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Commonwealth v. Hunter

COMMONWEALTH OF PENNSYLVANIA v. MICHELE RENAE HUNTER, Defendant Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch Criminal Action No. 1470-2011

Judges: Recusal

1. The inquiry on motion for recusal is whether the conduct or statements of the court raise an appearance of impropriety, even if actual bias or prejudice is lacking. Pa C.J.C. Canon 3(c).
2. In general, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged.
3. Where there is neither actual bias nor an appearance of impropriety, a recusal motion should be denied.

Jury: Voir Dire

1. In a non-capital case, individual voir dire of prospective jurors is optional. Pa. R. Crim. P. 631(E)(1).
2. If group voir dire cannot ensure an impartial jury panel, individual voir dire should be used.

Privileged Communications: Confidential Spousal Communications

1. Testimonial privileges are exceptions to the rule of relevance and in derogation of the search for truth; therefore, these privileges are not lightly created or expansively interpreted.
2. In criminal proceedings, the defendant holds a privilege that prevents his or her spouse from testifying as to confidential communications between the two. 42 Pa. C.S. §5914.
3. The bases for asserting the confidential spousal communications privilege are a valid marriage and the confidentiality of the statement. 42 Pa. C.S. §5914.
4. Communications between husband and wife are presumed confidential, and the party opposing exclusion of such testimony bears the burden of overcoming the presumption.
5. Statements concerning alleged or suspected child abuse are not protected by the confidential communications privilege.

Appearances:

Lauren E. Sulcove, Esq., *Assistant District Attorney*

Stephen D. Kulla, Esq., *Counsel for Defendant*

OPINION

Walsh, J., February 13, 2012

This case requires the Court to apply an ancient legal doctrine to modern technology. Defendant Michele Renae Hunter has filed an Omnibus Pretrial Motion. She asks the Court to preclude the admission of evidence under the confidential spousal communications privilege. She also asks this Judge to recuse himself, and for individual voir dire of prospective jurors at jury selection. For the reasons below, we deny the motion to recuse. Second, we take the motion for individual voir dire under advisement. Finally, the Court holds that the confidential communications privilege does not apply to the statements at issue.

Background

Michele Hunter and her husband, William M. Hunter, Sr., have been charged with very serious crimes related to alleged child abuse. The alleged victim in this case is William Sr.'s biological son and Michele's stepson.

On March 16, 2011, emergency personnel responded to the Hunter household for a report that the alleged victim was in cardiac arrest. The child, who was four years old, had arrested and was taken to Chambersburg Hospital. He had a bruise on his lower back, and one of his pupils was dilated. Emergency personnel airlifted him to Milton S. Hershey Medical Center for further treatment. Doctors determined that the child suffered a subdural hemorrhage and brain damage, injuries which render him permanently disabled. The injuries are so serious that the Commonwealth characterized the case as "essentially a homicide." N.T., Tr. of Proceedings of Bail Hr'g, 8/23/11 at 36.

After investigation, Chambersburg Police charged Michele Hunter with aggravated assault, a first-degree felony; endangering the welfare of a child, a third-degree felony; simple assault, a first-degree misdemeanor; and criminal conspiracy to endanger the welfare of a child, a third-degree felony.^[1] Her husband was charged with similar offenses.^[2]

During the daytime hours of March 15 and 16, Michele, who was at home, and William Sr., who was at work, were in contact via text message. Most of the texts are about child's health and condition, though a few are irrelevant. Needless to say, the relevant messages are extremely damaging evidence.

At the Omnibus Motions Hearing, Michele testified that the messages concerned "matters in their lives" - things that a married couple would normally discuss. The record shows that Michele and William Sr. were validly married at the time. Their marital relationship was normal - no signs of spousal abuse or mistreatment. The record also shows that the texts were sent and received in confidence. The Commonwealth argued that third parties could have viewed the messages as they were being sent and received, but could uncover no evidence to support that contention.

On March 21, 2011, Detectives Scott A. Mummert and Todd L. Baker interviewed William Sr. at Hershey Medical Center. William Sr. allowed the detectives to view his cell phone. Detective Mummert read Michele's and William Sr.'s texts out loud to copy them onto an audio recorder. He also had William Sr. forward a copy of the conversation to his phone. The Commonwealth later obtained the text messages through subpoena, and it plans to use the messages at trial.

