L. Rev. 1111 (1949); 26 Wash. L. Rev. 62 (1951).

acts as such are generally not within the scope of privilege communications except in special cases where the act is done for the purpose of making a disclosure to the other.⁴⁰ The Minnesota court has not yet decided the point,⁴¹ but if the court construes acts to be communications, the fact that it does not require confidentiality for the privilege to apply might lead to an extreme broadening of the privilege, causing it to extensively overlap the privilege to exclude adverse testimony.

III. DISTINCTIONS BETWEEN THE MARITAL PRIVILEGES

There are significant distinctions between the privilege to prevent adverse testimony by the spouse and the privilege accorded confidential communications. The doctrine of privileged communications may be invoked by a spouse whether a party to the action or not,⁴² while the privilege to prevent adverse testimony by the spouse applies primarily where the spouse is a party.⁴³ Furthermore, the privilege against adverse testimony applies to knowledge however acquired, not only to communications.⁴⁴

The doctrine of privileged communications does not extend to communications made prior to the marriage⁴⁵ nor to those subsequent to the termination of the marriage.⁴⁶ The privilege continues even after death or divorce has terminated the marriage,⁴⁷ while that of preventing adverse testimony is co-extensive with the duration of the marriage.⁴⁸ Minnesota has conformed to this view, sustaining, after the death of one spouse, the exclusion of privileged statements made by that spouse,⁴⁹ and quite naturally has reached the same result where there were both death and divorce.⁵⁰

IV. EXCEPTIONS TO THE PRIVILEGES

Certain exceptions to the marital evidentiary rights have long

40. 8 Wigmore, Evidence § 2337.

41. But see *Tousley v. First Nat. Bank of Pine City*, 155 Minn. 162, 193 N. W. 38 (1923), where the court allowed testimony as to acts but apparently did not consider whether acts could constitute communications.

42. 8 Wigmore, Evidence § 2334.

43. 8 *id.* § 2234.

44. 8 *id.* § 2334.

45. 8 *id.* § 2335; Minn. Stat. § 595.02 (1949).

46. *Chamberlayne*, Evidence § 1166; Minn. Stat. § 595.02 (1949).

47. *Chamberlayne*, Evidence § 1166; 5 Jones, Evidence § 2143; 35 Va. L. Rev. 1111 (1949).

48. 8 Wigmore, Evidence § 2237.

49. *Beckett v. Northwestern Masonic Aid Ass'n*, 67 Minn. 298, 69 N. W. 923 (1897); *see Gjesdahl v. Harmon*, 175 Minn. 414, 420, 221 N. W. 639, 641 (1928); *Bunker v. United Order of Foresters*, 97 Minn. 361, 363, 107 N. W. 392, 393 (1906).

50. *In re Estate of Osbon*, 205 Minn. 419, 286 N. W. 306 (1939).

been recognized, the common law basis of these exceptions being the "necessity" of allowing spousal testimony in certain limited cases.⁵¹ The Minnesota statute⁵² excludes from the operation of the marital privileges the following classes of cases:

- (1) "... a civil action or proceeding by one against the other . . .";
- (2) "... a criminal action or proceeding for a crime committed by one against the other . . ."; and
- (3) "... an action or proceeding for abandonment and neglect of the wife or children by the husband. . . ."

Weighing against the policy behind the marital privileges are arguments for allowing spouses to testify against each other in cases of personal injuries or crimes committed by one spouse upon the other. It is urged that the wife should not be left entirely at the mercy of the husband,⁵³ because, as Chamberlayne argues,⁵⁴ frequently personal violence by one spouse to the other would be done under such circumstances as to make testimony by a third person virtually impossible. Marital harmony as a basis for sustaining the privileges is normally lacking in such cases, or, as our court has described it, there is a general lack of cordial relations.⁵⁵

The problem also arises whether so-called moral injuries against the wife may be considered within the meaning of the exception to the privileges. In the early case of *State v. Armstrong* the court stated by way of dictum that the wife of a defendant could not testify against her husband in a prosecution for adultery.⁵⁶ The conclusion that adultery was not within the exception encompassing crimes against the wife was based upon the reasons that the crime was capable of being proved without her testimony and that this was not a crime against her person, there being no violence to or abuse of her.⁵⁷ The language of the *Armstrong* case was later followed in *State v. Lasher*,⁵⁸ which held that in an adultery prose-

51. 3 Vernier, *American Family Laws* 587; 8 Wigmore, *Evidence* § 2239; 30 B. U. L. Rev. 135 (1950).

