SUBJECT: Spouse's testimony privilege, family violence cases

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Place, Talton, Farrar, Greenberg, Hudson, Nixon, Pickett, Pitts, Solis

0 nays

WITNESSES: For — Cindy Merrill, Debbie S. Holmes, Lt. John Silva, Houston Police Department; Alyson K. Minter; Hannah Riddering, Texas National Organization for Women; Shannon Noble, Texas Women's Political Caucus

Against — Keith S. Hampton, Texas Criminal Defense Lawyers Association; Laurie Blackburn; Jeanette Kinard; Lisa DeLong

On — Deborah D. Tucker, Texas Council on Family Violence; Vicki Isaacks, Dallas County Criminal District Attorney's Office

BACKGROUND: The testimony of a person's spouse in a criminal trial is limited under two privileges granted in Texas Rules of Criminal Evidence Rule 504:

• Rule 504(1), known as the confidential communication privilege, protects communications made by one spouse to another and not intended to be disclosed to others. Either spouse may decline to testify, and also may claim the privilege so that their spouse may not testify against them. Rule 504(1) makes this privilege unenforceable when the spouse is accused of a crime against a minor child or member of either spouse's household. However, the privilege does apply when the accused is charged with a crime committed during marriage against the other spouse.

• Rule 504(2) gives a spouse the privilege not to be called involuntarily as a witness against the other spouse. This so-called *spousal adverse testimony privilege* allows spouses to choose whether or not to testify. The privilege does not apply when the accused spouse is charged with a crime against a minor child or with something that occurred before marriage, but specifically does apply in proceedings in which the accused is charged with a crime committed against the spouse during the marriage.

DIGEST:

CSHB 35 would amend the Code of Criminal Procedure and disapprove Rule 504(2)(b)(1) of the Texas Rules of Criminal Evidence to direct that the spousal adverse testimony privilege, allowing the spouse to choose whether or not to testify, not apply in a proceeding in which the accused is charged with committing a crime against the spouse, a minor child or a member of the household of either spouse.

CSHB 35 would require that a summons issued to a person accused of domestic violence state that it is a felony offense to intentionally influence or coerce a witness to testify falsely, withhold testimony or harm or threaten a prospective witness.

CSHB 35 would also amend Government Code sec. 23.101(a) to instruct that trial courts should give preference to hearings and trials of criminal actions involving family violence over other criminal actions except those against defendants who are detained in jail pending trial.

The Court of Criminal Appeals would be required, by January 1, 1996, to adopt rules regarding the training of prosecuting attorneys relating to family violence cases.

This bill's effective date would be September 1, 1995.

SUPPORTERS SAY:

CSHB 35 would show the state is serious about combating domestic violence. A spouse's privilege not to testify against an abusing spouse virtually eliminates hope of fulfilling a goal of zero tolerance for violence. The Model Code on Domestic and Family Violence suggests that spousal testimony privileges should be inapplicable in criminal proceedings involving domestic or family violence. Texas is one of only four states and the District of Columbia that still recognizes the spousal adverse testimony privilege in cases of family violence.

The spousal adverse testimony privilege, as applied now, creates situations in which an abusive spouse threatens, coerces or physically harms the abused spouse in order to keep that spouse from testifying. The effect of the privilege becomes obvious in viewing actual cases of domestic abuse. The Harris County District Attorney's Family Violence Unit reports that in

non-spouse abuse cases, once the accused knows the victim may be compelled to testify, 90 percent of such cases are successfully prosecuted through negotiated pleas. But when spouses are involved, nearly 50 percent of such cases are dismissed because of the spousal privilege rule.

Giving a spouse the right not to testify against an accused abuser disempowers the victim, who become even more deeply controlled by a violent family situation, and harms society. Society has an interest in stopping domestic violence as early as possible and punishing the abusers. It has been reported that over 80 percent of male inmates currently in Texas prisons for violent crimes come from violent homes. The only person who benefits from the spousal testimony privilege is the abusing spouse, who can use this loophole to further tighten an abusive grip on the other spouse.

The purpose behind getting abused spouses to the witness stand is not always to jail the abuser; in most cases probation and rehabilitation are the best solutions. Nor is there any desire to make sure that the family is broken up over any abuse; most cases are resolved through negotiated pleas that keep the family together. What is important is that the abuser understand that violence will have consequences. If more than one-half of all such cases are dismissed because of the spousal privilege rule, many abusers will take the risk.

The argument that the spousal privilege protects family harmony becomes absurd in domestic violence cases. There is no consistent reason for holding that a spouse may be compelled to testify against a spouse accused of a crime against a minor child, but not a crime against the spouse. The argument that the existing privilege protects a woman's right to decide whether to testify ignores the fact that in most cases it is the *abuser's* choice whether or not the abused will testify. While there is not legal way for the abuser to keep the abused from testifying, abusers often use coercion, promises and more abuse to keep the abused spouse silent.

It is also essential that the abuser know that the abused spouse may be forced to testify and that any attempts at coercion will be punished. For this reason, it is essential to inform the abuser as early as when that abuser is given a summons of potential consequences of further abuse.

To further intervene in this cycle of abuse, hearings and trials of family violence matters must be placed on an expedited docket. It is estimated that most abused spouses who report the abusers are harmed an average of three times between the original arrest of the abuser and the trial.

OPPONENTS SAY:

CSHB 35 would not help to empower abused spouses, but would instead strip them of an essential right. Making women testify against their husbands essentially says they are incompetent to make their own decisions. The spousal adverse testimony privilege is a privilege of the testifying spouse and never prevents a spouse who wishes to testify from doing so.

In many cases of family violence there is often more than enough other testimony and evidence that can be used to proceed to trial. Forcing spouses to testify against each other inflames already tense situations. An abuser may not be removed from the home. Such tension created can only further unsteady an already difficult relationship and create explosive consequences.

The state should not place abused women who do not wish to testify for fear of further harming their relationship in the unenviable situation of either perjuring themselves or being held in contempt of court for not testifying. Such extreme penalties for simply trying to avoid further trouble could have the undesired consequence of causing more women to avoid reporting abuse. The state should continue to hold in regard the privacy and sanctity of marriage.

Police are often called to domestic violence situations by a neighbor or other bystander, and while there may be some mutual violence or argument, the husband is automatically assumed to be the one who started the trouble. In such cases, the spousal privilege helps to protect both spouses.

CSHB 35 would require trial courts to place family violence matters on the same expedited docket as accused criminal currently imprisoned. In many cases, domestic violence is only a misdemeanor offense, but these cases would be put ahead of such crimes as rape, robbery and assault if the accused in those cases was released pending trial.

CSHB 35 may swing too broadly in completely disallowing the privilege in cases in which one spouse is accused of *any* crime against the other, not just family violence cases.

NOTES:

SB 128 by Moncrief et al., an identical bill, passed the Senate by 29-0 on March 13 and was reported favorably, without amendment by the House Criminal Jurisprudence Committee on March 28. SB 128 is eligible to be considered in lieu of HB 35 on today's calendar.

The committee substitute added the provision regarding the notice printed on the summons sent to the accused, the expedited docketing provisions and the requirement that the Court of Criminal Appeals establish rules for training prosecuting attorneys in family violence matters. The committee substitute also deleted language applying the bill only to offenses committed after the effective date.