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## THE POWER AND PERILS OF SPOUSAL PRIVILEGE

Privilege is a powerful litigation tool. Documents, conversations, and communications can all be protected by privilege under the right circumstances. Privilege, however, comes in many shapes and sizes, so understanding the basics of privilege is crucial for determining whether a specific document, conversation, and/or communication is covered. Without a proper understanding of when privilege does or does not apply, certain documents, conversations, and communications may ultimately be admissible in court. A recent North Carolina Business Court decision highlights both the powers and perils of attempting to claim spousal privilege.

In *Futures Group, Inc. et al. v. Brosnan*, 2023 NCBC LEXIS 25, 2023 NCBC Order 9 (N.C. Super. Ct. Feb. 10, 2023), the North Carolina Business Court considered whether spousal privilege applies to “two recorded conversations” from November 9, 2017, and March 1, 2020, that a wife “had privately with” her husband during their marriage. Unbeknownst to the now ex-wife, the conversations were “record[ed] surreptitiously.” The ex-wife, a non-party to the lawsuit, argued that the conversations were “confidential marital communications protected by North Carolina’s spousal privilege.” In contrast, the plaintiff suggested the conversations were “not privileged and that [the ex-wife], as a non-party, lacks standing to contend otherwise.” The Court, therefore, analyzed whether surreptitiously recorded private conversations between a husband and wife are covered by North Carolina’s doctrine of spousal privilege.

### Spousal Privilege in North Carolina is Sacred

The Court first emphasized the sacredness of spousal privilege in North Carolina. Spousal “privilege is ‘premised upon the belief that the marital union is sacred and that its intimacy and confidences deserve legal protection.’” Spousal privilege is also intended to foster trust between spouses, so spouses need not fear that private conversations had during the marriage will be weaponized in later court proceedings. Spousal privilege even goes so far as to protect “communications that occur during the marriage even after the marriage ends.” N. C. Gen. Stat. § 8-56 further solidifies North Carolina’s commitment to protecting spousal privilege by codifying that “[n]o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.”

### What is Spousal Privilege?

North Carolina’s doctrine of spousal privilege relates to: “(1) communications between spouses during marriage, (2) that are intended to be kept confidential, and (3) are ‘induced by the marital relationship

and prompted by the affection, confidence, and loyalty engendered by such relationship.” It is important to note that this privilege does not cover any and all communications had between spouses during a marriage, but it does cover a significant amount of communications, so long as the communications (1) occur between the spouses (2) during the course of the marriage and are (3) expected to be confidential based on (4) the spouses’ marital relationship and affection, confidence, and loyalty to each other. It is important to note that spousal “privilege may not be waived by one spouse alone. Both spouses hold the privilege, and one may prevent the other from revealing protected communications.”

## Who Can Claim Spousal Privilege and When?

The Court subsequently made three determinations regarding the applicability of spousal privilege in this case. First, the Court found that the ex-wife had standing to argue against the use of the recordings in open court. The Court explained, “Even though she [i.e., the ex-wife] is not a party to the action, Aimee’s assertion that the communications she had with her husband were private, reflected in her objection on grounds of the spousal privilege, gives her a personal stake in a justiciable controversy.” The ex-wife, therefore, had the standing, or authority, to contest the use of the recordings.

Second, the Court analyzed whether the November 9, 2017 recording was privileged. During the conversation, the ex-wife clearly indicated that she wanted her ex-husband “to tell her father about her concerns.” Essentially, the ex-wife wanted to loop others into the details of this specific conversation. Because the ex-wife herself was not planning to keep the communication private, such communication was not protected by spousal privilege.

Third, the Court analyzed whether the March 1, 2020 conversation was covered by privilege. During this conversation, the ex-wife did not suggest that she wished for others to know about the conversation or that she had previously discussed the same with anyone else. In fact, it was not apparent whether her father later knew anything about the contents of this conversation. The ex-wife also made statements during the conversation which emphasized her belief that the conversation was and should remain confidential. As such, the recording was inadmissible because the ex-wife’s own statements indicated that, at the time of the conversation, she thought the conversation, “was, in its entirety, a confidential marital communication.”

## JAH Can Help

Navigating the powers and perils of privilege, whether spousal or otherwise, can be a complicated endeavor. If you have questions about what does or does not constitute privilege, please reach out to our [litigation team](#) or complete our [general contact form](#).

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