CPLR 4502(b): Spousal Privilege Waived by Commencement of Wrongful Death Action

Patricia C. Tuohy

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the amendment was made under subsection (a) or (b). Notions of fairness and expeditiousness, therefore, dictate permitting a party to exercise his sole opportunity to amend as of right upon the receipt of the last responsive pleading. To require leave to amend under CPLR 3025(b) would serve neither the interests of the litigants nor judicial economy.118

James M. Ebetino

ARTICLE 45—EVIDENCE

CPLR 4502(b): Spousal privilege waived by commencement of wrongful death action

CPLR 4502(b) generally prohibits compulsory disclosure of confidential interspousal communications made in reliance upon the marital relationship.119 It is well settled, however, that the priv-
ilege can be waived either by the failure to object timely or by consent. Recently, in Prink v. Rockefeller Center, Inc., the Court of Appeals recognized an additional means of waiver when it held that a spouse automatically waives the conjugal privilege by instituting an action for the wrongful death of her spouse. The plaintiff, as administratrix of the estate of her husband, Robert Prink, instituted a wrongful death action against the owners and architects of a building in which the decedent had occupied an office. The plaintiff claimed that her husband’s fatal fall from a thirty-six story window had been caused by negligence in the de-

statutes of all other jurisdictions are collected at 2 Wigmore § 488, supra.

The marital privilege . . . was founded upon a wise public policy, adopted and pursued for the purpose of encouraging to the utmost that mutual confidence between husband and wife which is the strongest guarantee of a happy marriage. . . . The law appreciated the fact that even truth itself might be pursued too keenly and might cost too much. The general evil of infusing reserve and disimulation between parties occupying such relations to each other, would be too great a price to pay for the chance of obtaining the truth in regard to some matter under investigation.


Although the conjugal privilege generally is not lost by the termination of the marital relationship, whether by divorce or death of one of the parties, see 5 WK&M ¶ 4502.22, not all the “daily and ordinary” conversations between spouses are protected. Only disclosures that would not have been made “but for the absolute confidence in. . . the marital relationship” are covered by the privilege. People v. Melske, 10 N.Y.2d 78, 80, 176 N.E.2d 81, 83, 217 N.Y.S.2d 65, 67 (1961). Moreover, the courts have narrowly construed the meaning of “confidential communications.” See, e.g., People v. Ressler, 17 N.Y.2d 174, 179, 216 N.E.2d 582, 584, 269 N.Y.S.2d 414, 416 (1966) (communications made in presence of third parties not privileged); Poppe v. Poppe, 3 N.Y.2d 312, 315, 144 N.E.2d 72, 74, 165 N.Y.S.2d 99, 102 (1957) (communication injuring spouse not privileged); Parkhurst v. Berdell, 110 N.Y. 386, 394, 18 N.E. 123, 127 (1888) (business matters discussed by spouses not privileged); People v. Watkins, 63 App. Div. 2d 1033, 1034, 406 N.Y.S.2d 343, 345 (2d Dep’t), cert. denied, 439 U.S. 1033 (1978) (communications between spouses jointly advancing criminal conspiracy or aiding commission of ongoing crime not privileged); The Survey, 51 St. John’s L. Rev. 786, 810 (1977).


122 Id. at 317, 398 N.E.2d at 522, 422 N.Y.S.2d at 916.
sign and maintenance of the building. It was noted on Prink's death certificate that his psychiatrist had reported to the medical examiner that the decedent had been "acutely tense and depressed," thereby raising the possibility that the death resulted from suicide. During an examination before trial, the plaintiff admitted that her husband had been seeing a psychiatrist, but invoked the marital privilege when questioned about any conversations she had had with her husband concerning his reasons for having sought such treatment. Additionally, the plaintiff conceded that she had spoken with her husband's psychiatrist following the accident, but refused to reveal the substance of the conversation, claiming the physician-patient privilege. Upon the defendants' motion, special term ordered the plaintiff to answer the questions concerning her conversations with her husband and his psychiatrist. The Appellate Division, First Department, affirmed, but certified the question to the Court of Appeals.

