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## Evidence HB 711

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## EVIDENCE

***Privileges: Amend Chapter 5 of Title 24 of the Official Code of Georgia Annotated, Relating to Privileges, so as to Change Provisions Relating to Spousal Privilege in Criminal Proceedings; Provide Certain Exceptions to the General Rule of Privilege; Provide for Confidentiality of Communications Between a Family Violence or Sexual Assault Victim and Agents Providing Services to Such Victims at Family Violence Shelters and Rape Crisis Centers; Provide for Definitions; Provide for a Waiver of Confidentiality; Provide for Admissibility of Certain Evidence; Provide for Exceptions; Provide for Procedure; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 24-5-503 (amended); 24-5-509 (new)
BILL NUMBER:	HB 711
ACT NUMBER:	586
GEORGIA LAWS:	2012 Ga. Laws 105
SUMMARY:	The Act abrogates the right of spousal privilege in cases involving domestic violence and creates confidentiality between family violence or sexual assault victims and agents providing services to such victims at family violence shelters and rape crisis centers.
EFFECTIVE DATE:	January 1, 2013

### *History*

Domestic violence is a serious problem in Georgia. In 2011, there were over 100 people killed in family violence incidents.<sup>1</sup> The

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1. See Electronic Mail Interview with Rep. Edward Lindsey (R-54th) (Apr. 20, 2012) [hereinafter Lindsey Interview].

number of domestic-violence deaths in Georgia increased by nearly 20% from 2008 to 2010.<sup>2</sup> In 2010 alone, Georgia law enforcement officers responded to over 65,000 domestic violence incidents.<sup>3</sup> It is statistics like these that have motivated prosecutors, victim advocacy groups, and legislators to work together to promote legislation to best address this problem within the State.<sup>4</sup>

The United States Supreme Court decision in *Crawford v. Washington* strengthened the power of the spousal privilege in many states, including Georgia.<sup>5</sup> The *Crawford* decision prevented State prosecutors from introducing out-of-court statements made by one spouse against the other when that spouse refused to testify because doing so would violate the defendant's Sixth Amendment Right to confront the witnesses against him.<sup>6</sup> Because Georgia has previously not restricted the spousal privilege, the victim of domestic violence could claim the privilege (though the defendant could not) and often times derail the State's case against the defendant by not testifying.<sup>7</sup>

Since the *Crawford* decision in 2004, there have been multiple attempts by Georgia legislators to remove spousal privilege in cases of domestic violence.<sup>8</sup> Those attempts failed for two main reasons. First, Georgia prosecutors disfavored the language of previous attempts because they did not provide the prosecution with the tools they needed to appropriately prosecute these cases.<sup>9</sup> Second, victim advocacy organizations did not feel that the proposed legislation adequately protected victims of domestic violence.<sup>10</sup> These two groups—prosecutors wanting to convict offenders and the victim advocacy organizations wanting to protect the victims of family violence—were unable to reach common ground.<sup>11</sup>

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2. See GA. COMM'N ON FAMILY VIOLENCE & GA. COAL. AGAINST DOMESTIC VIOLENCE, 2011 GEORGIA DOMESTIC VIOLENCE FATALITY REVIEW ANNUAL REPORT 35 (2011), available at <http://www.gcfv.org/files/2011-ga-fatality-review-web2.pdf>.

3. GA. COMM'N ON FAMILY VIOLENCE, DOMESTIC VIOLENCE IN GA. 1 (2011), available at <http://www.gcfv.org/files/DV%20in%20Georgia%20Facts%20September%202011%20Updates.pdf>.

4. See Lindsey Interview, *supra* note 1.

5. *Crawford v. Washington*, 541 U.S. 36 (2004).

6. See *id.* at 53–54.

7. See Lindsey Interview, *supra*, note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

At the time HB 711 was introduced, Georgia was one of only a handful of states that still permitted the use of spousal privilege in family violence cases.<sup>12</sup> For the above reasons, there was a lot of pressure to introduce a bill that would (1) satisfy both prosecutors and victim advocacy organizations and (2) remove this privilege that perpetrators of domestic violence used against their victims.<sup>13</sup> Through the concerted efforts of legislators, prosecutors, and victim advocacy groups, HB 711 represented a joint effort at addressing the domestic violence epidemic in Georgia. Prosecutors wanted the tool of victim testimony, and victim advocates wanted the ability to protect the communications between themselves and domestic violence victims.<sup>14</sup>

