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## COMMENTS

# CONFIDENTIAL COMMUNICATIONS PRIVILEGE OF HUSBAND AND WIFE: APPLICATION UNDER THE MISSOURI DISSOLUTION STATUTE

### I. INTRODUCTION

Missouri courts have long held that confidential communications between a husband and wife are privileged.<sup>1</sup> Recent cases, however, have recognized and expanded important exceptions to that privilege. According to these cases, the confidential communications privilege does not prevent one spouse from testifying as to personal communications with the other, if that testimony deals primarily with property matters or business dealings.<sup>2</sup>

This comment will reexamine the need for the confidential communications privilege between husband and wife in an action for dissolution of marriage. Discussion will center on the possibility that Missouri's existing exceptions to the confidential communications privilege make the privilege inapplicable in actions brought under the new Missouri Divorce Act.<sup>3</sup> The argument that the confidential communications privilege should not be applied in divorce actions will be based on: 1) the relationship between the existing exceptions to the privilege and the new concepts of property division and partnership theory of marriage which exist under the new divorce act; and 2) the tendency of Missouri courts to limit the confidential communications privilege whenever possible.

### II. HUSBAND-WIFE WITNESS PRIVILEGE

Before discussing the possible exceptions to the confidential communications privilege, it may be helpful to define the privilege as it exists in Missouri and to distinguish it from other husband-wife witness privileges.

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1. Moore v. Moore, 51 Mo. 118 (1872).

2. Durr v. Vick, 345 S.W.2d 165 (Mo. 1961); Brooks v. Brooks, 357 Mo. 343, 208 S.W.2d 279 (1948). See text accompanying notes 26-32 *infra*.

3. §§ 452.300-415, RSMo (Supp. 1975). Although the word "divorce" is never mentioned in Missouri's dissolution of marriage statute, the legislation was entitled the Missouri Divorce Reform Act. See Thayer, *Dissolution of Marriage Under Missouri's New Divorce Law: Introduction*, 29 J. Mo. B. 496 (1973). In this comment the word dissolution will therefore be used when referring to the court action terminating the marital relationship, and the word divorce will be used when referring to the legislative act.

### A. Confidential Communications Privilege

The confidential communications privilege between husband and wife is embodied in section 491.020, RSMo 1969.<sup>4</sup> Basically the privilege provides that one spouse may not testify in court as to confidential communications between the two made while they are alone.<sup>5</sup> Absent waiver, testimony concerning such confidential communications is inadmissible.

The basic rationale for the confidential communications privilege is to encourage spouses to confide in one another by removing the fear that their conversations may be later disclosed in court.<sup>6</sup> This rationale effectively defines the parameters of the privilege. The statements must be made during the marriage relationship in order to be privileged.<sup>7</sup> Furthermore, in order to remove effectively the fear of future disclosure the privilege must extend beyond the termination of the relationship.<sup>8</sup> In addition, the presence of a third party capable of understanding the

4. § 491.020, RSMo 1969, provides:

No married woman shall be disqualified as a witness in any civil suit prosecuted in the name of or against her husband, whether joined or not with her husband as a party; and no married man shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party; provided, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admission or confidential communications of her husband, made to herself; and provided further, that nothing in this section shall be construed to authorize or permit any married man, while the relation exists, or subsequently, to testify to any admission or confidential communications of his wife, made to himself.

Section 546.260, RSMo 1969, provides that the confidential communications privilege also applies in criminal actions. See Comment, *The Missouri Law of Marital Communications: Inconsistency Between Property and Divorce Cases*, 1 St. L.U.L.J. 117 (1950), where the author traces in detail the development of the Missouri statute on confidential communications through its various stages of revision. Procedural questions concerning who must show the communication to be privileged are unsettled in Missouri. Compare, e.g., *Allen v. Allen*, 60 S.W.2d 709 (St. L. Mo. App. 1933) (the court will presume that all communications between husband and wife are confidential until the party attacking the privilege can show otherwise) with *State ex rel. Boswell v. Curtis*, 334 S.W.2d 757 (Spr. Mo. App. 1960) (the burden of showing that the statement was confidential and therefore within the privilege was on the person asserting the privilege).

5. *Long v. Martin*, 152 Mo. 668, 54 S.W. 473 (1899); *Forbis v. Forbis*, 274 S.W.2d 800 (Spr. Mo. App. 1955); *Kistner v. Kistner*, 89 S.W.2d 106 (St. L. Mo. App. 1936); *Tucker v. Tucker*, 224 Mo. App. 669, 31 S.W.2d 238 (Spr. Ct. App. 1930). See also 8 J. WIGMORE, EVIDENCE § 2336 (McNaughton rev. 1961).

