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## EVIDENCE Crime Against Minor Child: Compel Testimony of Spouse

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## EVIDENCE

### *Crime Against Minor Child: Compel Testimony of Spouse*

CODE SECTION:	O.C.G.A. § 24-9-23 (amended)
BILL NUMBER:	SB 34
ACT NUMBER:	747
SUMMARY:	The Act amends the provisions of the Code which prohibited the compulsion of testimony from one spouse against another in criminal proceedings. It provides that spouses may be compelled to testify against each other in proceedings in which the husband or wife is charged with a crime against a minor child. A spouse can be compelled to give evidence only as to the specific act for which the defendant is charged.
EFFECTIVE DATE:	April 16, 1987

#### *History*

Prior to the enactment of SB 34, Georgia law provided that the testimony of a criminal defendant's spouse could not be compelled in a criminal proceeding.<sup>1</sup> Spouses were competent, but could not be compelled to testify against each other in criminal proceedings.<sup>2</sup> The privilege of refusing to testify belongs to the witness spouse and not the defendant spouse.<sup>3</sup> This modern spousal privilege allowing a spouse to refuse to testify against a criminal defendant spouse is nearly all that remains of the abandoned common law rule which unconditionally disqualified the spouse of a party from testifying for or against that party in any civil and criminal proceeding.<sup>4</sup>

The common law prevented spouses from testifying because it was assumed that they could not be neutral or disinterested witnesses in a pro-

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1. O.C.G.A. § 24-9-23 (1982). The Act retains all of section 24-9-23, renames it section 24-9-23(a), and adds a new paragraph (b) abolishing in child abuse prosecutions the privilege created in paragraph (a).

2. *Id.*

3. *Morris v. State*, 173 Ga. App. 663, 664, 327 S.E.2d 792, 793 (1985) (accused may not prevent voluntary testimony of spouse).

4. C. McCORMICK, *McCORMICK ON EVIDENCE* § 66 (3d ed. 1984).

ceeding involving a spouse.<sup>5</sup> The reasons for making spouses incompetent to testify, however, do not exist in all cases, and there has been a trend to allow spousal testimony even though the defendant objected based on the spousal privilege.<sup>6</sup> The opportunity for pre-trial discovery and the right to a thorough and sifting cross-examination have eliminated much of the justification for the spousal privilege in cases in which a spouse volunteers to be a hostile witness.<sup>7</sup> The United States Supreme Court has recognized a voluntary testimony spouse abuse exception to the spousal privilege in *Wyatt v. United States*.<sup>8</sup>

Prior to the enactment of SB 34, the spousal privilege of O.C.G.A. § 24-9-23 had the effect of thwarting child and spouse abuse prosecutions in Georgia. Spouses could not be compelled to testify against an abusing spouse. Thus, many Georgia spouse or child abuse cases were dismissed for lack of a witness to testify against the defendant. The new law parallels the expressed intent of the spousal testimonial privilege envisioned in the unenacted Federal Rule of Evidence 505.<sup>9</sup> The drafters of the Federal Rules of Evidence recognized that in certain cases, no spousal testimonial privilege should exist to shield criminal defendants.<sup>10</sup> In fact, compelled spousal testimony is often the most crucial element of a successful prosecution for spouse or child abuse. Proposed Federal Rule of Evidence 505 would have eliminated the spousal privilege in those cases where the defendant is charged with a crime against a spouse or the child of either.<sup>11</sup> The Georgia Act applies only to testimony concerning the abuse of children, but is not limited to the children of the couple. Thus, the courts and the lawmakers are increasingly recognizing that crimes against family members often will go unpunished when a spouse cannot be compelled to testify against another spouse.

Reported child abuse is on the rise in Georgia,<sup>12</sup> and the legislature has

5. *Id.*

6. *E.g.*, *Wyatt v. United States*, 362 U.S. 525, 526 (1960) (wife may testify against husband when she is victim of his alleged crime). *See also* *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984) and *Wiley v. State*, 150 Ga. App. 607, 258 S.E.2d 286 (1979) (each case holding that public policy does not permit claim of spousal privilege by defendant charged with a crime against a spouse or child).

7. *Wiley v. State*, 150 Ga. App. 607, 258 S.E.2d 286 (1979).

8. 362 U.S. 525, 526 (1960) (husband may not exclude wife's testimony in Mann Act prosecution).

9. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 217 (West 1984). Congress did not adopt any specific evidentiary privileges; instead, it chose to preserve the common law privileges without codifying them in the Federal Rules of Evidence. FED. R. EVID. 501, advisory committee's note.

10. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 217 (West 1984).

11. *Id.*

12. There were 1,992 reported cases of child abuse in Georgia in 1983. One year later, the total had risen to 3,872. *Gwinnett DA Wants Special Prosecutor in Child Abuse Cases*, *Atlanta J. & Const.*, Oct. 28, 1986, at 16C, col. 4.

responded to this increase.<sup>13</sup> Child abuse prosecutors have long urged that the spousal privilege be abolished in abuse cases because it only serves to protect abusers and does not advance legitimate family interests. SB 34 is the result of a request by a Gwinnett County prosecutor that the legislature enact an exception to the spousal privilege to permit the compulsion of testimony of one spouse against another in child abuse cases.<sup>14</sup>

#### SB 34

The Act amends O.C.G.A. § 24-9-23 which provided that spouses are competent but may not be compelled to testify against each other in criminal cases by redesignating it as paragraph (a) and adding a new paragraph (b) abolishing the spousal privilege when "the husband or wife is charged with a crime against the person of a minor child."<sup>15</sup> The minor child need not be either spouse's child because the Act eliminates the spousal privilege in all child abuse cases.

The Act comprehensively abolishes the spousal privilege in all child abuse cases by specifically mentioning the privilege in O.C.G.A. § 24-9-23(a) as not applicable and also referring to two other code sections which might be used to shield an abuser.<sup>16</sup> The two corresponding spousal privilege provisions of the Code are sections 24-9-21(1) and 24-9-27(a). The former provides that communications between husband and wife are confidential and excluded from admission into evidence on grounds of public policy in Georgia,<sup>17</sup> and the latter provides that no witness shall be required to testify on matters that would "bring infamy, disgrace, or public contempt upon . . . any member of his family."<sup>18</sup> By stating that these provisions are also inapplicable, the Act expresses an intent to remove all the Code's spousal privilege barriers to admission into evidence of the testimony of spouses against each other in child abuse cases.

As introduced, SB 34 provided that the spousal privilege in O.C.G.A. § 24-9-23 would not apply in criminal cases involving child molestation, sexual assault on a child, or sexual exploitation of a child. The bill was assigned to the Senate Special Judiciary Committee where an amendment was added which broadened the bill's scope to include all provisions of the Code which could be construed to confer a spousal privilege in child

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13. See, e.g., O.C.G.A. § 24-3-16 (Supp. 1987). This section, enacted in 1986, created a new exception to the hearsay evidence rule permitting the testimony of a third party concerning statements made by an abused child under the age of fourteen when the child is available to testify. See *Selected 1986 Georgia Legislation, Hearsay: Sexually Abused Children*, 2 GA. ST. U.L. REV. 196 (1986) (bill's intent is to bolster the abused child's testimony since a minor child is easily intimidated in open court by the presence of the abuser and by cross examination methods).

14. See *supra* note 12.

15. O.C.G.A. § 24-9-23(b) (Supp. 1987).

16. O.C.G.A. § 24-9-27(a) (1982).

17. O.C.G.A. § 24-9-21(1) (1982).

18. O.C.G.A. § 24-9-27(a) (1982).

abuse cases.<sup>19</sup> The committee amendment also deleted the language listing various child abuse crimes and substituted instead a provision that the abolition of the spousal testimonial privilege would apply in any proceeding in which a spouse "is charged with a crime against the person of a child." The Senate approved the committee amendment.

The House Judiciary Committee added two provisions to the bill which limited its scope.<sup>20</sup> One provision, which became part of the final bill as passed, states that this exception to the interspousal privilege only applies to "the specific act for which the defendant is charged."<sup>21</sup> The other provision, which was deleted by a Senate floor amendment, provided that the exception applies only when "the alleged victim is incapable of testifying."<sup>22</sup>

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19. SB 34 (SCA), 1987 Ga. Gen. Assem. (Senate committee amendment added a provision bringing within the scope of SB 34 abolition of the spousal testimonial privileges of O.C.G.A. §§ 24-9-21(1) and 24-9-27(a)).

20. SB 34 (HCS), 1987 Ga. Gen. Assem.

21. O.C.G.A. § 24-9-23(b) (Supp. 1987).

22. SB 34 (HCS), 1987 Ga. Gen. Assem.