Victim advocates wanted their communications with victims privileged so that victims would be more willing to divulge the information necessary to best assist them.<sup>15</sup> When HB 711 was introduced, privileges for communications with victim advocates existed in at least thirty-nine other states.<sup>16</sup> Victim advocacy organizations argued that such a privilege would enable victim advocates to better serve victims, and that it would also help prevent perpetrators from using statements made by victims against them in divorce or child custody proceedings.<sup>17</sup>

### *Bill Tracking of HB 711*

#### *Consideration and Passage by the House*

Representatives Edward Lindsey (R-54th), Alex Atwood (R-179th), Penny Houston (R-170th), Stephanie Benfield (D-85th), and Mike Jacobs (R-80th) sponsored HB 711.<sup>18</sup> The House read the

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12. *Id.*

13. *See* Lindsey Interview, *supra* note 1.

14. *See id.*

15. GA. COAL. AGAINST DOMESTIC VIOLENCE, SUPPORT HB 711 TO PROMOTE SAFETY & JUSTICE FOR VICTIMS OF DOMESTIC VIOLENCE & SEXUAL ASSAULT (2012), available at <http://gcadv.org/wp-content/uploads/2010/06/HB-711-talking-points.pdf>.

16. *Id.*

17. *Id.* Without such protection, abusive spouses can subpoena employees of victim advocacy groups and force them to testify at custody and divorce hearings, effectively using communications made in confidence, while the victim was seeking treatment, to undermine her credibility. *Id.*

18. HB 711, as introduced, 2012 Ga. Gen. Assem.

bill for the first time on January 11, 2012,<sup>19</sup> and for the second time on January 12, 2012.<sup>20</sup> Speaker of the House David Ralston (R-7th) assigned it to the House Judiciary Committee, which favorably reported a Committee Substitute on February 2, 2012.<sup>21</sup> The substitute did not include any substantive changes and only sought to “tighten up” the language of the bill to ensure it applied only to occasions of crimes perpetrated by one spouse against the other.<sup>22</sup> During the floor debate, Representative Lindsey, along with the other sponsors of the bill, offered an amendment that inserted the phrase “against his or her spouse” after the word “crime” in line 26 of the bill.<sup>23</sup> The House adopted the floor amendment without objection.<sup>24</sup> The House adopted the Committee substitute with the floor amendment by a vote of 162 to 1.<sup>25</sup>

#### *Consideration and Passage by the Senate*

Senator Bill Hamrick (R-30th) sponsored HB 711 in the Senate, and the bill was first read on February 8, 2012.<sup>26</sup> Lieutenant Governor Casey Cagle (R) assigned the bill to the Senate Judiciary Committee.<sup>27</sup> The Senate Judiciary Committee favorably reported the bill on March 13, 2012.<sup>28</sup> The bill was read a second time in the Senate on March 14, 2012, and a third time on March 21, 2012.<sup>29</sup> During the floor debate on March 21, 2012, Senators Judson Hill (R-32nd), John Crosby (R-13th), Bill Cowsert (R-46th), Bill Jackson (R-24th), William T. Ligon, Jr. (R-3rd), and Jesse Stone (R-23rd) offered an amendment that applied to compelling testimony and left the spousal privilege intact in instances where the accused spouse had

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19. *Id.*; State of Georgia Final Composite Status Sheet, HB 711, May 10, 2012.

20. State of Georgia Final Composite Status Sheet, HB 711, May 10, 2012.

21. HB 711 (HCS), 2012 Ga. Gen. Assem.

22. Video Recording of House Floor Debate, Feb. 7, 2012 at 1hr., 51 min., 18 sec. (remarks by Rep. Edward Lindsey, (R-54th)), <http://www.gpb.org/lawmakers/2012/day-16> [hereinafter House Floor Video].

23. *Id.* at 1hr., 53 min., 50 sec. (announcement by the clerk).