52. Minn. Stat. § 595.02 (1949).

53. 8 Wigmore, *Evidence* § 2239; 48 Mich. L. Rev. 546 n. 2 (1950). The Minnesota court referred to the necessity for the exception to the privilege in *State v. Armstrong*, 4 Minn. 335 (251), 342 (258) (1860).

54. Chamberlayne, *Evidence* § 1155.

55. See *State v. Feste*, 205 Minn. 73, 76, 285 N. W. 85, 87 (1939).

56. See *State v. Armstrong*, 4 Minn. 335 (251), 342 (259) (1860).

57. *Ibid.* In a prosecution of a third party for adulterous relations with the witness' spouse, the court allowed the witness to testify. *State v. Volland*, 57 Minn. 225, 58 N. W. 878 (1894).

58. 131 Minn. 97, 154 N. W. 735 (1915); see *State v. Marshall*, 140 Minn. 363, 365, 168 N. W. 174, 175 (1918).

cution of both wrongdoers the wife of one of the defendants should be excluded as a witness.

Several writers argue with considerable force that moral injuries to the spouse should be included within the exception because not really distinguishable from physical injuries and inclusion would not detract from marital harmony.⁵⁹ Such reasoning has much merit, in spite of practical difficulties in ascertaining the various classes of cases to be embraced by the enlarged category of exceptions. However, the possibility of condonation and the continuance of marital harmony suggests instances in which the injured spouse might desire not to testify. Perhaps it might be desirable to grant only to the witness spouse the privilege to refrain from testifying. In any event, the Minnesota court up to the present has not evidenced any tendency to expand on its own initiative the scope of the exception.⁶⁰

An additional problem is whether privileged communications may be disclosed in a civil suit between spouses. Wigmore contends that to preclude the disclosure of privileged communications essential to the case would reach harsh results.⁶¹ A literal interpretation of our statute would, in such suits, exclude from the privilege not only adverse spousal testimony but also privileged communications. However, in spite of the existence of the suit between spouses, still remaining is the policy of freely inducing marital disclosures without fear of later revelation.⁶²

Special circumstances are present in suits for alienation of affections. Although these are not actually suits against the mate, certain of his interests, such as reputation, might be affected. However, the spouse bringing the suit may give testimony reflecting upon the non-party spouse.⁶³ In such a suit the privilege against adverse marital testimony prevents the non-party spouse from testifying against the party spouse,⁶⁴ and the latter may not disclose privileged communications of the former to him.⁶⁵

59. 8 Wigmore, Evidence § 2239(3) ; 48 Mich. L. Rev. 546 (1950).

60. See *State v. Marshall*, 140 Minn. 363, 365, 168 N. W. 174, 175 (1918).

61. 8 Wigmore, Evidence § 2338.

62. See note 25 *supra*.

63. *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784 (1897).

64. *Huot v. Wise*, 27 Minn. 68, 6 N. W. 425 (1880).

65. *Gjesdahl v. Harmon*, 175 Minn. 414, 221 N. W. 639 (1928). Use of the masculine gender throughout this Note is generally intended to include also the feminine. Cf. Minn. Stat. § 645.08(2) (1949).

V. WHO MAY ASSERT THE PRIVILEGES

A. *Who Is a Spouse*

Only legally married individuals are included within the scope of the privileges and ordinarily the testimony of mistresses and of second wives of bigamists are not within the area of protection.⁶⁶ For purposes of invoking the privilege against adverse testimony, it is sufficient that the woman is the wife of the party at the time of the action, and testimony as to events prior to the marriage, even including crimes against each other, will be excluded.⁶⁷ In the case of privileged communications the court looks to whether the woman was the wife of the communicator at the time the communication was made. Communications arising before or after the marriage relation are not privileged as communications between spouses.⁶⁸

B. *Privilege Against Adverse Testimony*

The statutory grant of the privilege against adverse marital testimony is contained in the words: "A husband cannot be examined for or against or his wife without her consent, nor a wife for or against her husband without his consent . . ."⁶⁹ A question naturally arises whether the privilege belongs to the marital party, to the marital witness or to both, a problem expressly covered by statute in some other states.⁷⁰ The issue arises when one spouse is a party and the adversary calls the other spouse as a witness, the party spouse consenting and the witness spouse objecting, though this would seem to be an unusual case.