6. See, e.g., *Miller v. Miller*, 14 Mo. App. 418, 419 (St. L. Ct. App. 1883).

7. § 491.020, RSMo 1969. C. McCORMICK, EVIDENCE § 81 (2d ed. 1972).

8. *State v. Kodat*, 158 Mo. 125, 59 S.W. 73 (1900); 8 J. WIGMORE, *supra* note 5, § 2341.

communication would seem to rebut the confidential nature of the communication.<sup>9</sup>

Because both spouses are needed to effectuate a privileged confidential communication, the privilege is said to belong to both parties.<sup>10</sup> Therefore, the consent of both spouses is needed to waive the privilege.<sup>11</sup> Because the privilege belongs only to the spouses, third parties should not be allowed to claim the benefits of the confidential communications privilege.<sup>12</sup>

### B. "Adverse-Witness" Privilege

The confidential communications privilege should not be confused with the so-called "adverse-witness" privilege which also exists between husband and wife.<sup>13</sup> This privilege involves the ability of a spouse to testify for or against the other spouse in a criminal prosecution. It had generally been thought that the defendant spouse could prevent the other from testifying by making timely objection.<sup>14</sup> The defendant spouse, of course, could waive this privilege.<sup>15</sup> In addition, the privilege did not apply if the defendant spouse was charged with a crime against the other spouse or their children.<sup>16</sup>

A recent Missouri case significantly clarified the law in this area. In *State v. Frazier*<sup>17</sup> the court concluded that the option of testifying against a defendant spouse lies with the witness spouse. A spouse may testify against the defendant spouse in a criminal prosecution, even over the objection of the defendant spouse, but may not be *compelled* to testify by the prosecution.<sup>18</sup> Apparently the privilege of the witness spouse ex-

9. Schierstein v. Schierstein, 68 Mo. App. 205 (St. L. Ct. App. 1896) (presence of 9-month-old baby did not destroy privilege). See also Erickson, *Testimony by Husband and Wife in Missouri*, 24 Mo. L. Rev. 546, 547 (1959).

10. C. McCORMICK, *supra* note 7, § 83.

11. Wigmore advances the proposition that the privilege should belong only to the communicating spouse. 8 J. WIGMORE, *supra* note 5, § 2340. See also Coleman v. Coleman, 318 S.W.2d 378 (St. L. Mo. App. 1958).

12. This point has been overlooked by the courts from time to time. See, e.g., Henry v. Sneed, 99 Mo. 407, 12 S.W. 663 (1889) (third party allowed to assert the privilege).

13. § 546.260, RSMo 1969.

14. See *State v. Kodat*, 158 Mo. 125, 59 S.W. 73 (1900).

15. 8 J. WIGMORE, *supra* note 5, § 2242. Because the adverse witness rule is a privilege, it is waived if not properly asserted. *State v. Hill*, 76 S.W.2d 1092 (Mo. 1934).

16. *State v. Kollenborn*, 304 S.W.2d 855 (Mo. En Banc 1957); *State v. Pennington*, 124 Mo. 388, 27 S.W. 1106 (1894).

17. 550 S.W.2d 590 (Mo. App., D.K.C. 1977).

18. A spouse is now a competent witness against a defendant spouse in any criminal proceeding if the witness spouse willingly testifies; the option of doing so belongs to the witness spouse; and a witness spouse is permitted, but may not be compelled, to testify in any

tends beyond the termination of the marital relationship as to acts committed during marriage.<sup>19</sup>

### C. Spousal Disqualification

The confidential communications privilege also should be distinguished from the common law rule which barred either spouse from testifying for or against the other.<sup>20</sup> This common law disqualification was not a true privilege because it could not be waived. Like most states,<sup>21</sup> Missouri has abolished the spousal witness disqualification by statute.<sup>22</sup>

Because this comment is concerned with the relationship of privileged communications to Missouri's new divorce act, only the confidential communications privilege will be discussed.<sup>23</sup>

## III. EXCEPTIONS TO THE CONFIDENTIAL COMMUNICATIONS PRIVILEGE

### A. The Property Exceptions

Missouri courts have expressed the view that the confidential communications privilege between husband and wife should be jealously guarded.<sup>24</sup> Nevertheless, the courts actually have been quite willing to

criminal proceeding against a defendant spouse as to any relevant and admissible matter save confidential communications between the spouses.

*Id.* at 596.

19. In *Frazier* the witness' testimony concerned an incident during the marriage; the defendant and the witness were divorced at time of the trial. 550 S.W.2d at 592. The court did not discuss and therefore apparently did not base its holding on the fact that the ex-wife could testify against the defendant because of the fact that the witness and the defendant were divorced at the time of the trial. Thus, this decision could be read to mean that the privilege of a witness spouse not to testify against a defendant spouse extends beyond the termination of the marital relationship. Because the justification for the adverse witness privilege is to preserve marital harmony *during* the relationship, commentators were generally of the opinion that any adverse witness privilege ended when the marriage did. See C. McCORMICK, *supra* note 7, § 85. However, Missouri courts already had held that the adverse witness privilege extended beyond the termination of the marriage. *State v. Kodat*, 158 Mo. 125, 59 S.W. 73 (1900).