24. *Id.*

25. Georgia House of Representatives Voting Record, HB 711 (Feb. 7, 2012).

26. State of Georgia Final Composite Status Sheet, HB 711, May 10, 2012.

27. *Id.*

28. *Id.*

29. *Id.*

not been arrested for a crime involving the testifying spouse.<sup>30</sup> The Senate voted on, and failed to pass, the amendment by a vote of 13 yeas and 39 nays.<sup>31</sup> The Senate then passed the bill as favorably reported from the Senate Judiciary Committee by a vote of 52 to 1.<sup>32</sup> The House sent the bill as passed by both chambers to Governor Deal on April 2, 2012, and it was signed into law on April 16, 2012.<sup>33</sup>

### *The Act*

The Act amends Articles 503 and 509 of Chapter 5 of Title 24 of the Official Code of Georgia Annotated for two reasons. First, the Act creates new exceptions to the general rule of spousal privilege within the context of a criminal case.<sup>34</sup> Second, the Act provides for the confidentiality of communications between family violence or sexual assault victims and the agents providing services to them.<sup>35</sup> Specifically, section one of the Act amends existing Code section 24-5-503, creating three new exceptions to the spousal immunity privilege aimed at abolishing it within the context of domestic violence.<sup>36</sup> The original section only exempted proceedings where a spouse was charged with a crime against a child under the age of eighteen from the spousal immunity privilege.<sup>37</sup> The new exemptions include proceedings where one spouse is charged with: (1) “a crime against his or her spouse”; (2) causing physical damage to the property of either or both spouses; or where (3) the alleged crime against the defendant’s current spouse occurred prior to the marriage of the husband and wife.<sup>38</sup>

Section two adds a new Code section, 24-5-509, which prevents an agent from a family violence shelter or rape crisis center from being

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30. Failed Senate Floor Amendment to HB 711, introduced by Sen. Judson Hill (R-32nd), Sen. John Crosby (R-13th), Sen. Bill Cowsert (R-46th), Sen. Bill Jackson (R-24th), Sen. William T. Ligon, Jr. (R-3rd), and Sen. Jesse Stone (R-23rd), Mar. 21, 2012.

31. *Id.*; Video Recording of Senate Floor Debate, March 21, 2012 at 2 hrs., 28 min., 45 sec. (remarks by Sen. Bill Hamrick (R-30th)), <http://www.gpb.org/lawmakers/2012/day-36> [hereinafter Senate Video].

32. Georgia Senate Voting Record, HB 711 (Mar. 7, 2012).

33. State of Georgia Final Composite Status Sheet, HB 711, May 10, 2012.

34. O.C.G.A. § 24-5-503 (Supp. 2012).

35. *Id.*

36. *Id.* §§ 24-5-503(b)(2)–(4).

37. O.C.G.A. § 24-5-503(b) (2011).

38. O.C.G.A. §§ 24-5-503(b)(2)–(4) (Supp. 2012).

compelled to disclose any evidence they acquired while rendering services to a victim.<sup>39</sup> First, section 24-5-509 defines the terms pertinent to the newly created privilege.<sup>40</sup> Next, section 24-5-509 also provides for limited exceptions to the privilege in both civil and criminal proceedings where the evidence sought: (1) is material; (2) is not proffered solely for showing the victim's character for truthfulness; (3) is "not available or already obtained by the party seeking [it]"; and (4) its probative value outweighs the negative effect of the disclosure on the victim.<sup>41</sup> The new section protects the privacy of excepted communications, however, by requiring the court to "order that such evidence be produced for the court under seal [and] shall examine the evidence in camera" before disclosing it.<sup>42</sup>

Section 24-5-509 further specifies that the privilege afforded under the new section terminates upon the death of the victim and is inapplicable if the agent was a witness or a party to the crime that occurred in his or her presence.<sup>43</sup> The "mere presence of a third person during communications between a victim and an agent does not void the privilege," provided the victim still has a reasonable expectation of privacy,<sup>44</sup> but if the victim is incompetent, his or her guardian can waive the privilege.<sup>45</sup> Finally, if either party intends to compel evidence under the new Code section, he must file and serve notice of his intention to do at least ten days prior to trial and the court shall have a pre-trial hearing to determine the issue.<sup>46</sup>

### *Analysis*

#### *The Failed Senate Floor Amendment*

One of the most debated elements of HB 711 was the failed floor amendment proposed by Senator Judson Hill from Georgia's 32nd District. The proposed amendment would have significantly altered

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39. *Id.* §§ 24-5-509(a)–(b).

40. *Id.* §§ 24-5-509(a)(1)–(12).

41. *Id.* §§ 24-5-509(b)(1)–(2).

42. *Id.* § 24-5-509(c).

43. *Id.* §§ 24-5-509(d)–(e).

44. O.C.G.A. § 24-5-509(f) (Supp. 2012).

45. *Id.* § 24-5-509(g).

