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THE LIMITS OF SPOUSAL PRIVILEGE IN PENNSYLVANIA



GOLDSTEIN LAW PARTNERS · PLAIN-LANGUAGE LEGAL EXPLAINER

The Limits of Spousal Privilege in Pennsylvania

"Anything I tell my spouse is privileged" is one of the most common misconceptions in Pennsylvania evidence law. The truth is more limited — and more interesting — than the myth.

The short answer

Most people believe that marriage builds a wall around everything a husband and wife say and do together, and that one spouse can never be forced to say a word against the other. Pennsylvania law is far more modest. The Commonwealth recognizes not one spousal privilege but two, each with its own scope, its own owner, and its own list of situations where it simply evaporates. Neither is the blanket of secrecy that popular imagination assumes.

Understanding the difference matters because the two privileges answer two entirely different questions. One asks whether a private statement between spouses can ever come into evidence. The other asks whether one spouse can be made to take the stand against the other at all. Confusing them — as litigants frequently do — leads to badly mistaken assumptions about what a courtroom can and cannot hear.

Two different privileges

The first is the **confidential-communications privilege**. It protects the substance of private exchanges between spouses — the things said in confidence, behind a closed door, with no one else listening. The second is the **adverse-testimony privilege**, which is not about the content of anything at all. It is about compulsion: whether a person can be forced to testify against the one to whom they are married.

A practical note before going further. Pennsylvania draws a sharp line between two different spousal privileges, and they are easy to conflate. Section 5914 is the confidential-communications rule; Section 5913 is the adverse-testimony rule. Each protects a different thing, belongs to a different holder, and carries its own exceptions — so the safest practice is to identify each privilege by what it does rather than to assume the two are interchangeable.

The confidential-communications privilege

In a criminal case, [42 Pa.C.S. § 5914](#) provides that "neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial." The civil counterpart, [42 Pa.C.S. § 5923](#), imposes the identical bar in civil proceedings.

The word that does all the work here is *confidential*. This privilege reaches only genuine confidential communications — what one spouse told the other in reliance on the

privacy of the marriage. It does not protect everything a spouse happened to observe. If a wife sees her husband arrive home with blood on his sleeve, that is an observed fact, not a confidential communication, and no privilege shields it. The same is true of words spoken in front of third parties: a remark made across a crowded dinner table, where guests can plainly hear, was never confidential to begin with and cannot be retroactively sealed by invoking the marriage.

A useful way to think about it: the privilege protects what was *told in confidence*, not what was *seen*, and not what was *said in public*. Acts are not communications. An audience destroys confidentiality.

This distinction surprises clients constantly. They assume that because two people are married, the marriage itself converts every interaction into protected territory. It does not. The privilege is tethered to the confidential nature of the exchange, and where that confidentiality is missing, the privilege never attaches in the first place.

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Testifying against a spouse — criminal cases

The adverse-testimony privilege in the criminal context comes from [42 Pa.C.S. § 5913](#), which states that "a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse." Two features deserve emphasis. First, this is a privilege not to testify at all against the spouse — broader in that sense than the communications rule, because it is not limited to confidential statements. Second, and critically, the privilege belongs to the *witness-spouse*. It is the spouse who is asked to testify who decides whether to invoke it or set it aside. The defendant-spouse cannot force the other to stay silent.

But the privilege is riddled with exceptions, and § 5913 lists four situations in which it disappears entirely. It does not apply in proceedings for desertion and maintenance. It does not apply "in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children." It does not apply when spousal testimony is needed to prove the fact of marriage in a bigamy prosecution. And it does not apply "in any criminal proceeding in which one of the charges pending against the defendant includes murder, involuntary deviate sexual intercourse or rape."

The thread running through these exceptions is unmistakable. Where the alleged conduct is violence within the family or among the gravest offenses on the books, the law refuses to let the marriage become a shield. A spouse accused of assaulting the other or the children cannot hide behind the relationship he is charged with abusing.

Testifying against a spouse — civil cases

The civil version appears in [42 Pa.C.S. § 5924](#). Subsection (a) declares that "neither husband nor wife shall be competent or permitted to testify against each other." But subsection (b) withdraws that protection across a broad swath of family litigation:

actions for divorce, including the division of property; proceedings for support or for property; matters of custody or visitation of children; and any proceeding "arising under 23 Pa.C.S. Ch. 61 (relating to protection from abuse)."

This makes intuitive sense once stated. The disputes most likely to require one spouse's testimony about the other are exactly the disputes *between* spouses — divorce, support, custody, and protection-from-abuse cases. It would be self-defeating to bar that testimony in the very proceedings where it is most essential. So in the family-court arena, the adverse-testimony privilege largely gives way.

How the two privileges interact

Because the privileges serve different purposes, they operate independently of one another, and this independence carries a real consequence: waiving one does not surrender the other. A spouse who agrees to take the witness stand against the other — waiving the adverse-testimony privilege — has not thereby opened the door to disclosing confidential communications. The confidential-communications privilege survives that waiver and must be separately addressed. The reverse is equally true.

In practice, this means a witness-spouse and counsel must analyze each privilege on its own terms. The questions are sequential: Can this witness be compelled to testify at all in this proceeding, given the exceptions that may apply? And separately, even if she testifies, can she be made to repeat confidential statements her spouse made to her in private? The answer to the first does not dictate the answer to the second.

Practical takeaways

For anyone navigating these rules, a few points are worth holding onto. The marriage does not seal the vault around everything. Confidential communications are protected; observed acts and public statements are not. The privilege not to testify against a spouse

belongs to the witness, not the defendant, and it vanishes in cases of family violence, in bigamy proof, and in the most serious felony prosecutions. On the civil side, it falls away across the family-court docket. And the two privileges never rise or fall together — each must be claimed, and each can be lost, on its own.

None of this is a substitute for advice tailored to a specific case. Whether a particular statement was truly confidential, whether a particular charge triggers an exception, and who holds the right to waive in a given proceeding are fact-driven questions that reward careful analysis. If spousal testimony is at issue in a matter you are facing, the prudent course is to map both privileges against the facts before assuming either one will keep anything out — or let anything in.

Authorities Cited

1. 42 Pa.C.S. § 5913 — <https://law.justia.com/codes/pennsylvania/title-42/chapter-59/section-5913/>
 2. 42 Pa.C.S. § 5914 — <https://law.justia.com/codes/pennsylvania/title-42/chapter-59/section-5914/>
 3. 42 Pa.C.S. § 5923 — <https://law.justia.com/codes/pennsylvania/title-42/chapter-59/section-5923/>
 4. 42 Pa.C.S. § 5924(a) — <https://law.justia.com/codes/pennsylvania/title-42/chapter-59/section-5924/>
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Have a question about how this applies to your situation? [Email us at info@goldsteinlp.com](mailto:info@goldsteinlp.com) for more information.

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