20. See 8 J. WIGMORE, *supra* note 5, § 2334.

21. *Id.*

22. § 491.020, RSMo 1969.

23. See Erickson, *supra* note 9, for a discussion of the differences among the confidential communications privilege, the adverse witness privilege, and the common law spousal disqualification.

24. See the leading case in Missouri on the confidential communications privilege, *Berlin v. Berlin*, 52 Mo. 151 (1873), wherein Judge Sherwood stated:

Communications of husband and wife *inter sese* are privileged, and are sedulously guarded by the seal of that absolute inviolability which the law places upon the hallowed intimacies of the marital relation. So strictly has the law, on the grounds of public policy, enforced the ob-

create exceptions to the privilege and admit evidence of confidential communications in certain circumstances. Most of the cases that have recognized an exception to the confidential communications privilege have involved some type of dealings between the spouses that involved property, either real or personal.<sup>25</sup> Generally one of the spouses wishes to testify concerning property matters in a suit for separate maintenance and support or in a divorce proceeding, while the other claims that such testimony is privileged and therefore inadmissible.

As a general rule, Missouri courts have been willing to admit the testimony of one spouse concerning communications dealing with *property* matters. These cases have fallen into three categories: cases involving a joint business venture between the spouses; cases allowing the admissibility of otherwise confidential communications to prevent a fraud on the property rights of one of the spouses; and cases establishing an agency relationship between the spouses.

### 1. Joint Business Ventures

The most recent Missouri case to admit testimony concerning the confidential communications of husband and wife was *Durr v. Vick*.<sup>26</sup> The husband brought an action against his former wife to recover one-half of the proceeds of certain promissory notes owned jointly by the two. The wife sought to exclude certain statements made during the marital relationship that the ownership in the note and its proceeds was to be half and half. The court acknowledged the general rule that confidential communications between husband and wife are inadmissible.<sup>27</sup> However, the court allowed the testimony into evidence and stated that "in view of the nature of the transaction involved" the communications were not privileged.<sup>28</sup>

For support the *Durr* court cited *Brooks v. Brooks*.<sup>29</sup> This 1948 case is probably the most important case in establishing an exception to the

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servance of this rule, that in no instance and for no purpose has its  
infraction ever been permitted . . . .

*Id.* at 152.

25. For a discussion of the "property line" of divorce cases suggesting exceptions to the confidential communications privilege, see Comment, *supra* note 4. See also Renard, *Confidential Communications Between Husband and Wife*, 3 J. Mo. B. 91 (1947).

26. 345 S.W.2d 165 (Mo. 1961).

27. The court recognized that the general definition of confidential communications is communications between the spouses when no third parties are present. *Tucker v. Tucker*, 224 Mo. App. 669, 31 S.W. 2d 238 (Spr. Ct. App. 1941). However, the court stated that this definition was "not decisive of the question presented." 345 S.W.2d at 168.

28. 345 S.W.2d at 168.

29. 357 Mo. 343, 208 S.W.2d 279 (1948).

husband-wife confidential communications privilege.<sup>30</sup> In *Brooks* a wife sued her husband for an accounting of the proceeds of an alleged joint business venture between the spouses. The wife sought to testify that her husband had told her that the business would be "mine and his business, and we would work together."<sup>31</sup> The court held that because the conversations related primarily to business matters, they were not *marital confidences*.<sup>32</sup> Therefore, the testimony of the wife concerning the ownership of the business was admitted.

In *State ex rel. Boswell v. Curtis*,<sup>33</sup> a suit for alienation of affections, the court interpreted the meaning of a joint business venture rather broadly. In *Boswell* production of income tax returns was sought in order to establish the net worth of one spouse. Production of these returns was challenged. The wife argued that because the returns were filed jointly, they were privileged as confidential communications. Although two earlier Missouri cases had held similar testimony privileged,<sup>34</sup> production of the income tax returns was ordered. The court's basis for holding the returns not privileged was that "transaction of purely business matters are often not privileged as marital confidences."<sup>35</sup> Apparently the court reasoned that because the husband and wife jointly owned a majority of stock in a corporation, the filing of the tax return involved a business venture.

It is clear that Missouri courts are willing to admit otherwise privileged confidential communications if the existence of some type of joint business venture between the spouses is established. In addition, Missouri courts seemed to have defined what constitutes a business venture rather broadly, although the guidelines have not been clearly established.

30. For a detailed discussion of the facts of *Brooks*, see Comment, *supra* note 4, at 129-31.

31. 357 Mo. at 346, 208 S.W.2d at 280.

