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EXPANDED WAIVER OF MARITAL PRIVILEGES IN MISSOURI

*State v. Pendergras*¹

In 1977,² the Missouri Court of Appeals for the Western District attempted to significantly alter the spousal privileges in criminal cases by vesting the testimonial privilege entirely in the witness-spouse.³ This decision was later overruled by the Missouri Supreme Court.⁴ But in a recent decision, the western district court of appeals again may have significantly changed the status of the privileges in Missouri. In *State v. Pendergras*,⁵ the court has apparently created a new exception to the related marital privilege of confidential communications.

The case arose when, following a marital dispute, the defendant's wife reported to police that he was in possession of narcotics. The police discovered marijuana and cocaine in a satchel on the defendant's premises and in the trunk of his car. During the trial, the defendant testified that, because of marital problems, he had not resided at the family home for two weeks before his arrest. He claimed that the car had been under his wife's control during that period and that the satchel was hers. He denied any knowledge of the drugs.⁶

The state called the defendant's wife in rebuttal.⁷ She testified that he had never moved out of the house, that he had the only key to the car, and that the satchel was his.⁸ She also testified that she had seen the defendant using narcotics on the premises and recounted certain confidential statements made to her by the defendant regarding his case.⁹ The defendant was convicted and he appealed.

1. 621 S.W.2d 68 (Mo. App., W.D. 1981).

2. *State v. Frazier*, 550 S.W.2d 590 (Mo. App., K.C. 1977).

3. *Id.* at 595.

4. *State v. Euell*, 583 S.W.2d 173 (Mo. En Banc 1979). The *Euell* court relied heavily on *Hawkins v. United States*, 358 U.S. 74 (1958), to support its conclusion that the testimonial privilege should be vested in the defendant-spouse as well as the witness-spouse. 583 S.W.2d at 177. The United States Supreme Court overruled *Hawkins* shortly thereafter in *Trammel v. United States*, 445 U.S. 40 (1980).

5. 621 S.W.2d 68 (Mo. App., W.D. 1981).

6. *Id.* at 69.

7. *Id.* The defendant objected to his wife's testimony on the ground that it was privileged. *Id.* at 70.

8. *Id.* at 69-70.

9. The wife testified that the defendant had asked her to commit perjury by testifying that "she had set him up," and had bribed his chief witness. Brief for Respondent at 6, *State v. Pendergras*, 621 S.W.2d 68 (1981). The defendant's wife also testified that he told her he had used cocaine. *Id.*

The sole issue on appeal was whether the trial court erred in admitting the wife's testimony. The defendant argued that the testimony was inadmissible under section 546.260 of the Revised Statutes of Missouri,¹⁰ which provides that a defendant may exclude the adverse testimony of his spouse in a criminal case¹¹ and any confidential communications between the spouses.¹²

The court of appeals held that the defendant had waived his privilege by attempting to show that his wife was responsible for the narcotics, thereby blackening her reputation.¹³ The court relied on *State v. Bledsoe*¹⁴ to support its decision.¹⁵ In *Bledsoe*, the Missouri Supreme Court ruled that a defendant, by revealing confidential communications between himself and his spouse and blackening her reputation, waived his privilege to exclude her testimony.¹⁶ The defendants in both *Bledsoe* and *Pendergras* had objected to their spouses' testimony on the basis of section 546.260.¹⁷

10. (1978). This statute provides:

No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused . . . ; provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf . . . ; provided, that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife.

11. See *State v. Dunbar*, 360 Mo. 788, 792, 230 S.W.2d 845, 847 (1950).

12. See *State v. Euell*, 583 S.W.2d 173, 176 (Mo. En Banc 1979); *Moore v. Moore*, 51 Mo. 118, 119 (1872). Confidential communications have been defined as those communications exchanged between husband and wife when they are alone. *State v. Montgomery*, 571 S.W.2d 784, 787 (Mo. App., St. L. 1978). Thus, a communication is not considered confidential, and no privilege exists, if a third party is present at the time it is made. *Long v. Martin*, 152 Mo. 668, 674, 54 S.W. 473, 475 (1899); *Tucker v. Tucker*, 224 Mo. App. 669, 674, 31 S.W.2d 238, 241 (Spr. 1930). See Comment, *Testimony by Husband and Wife in Missouri*, 24 MO. L. REV. 546, 551 (1959). See also notes 3 & 4 and accompanying text *supra*.