46. *Id.* § 24-5-509(h).

the Act in one important instance: the first arrest of an individual for domestic violence.<sup>47</sup> Specifically, the amendment required a judicial hearing in instances of a defendant's first arrest for domestic violence to determine whether the spousal privilege should apply.<sup>48</sup> At this hearing the court would examine the specific facts of the incident and spousal situation to evaluate and determine if any coercion, potential coercion, intimidation, or threats existed in that specific case.<sup>49</sup>

While several senators spoke on the proposed amendment, the two opposing arguments can be summarized in two main positions: (1) the amendment sought to preserve the sanctity of marriage, with which the Act ostensibly interferes; or (2) the amendment would effectively destroy the Act and what the legislators hoped to accomplish with it.<sup>50</sup>

Multiple senators argued that the proposed amendment sought only to preserve the sanctity of marriage by preventing the State from invalidating the spousal privilege, which existed in Georgia for over 200 years, unless there is a pattern of spousal or child abuse.<sup>51</sup> The crux of this position is that a marriage is sacred and that the State should not interfere unless absolutely necessary. To this end, the State should not have the power to invalidate the spousal privilege without a showing of a pattern of abuse, coercion, intimidation, or threats against the victim testifying.<sup>52</sup> They further contend, and the other side of the debate would agree, that subsequent arrests for domestic violence demonstrate a pattern of such behavior.<sup>53</sup> The sides disagreed, however, as to whether, for a first arrest for domestic violence, the State should have to show such a pattern of coercion,

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47. Failed Senate Floor Amendment to HB 711, introduced by Sen. Judson Hill (R-32nd), Sen. John Crosby (R-13th), Sen. Bill Cowsert (R-46th), Sen. Bill Jackson (R-24th), Sen. William T. Ligon, Jr. (R-3rd) and Sen. Jesse Stone (R-23rd), Mar. 21, 2012.

48. *Id.*

49. *Id.*; Senate Video, *supra* note 31, at 1 hr., 48 min. (remarks by Sen. Judson Hill (R-32nd)), <http://www.gpb.org/lawmakers/2012/day-36>.

50. *Compare* Senate Video, *supra* note 31, at 1hr., 54 min. (remarks by Sen. Bill Cowsert (R-46th)) (explaining that the amendment "preserve(s) the sanctity of marriage" and prevents the state from forcing a victim to testify), *with id.* at 1hr., 50 min. (remarks by Sen. Jason Carter (D-42nd)) (explaining that the proposed amendment would "gut the bill in two ways": (1) the prior statements of the victim would be inadmissible at a hearing and (2) spousal abuse is rarely reported in the first instance, so the first time a suspect is arrested is probably not the first time the abuse has occurred).

51. *See* Senate Video, *supra* note 31, at 1 hr., 54 min. (remarks by Sen. Bill Cowsert (R-46th)).

52. *Id.*

53. *Id.*



threats, or intimidation through a hearing in order to force the victim-spouse to testify.<sup>54</sup> Senator Cowsert gave an example of an actual case he was involved in where an accident occurred that was a direct result of the wife's attempted criminal activity and her husband's attempt to stop it.<sup>55</sup> The senator contended that without the spousal privilege the wife would have been forced to testify against her husband, sending him to jail for an accident.<sup>56</sup>

Senator Cowsert, along with the other proponents of the amendment, argued that the victim-spouse's prior statements are unnecessary to establish a pattern or situation that would allow a judge to invalidate the spousal privilege.<sup>57</sup> As a result, the amendment would preserve the sanctity of marriage while promoting prosecution of domestic violence thereby addressing the domestic violence problem in Georgia.

Opposing senators insisted that the proposed amendment would render the Act useless.<sup>58</sup> They argued that without the ability to question the victim-spouse or present his or her prior statement at the hearing, contrary to the assertions of the proponents of the amendment, the State would neither be able to demonstrate a pattern of behavior nor the existence of coercion, threats, or intimidation on a first arrest.<sup>59</sup> While the proponents of the amendment contend that other evidence such as what officers overheard would be sufficient, it seems fairly unlikely that a defendant would openly threaten or intimidate the victim-spouse in front of a law enforcement officer. Senator Carter correctly pointed out that *Crawford v. Washington* firmly establishes a constitutional right to confront one's accusers and any witnesses against him and that spousal privilege prevents the State from using any out-of-court statements by the victim-spouse.<sup>60</sup>

Further, it seems that Senator Cowsert's example was inapposite because while the alleged victim-spouse would be compelled to