32. The conversations here involved relate primarily to business matters, not marital confidences, and are clearly a part of the *res gestae*. The better reasoned cases are to the effect that in actions between husband and wife *involving property rights* the rule excluding relevant conversations between them in the absence of third persons as confidential communications yields to the necessity of the situation for the prevention of injustice and they are competent witnesses respecting such conversations.

*Id.* at 350, 208 S.W.2d at 283 (emphasis added).

33. 334 S.W.2d 757 (Spr. Mo. App. 1960).

34. *Reeve v. Reeve*, 160 S.W. 2d 804 (K.C. Mo. App. 1942); *McPheeters v. MCPheeters*, 207 Mo. App. 634, 227 S.W. 872 (Spr. Ct. App. 1921).

35. 334 S.W.2d at 763. "The only other strict privilege which the wife might assert would be upon the ground of confidential communication. But communications between husband and wife as to transaction of purely business matters are often not privileged as marital confidences." Professor Wigmore emphasized that the "essence of the [confidential communications] privilege is to protect

## 2. Fraud on Property Rights

Missouri courts also have been willing to admit testimony which concerns marital confidences if it is necessary to prevent fraud on the marital property rights on one spouse. This *ex necessitate* exception to the confidential communications privilege was first established in *Henry v. Sneed*.<sup>36</sup> A husband and wife had been induced by fraud to execute a deed of trust concerning a parcel of real property. The court admitted testimony of conversations between the husband and wife concerning the alleged fraud, even though these conversations were apparently confidential. The court held that the conversations were not privileged because they constituted a part of the fraudulent conduct.<sup>37</sup>

In *Henry v. Sneed* the claim that the conversations were privileged was made by a third party rather than one of the spouses.<sup>38</sup> The fraud exception to the confidential communications privilege later was invoked under similar circumstances in two subsequent cases. In *Hack v. Rollins*<sup>39</sup> and *Rice v. Waddill*<sup>40</sup> testimony concerning otherwise confidential communications between husband and wife was held admissible because the court felt that the testimony was necessary in order to prevent or expose fraud.<sup>41</sup>

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confidences only." 8 J. WIGMORE, *supra* note 5, § 2336. Wigmore cited extensively from the leading case of *Sexton v. Sexton*, 129 Iowa 487, 491-92, 105 N.W. 314, 315-16 (1905) wherein the court discussed the confidential communications privilege:

As we have seen, the privilege is bottomed upon considerations of public policy. Accordingly it would seem that, whatever the form of expression adopted, no more is required than that the confidences inherent in the marital relation, or incident thereto, should be fully protected . . . . So, too, it cannot be that the rule of privilege must be held to extend so far as to exclude all communications between husband and wife having reference to business relations existing either as between them directly, or as between them—one or both—and others. *Certainly as to business relations existing between husband and wife directly, there can be no adverse consideration of public policy.* Quite to the contrary, public policy, as reflected by statute and by our decisions, permits of such relations to the fullest extent. And it would be shocking to say that a contract thus made, or rights or liabilities thus accruing, could not be enforced because, forsooth, a communication between the parties having relation thereto, and essential to proof, was privileged . . . . (emphasis added).

36. 99 Mo. 407, 12 S.W. 663 (1889).

37. The court said that the conversations were "part of the *res gestae*, and on the foot of fraud." *Id.* at 422, 12 S.W. at 665.

38. See text accompanying note 12 *supra*. See also Warrick, *Evidence—Husband and Wife—Confidential Communications*, 21 U. MO. BULL., L. SER. 40, 43 (1921).

39. 158 Mo. 182, 59 S.W. 232 (1900).

40. 168 Mo. 99, 67 S.W. 605 (1902).

41. *Rice v. Waddill*, 168 Mo. 99, 121, 67 S.W. 605, 610 (1902); *Hack v. Rollins*, 158 Mo. 182, 190, 59 S.W. 232, 234 (1900). Both decisions cited *Henry v.*



### 3. Spousal Agency Relationship

If the agency of one spouse for the other is established, testimony concerning communications made during the agency relationship is admissible. This is so even though the communications otherwise would be privileged. Only one case clearly sets forth the agency exception. In *Darrier v. Darrier*<sup>42</sup> a husband sought to divest his wife of title to certain land. He offered into evidence a letter which he had written which authorized his wife to buy the land in question with money he supplied. The court held the letter admissible; testimony by the husband concerning the letter also was admitted. The reason the letter was held admissible, and not privileged as a confidential communication, was the existence of an agency relationship between the spouses.<sup>43</sup>

## IV. ELIMINATION OF THE CONFIDENTIAL COMMUNICATIONS PRIVILEGE IN DISSOLUTION PROCEEDINGS

### A. *Single Action Dissolution Proceedings*

Until the passage of Missouri's Divorce Reform Act<sup>44</sup> in 1973, the court in a divorce proceeding had no jurisdiction to divide property between the parties. Thus two separate judicial proceedings often were required to resolve all issues upon the termination of marriage. One action was commenced in circuit court by the spouse seeking the divorce. In this legal action, the trial judge decided only whether a divorce should be granted to the parties. Following the divorce decree, if the parties could not agree on a property distribution, a separate equitable partition action or a statutory legal action was filed to resolve property disputes.<sup>45</sup>

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*Sneed* as authority for the proposition that an exception to the confidential communications privilege exists to prevent fraud.