13. 621 S.W.2d at 71. The court recounted the defendant's attempts to implicate his wife:

Q. It's your testimony that It's [sic] your wife's?

A. I don't know.

Q. Did you think it was your wife's at that time?

A. Yes; or one of her friends.

* * * * *

A. I was thinking—I was thinking so much. It was just repetitious [sic]. I just started thinking who in the hell would come in the house and put this stuff in here. Who would she let in the house.

Id. at 72 n.3.

14. 325 S.W.2d 752 (Mo. 1959).

15. 621 S.W.2d at 71.

16. 325 S.W.2d at 766.

It is important to realize that there are two independent privileges contained in the statute. The first is the testimonial privilege.¹⁸ Its origin is obscure;¹⁹ it is often mentioned in conjunction with the common law rule that a spouse was incompetent to testify on behalf of the other spouse.²⁰ The testimonial privilege and spousal incompetency are not related, however, and they must be kept conceptually distinct.²¹

States apply the testimonial privilege in various ways. Some retain the rule of incompetency that precludes adverse spousal testimony in criminal cases.²² Others, including Missouri, allow the defendant-spouse to control the privilege.²³ A growing number of states permit only the witness-spouse to assert the privilege.²⁴ This is the current federal rule.²⁵ The remaining jurisdictions have simply abolished the privilege entirely.²⁶

The modern rationale behind the testimonial privilege is a desire by the courts to avoid placing undue strain on the defendant's marriage by requiring

18. This is the portion of the statute that says that no "wife or husband" of a defendant "shall be required to testify" against him. MO. REV. STAT. § 546.260 (1978).

19. Wigmore believes that the testimonial privilege originated around the middle of the sixteenth century. 8 J. WIGMORE, EVIDENCE § 2227 (rev. ed. 1961 & Supp. 1981). Interestingly, the common law rule of spousal incompetency, which precluded one spouse from testifying on behalf of the other spouse, did not develop until the early seventeenth century. *Id.* Modern law, which retains the testimonial privilege but has abolished spousal disqualification in most jurisdictions, is actually a reflection of the early common law.

20. Note, for example, that spousal incompetency is abolished in the first clause of MO. REV. STAT. § 546.260 (1978), the statute which later provides for the testimonial privilege. *See* note 10 *supra*.

21. Despite the difference between incompetency and privilege, courts have often refused to allow waiver of privileges, which transforms them into rules of incompetency. *See, e.g.,* Henry v. Sneed, 99 Mo. 407, 12 S.W. 663 (1889) (no waiver permitted, but confidential communications allowed under exception to privilege). For a discussion of the view that incompetency and waiver are not absolute rules, see J. MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW 78-92 (1947).

22. *See, e.g.,* IOWA CODE § 622.7 (1979), *construed in* State v. Pepples, 250 N.W.2d 390 (Iowa 1977); TEX. CRIM. PROC. CODE ANN. § 38.11 (Vernon 1979). These jurisdictions recognize, however, the common law exception of necessity and allow the spouse to testify when a crime has been committed against him. For Missouri cases on this point, see note 35 *infra*.

23. *See, e.g.,* NEB. REV. STAT. § 27-505 (1975); note 10 *supra*.

24. *See, e.g.,* KY. REV. STAT. § 421.210 (Cum. Supp. 1980), *construed in* Hall v. Commonwealth, 309 Ky. 74, 215 S.W.2d 840 (1948); LA. REV. STAT. ANN. § 15:461 (West 1981), *construed in* State v. Triplett, 313 So. 2d 227 (La. 1975).

25. *See, e.g.,* Trammel v. United States, 445 U.S. 40, 51 (1980).

26. *See, e.g.,* ARK. STAT. ANN. § 34-2424 (Cum. Supp. 1981); ILL. REV. STAT. ch. 38, § 155-1 (1969), *construed in* People v. Burton, 6 Ill. App. 3d 879, 286 N.E.2d 792 (1972), *cert. denied*, 411 U.S. 937 (1973); KAN. STAT. ANN. §§ 60-407, -428 (1976); OKLA. STAT. ANN. tit. 12, §§ 2103, 2501, 2504 (West Supp. 1979).

one spouse to testify against the other.²⁷ Because the goal is to protect the particular marriage involved, the privilege is not available if the marriage ends before trial.²⁸