A divided Court of Appeals affirmed. Writing for the majority, Judge Meyer initially determined that the information withheld by Mrs. Prink was protected by both the physician-patient and the marital privileges unless they had been waived. Noting
that neither privilege is terminated by death and that the psychiatrist's disclosures to the medical examiner and to Mrs. Prink did not constitute a waiver of the physician-patient privilege, the majority nevertheless held that both privileges had been waived by the commencement of the wrongful death action. The Court observed that the personal representative in a wrongful death action essentially stands in the same posture as the decedent and therefore concluded that since Mr. Prink could not have asserted the privileges had he survived and sued the defendant for his injuries, neither could the plaintiff.

Judge Meyer reasoned that the physician-patient privilege had been waived by relying upon the rule that the "bringing [of] a personal injury action in which mental or physical condition is affirmatively put in issue, . . . waives the privilege." Balancing the unfairness of subjecting a defendant to

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132 48 N.Y.2d at 314, 398 N.E.2d at 520, 422 N.Y.S.2d at 914 (citing Davis v. Supreme Lodge, Knights of Honor, 165 N.Y. 159, 58 N.E. 891 (1900); Southwick v. Southwick, 49 N.Y. 510, 518, (1872); CPLR 4504(c); Richardson, Evidence § 455 (10th ed. 1973); 8 Wigmore, Evidence § 2341 (McNaughton rev. ed. 1981)).

133 48 N.Y.2d at 314-15, 398 N.E.2d at 520, 422 N.Y.S.2d at 914. The majority observed that since the physician-patient privilege belongs to the patient, the psychiatrist, "by his sole fiat," could not effectuate a waiver without the consent of the holder of the privilege. Id. at 314-15, 398 N.E.2d at 520, 422 N.Y.S.2d at 914-15.

134 Id. at 315-18, 398 N.E.2d at 519-23, 422 N.Y.S.2d at 913-17.

135 Id. at 215-16, 398 N.E.2d at 521, 422 N.Y.S.2d at 915. Wrongful death actions may be brought only pursuant to EPTL 5-4.1 (1967):

"For essentially the same reason," the majority concluded that Mr. Prink could have invoked neither the physician-patient nor the marital privileges. 48 N.Y.2d at 316-17, 398 N.E.2d at 521, 422 N.Y.S.2d at 915. The Prink Court first examined the decedent's use of the privilege against self-incrimination as a possible aid, see CPLR 4501 (1963), but concluded that the privilege does not allow a plaintiff to seek relief and at the same time withhold information relevant to his right to maintain an action. Id. at 316, 398 N.E.2d at 521, 422 N.Y.S.2d at 915; see Steinbrecher v. Wapnick, 24 N.Y.2d 354, 363, 248 N.Y.S.2d 408, 425, 300 N.Y.S.2d 555, 563 (1969); Laverne v. Incorporated Village of Laurel Hollow, 18 N.Y.2d 635, 638, 219 N.E.2d 294, 295, 272 N.Y.S.2d 780, 782, appeal dismissed, 386 U.S. 682 (1966); Levine v. Bornstein, 6 N.Y.2d 892, 893, 160 N.Y.S.2d 921, 921-22, 190 N.Y.S.2d 702, 702 (1959); Cronk v. Cayuga County Patrons' Fire Relief Ass'n, 80 Misc. 2d 945, 948, 396 N.Y.S.2d 587, 589 (Sup. Ct. Oswego County 1977); 3 WK&M ¶ 3104.38-40.

"For essentially the same reason," the majority concluded that Mr. Prink could have invoked neither the physician-patient nor the marital privileges. 48 N.Y.2d at 316, 398 N.E.2d at 521, 422 N.Y.S.2d at 915.

