

**KENTUCKY BAR ASSOCIATION
KENTUCKY RULES OF EVIDENCE**

**ARTICLE V
PRIVILEGES**

KRE 504 Husband-wife privilege

(a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

(b) Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

(c) Exceptions. There is no privilege under this rule:

(1) In any criminal proceeding in which sufficient evidence is introduced to support a finding that the spouses conspired or acted jointly in the commission of the crime charged;

(2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:

(A) The other;

(B) A minor child of either;

(C) An individual residing in the household of either; or

(D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence. The court may refuse to allow the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected; or

(3) In any proceeding in which the spouses are adverse parties.

(d) Minor Child. The court may refuse to allow the privilege in any proceeding if the interests of a minor child of either spouse may be adversely affected.

Evidence Rules Review Commission Notes (2006)

The 2006 amendment to this provision of the Rules makes two modifications in the 1992 provision on husband-wife privilege. The first is substantive; the second merely clarifies part of the original provision in order to eliminate ambiguity concerning one of the exceptions to the privilege.

KRE 504(c)(1) denies claims of spousal privileges in criminal proceedings when it is established that the spouses were jointly involved in the commission of crimes. (It should be noted that this exception is similar to the crime/fraud exception to the lawyer-client privilege.) The original provision of this rule provided for loss of the privilege when there was "evidence sufficient to support a finding" of joint criminal activity by the spouses. This yardstick is normally used in the evidence rules for deciding preliminary questions involving what is called "conditional relevance" (in KRE 104(b)). A greater proof requirement (preponderance of the evidence) is used for determining all other preliminary questions upon which admissibility of evidence depends (in KRE 104()) The preliminary question upon which loss of the spousal privilege depends under KRE 504(c)(1) is not a conditional relevance question but is instead a so-called "competency" question that needs to be resolved by the standard set forth in KRE 104(a). The proposed amendment would make this change with respect to the "joint crime" exception to spousal privileges, It should be noted that the Supreme Court adopted this same position with respect to the crime/fraud exception to the lawyer-client privilege in Stidham v. Clark, 74 S.W.3d 719 (Ky. 2002).

KRE 504(c)(2), as originally adopted, was ambiguous, as indicated in the following statement: "The last sentence of KRE 504(c)(2)(D) is ambiguous (perhaps partly because it seems to be out of place in the provision) but seems to create an entirely separate exception to spousal privileges that would require a trial judge to deny any and all spousal privilege claims determined to be adverse 'to the interests of a minor child of either spouse.'" Lawson, *The Kentucky Evidence Law Handbook* 376 (4th ed. 2003). The drafters of the original provision clearly indicated in their Commentary that the intent was to create a separate exception when spousal testimony was needed for determination of matters involving "the best interests of a minor child":

"The final sentence of the rule [KRE 504(c)(2)] provides that a judge may refuse to recognize the privilege in any kind of action if convinced that spousal testimony is needed to decide what is in the best interests of a minor child of either spouse." Evidence Rules Study Committee, *Kentucky Rules of Evidence-Final Draft*, p. 45 (November 1989).

The proposed amendment eliminates this ambiguity in the original provision by separating the last sentence of KRE 504(c)(2) from that provision and moving it to a new subsection of the rule, thereby clearly indicating that there is a separate exception to spousal privileges for testimony needed to determine matters involving "the best interests of a minor child." The new separate exception is now numbered KRE 504(d).

HISTORY: Amended by Supreme Court Order 2006-06, eff. 7-1-06; 1992 c 324, § 9, 34, eff. 7-1-92; 1990 c 88, § 26