The second privilege is known as the communications privilege.²⁹ It enables either spouse to exclude confidential communications made between them during the marriage.³⁰ The purpose of the communications privilege is to encourage trust and security within the institution of marriage in general,³¹ a goal fundamentally different from that of the testimonial privilege. The privilege performs this function by assuring spouses that the confidences passing between them during marriage will be excluded from the public forum of the courts.³² The communications privilege is designed to protect the privacy of all marriages, not just the one involved in the case, and so it continues even after the marriage is dissolved.³³

27. *Trammel v. United States*, 445 U.S. 40, 44 (1980); 8 J. WIGMORE, *supra* note 19, § 2228. Missouri's strong commitment to the privilege is demonstrated by *State v. Dunbar*, 360 Mo. 788, 230 S.W.2d 845 (1950). In *Dunbar*, the defendant-husband shot his wife. A crime against the other spouse is a long-recognized exception to the privilege to exclude adverse testimony. See note 35 and accompanying text *infra*. Though she signed the complaint voluntarily, the wife refused to testify at trial. The Missouri Supreme Court, following what it believed to be the legislature's intent to safeguard the marital relationship, held that it was reversible error to compel the wife's testimony at trial. 360 Mo. at 792, 230 S.W.2d at 847. The case is discussed in *Criminal Law—Assault with Intent to Kill or Do Great Bodily Harm—Specific Intent—Power to Compel Defendant's Wife to Testify Over His Objection*, 17 MO. L. REV. 90 (1952).

28. *State v. Euell*, 583 S.W.2d 173, 177 (Mo. En Banc 1979).

29. This is the portion of the statute that provides that "in no case shall husband or wife . . . be permitted to disclose confidential communications . . . made between them." MO. REV. STAT. § 546.260 (1978).

30. *Berlin v. Berlin*, 52 Mo. 151, 152 (1873); *State v. Montgomery*, 571 S.W.2d 784, 787 (Mo. App., St. L. 1978). This privilege is also recognized in civil cases. See MO. REV. STAT. § 491.020 (1978).

31. See *Dickensen v. Abernathy Furniture Co.*, 231 Mo. App. 303, 315, 96 S.W.2d 1086, 1094 (K.C. 1936); *Miller v. Miller*, 14 Mo. App. 418, 419 (St. L. 1883); 8 J. WIGMORE, *supra* note 19, § 2332.

32. See *Berlin v. Berlin*, 52 Mo. 151, 152 (1873). In this respect, as in others, the communications privilege is similar to the privileges provided to attorneys, physicians, and priests. See MO. REV. STAT. § 491.060 (1978). Wigmore lists four criteria for determining the usefulness of communications privileges in general: (1) the communication must originate in confidence; (2) the confidentiality must be essential to the relationship; (3) the relationship must be a proper object for the law to encourage; and (4) the injury incurred by disclosure must be greater than the benefit of a full investigation. 8 J. WIGMORE, *supra* note 19, § 2232. All of these characteristics are found in the spousal communications privilege. *Id.*

33. *State v. Euell*, 583 S.W.2d 173, 176 (Mo. En Banc 1979), *overruling* *State v. Kodat*, 158 Mo. 125, 59 S.W. 73 (1900). The *Euell* court held that the testimonial privilege ended with the termination of the marriage but was careful to distinguish between the testimonial and communications privileges; the communications

Historically, Missouri courts have applied the statute in accordance with the common law.³⁴ For many years, the only exception arose from necessity: when one spouse committed a crime against the other.³⁵ Waiver of privileges was generally limited to those instances where the party controlling the privilege either consented to its waiver³⁶ or failed to object at the proper time.³⁷

The development of the rules of evidence has resulted in waning support for these privileges, especially the testimonial privilege.³⁸ Prior restrictions have been modified by exceptions to both the testimonial³⁹ and communications⁴⁰ privileges. The courts have also been more inclined to find waivers.

privilege, said the court, continues beyond the end of the marriage. 583 S.W.2d at 177.

34. The courts require that the spouses be lawfully married. *See* State v. Shreve, 137 Mo. 1, 38 S.W. 548 (1897); State v. Moore, 61 Mo. 276 (1875). Predictably, this has led to disputes over what is a lawful marriage. The Missouri Supreme Court has recognized that a common law wife cannot be compelled to testify against her husband. State v. Harris, 283 Mo. 99, 109, 222 S.W. 420, 423 (1920), *overruled on other grounds*, State v. Carson, 299 Mo. 367, 252 S.W. 688 (1923). In a prosecution for bigamy, the defendant can exclude his first wife's testimony. State v. Ulrich, 110 Mo. 350, 364, 19 S.W. 656, 660 (1892). Testimony of the second wife, however, has been allowed. State v. Shreve, 137 Mo. 1, 5, 38 S.W. 548, 549 (1897). *See generally* Annot., 4 A.L.R.4th 423 (1980).