136 48 N.Y.2d at 316-17, 398 N.E.2d at 522, 422 N.Y.S.2d at 916; see Koump v. Smith, 25 N.Y.2d 297, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969). The Court took judicial notice that "many apparently accidental deaths are in fact suicides." 48 N.Y.2d at 316-17, 398 N.E.2d at 522, 422 N.Y.S.2d at 916. The majority determined that an alleged fall from a 36th story window was "sufficiently equivocal" so that a wrongful death action based upon that act necessarily put the decedent's mental condition in issue. Id.; see Beeler v. Hildan Crown Container Corp., 26 App. Div. 2d 163, 164-65, 271 N.Y.S.2d 373, 375 (3d Dep't
liability without providing him an opportunity to establish his inculpability against the "real source" of the marital privilege, the Prink majority declared that "the better policy" would be to hold that the spousal privilege also had been waived.

Chief Judge Cooke dissented in part, arguing that the majority's "abrogation" of the conjugal privilege "seriously undermines the strong social policy supporting the privilege and marks an unexplained departure from prior precedent." The dissent disputed the majority's emphasis on the unfairness of permitting a party seeking affirmative relief to invoke the privilege, since the legislative intent behind CPLR 4502(b) was that the preservation of the marital relationship should outweigh any inequities that might result from the suppression of relevant evidence. Observing that the statute does not require the privilege to be asserted only defensively, Chief Judge Cooke stated that the majority's decision anomalously precludes plaintiffs from invoking the spousal privilege but leaves defendants free "to defeat a meritorious claim by...

1966).


120 48 N.Y.2d at 318, 398 N.E.2d at 522, 422 N.Y.S.2d at 916-17. Addressing the justifications for the marital privilege, the majority adopted the theory set forth in McCormick, Evidence § 86 (Cleary 2d ed. 1972):

While the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony, is at best doubtful and marginal.

Probably the policy of encouraging confidences is not the prime influence in creating and maintaining the privilege. It is really a much more natural and less devious matter. It is a matter of emotion and sentiment. All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife. It is important to recognize that this is the real source of the privilege. When we do, we realize at once that this motive of delicacy, while worthy and desirable, will not stand in the balance with the need for disclosure in court of facts upon which a man's life, liberty, or estate may depend.

121 48 N.Y.2d at 317, 398 N.E.2d at 522, 422 N.Y.S.2d at 916.

122 Id. at 318-21, 398 N.E.2d at 523-25, 422 N.Y.S.2d at 917-19 (Cooke, C.J., dissenting).

Chief Judge Cooke agreed with the affirmance of that part of special term's order requiring the plaintiff to disclose the contents of her discussion with the psychiatrist. Id. at 318, 398 N.E.2d at 523, 422 N.Y.S.2d at 917 (Cooke, C.J., dissenting).

123 Id. at 319, 398 N.E.2d at 523, 422 N.Y.S.2d at 917 (Cooke, C.J., dissenting) (citing Warner v. Press Pub. Co., 132 N.Y. 181, 30 N.E. 393 (1892)).

124 48 N.Y.2d at 320-21, 398 N.E.2d at 524, 422 N.Y.S.2d at 918 (Cooke, C.J., dissenting).

125 Id. Chief Judge Cooke stated that the majority's decision leaves litigants confronted with a "Hobson's choice" of either "betray[ing] the trust and confidence of one's spouse or forego[ing] one's right to seek redress for a grievances wrong." Id.
hiding behind the same privilege."  

It appears that the Prink holding nullifies the availability of the conjugal privilege to any party in a civil action seeking affirmative relief. Although Prink involved an action sounding in tort, it would seem that the scope of the decision could embrace all categories of litigation. For example, a party seeking to recover for breach of contract could be compelled, under Prink, to disclose any statement, otherwise protected by the marital privilege, that may have a bearing on the outcome of the controversy. It is suggested, however, that marital harmony should not be disturbed when the information sought can be derived from other sources or where it is neither dispositive of the case nor crucial to a party's defense.