Among the applicable policy reasons suggested by Wigmore is the desire to prevent the ill will of the party spouse toward the witness spouse,⁷¹ though this reason does not have much practical persuasive force in the situation where the party spouse has already consented. On the other hand, Wigmore advances as a more cogent ground the recognition of a witness' refusal to become an unwilling instrument of condemnation of her spouse. He indicates that the few American courts that have passed upon this question have tended to grant the privilege to the witness. Nevertheless, the precise wording of the statute would leave a Minnesota court faced

66. See Chamberlayne, *Evidence* § 1155; 8 Wigmore, *Evidence* §§ 2230 (mistresses), 2231 (bigamous spouses).

67. *State v. Feste*, 205 Minn. 73, 285 N. W. 85 (1939); *State v. Frey*, 76 Minn. 526, 79 N. W. 518 (1899).

68. See notes 45 and 46 *supra*.

69. Minn. Stat. § 595.02 (1949).

70. 3 Vernier, *American Family Laws* 584-585; Note, 3 Vand. L. Rev. 298, 299 n. 13 (1950).

71. 8 Wigmore, *Evidence* § 2241.

with such a case relatively little choice but to deny the privilege to the witness spouse where the party spouse has previously consented to the testimony. The desirability of this result is questionable, for in some cases it may force one spouse to choose between incriminating the other or committing perjury, where the other consents for the purpose of obtaining his spouse's false testimony.⁷²

Of course, when a witness spouse seeks to assert the privilege and the other spouse is neither a party nor otherwise interested, the court will deny the privilege.⁷³ Likewise, the non-interested non-party spouse may not prevent the witness spouse from testifying.⁷⁴

C. *Privileged Communications*

The question whether the privilege to exclude communications belongs exclusively to the communicator is answered affirmatively by Wigmore, with the exception that the communicatee may assert the privilege in the extraordinary situation where his silence might be understood as an assent and an "adoption of the statement" of the communicator and therefore a communication itself.⁷⁵ One Minnesota case, in upholding an exercise of the privilege, used language which might indicate that either communicator or communicatee might object to the revelation of privileged communications.⁷⁶ Further, the spouse's privilege would be recognized whether or not he was a party to the action, and even in the absence of affirmative objection by him.⁷⁷ The wording of the statute is: ". . . nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. . . ."⁷⁸ A comparison of the wording of this section with that of the subsequent sections dealing with attorney-client, doctor-patient and clergyman-penitent privileges discloses that the latter sections explicitly place the exercise of the privilege in one specified person. It is possible therefore to conclude that the privilege against disclosure of privileged communications extends to either the communicator or the communi-

72. Wigmore contends that the rarity of a husband who would thus expect his wife to perjure herself does not justify a "rule of universal deprivation." 2 *id.* § 601.

73. *Evans v. Staalle*, 88 Minn. 253, 92 N. W. 951 (1903).

74. *See Leonard v. Green*, 30 Minn. 496, 501, 16 N. W. 399, 400 (1883).

75. 8 Wigmore, *Evidence* § 2340.

76. *See Gjesdahl v. Harmon*, 175 Minn. 414, 420, 221 N. W. 639, 641 (1928) (the communicator's privilege was the one in fact recognized); see also *Leppla v. Minnesota Tribune Co.*, 35 Minn. 310, 311, 29 N. W. 127, 128 (1886); *Leonard v. Green*, 30 Minn. 496, 501, 16 N. W. 399, 400 (1883).

77. *Gjesdahl v. Harmon*, *supra* note 76, at 420, 221 N. W. at 641.

78. Minn. Stat. § 595.02 (1949).

catee. However, the use of "either" might be construed to mean merely that the privilege may be asserted by either husband or wife.

D. *Claim of Privilege by Third Persons*

Generally the privileges to withhold testimony are personal to the witness and are not primarily designed for the benefit of litigants.⁷⁹ Where neither husband nor wife are interested parties to the action both may generally testify, in spite of sharp clashes or conflicts of testimony.⁸⁰ According to one case, privileged communications may not be disclosed even in suits to which the spouse possessing the privilege is not a party,⁸¹ though perhaps the objection may not be made by the third party.⁸² Despite uncertainty in some phases of the problem it seems clear that when one spouse is called upon to testify against the interest of the other spouse who is not a party, both husband and wife may waive the privilege irrespective of the wishes of the third party.⁸³ There is not much case authority to indicate the result when a spouse asserts a marital privilege in an action between third parties, though it appears that there is a probable protection of such a spouse to the extent of privileged communications.⁸⁴

