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## *Brown v. State:*

### **Spousal Privilege Allows for the Confidentiality of Marital Communications by Bestowing a Privilege, Waivable Upon the Spouse Making the Communication**

By Christopher Mason

In a case of first impression, the Court of Appeals of Maryland held that section 9-105 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland ("section 9-105") does not render one spouse incompetent to testify against the other spouse. *Brown v. State*, 359 Md. 180, 753 A.2d 84 (2000). Instead, the court held that section 9-105 merely bestows a privilege upon the spouse making the communication that is exercisable and may be waived by the same spouse. The court grounded its holding on the basic principles of statutory construction.

On September 10, 1995, Keith Brown ("Brown") allegedly murdered his mistress, Makea Stewart. During petitioner's trial for the murder, his wife, Ms. Brown, testified during the state's case-in-chief that Brown had confessed to her that he had killed Ms. Stewart. After the completion of her testimony, Brown's attorney objected to the testimony based upon section 9-105, arguing that the testimony given by Ms. Brown was inadmissible because it was a confidential communication between husband and wife.

The trial judge originally ruled in favor of the defense, but later reconsidered its ruling in light of

*Harris v. State*, 37 Md. App. 180, 376 A. 2d 1144 (1977), where the court of special appeals held that section 9-105 did not apply when the confidential communication constituted a threat or crime against the other spouse. The trial judge held that Brown's 'my spouse did it' defense, raised at different times throughout the trial, put Ms. Brown at risk, and thus, precluded Brown from invoking section 9-105. The judge concluded that, although section 9-105 is a competency statute, it would be unfair to disallow Ms. Brown an opportunity to reply to the accusations raised by her husband, which is exactly what the exclusionary provision of section 9-105 would do. Consequently, Ms. Brown's testimony was deemed admissible and, as a result, Brown was a convicted of first-degree murder and various handgun offenses.

The Court of Special Appeals of Maryland affirmed the convictions in an unreported opinion. The court held that section 9-105 is a privilege statute, not a competency statute, and this privilege is waived when a 'my spouse did it' defense is raised. The Court of Appeals of Maryland granted certiorari to determine the following: (i) whether section 9-105 is a privilege status or a competency

statute; (ii) if, in fact, it is a privilege statute, can that privilege be waived; and (iii) if the privilege is waived in the case at bar.

The court of appeals began its analysis by looking to the principles of statutory construction. *Brown v. State*, 359 Md. 180, 188, 753 A.2d 84, 88 (2000). The court concluded that its primary objective was to ascertain the Legislature's intent in enacting, and periodically amending, the statute. *Id.* Ordinarily, if the language of the statute is clear and unambiguous, then the analysis will end at this point. *Id.* However, the court stated that if a literal reading is inconsistent with the purpose of the legislative intent, the court can look beyond that literal meaning, and "may consider the consequences resulting from one meaning rather than another, and adopt the construction which avoids an illogical or unreasonable result, or one which is consistent with common sense." *Id.* at 189, 753 A.2d at 88 (quoting *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 75, 517 A.2d 730, 732 (1986)).

In discerning the intent of the legislature, the court of appeals determined that section 9-105 "cannot be considered in isolation," and looked to the general rule set forth in section 9-

101 of the Courts and Judicial Proceedings Article of the Annotated Code for guidance. *Id.* at 189, 753 A.2d at 89. Additionally, the court opined that it is sometimes “necessary to look at the development of a statute . . .” to assess the legislature’s intent. *Id.* (quoting *Condon v. State*, 332 Md. 481, 492, 632 A.2d 753, 758 (1993)).

Reviewing the history of section 9-105, the court found that the Maryland General Assembly established a spousal privilege by enacting a statute in 1964 that prohibited one spouse from giving evidence for or against the other spouse in a criminal proceeding, and forbade the disclosure of marital communications in any proceeding, civil or criminal. *Id.* at 195, 753 A.2d at 92. Repealed by the legislature in 1876 for ancillary reasons, the court of appeals, believing this retraction was inadvertent, still followed the provisions as a result of their common law roots. *Id.* at 196, 753 A.2d at 92 (citing *Turpin v. State*, 55 Md. 462 (1881)).

Following the lead of the state judiciary, the legislature reinstated the spousal testimony privilege in 1888. *Id.* at 196, 753 A.2d at 93. As a result of the 1888 amendment, the law in Maryland was that:

- 1) spouses were generally competent and compellable witnesses; 2) in criminal proceedings, the spouse of the defendant was competent to testify, but 3) in no case, civil or criminal,

shall any husband or wife be competent to disclose any confidential communication made by the one to the other during the marriage.

*Id.* at 197, 753 A.2d at 93.

This language, along with the provision that a person could not be compelled to give adverse testimony in a criminal proceeding involving the person’s spouse followed the legislature’s intent by enacting section 9-105 of the Courts and Judicial Proceedings Article in 1973.

After a thorough analysis of section 9-105, the Court of Appeals of Maryland held that section 9-105 does not necessarily render one spouse incompetent to testify against the other spouse. *Id.* at 202, 753 A.2d at 96. Rather, the court held the statute created a privilege that allows the communicating spouse to prevent testimony by the other spouse that would reveal that confidential communication, but the confidential communication may be waived by the spouse who asserted the spousal communication. *Id.*

The court did note, however, that due to the “solid public policy underpinnings” of this privilege there can be no waiver of the privilege except in the clearest of circumstances. *Id.* at 203, 753 A.2d at 96. These circumstances include (i) the failure to object, and (ii) voluntary self-disclosure of the conversation. *Id.* at 206, 753 A.2d at 98. Since Brown’s “my spouse did it” defense did not encompass either of these two circumstances,

the court concluded that the privilege was not waived. *Id.* Consequently, it reversed Brown’s convictions and remanded the case for a new trial. *Id.* at 206-7, 753 A.2d at 98.

Although *Brown v. State* will most likely lead to more evidentiary hearings regarding communications between spouses in order to determine if the communication was confidential and therefore inadmissible, the court properly balanced the sanctity of marriage and the need for confidentiality to promote trust and harmony between spouses. While a competency finding would have resulted in a bright line rule, under which spouses could never testify under any circumstances, the current privilege finding allows for a possible waiver and the admissibility of the resulting testimony.