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54. *Id.*

55. *Id.* The victim-spouse attempted to drive drunk, her husband took her keys, and she got angry and hit him. *Id.* After he pushed her off, she fell, and he took her to the hospital. *Id.* The hospital called the police, who arrested him. *Id.*

56. See Senate Video, *supra* note 31, at 1 hr., 54 min. (remarks by Sen. Bill Cowsert (R-46th)).

57. *Id.*

58. See, e.g., *id.*, at 1 hr., 50 min. (remarks by Sen. Jason Carter (D-42nd)).

59. *Id.*

60. *Id.*

testify, she would be able to testify as to her husband's innocence and the accident resulting from her attempt to drive while intoxicated. As such, this does not seem to be a valid objection to the removal of the spousal privilege in all domestic violence cases. Furthermore, with the victim-spouse being compelled to testify truthfully, the court is in a better position to determine if an incident was isolated or the result of a pattern of behavior. Finally, in many domestic violence cases the first arrest is not the first incident of domestic violence but rather the most recent and most severe, which is why it garnered the attention of law enforcement.<sup>61</sup>

One fact that both sides of the debate agreed on is that Georgia has a domestic violence problem, and both sides of this debate wanted to fight this problem.<sup>62</sup> Ultimately the amendment failed, most likely for many of the reasons asserted by those arguing against it. Even if the amendment did not completely gut the Act, as one senator put it, it certainly would have reduced its effectiveness. This important piece of legislation had been negotiated over a long period of time and failed before.<sup>63</sup> Thus, it seems that legislators were not going to risk the bill failing again, losing the support of prosecutors or domestic violence groups, or being rendered ineffective by allowing this amendment to pass.

### *Forcing Victims to Testify*

One of the major concerns over abolishing spousal immunity in cases of domestic abuse is the potential ramifications of giving prosecutors the power to compel victims to testify against their spouses.<sup>64</sup> Under Georgia's previous spousal immunity statute, the victimized spouse could elect to waive the privilege and testify.<sup>65</sup> By abolishing spousal immunity for domestic violence cases, the Act takes this choice away in an effort to prevent abusers from intimidating their victims into silence. The Act gives prosecutors a

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61. See Senate Video, *supra* note 31, at 1 hr., 50 min. (remarks by Sen. Jason Carter (D-52nd)).

62. *Id.*, at 1 hr. 47 min.

63. See Lindsey Interview, *supra* note 1.

64. See *id.* (explaining that concerns over cutting away too much of the privilege forced proponents to tighten up the language of the bill).

65. O.C.G.A. § 24-5-503 (Supp. 2012).

powerful tool in an attempt to curb the epidemic of domestic violence in Georgia, but they must use it judiciously.<sup>66</sup>

Unfortunately, domestic violence cases often involve volatile situations and an overzealous prosecutor can inadvertently endanger a victim forced to testify against her abuser.<sup>67</sup> Further, forcing a victim to testify can be harmful to an innocent spouse where the alleged crime was the result of an accident or circumstances similar to the story Senator Cowser shared during the Senate debate.<sup>68</sup> Though these concerns are legitimate, they are not detrimental to the Act and are better addressed by prosecutorial discretion rather than amending the legislation. Otherwise, the legislature runs the risk of crippling the Act for the sake of micromanaging its application.

Last, the abolishment could threaten to erode more of the privilege than intended if unforeseen weakness in the language of the statute is exploited. Spousal immunity has long been viewed as an important method for protecting marital communications,<sup>69</sup> so the scope of its abolishment was a concern for defense attorneys.<sup>70</sup> The language of the bill was tightened up to make sure that the waiver only applied in specific, desired instances, but the success of the changes made can only be assessed after the Act goes into effect next year.<sup>71</sup> There are some minor concerns with the Act, voiced in the debate over the failed Senate floor bill and other debates during its passage. The overriding need to reduce the amount of domestic violence in Georgia, however, coupled with the efforts of the Act's proponents to shore up its language should ensure the Act's success in reducing the manipulation of spousal privilege to stymie prosecution in domestic violence cases in Georgia.

*Ashley Champion & J. Adam Wilkinson*

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66. See Lindsey Interview, *supra* note 1.

67. *Id.*

68. See Senate Video, *supra* note 31, at 1 hr., 54 min., 22 sec. (remarks of Senator Bill Cowser (R-46th)).

69. *Id.* (emphasizing the importance of marital communications); Lindsey Interview, *supra* note 1.

70. Lindsey Interview, *supra* note 1.

71. *Id.*