35. *See, e.g.*, State v. Pennington, 124 Mo. 388, 27 S.W. 1106 (1894) (husband charged with attempt to kill wife); State v. Bean, 104 Mo. App. 255, 78 S.W. 640 (St. L. 1904) (husband charged with abandonment). *But cf.* State v. Vaughan, 136 Mo. App. 645, 118 S.W. 1186 (K.C. 1909) (wife not competent when husband charged with disturbing her peace).

36. Consent may be either explicit or implicit. Implicit consent occurs when the defendant calls his spouse to the stand. The prosecution has the right to cross-examine, though it may not go beyond the scope of direct examination. State v. Emrich, 361 Mo. 922, 927, 237 S.W.2d 169, 173 (1951); State v. Black, 360 Mo. 261, 270, 227 S.W.2d 1006, 1012 (1950). The testimony of the witness-spouse may also be impeached by prior inconsistent statements. State v. Mayberry, 360 Mo. 35, 41, 226 S.W.2d 725, 729 (1950).

37. *See, e.g.*, State v. Johnson, 586 S.W.2d 437, 441 (Mo. App., S.D. 1979).

38. Scholarly criticism of the testimonial privilege has been intensive. *See, e.g.*, Orfield, *The Husband-Wife Privileges in Federal Court*, 24 OHIO ST. L.J. 144, 164-65 (1963) (advocating abolition of testimonial privilege); Rothstein, *A Re-evaluation of the Privilege Against Adverse Spousal Testimony in Light of Its Purpose*, 12 INT'L & COMP. L.Q. 1186, 1194-95 (1963) (advocating balancing test). Wigmore, who finds little fault with the communications privilege, refers to the testimonial privilege as "the merest anachronism in legal theory and an indefensible obstruction to truth in practice." 8 J. WIGMORE, *supra* note 19, § 2228.

39. *See* State v. Kollenborn, 304 S.W.2d 855, 864 (Mo. En Banc 1957) (injury to spouse's child waived testimonial privilege).

40. Missouri courts have recognized three separate exceptions to the communications privilege. First, no privilege is available when the spouses have formed an agency relationship. *Darrier v. Darrier*, 58 Mo. 222, 234 (1874). Second, the

*State v. Bledsoe*⁴¹ is representative of the decisions expanding waiver. In *Bledsoe*, the defendant was accused of murdering his wife's parents. During the trial, he revealed confidential communications from his wife concerning her extra-marital affairs.⁴² His wife countered with testimony adverse to his case which contained confidential communications he had made to her.⁴³ The Missouri Supreme Court ruled that since the defendant had blackened his wife's reputation by revealing confidential communications, he had waived his marital privileges.⁴⁴

The language of *Bledsoe* is ambiguous. It is unclear from the decision whether the court found one waiver for both privileges or separate waivers for each. Clearly, the defendant's revelation of confidential communications waived the communications privilege.⁴⁵ This is a settled rule of law.⁴⁶ The court may also have held that waiver of the communications privilege by necessity waived the testimonial privilege. As a practical matter, waiver of the communications privilege would be useless if the witness-spouse could be prevented from speaking under the testimonial privilege.⁴⁷

Throughout the decision, however, the court alluded to the defendant's blackening of his spouse's reputation.⁴⁸ The court noted that the defendant's testimony had destroyed "the peace, confidence, and tranquility of his

privilege does not apply when the issue is fraud on marital property rights. *Henry v. Sneed*, 99 Mo. 407, 421, 12 S.W. 663, 667 (1889). Third, the privilege does not apply when the spouses are engaged in a joint business venture. *Durr v. Vick*, 345 S.W.2d 165, 168 (Mo. 1961). See generally Comment, *Confidential Communications Privilege of Husband and Wife: Application Under the Missouri Dissolution Statute*, 43 MO. L. REV. 235 (1978).

41. 325 S.W.2d 762 (Mo. 1959).

42. *Id.* at 765.

43. *Id.* at 766. Although not raised by the defendant on appeal, his wife's testimony apparently went beyond the scope of his statements blackening her reputation. *Id.* Thus, a waiver of the testimonial privilege apparently is a total waiver and is not limited to a rebuttal of the defendant's statements. This idea of total waiver is in accord with the belief that waiver of the testimonial privilege in itself means that the marriage at issue is already seriously damaged, and full disclosure will cause no further harm.

