

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Judiciary Committee

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BILL: SB 80

SPONSOR: Senator Geller

SUBJECT: Parent-child Privilege

DATE: April 5, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	<b>Favorable</b>
2.	_____	_____	CF	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill creates a statutory parent-child privilege. This evidentiary privilege allows a parent or child, or guardian or conservator thereof, to invoke the privilege to refuse to disclose, or prevent another from disclosing, certain communications between the parent and child which were intended to be made in confidence. The privilege applies to communications made between a child, 25 years of age or younger, and his or her parent. The privilege also applies to communications between a child and his or her parent, 65 years of age or older.

The parent-child privilege is not available in the following proceedings:

- Any proceedings brought by the child against the parent or vice versa;
- Any criminal proceeding in which the child is charged with a crime committed against the person or property of the child's parent or any other child of the parent;
- Any criminal proceeding in which the parent is charged with a crime committed against the person or property of the child or any child of the child;
- Any criminal or other governmental investigation involving allegations of certain types of abuse, neglect, abandonment, or nonsupport of a child by the parent;
- Any criminal or other governmental investigation involving allegations of certain types of abuse of a parent by a child of that parent; and
- Any proceeding governed by the Florida Family Law or Florida Juvenile Rules of Procedure.

The bill provides that privilege may be waived if either the parent or child expressly consents to the disclosure of the communication. If the child has not reached majority or been otherwise emancipated, the child's consent is invalid unless approved by a court as being in the child's best interest.

This bill creates section 90.5045, Florida Statutes.

## II. Present Situation:

Under current law, a person may not assert an evidentiary privilege or otherwise refuse to testify as a witness unless a privilege has been created by statute, Supreme Court rule, or the State or U.S. Constitutions.<sup>1</sup> An evidentiary privilege prohibits the discovery, subpoena, or admission of what otherwise might be admissible evidence in a legal proceeding.<sup>2</sup> “Privileges are impediments to the search for truth, finding their justification in the priority of societal values they serve.”<sup>3</sup> Privileges are strictly construed because they are in derogation of the common law.<sup>4</sup>

The Florida Evidence Code creates the following evidentiary privileges:

- Journalist’s privilege;<sup>5</sup>
- Lawyer-client privilege;<sup>6</sup>
- Psychotherapist-patient privilege;<sup>7</sup>
- Sexual assault counselor-victim privilege;<sup>8</sup>
- Domestic violence advocate-victim privilege;<sup>9</sup>
- Husband-wife privilege;<sup>10</sup>
- Privilege with respect to communications with clergy;<sup>11</sup>
- Accountant-client privilege;<sup>12</sup> and
- Privilege with respect to trade secrets.<sup>13</sup>

A parent-child privilege is not recognized in Florida.<sup>14, 15</sup> The most similar privilege to the parent-child privilege recognized in Florida is the husband-wife privilege. Under the husband-wife privilege:

A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were

<sup>1</sup> See s. 90.501, F.S.A. and Law Revision Council Note--1976 (stating, “This section abolishes all common-law privileges existing in Florida and makes the creation of privileges dependent upon legislative action or pursuant to the Supreme Court’s rule-making power.”).

<sup>2</sup> See *In re Grand Jury Proceedings*, 664 F.2d 423, 429 (5th Cir. 1981) and *The Florida Bar v. Forrester*, 818 So. 2d 477, 481-482 (Fla. 2002).

<sup>3</sup> *In re Grand Jury Proceedings*, 664 F.2d at 429 (quoting *United States v. Brown*, 605 F.2d 389, 396 (8th Cir. 1979)).

<sup>4</sup> *O’Neill v. O’Neill*, 823 So. 2d 837, 839 (Fla. 5th DCA 2002)

<sup>5</sup> Section 90.5015, F.S.

<sup>6</sup> Section 90.502, F.S.

<sup>7</sup> Section 90.503, F.S.

<sup>8</sup> Section 90.5035, F.S.

<sup>9</sup> Section 90.5036, F.S.

<sup>10</sup> Section 90.504, F.S.

<sup>11</sup> Section 90.505, F.S.

<sup>12</sup> Section 90.5055, F.S.

<sup>13</sup> Section 90.506, F.S.

<sup>14</sup> See *Hope v. State*, 449 So. 2d 1319 (Fla. 2d DCA 1984).