Discussion

In her Omnibus Pretrial Motion, Michele Hunter seeks to suppress or exclude the text messages under the confidential spousal communications privilege, which is codified at 42 Pa. C.S. §5914. She also asks this Judge to recuse himself. Finally she requests individual voir dire of prospective jurors, as opposed to group voir dire. The Court will discuss the recusal motion first, then the voir dire motion. Finally, we will discuss the motion to exclude.

1. Motion to Recuse

Hunter asks this Judge to recuse himself based on statements the Court made about the text messages at Hunter's August 23, 2011 bail modification hearing. She claims that those statements indicate that the Court has prejudged this case.

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including where the judge has a personal bias or prejudice concerning a party. Pa. C.J.C. Canon 3(C)(1)(a). "The inquiry is not whether a judge was in fact biased against the party moving for recusal, but whether, even if actual bias or prejudice is lacking, the conduct or statement of the court raises 'an appearance of impropriety.'" Commonwealth v. Druce, 796 A.2d 321, 327 (Pa. Super. 2002) (quoting In re McFall, 533 Pa. 24, 33, 617 A.2d 707, 712 (1992)), aff'd, 577 Pa. 581, 848 A.2d 104 (2004); see also Commonwealth v. Benchoff, 700 A.2d 1289, 1294-95 (Pa. Super. 1997). "As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged." Commonwealth v. White, 557 Pa. 408, 426, 734 A.2d 374, 384 (1999) (quoting Commonwealth v. Abu-Jamal, 553 Pa. 485, 507, 720 A.2d 79, 89 (1998)).

As the Court indicated at the Omnibus Pretrial Hearing, recusal motions are a delicate issue, and we appreciate Defense counsel vigorously representing his client. We deny the motion because we believe that we can be impartial, and we have not prejudged this case. The Court has, in fact, struggled at great length to find the correct answer to Hunter's privilege claim. Also, we cannot remember the remarks from the bail modification hearing to which Hunter refers because they were not transcribed. The Court is also unaware of any extra-judicial reports on our statements, and Hunter has pointed to none. Because there is neither actual prejudice nor an appearance of impropriety, the motion to recuse is denied.

II. Motion for Individual Voir Dire

Hunter next asks the Court to allow individual voir dire of the prospective jurors, as opposed to having the jurors questioned as a group. She says that individual voir dire is necessary to ensure an unbiased jury panel.

The Rules of Criminal Procedure make individual voir dire of prospective jurors optional in non-capital cases, Pa. R. Crim. P. 631(E)(1). We recognize that such a method of selecting the jury might be advisable or necessary in this case. It is, however, premature to grant Hunter's motion. We will take the motion under advisement, and it shall remain open until closer to the date for jury selection.

III. Confidential Spousal Communications Privilege

Hunter's final - and most important - request for relief concerns the text messages. She wants the Court to exclude the messages under the confidential spousal communications privilege. She argues that the statements are presumed confidential, and that no exception applies. The Commonwealth responds that the privilege does not apply under the reasoning of Commonwealth v. Spetzer, 572 Pa. 17, 813 A.2d 707 (2002).

A. Establishing the Existence of Privilege^[3]

The confidential communications privilege is a tricky concept, its scope uncertain, and its origins murky. "[It] did not arise in a vacuum, but instead ... has ancient origins rooted in the common law." Id. at 34, 813 A.2d at 717-18.

Privileges are an exception to the rule that the legal system has a right to "every man's evidence."^[4] Id. (quoting Trammel v. United States, 445 U.S. 40, 50-51 (1980)). "Testimonial privileges are exceptions to the rule of relevance and in derogation of the search for truth; therefore, these privileges are not lightly created or expansively interpreted." Commonwealth v. Reese, 31 A.3d 708, 717 (Pa. Super. 2011) (en banc).

A party asserting a privilege needs to show the existence of some facts sufficient to invoke a privilege. The party challenging the privilege bears the burden of proof. Id. For the confidential communications privilege, the facts the privilege-holder must show are (1) the existence of a valid, legal marriage, and (2) the actual confidentiality of the statements. 42 Pa. C.S. §5914; Reese, 31 A.3d at 717-18.