44. *Id.* at 767.

45. The scope of this waiver has not been clearly defined in Missouri. It is not settled, for example, whether a defendant's revelation of some communications should waive the privilege for all communications.

46. *State v. St. John*, 94 Mo. App. 229, 235, 68 S.W. 374, 376 (St. L. 1902); *White v. State*, 268 P.2d 310, 313 (Okla. Crim. App. 1954).

47. Assume, for example, that the defendant-spouse has revealed confidential communications during his testimony. This waives the communications privilege and his spouse can testify as to confidential communications. Unless the testimonial privilege is also waived, however, the witness-spouse cannot testify to anything that is adverse to the defendant's cause. Unless the testimonial privilege is waived along with the communications privilege, the waiver of the communications privilege is useless.

48. 325 S.W.2d at 766-67.

marriage."⁴⁹ This reasoning comports with the rationale behind the testimonial privilege, that it is the defendant's own marriage that must be protected.⁵⁰ *Bledsoe* may be read as holding that blackening the spouse's reputation independently waives the testimonial privilege,⁵¹ while revealing confidential communications waives the communications privilege.

As a foundation to its analysis, the *Pendergras* court apparently interpreted *Bledsoe* as establishing that the testimonial privilege is waived when one spouse blackens the reputation of the other.⁵² This is an acceptable interpretation of the case, and one that is properly within the rationale of the testimonial privilege.⁵³ The court departed from *Bledsoe*, however, in apparently ruling that a defendant's communications privilege is waived when he waives his testimonial privilege by blackening his spouse's reputation.⁵⁴ In reaching this result, the court stated that it was irrelevant whether any confidential communications were revealed by the defendant.⁵⁵ The court did not find any independent waiver of the communications privilege.⁵⁶

The reasoning of the *Pendergras* court is difficult to understand. Although it is possible to read *Bledsoe* as controlling the outcome in *Pendergras*, that interpretation requires reading into *Bledsoe* a rule of law that is unnecessary under the facts of that case⁵⁷ and which is inconsistent with existing case law

49. *Id.* at 766.

50. See note 27 and accompanying text *supra*.

51. There are few cases supporting this proposition. None of the cases cited in *Bledsoe* dealt with a waiver of the testimonial privilege based on blackening of the witness-spouse's reputation. See cases cited 325 S.W.2d at 767. There is also little support for this in other jurisdictions. In *People v. Worthington*, 38 Cal. App. 3d 359, 113 Cal. Rptr. 322 (1974), however, the court held that the defendant waived his testimonial privilege when he accused his wife of the murder for which he was being tried. *Id.* at 365, 113 Cal. Rptr. at 326. This case does not directly support the argument that blackening a spouse's reputation waives the testimonial privilege, however, because the defendant also revealed confidential communications. *Id.*

52. Significantly, if the *Bledsoe* court based its waiver of both marital privileges on the defendant's revelation of confidential communications, which is one possible interpretation of the case, it does *not* support the holding in *Pendergras*.

53. See text accompanying notes 27 & 28 *supra*.

54. 621 S.W.2d at 71.

55. *Id.* This conclusion is supported by the substantial number of confidential communications contained in the wife's testimony. See note 9 *supra*. In fact, a large portion of the state's brief on appeal dealt with these communications. Brief for Respondent at 13-17, *Pendergras*. While the court noted that it might have disposed of the case by finding that the defendant had himself revealed confidential communications, it declined to do so. 621 S.W.2d at 71. The court's failure to use any other waiver theory for confidential communications indicates that it believed that waiver of the testimonial privilege also waived the communications privilege.

56. 621 S.W.2d at 71-72.

57. *Bledsoe* dealt with a situation where the defendant attacked his own marriage while simultaneously revealing confidential communications. *State v. Bledsoe*, 325 S.W.2d 762, 766 (Mo. 1959). Revelation of confidential communications

on the subject.⁵⁸

Because the privileges are not related, there is no conceptual reason why a waiver of one privilege should automatically affect the other. Although practicality suggests that a waiver of the communications privilege should also waive the testimonial privilege,⁵⁹ there is no such necessity when the testimonial privilege is the one waived. It is possible, and entirely within the rationale of the communications privilege, to allow the witness-spouse to testify as to anything except confidential communications.