One additional case, *Moeckel v. Heim*, 134 Mo. 576, 36 S.W. 226 (1896), involved fraud in dealing with property and the admissibility of otherwise confidential communications between husband and wife. The court admitted such communications, citing and following *Henry v. Sneed*.

42. 58 Mo. 222 (1874).

43. *Id.* at 234. Judge Sherwood likened the letter to a power of attorney, remarking that no one would doubt that a formal power of attorney would be admissible. For a criticism of this reasoning, see Comment, *supra* note 4, at 127. For another case holding testimony of the wife admissible after her agency for the husband was established, see *Ingerham v. Weatherman*, 79 Mo. App. 480 (K.C. App. 1899). *Ingerham* is not very useful precedent because the court did not clearly establish which privilege between husband and wife was applicable.

44. §§ 452.300-415, RSMo (Supp. 1975). See *Symposium: Dissolution of Marriage Under Missouri's New Divorce Law*, 29 J. Mo. B. 495 (1973).

45. See §§ 452.170-.240, RSMo 1969 (married woman to petition the court). See also *Sackman v. Sackman*, 143 Mo. 576, 45 S.W. 264 (1898) (the divorce petition was sufficient to start equitable action independent of statute).

Under this two-action system, testimony involving property matters between the spouses was not relevant in the legal proceeding for divorce. Therefore, trial judges were not called upon to decide whether confidential communications between husband and wife which dealt with property should be admissible in a divorce action; such matters were irrelevant. An argument that the confidential communications privilege should not apply due to the established "property" exception would have been totally misplaced in a divorce proceeding.

However, under the 1973 Divorce Act questions of property division are to be resolved in the same proceeding as the issue of divorce.<sup>46</sup> Now that testimony involving property rights will be relevant in divorce proceedings, Missouri practitioners are in the position to argue that the confidential communications privilege should not apply in such actions. The argument can be premised on the "property" exceptions to the confidential communications privilege in Missouri. Because the privilege does not apply to testimony involving property matters, at a minimum it should not apply in divorce proceedings to testimony involving property matters between the spouses.

In addition, a credible argument can be advanced that the confidential communications privilege should not apply to any testimony in a dissolution action. Under the new divorce act, the *conduct* of the parties during the marriage is a factor to be considered by the trial judge when distributing marital assets.<sup>47</sup> Thus, testimony concerning confidential communications that would seem to bear only on the issue whether the marriage should be dissolved or the amount of maintenance to be awarded also would be relevant in deciding how the marital property is to be divided.

Therefore, under Missouri's new divorce act the entire dissolution proceeding involves matters relevant to property division. Missouri cases have established that confidential communications involving property matters are not privileged. Missouri courts therefore should eliminate the application of the privilege in dissolution actions. This would make available to the courts all the information necessary for proper administration of the new divorce act.

### B. *Partnership Theory of Marriage*

Further support for the argument that the confidential communications privilege should not apply in dissolution actions is provided by the conceptual changes in the marital relationship brought about by the new divorce act. Missouri's new divorce act is based on the Uniform Marriage

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46. See § 452.330.1, RSMo (Supp. 1975). See also Krauskopf & Fowler, *Dissolution of Marriage Under Missouri's New Divorce Law: Property Provisions*, 29 J. Mo. B. 508, 510 (1973).

47. § 452.330.1(4), RSMo (Supp. 1975).

and Divorce Act.<sup>48</sup> This new act changes the relationship of husband and wife for purposes of accumulating and distributing assets during the marriage to that of equal partners in a shared enterprise-type relationship.<sup>49</sup>

Section 452.330, RSMo (Supp. 1975) controls matters of property distribution incident to divorce.<sup>50</sup> This section is based on section 307 of the Uniform Marriage and Divorce Act, as originally approved by the Commissioners of Uniform State Laws in 1970. Most commentators agree that section 307 of the Uniform Act creates a community property rule for the division of marital property upon dissolution.<sup>51</sup>

By suggesting the adoption of section 307, the Commissioners on Uniform State Laws were not attempting to force an entire community property scheme upon common law property jurisdictions. Rather, their intent seems to have been to reflect a shared enterprise or partnership theory of marriage and the accumulation of marital assets.<sup>52</sup> This shared enterprise or partnership theory of marriage is, of course, the essence of community property law.<sup>53</sup> The Commissioners forthrightly recommended that the "distribution of property upon the termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to a dissolution of a partnership."<sup>54</sup> Thus, section 307 was meant to reflect not only community property concepts, but also the shared enterprise or partnership theory of the marriage relationship.