Michele Hunter has properly invoked the privilege. At the time of the statements, she and William Sr. were married, and the communications were made in confidence. The Commonwealth asked Michele Hunter whether a third party overheard (or rather over-read) the conversation. It claimed that anyone could have read or responded to her texts using William Sr.'s phone. It uncovered no evidence of either. Therefore, the Commonwealth must prove that the text messages are not privileged.

B. Interpreting the Scope of the Privilege

The confidential spousal communications privilege reads: Except as otherwise provided in this subchapter, in a criminal proceeding 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.

42 Pa. C.S. §5914. The comment to the statute states that it is substantially similar to an act passed by the General Assembly in 1887. We cannot determine solely from the statute whether the text messages at issue are privileged. And the Court has been unable to find any directly on point. Most cases asked to decide privilege based on the content of the communications involved situations where the defendant-spouse was abusive to the witness-spouse. In this case, there are no allegations of spousal abuse or other marital disharmony (at the time the statements were made). Rather, the communications at issue concern the alleged abuse of the Hunters' child. To determine whether the text messages are privileged, we must look to the history of the confidential communications privilege and its interaction with the spousal witness privilege.

1. The Confidential Spousal Communications Privilege Versus the Spousal Witness Privilege

It is important to differentiate the privilege asserted in this case - the confidential spousal communications privilege, 42 Pa. C.S. §5914 - with the spousal witness privilege, Id. §5913. "Unquestionably, sections 5913 and 5914 involve two distinct rules." Commonwealth v. Hancharik, 534 Pa. 435, 439, 633 A.2d 1074, 1076 (1993). Distinguishing the two rules is necessary to determine whether the confidential communications privilege applies here.

The confidential communications privilege requires a valid marriage at the time the communications were made. Commonwealth v. Weiss, 565 Pa. 504, 520-21, 776 A.2d 958, 967-68 (2001). Only the spouse asserting the privilege (Michele Hunter) may waive it. 42 Pa. C.S. §5914; Commonwealth v. May, 540 Pa. 237, 249, 656 A.2d 1335, 1341-42 (1995). It protects only confidential communications.^[5] Finally, it contains only one exception: if the defendant-spouse attacks the character of the witness-spouse during the defendant's case-in-chief, the witness-spouse may testify for the

Commonwealth in rebuttal. 42 Pa. C.S. §5915; Hancharik, 534 Pa. at 440-42, 633 A.2d at 1077.

In contrast, the spousal witness privilege requires a valid marriage at the time of the testimony. It is waivable by the testifying spouse and, when invoked, bars all testimony - not just confidential communications. Commonwealth v. Valle-Velez, 995 A.2d 1264, 1269 (Pa. Super.), alloc. denied, 608 Pa. 666, 13 A.3d 478 (2010). Finally, it includes several broad exceptions, including one for cases involving child abuse. 42 Pa. C.S. §5913; Hancharik, 534 Pa. at 440; 633 A.2d at 1076-77.

It is easy to conflate the confidential communications privilege with the spousal witness privilege. For example, the Superior Court did so in Commonwealth v. Hancharik, a case cited by the Commonwealth. In that case, the court held that the spousal witness privilege exceptions also apply to the confidential spousal communications privilege. 388 Pa. Super. 337, 338-39, 565 A.2d 782, 783 (1989) (en banc). If the Superior Court's decision were good law, our analysis would be much shorter and simpler, because the child-abuse exception at §5913(2) would abrogate the privilege in this case. On appeal, however, the Supreme Court expressly disclaimed the Superior Court's reasoning:

The Superior Court construed [the prefatory clause in §5914, which states "except as otherwise provided in this subchapter"] to mean that the "bodily injury and violence" exception stated in section 5913 applied as an exception to the rule stated in section 5914. The court failed to explain, however, how this interpretation could stand against the criticism that it renders section 5914 entirely superfluous. If a husband or wife is incompetent to testify against the spouse at all (section 5913), there is no need to state separately that a husband or wife is incompetent to testify to confidential communications (section 5914).