Pendergras is inconsistent with the purpose of the communications privilege, which is to protect the institution of marriage.⁶⁰ Courts that recognize this purpose have consistently refused to waive the privilege even though the particular marriage at issue has ended.⁶¹ This new waiver created in *Pendergras* is in opposition to established law.⁶²

The effects of *Pendergras* could be extensive. In many instances, the family home and car are exclusively within the control of the husband and wife. When one spouse is charged with possession of narcotics found in the home or car, a denial of guilt would itself heavily implicate the other. This alone might be sufficient to waive both the defendant's testimonial and communications privileges.⁶³

is an accepted method of waiving this privilege. See note 46 *supra*. Unlike the *Pendergras* case, there was no need for the *Bledsoe* court to find that waiver of the testimonial privilege also waived the communications privilege, because *Bledsoe* had already waived that privilege in a more traditional manner.

58. See, e.g., *Trammel v. United States*, 445 U.S. 40, 51 (1980); *State v. Euell*, 583 S.W.2d 173, 176 (Mo. En Banc 1979). Both of these cases carefully distinguish between the communications and testimonial privileges. See also *Wolfe v. United States*, 291 U.S. 7, 15 (1934) (acknowledging privilege for confidential communications in federal courts); 8 J. WIGMORE, *supra* note 19, § 2334.

59. See note 47 *supra*.

60. See 8 J. WIGMORE, *supra* note 19, § 2232.

61. See, e.g., *O'Neill v. O'Neill*, 264 S.W. 61 (Mo. App., St. L. 1924) (communications privilege applied in divorce action).

62. Although not discussed by the court, some support for the *Pendergras* decision can be found by analogy in cases involving other communications privileges. For example, Missouri recognizes an attorney-client communications privilege. See MO. REV. STAT. § 491.060 (1978). When a client alleges that an attorney is incompetent, the privilege is no longer available to the client. See *Venari v. State*, 474 S.W.2d 833 (Mo. 1971); *Lansdown v. State*, 472 S.W.2d 342 (Mo. 1971). Thus, when a client blackens his attorney's reputation, he waives his communications privilege.

Although this appears somewhat similar to the situation in *Pendergras*, the two situations may be distinguished. Waiver of the attorney-client privilege requires that there be a point of contention between the two parties, e.g., a malpractice suit or a motion to set aside a verdict for ineffective assistance of counsel. This requirement that the parties be adversaries draws the attorney-client waiver closer to the common law exception for necessity, see cases cited note 35 *supra*, than the situation in *Pendergras*, though it can be argued that the question of which spouse was guilty made the defendant and his spouse adversaries to some extent.

63. Another problem that arises is coercion of the witness-spouse. In both

Pendergras may also have an effect on civil litigation. Although there is no testimonial privilege in civil cases, there is a communications privilege identical to that in criminal cases.⁶⁴

The change in marital privileges by *Pendergras* may or may not be desirable.⁶⁵ It is obviously undesirable to withhold valuable evidence from a jury or to allow defendants to commit perjury, unafraid of contrary testimony from their spouses. But there are compelling and logical reasons why some relationships require a degree of confidentiality to foster the utmost trust between the parties. Depending on what factors are stressed, the ultimate effect of *Pendergras*, restricting the scope of privileged evidence, can easily be justified.

Unfortunately, the *Pendergras* court did not discuss these factors. Instead, the court's ambiguous decision has left an uncertain area of the law even more confusing. For the practitioner who must decide what conduct is sufficient to waive his client's marital privilege, *Pendergras* provides little guidance.

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Pendergras and *Trammel*, pressure was applied to the witness-spouse to obtain her testimony for the prosecution. In *Trammel*, another narcotics case, the spouse was promised lenient treatment in exchange for her testimony. *Trammel v. United States*, 445 U.S. 40, 43 (1980). In *Pendergras*, the witness-spouse testified at a hearing for a new trial that the prosecutor "told her she was implicated very heavily and that if Defendant was acquitted everyone would assume that she was guilty and she might lose custody of her daughter." Brief for Appellant at 7, *Pendergras*.

64. See MO. REV. STAT. § 491.020 (1978).

65. The arguments in favor of the privilege are well established. See notes 31-33 and accompanying text *supra*. An argument against the privilege is that it does little to insure the privacy of marriage because few people know about it. See Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929). Criticism of the testimonial privilege is louder and more extensive. See note 38 *supra*. The thrust of the criticism is that the testimonial privilege provides little, if any, social benefit but creates the potential for great individual harm because it violates the fundamental principle that all relevant information should be presented at trial. See Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 410-14 (1931).