VI. EXERCISE OF THE PRIVILEGES

A. *Which Rulings on the Privileges May be Appealed*

There is little helpful Minnesota authority on the problem of which rulings on the privileges may be appealed. Wigmore states the general rule that there may be an appeal from a wrongful sustaining of the privilege, as that keeps out evidence which was entitled to be admitted and is detrimental to the objector.⁸⁵ He expresses the further view that a wrongful denial of the privilege should not be grounds for appeal, for it has the effect of increasing the amount of relevant evidence and does not render the verdict untrustworthy. He admits that the majority of the courts adjudicating this question have adopted the contrary view, relying on what he terms a "sporting theory," that litigation must be won or lost according to the rules of the game. However, if wrongful denial of the privilege could not be asserted as grounds for appeal, a trial court could always be "safe" by denying the privilege.

79. 8 Wigmore, Evidence § 2196.

80. 5 Jones, Evidence § 2135; Hutchins and Slesinger, *supra* note 1, at 675. Jones qualifies this proposition by saying that this rule does not apply if the evidence directly charges the witness spouse with an indictable offense.

81. Gjesdahl v. Harmon, 175 Minn. 414, 221 N. W. 639 (1928).

82. Sommerfeld v. Griffith, 173 Minn. 51, 216 N. W. 311 (1927).

83. 8 Wigmore, Evidence § 2241.

84. See Gjesdahl v. Harmon, 175 Minn. 414, 420, 221 N. W. 639, 641 (1928).

85. 8 Wigmore, Evidence § 2196.

B. *Waiver*

At common law it was not possible to waive the incompetency to testify for or against the spouse, because the doctrine of waiver is applicable only to privileges.⁸⁶ The statute expressly requires the consent of one spouse to testimony for or against him, and it further requires consent to the disclosure of confidential communications.⁸⁷ In effect, this consent operates as a waiver of the privileges. Waiver may also be accomplished by an extra-judicial disclosure or by an act which places the spouse in such a position that he cannot validly object to further testimony upon that point.⁸⁸ A common form taken by the waiver of the privilege at trial is the failure properly to object to adverse testimony at the time the spouse is called to the stand⁸⁹ or when disclosure of a privileged communication is requested. Presumably husband and wife marital privilege waivers will be restricted to cases in which the person waives his rights with some degree of knowledge of the applicability of the privileges.⁹⁰

Wigmore states that when the spouse of a party is called to the stand to testify for that party there is a waiver of privileges, because it would be unfair to let one side use the spouse and then preclude cross-examination of that testimony.⁹¹ The Minnesota court has adopted this rule,⁹² and the court indicated that such cross-examination might include any material relevant to the issue of the case regardless of the scope of the direct examination.⁹³ This conclusion was premised on the theory that it would not be fair to use the spouse only as to favorable matters and then to withdraw the consent as to unfavorable information. The court expressly limited the scope of the waiver as not including privileged communications which are not the subject of direct examination.⁹⁴

C. *Effect of Statutory Cross-examination*

Statutory cross-examination of one's adversary is a well-established

86. See *Stein v. Bowman*, 13 Pet. 209, 222 (U.S. 1839); see 5 Jones, *Evidence* § 2137; 11 Minn. L. Rev. 575 (1927).

87. Minn. Stat. § 595.02 (1949).

88. 8 Wigmore, *Evidence* § 2340.

89. 8 *id.* § 2242.

90. *Cf. Ross v. Great Northern Ry.*, 101 Minn. 122, 126, 111 N. W. 951, 953 (1907).

91. 8 Wigmore, *Evidence* § 2242.

92. *State v. Stearns*, 184 Minn. 452, 238 N. W. 895 (1931); *National German-American Bank v. Lawrence*, 77 Minn. 282, 287, 80 N. W. 363 (1899).

93. See *id.* at 290, 80 N. W. at 364.

94. *Ibid.*

lished procedure in Minnesota.⁹⁵ Even though both spouses are defendants in an action, however, the statute allowing the cross-examination of an adversary does not allow the questioning to include matters in violation of the right against adverse testimony of the other spouse.⁹⁶ The Minnesota court has rejected the argument that the husband and wife statutory marital privileges were affected by the statute allowing cross-examination of the adversary.⁹⁷