<sup>15</sup> A parent-child privilege has been recognized by four states: Connecticut, Idaho, Minnesota, and New York. Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 Am. Crim. L. Rev. 1227, note 161 (Summer 2004).

intended to be made in confidence between the spouses while they were husband and wife.<sup>16</sup>

### **Policy for Familial Privileges**

The policy underlying the common law marital privilege, which is likely the policy supporting the husband-wife privilege, has been expressed as follows:

Society has a deeply-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses. . . . But the reason [for the marital privilege] . . . is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society. The matter that the law prohibits either the husband or wife from testifying to as witnesses includes any information obtained by either during the marriage, and by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known.<sup>17</sup>

In a New York case, the court recognized a parent-child privilege because “fostering . . . a confidential parent-child relationship is necessary to [a] child’s development of a positive system of values, and results in an ultimate good to society as a whole.”<sup>18</sup>

### **Veto of Parent Child Privilege Legislation**

During the 2003 Regular Session, the Legislature passed and the Governor vetoed SB 90, which created a parent-child privilege. The Governor stated the following as the basis for vetoing the legislation:

I understand that the relationship between a parent and a child is unique and that free and open communication between a parent and child should be encouraged. However, I have concerns that the privilege created by this bill is overly broad. While a privilege limited to communications between a parent and a minor child may be entirely appropriate, this legislation does not limit the privilege to communications between parents and minor children. Instead, the privilege would apply to communications between a parent and a child of any age, including an adult child. I agree with the view of the state prosecutors that this broad language

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<sup>16</sup> Section 90.504(1), F.S.

<sup>17</sup> *Mercer v. State*, 24 So. 154, 157 (Fla. 1898).

<sup>18</sup> *Application of A and M v. Doe*, 403 N.Y.S.2d 375, 380 (N.Y. App. Div. 1978).

would adversely affect criminal investigations and would ultimately result in the delay of prosecutions in legal proceedings.<sup>19</sup>

### III. Effect of Proposed Changes:

This bill creates a statutory parent-child privilege. This evidentiary privilege allows a parent or child, or guardian or conservator thereof, to invoke the privilege to refuse to disclose, or prevent another from disclosing, certain communications between the parent and child which were intended to be made in confidence. The privilege applies to communications made between a child, 25 years of age or younger, and his or her parent. The privilege also applies to communications between a child and his or her parent, 65 years of age or older.

The parent-child privilege is not available in the following proceedings:

- Any proceedings brought by the child against the parent or vice versa;
- Any criminal proceeding in which the child is charged with a crime committed against the person or property of the child's parent or any other child of the parent;
- Any criminal proceeding in which the parent is charged with a crime committed against the person or property of the child or any child of the child;
- Any criminal or other governmental investigation involving allegations of certain types of abuse, neglect, abandonment, or nonsupport of a child by the parent;
- Any criminal or other governmental investigation involving allegations of certain types of abuse of a parent by a child of that parent; and
- Any proceeding governed by the Florida Family Law or Florida Juvenile Rules of Procedure

The proceedings governed by the Family Law Rules and Juvenile Rules of Procedure for which the parent-child privilege is not applicable include: dissolution of marriage; annulment; support unconnected with dissolution of marriage; custodial care of or access to children; adoption; emancipation of a minor; declaratory judgment actions related to premarital, marital, or post-marital agreements; injunctions for domestic and repeat violence; delinquency; dependency and termination of parental rights; and proceedings for families and children in need of services.

The bill provides that privilege may be waived if either the parent or child expressly consents to the disclosure of the communication. If the child has not reached majority or been otherwise emancipated, the child's consent is invalid unless approved by a court as being in the child's best interest.

Finally, the bill provides an effective date of July 1, 2005. The provisions of the bill may apply to all proceedings pending on or after July 1, 2005.<sup>20</sup>

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<sup>19</sup> Governor's Veto Message for SB 90, 2003 Regular Session (June 26, 2003).

<sup>20</sup> See *Chabert v. Bacquie*, 694 So. 2d 805, 811 (Fla. 4th DCA1997) (discussing how a new statute providing for attorney-client privilege applied to pending litigation).

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

This bill does not appear to completely eliminate the stated basis for the Governor's veto of SB 90, 2003 Regular Session. The Governor suggested in his veto message that a parent-child privilege should be limited to communications between a parent and a minor child. This bill will allow the parent-child privilege to apply to children up to age 25 when the parent is younger than age 65. This privilege will also apply adult children of any age when the parent is age 65 or older.



## **VIII. Summary of Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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