Because of the widespread acceptance of the value of a partnership theory of marriage, one commentator has suggested that "it is fair to assume" that the Missouri legislature intended to incorporate the partnership concept of marriage into Missouri law when they adopted

48. Thayer, *supra* note 3, at 496.

49. See Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. Rev. 165 (1976).

50. This section provides that "the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors . . ." § 452.330.1, RSMo (Supp. 1975). The factors set forth in the statute are:

- (1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- (2) The value of the property set apart to each spouse;
- (3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and
- (4) The conduct of the parties during the marriage.

51. FAMILY LAW REPORTER, DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 57 (1974); BROWN, *Dissolution of Marriage—Personal Injury Damages as Marital Property in Missouri*, 41 Mo. L. Rev. 603, 604 (1976).

52. Krauskopf, *supra* note 49, at 166.

53. *Id.*

54. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 178 (1970).

section 307.<sup>55</sup> Missouri's version of section 307 limits the class of divisible property to "marital property." However, this fact highlights the intent to adopt partnership concepts of marriage into Missouri law by limiting divisible property to that which is acquired through the *joint efforts* of both spouses during the marriage.<sup>56</sup>

Missouri courts have acknowledged the partnership theory of the marital relationship. In two recent appellate court decisions, *In re Marriage of Cornell*<sup>57</sup> and *Corder v. Corder*,<sup>58</sup> the partnership theory of marriage was discussed in reference to property divisions. These two cases can be read as authority that Missouri is on its way to adopting a partnership theory of marriage for property acquisition purposes.

By accepting a partnership theory of marriage, Missouri courts have strengthened the argument for eliminating the confidential communications privilege in dissolution actions. If spouses are "partners" in the shared enterprise of collecting marital assets, communications concerning such marital property should be admissible under the joint enterprise exception to the confidential communications rule. The Missouri cases which have admitted confidential communications by use of this exception would serve as specific authority for this proposition.<sup>59</sup>

### C. Intent of Parties

In distributing assets incident to dissolution of marriage, Missouri trial judges are directed to "set apart to each spouse his property."<sup>60</sup> In essence, this means that the court is to set aside the separate property of each spouse and divide only the marital property. In so doing the judge must decide what is and what is not marital property.

Missouri courts have recognized that the *intent of the spouses* can determine whether assets are marital or separate property.<sup>61</sup> If such an intent on the part of the spouses can control, then communications between the spouses to the effect that "this will be ours together" or "everything will be 50-50"<sup>62</sup> should be admissible in divorce actions even though confidential. It can be argued that such statements already are admissible in order to prevent a fraud on the property rights of a spouse.<sup>63</sup>

55. Krauskopf, *supra* note 49, at 171.

56. Krauskopf, *supra* note 49, at 173.

57. 550 S.W.2d 823 (Mo. App., D. Spr. 1977).

58. 546 S.W.2d 798 (Mo. App., D.K.C. 1977).

59. See text accompanying notes 26-35 *supra*.

60. § 452.330.1, RSMo (Supp. 1975). See note 50 *supra*.

61. *Conrad v. Bowers*, 533 S.W.2d 614 (Mo. App., D. St. L. 1975). See also *Jaeger v. Jaeger*, 547 S.W.2d 207 (Mo. App., D. St. L. 1977); *Stark v. Stark*, 539 S.W.2d 779 (Mo. App., D.K.C. 1976).

62. See *Estate of Raphael*, 91 Cal. App. 2d 931, 206 P.2d 391 (1949) (such a statement admissible under California's "pillow talk" rule).

63. See text accompanying notes 36-41 *infra*.

#### D. Trend Toward Restrictive Application of the Privilege

Another possible argument for the elimination of the confidential communications privilege in dissolution actions is the tendency of Missouri courts to limit the application of the privilege whenever possible. The courts have been willing to eliminate the application of the privilege whenever justified by sound reason. This willingness has been evident in cases involving verbal assaults. This type of case generally involves the use of threatening or abusive language by one spouse against the other. Strictly speaking, such verbal assaults if made between the spouses while they are alone would constitute privileged communications and therefore be inadmissible in a dissolution proceeding.<sup>64</sup>

Missouri courts have held, however, that such communications are admissible to prove indignities inflicted upon a spouse.<sup>65</sup> These courts did not feel particularly constrained by the confidential communications privilege and were ready to find exceptions to the privilege to avoid unjust results. Although the question of the admissibility of such verbal assaults is far from settled, recent Missouri cases have indicated such communications may be admissible.<sup>66</sup>

This willingness on the part of Missouri courts to create exceptions to the confidential communications privilege shows a judicial desire to limit the application of the privilege. Because the existing property exceptions to the privilege give Missouri courts a ground on which to limit application of the privilege in dissolution actions, such action should be taken to prevent unjust results.