D. *Comment on Failure to Call Spouse*

When the defendant in a criminal prosecution refuses to allow his wife to testify, he is not required to state the grounds for his refusal.⁹⁸ However, even though the defendant notifies the prosecuting attorney that he intends to assert the privilege, it is not improper for the prosecutor to request the testimony at trial.⁹⁹ Prejudice to the defendant may be avoided by the lower court's instructing the jury that the objection to the testimony of the spouse should not be considered against the defendant.¹⁰⁰ In one case, a defendant's failure to call his wife as a witness was commented upon in the prosecutor's closing argument, and the court expressed its disapproval of such tactics, though under the defendant's theory of defense it did not consider the comment reversible error.¹⁰¹

VII. THE FUTURE OF THE PRIVILEGES

Critics of the privilege to exclude testimony for or against the spouse have assigned numerous reasons for its abrogation. They point to other infringements upon domestic tranquility not prevented by the privilege, resulting from contradictory testimony by spouses in actions between third persons¹⁰² or from the testimony of children or brothers and sisters.¹⁰³ Furthermore, economic and social changes have somewhat lessened the physical unity of the home,¹⁰⁴ and the changed concept of the family is said to render the privilege an anachronism.¹⁰⁵ The current high divorce rate is ad-

95. Minn. R. Civ. P. 43.02 (1952), formerly covered by Minn. Stat. § 595.03 (1949).

96. See *Lloyd v. Simons*, 90 Minn. 237, 244, 95 N. W. 903, 906 (1903).

97. *Ingersoll v. Odendahl*, 135 Minn. 428, 162 N. W. 525 (1917); see *Wolford v. Farnham*, 44 Minn. 159, 165, 46 N. W. 295, 297 (1890).

98. See *State v. Kampert*, 139 Minn. 132, 139, 165 N. W. 972, 975 (1918).

99. *State v. Roby*, 128 Minn. 187, 150 N. W. 793 (1915).

100. See *id.* at 192, 150 N. W. at 795.

101. *State v. Kampert*, 139 Minn. 132, 165 N. W. 972 (1918).

102. *Hutchins and Slesinger*, *supra* note 1, at 675.

103. *Id.* at 677.

104. *Id.* at 677-678.

105. 8 Wigmore, *Evidence* 232; Hines; *Privileged Testimony of Husband and Wife in California*, 19 Calif. L. Rev. 390, 407 (1931).

vanced as being illustrative of the de-emphasis of connubial concord.¹⁰⁶ Also, it is contended that the benefits of the privilege are largely conjectural, whereas the exclusion of the evidence is a definite loss.¹⁰⁷

However, in many families and homes the presence of marital confidence and harmony may not be as illusory as supposed by the adversaries of the privilege. To require one spouse to testify against the other would clearly often strain domestic felicity. A great number of legislatures and courts, including Minnesota's,¹⁰⁸ have concluded that requiring adverse testimony would be detrimental to society. Perhaps a re-examination of the utility of the privilege would be valuable, however, and assistance may be provided by the experience of those states which have abolished the privilege altogether.¹⁰⁹

The privilege to exclude privileged communications is said to be largely unknown to laymen and not relied upon, so it is contended that its abolition would work no hardship.¹¹⁰ Also, whether the benefit from the privilege outweighs the injury is claimed to be speculative,¹¹¹ though Wigmore disputes this and asserts that confidence is essential to the marital relation and should be promoted by the courts.¹¹² There is clearly more justification for retaining this privilege than the privilege against adverse testimony.

Other matters which the legislature might profitably consider and clarify include the question whether the communicating spouse is the only one who may claim the privilege or whether the communicatee may also invoke it. Another area warranting reconsideration is whether the witness spouse should be specifically granted a privilege to refrain from testifying against the party spouse irrespective of the latter's consent or objection. Granting such a privilege would avoid placing the witness spouse in the position where he must either commit perjury or incriminate the other spouse.¹¹³

106. Hutchins and Slesinger, *supra* note 1, at 678.

107. *Id.* at 675; see also 3 Vernier, American Family Laws 589.

108. Minn. Stat. § 595.02 (1949), *State v. Feste*, 205 Minn. 73, 285 N. W. 85 (1939).

109. See 3 Vernier, American Family Laws 584-586; 8 Wigmore, Evidence § 2245. The privilege is also abolished in England. *Ibid.*

110. 3 Vernier, American Family Laws 589; Hines, *supra* note 105, at 413; Hutchins and Slesinger, *supra* note 1, at 682.

111. Hines, *supra* note 105, at 412-413; Hutchins and Slesinger, *supra* note 1, at 682.

112. 8 Wigmore, Evidence § 2332.

113. See text at V., B. *supra*.