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147 48 N.Y.2d at 320, 398 N.E.2d at 524, 422 N.Y.S.2d at 918. (Cooke, C.J., dissenting); see id. at 316-18, 398 N.E.2d at 521-23, 422 N.Y.S.2d at 915-17. Prior to Prink, the courts made no distinctions based upon the spouse's position in the litigation. See People v. Hayes, 140 N.Y. 484, 496, 35 N.E. 951, 954 (1894); Warner v. Press Pub. Co., 132 N.Y. 181, 183, 30 N.E. 393, 394 (1892). Although the physician-patient privilege is waived by any party who affirmatively places his mental or physical condition in issue, Koump v. Smith, 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969), it is submitted that a similar rule is inappropriate where the conjugal privilege is involved. The marital privilege was derived from the common-law notion that spouses were incompetent witnesses against one another. Richardson, supra note 119, § 445. By statute, New York abrogated the incompetency except as to confidential communications. See id. § 446. The physician-patient privilege, however, had no basis in the common law. Id. § 426. Indeed, New York was the first jurisdiction to enact a statute creating the privilege. See id. Furthermore, it is suggested that the justification for the physician-patient privilege—to encourage full disclosure in order to promote effective medical treatment—is not as compelling as that for the spousal privilege—to strengthen and preserve the institution of marriage. Id. §§ 428, 447. Thus, it is submitted that, unlike the physician-patient privilege, the historical and policy considerations underlying the conjugal privilege outweigh the need for relevant evidence so that the mere commencement of an action should not require a spouse to reveal communications made in reliance upon the trust inherent in the marital relationship.

148 See 48 N.Y.2d at 321, 398 N.E.2d at 524, 422 N.Y.S.2d at 919 (Cooke, C.J., dissenting). It is submitted that in order to preserve the legislative policy considerations supporting the conjugal privilege, the majority could have adopted Chief Judge Cooke's suggestion to
By redefining the rationale underlying the adoption of the spousal privilege, it is submitted that the *Prink* majority substituted its judgment for that of the legislature and thereby produced an unfortunate precedent. Perhaps legislative action reaffirming the social policies supporting the privilege is necessary. In the absence of such corrective legislation, however, it appears unlikely that the marital privilege will afford a significant amount of protection to future litigants.

*Patricia C. Tuohy*

allow the factfinder to draw an adverse inference from the plaintiff's invocation of the privilege. See id.

19 See id. at 317-18, 398 N.E.2d at 522, 422 N.Y.S.2d at 916-17. Both legislative and historical support for the privilege, see Joint Legislative Committee on Matrimonial and Family Laws, [1962] N.Y. Leg. Doc. No. 34, at 119, 145; Richardson, note 119 supra, § 477, as well as prior case law, see Poppe v. Poppe, 3 N.Y.2d 312, 315, 144 N.E.2d 73, 73, 165 N.Y.S.2d 99, 101 (1957); People v. Hayes, 140 N.Y. 484, 496, 35 N.E. 951, 954-55 (1894); Warner v. Press Publication Co., 132 N.Y. 181, 183, 30 N.E. 393, 394 (1892), recognized that the conjugal privilege grew out of the desire to protect the marital relationship. See note 119 supra. *Prink*, however, indicates that the privilege was based more on an “emotion[al]” or “sentiment[al]” reluctance to “pr[y] into the secrets of [a] husband and wife.” 48 N.Y.2d at 317-18, 398 N.E.2d at 522, 422 N.Y.S.2d at 916-17 (quoting McCormick, *Handbook on the Law of Evidence* § 86 (Cleary 2d ed. 1972)).


There exist specific statutory exceptions to the marital privilege. See N.Y. Family Ct. Act § 1046(a)(vii) (McKinney 1975) (privilege not available in proceeding involving child abuse or neglect); N.Y. Mental Hyg. Law § 23.01(b) (McKinney 1978) (privilege not available in hearing for involuntary admission of drug dependent person); N.Y. Soc. Serv. Law § 384-b(3)(h) (McKinney Supp. 1979-1980) (privilege not available in proceeding to terminate parental rights). It is submitted that these statutes represent a legislative determination that only in such situations does public policy mandate a restriction of the spousal privilege.

15 It is conceivable that the *Prink* holding may survive future judicial scrutiny by being restricted to its facts. For instance, it would seem plausible that the Court later may interpret *Prink* as precluding the invocation of the spousal privilege in wrongful death actions only where either the physical or mental condition of a deceased spouse is in issue.