#### V. LEGISLATION

Legislation in Missouri and other states has affected the application of the confidential communications privilege in certain situations. Such legislation has tended to restrict rather than expand the privilege. In deciding whether Missouri courts should apply the confidential com-

64. See, e.g., *Gruner v. Gruner*, 183 Mo. App. 157, 165 S.W. 865 (St. L. Ct. App. 1914); *Schierstein v. Schierstein*, 68 Mo. App. 205 (St. L. Ct. App. 1896); *Brown v. Brown*, 53 Mo. App. 453 (K.C. Ct. App. 1893); *Ayers v. Ayers*, 28 Mo. App. 97 (St. L. Ct. App. 1887); *Miller v. Miller*, 14 Mo. App. 418 (St. L. Ct. App. 1883); *Vogel v. Vogel*, 13 Mo. App. 588 (St. L. Ct. App. 1883).

65. See, e.g., *Meyer v. Meyer*, 158 Mo. App. 29, 138 S.W. 70 (St. L. Ct. App. 1911); *Schweikert v. Schweikert*, 108 Mo. App. 477, 83 S.W. 1095 (St. L. Ct. App. 1904); *Maget v. Maget*, 85 Mo. App. 6 (K.C. Ct. App. 1900). *Meyer* and *Maget* originally set forth the "verbal assault" exception to the confidential communications privilege. Early Missouri opinions did not consider this exception as law and held that *Meyer* and *Maget* had been "practically overruled" by *Gruner v. Gruner*, 183 Mo. App. 157, 165 S.W. 65 (St. L. Ct. App. 1914).

66. See *Oliver v. Oliver*, 325 S.W.2d 33 (St. L. Mo. App. 1959) (dictum); *Coleman v. Coleman*, 318 S.W.2d 378 (St. L. Mo. App. 1958) (dictum); *Sellars v. Sellars*, 274 S.W.2d 509 (Spr. Mo. App. 1955) (dictum).

munications privilege in dissolution actions, this legislative trend should be given consideration.

### A. Legislation in Other States

#### 1. Uniform Marriage and Divorce Act States

According to the Commissioners on Uniform State Laws there are now six states, excluding Missouri, that have adopted some form of the Uniform Marriage and Divorce Act.<sup>67</sup> These six states are Arizona,<sup>68</sup> Colorado,<sup>69</sup> Georgia,<sup>70</sup> Kentucky,<sup>71</sup> Montana,<sup>72</sup> and Washington.<sup>73</sup> All six of these states statutorily recognize a confidential communications privilege between husband and wife that is similar to the Missouri privilege.<sup>74</sup>

However, five of these six states have enacted specific legislation which has effectively eliminated the use of the confidential communications privilege in dissolution actions.<sup>75</sup> This has been accomplished in four states by making the privilege inapplicable in any civil action or proceeding between the spouses.<sup>76</sup> The remaining state simply provided that the privilege does not apply in divorce actions.<sup>77</sup> Missouri and Georgia remain the only states that have adopted some form of the Uniform Marriage and Divorce Act without statutorily eliminating the application of the confidential communications privilege in dissolution actions.

#### 2. Community Property States

Because Missouri has adopted a community property-type scheme for property distribution incident to dissolution of marriage,<sup>78</sup> examina-

67. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Table VII, at 414 (1975).

68. ARIZ. REV. STAT. §§ 25-301 to 328 (Supp. 1977).

69. COLO. REV. STAT. §§ 14-10-101 to 133 (1974).

70. GA. CODE ANN. §§ 30-101 to 134 (Supp. 1977).

71. KY. REV. STAT. §§ 403.010-.350 (Supp. 1976).

72. MONT. REV. CODES ANN. §§ 48-301 to 341 (Supp. 1977).

73. WASH. REV. CODE ANN. §§ 26.09.101-902 (Supp. 1977).

74. ARIZ. REV. STAT. § 12-2232 (Supp. 1977); COLO. REV. STAT. § 13-90-107 (1974); GA. CODE ANN. § 38-418 (1974); KY. REV. STAT. § 421.210(1) (1972); MONT. REV. CODES ANN. § 93.701-4 (Supp. 1977); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1977).

75. The only state besides Missouri that has not statutorily eliminated the application of the confidential communications privilege in divorce actions is Georgia. GA. CODE ANN. § 38-418 (1969).

76. ARIZ. REV. STAT. § 12-2232 (1956); COLO. REV. STAT. § 13-90-107 (1974); MONT. REV. CODES ANN. § 93.701-4 (Supp. 1977); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1977).

77. KY. REV. STAT. § 421.210(1) (1972).

78. See text accompanying notes 50 & 51 *supra*.

tion of the treatment of the confidential communications privilege in community property states is also in order. At present there are eight community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.<sup>79</sup> All except Louisiana<sup>80</sup> and New Mexico<sup>81</sup> have a statutory confidential communications privilege between husband and wife.<sup>82</sup>

Of the six community property states that have a statutory confidential communications privilege, all but Texas have specifically provided that the privilege does not apply in civil actions between the spouses.<sup>83</sup> This would of course include divorce actions. Thus, of the eight community property states only one, Texas, still applies the confidential communications privilege in dissolution actions.

### B. *Uniform Reciprocal Enforcement of Support Act*

As noted earlier, the basic rationale for the confidential communications privilege is to encourage spouses to confide in one another without fear of future disclosure of such communications.<sup>84</sup> This rationale seems to be firmly grounded in Missouri's case law and may serve as the primary argument against eliminating the application of the confidential communications privilege in dissolution actions.<sup>85</sup>

However, the Missouri legislature already has seen fit to eliminate the application of the confidential communications privilege in actions under the Uniform Reciprocal Enforcement of Support Act

79. W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 57 (2d ed. 1971).

80. LA. REV. STAT. ANN. § 13:3665 (West 1968). The omission of any mention of the confidential communications privilege from the statute concerning the competency of witnesses in civil cases has caused some commentators to wonder if the omission was deliberate or simply an oversight. Note, 14 LA. L. REV. 427, 430 n.22 (1954). Apparently, since the statute has not been revised, the omission was intentional.

81. N.M. STAT. ANN. § 20-1-12 (1975). New Mexico's statute provides that a spouse cannot be *compelled* to disclose communications between the spouses while they are married, but apparently such spouse may do so voluntarily.

82. ARIZ. REV. STAT. § 12-2232 (1956); CAL. EVID. CODE § 980 (West 1966); IDAHO CODE § 9-203 (Supp. 1977); NEV. REV. STAT. § 48-040 (1966); TEX. CRIM. PRO. CODE ANN. § 38-11 (Vernon 1966); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1977).

83. ARIZ. REV. STAT. § 12-2232 (1956); CAL. EVID. CODE §§ 981-84 (West 1966); IDAHO CODE § 9-203 (Supp. 1977); NEV. REV. STAT. § 48.040 (1966); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1977). Two of these five states, Arizona and Washington, have also enacted the Uniform Marriage and Divorce Act in some form. See authorities cited note 76 *supra*.

84. See text accompanying note 6 *supra*.

85. The validity of this rationale has been doubted for some time. See Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929). But see Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 219 (1961).

(U.R.E.S.A.).<sup>86</sup> This legislation effectively rebuts any strong public policy in favor of the continued application of the confidential communications privilege in Missouri. It is difficult to justify the application of the privilege in regular dissolution proceedings but not in actions under U.R.E.S.A. Both proceedings can involve significant amounts of testimony concerning the marital relationship and spousal communications. If confidential communications are admissible in actions under U.R.E.S.A., such communications should also be admissible in actions under the Divorce Reform Act.

## VI. CONCLUSION

Missouri courts have formulated three interrelated exceptions to the application of the confidential communications privilege. All three exceptions apply when the otherwise confidential communication deals primarily with property matters. It is submitted that because proceedings under the new divorce act are permeated with property questions, the confidential communications privilege should not apply in divorce actions. Additional support for this proposition is found in the partnership theory of marriage inherent in the new divorce act, and the willingness of Missouri's courts to limit the application of the confidential communications privilege when possible.

Missouri courts are in a position to remove the application of the confidential communications privilege in divorce proceedings and should do so. If the courts are hesitant, the same result could be accomplished through specific legislation. Such legislation barring the application of the privilege in divorce actions would bring Missouri in line with the majority of community property states and states with divorce acts similar to that of Missouri. Legislation in Missouri already has made the confidential communications privilege inapplicable in actions under U.R.E.S.A. Legislation of this type could be extended to cover all dissolution actions.<sup>87</sup>

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86. § 454.210, RSMo 1969.

87. Professor McCormick, after stating his doubts concerning a valid need for the confidential communications privilege, especially in light of the disproportionate harm the privilege may cause to the administration of justice, concluded:

[The wider solution] is to recognize, by statute, rule of court or decision, that the privilege is not absolute but a qualified one, which must yield if the trial judge finds that the evidence of the communication is required in the due administration of justice. The judge could then protect the marital confidence when it should be protected, namely, when the material fact sought to be established by the communication is not substantially controverted and may be proven with reasonable convenience by other evidence.

C. McCORMICK, *supra* note 7, at § 86.