Hancharik, 534 Pa. at 440-41, 633 A.2d at 1077.

Thus, the exceptions in §5913 do not apply to §5914. This fact means that the Court must examine to determine whether Michele's text messages are privileged.

2. History of the Confidential Spousal Communications Privilege^[6]

The common law origins of the confidential communications privilege are shrouded in obscurity. A detailed history is provided in 8 Wigmore on Evidence §2227 (1961 ed.). For our purposes, it is sufficient to note that the common law prohibited spouses from testifying in favor of the other. Under the archaic doctrine of coverture, husband and wife were one person in the eyes of the law, and the common law prohibited parties from testifying on their own behalf. Such testimony was barred because it was inherently unreliable.

Similarly, a party-spouse held a privilege that prohibited a witness-spouse from testifying against him, because she might reveal intimate secrets and disrupt marital harmony.^[7] Somewhat paradoxically, the common law prohibited spouses from testifying for each other because they might lie, and against each other because they might tell the truth. See Commonwealth v. Moore, 453 Pa. 302, 311-12, 309 A.2d 569, 573 (1973) (Pomeroy, J., dissenting).

At some point, the privilege was extended so that it existed after the dissolution of the marriage, either by death or divorce. See Cornell v. Vandartsdalen, 4 Pa. (4 Barr.) 364 (1846) (holding that a widow could not testify against her husband's estate as to confidential communications). At common law, similar to §5914, the privilege protected against only confidences between husband and wife.

3. Purpose for the Privilege

The reason for the privilege is the preservation of matrimonial harmony by the preservation of marital confidences. "[T]he happiness of the marriage state requires that the confidence between man and wife should be kept forever inviolable." Doker v. Hasler, (1824) 171 Eng. Rep. 992, 992; Ry. & Mood. 198, 198 (C.P.) (opinion of Lord Wynford, C.J.). In Cornell, the Supreme Court said that "[t]he great object of these rules being to secure domestic happiness by prohibiting confidential communications from being divulged, the rule is the same to that extent, even though the other party is no longer in being, or has even been divorced and married to another person." Cornell, 4 Pa. (4 Barr.) at 374. Stated a third way, the purpose of the confidential spousal communications privilege is "to preserve the peace, harmony, and confidence" in the marital bond. Seitz v. Seitz, 170 Pa. 71, 74-75, 32 A. 578, 578 (1895); see also 1 McCormick on Evidence §86 (6th ed. 2009).

"[T]he marital harmony policy served by the privilege was relevant to determining which communications should be deemed confidential." Spetzer, 572 Pa. at 35-36, 813 A.2d at 718. Just as the existence of all privileges is conditioned on

the nature of the communication,^[8] if a statement made between spouses does not further the purpose of the privilege, it is not confidential. Id.

In Spetzer, the defendant horrifically physically and sexually abused his step-children, and physically abused his wife. On appeal, he argued that his trial counsel ineffectively failed to object to the admission of certain confidential statements he made to his wife. The statements at issue involved Spetzer's attempts to have his wife arrange a sexual rendezvous between him and his step-daughters. Spetzer beat his wife when she failed to comply, and forced her to recant statements she made to police. 572 Pa. at 24-26, 813 A.2d at 712-713. The Superior Court agreed that Spetzer's lawyer should have objected to the statements, and it reversed several of his convictions.

The Commonwealth appealed, and the Supreme Court reversed. The court noted that the statements were "not the sensitive, marital harmony-inspiring communications contemplated by the common law authorities, or the Pennsylvania General Assembly in erecting this privilege. To the contrary, these communications were intended to further marital disharmony." Id. at 39, 813 A.2d at 720-21. The court drew on the result in Seitz, where it had refused to recognize a privilege in a husband's boastful taunts of adultery to his wife. Id. at 39-40, 813 A.2d at 720-21.

The Spetzer court also discussed the application the Child Protective Services Law, 23 Pa. C.S. §6381, which waives marital privileges in any proceeding regarding child abuse. It did not address whether the CPSL abrogates the confidential communications privilege in criminal proceedings. Id. 42, 813 A.2d at 722 ("[W]e need not reach the broader question of whether the CPSL operated directly to modify §5914 in criminal prosecutions involving the abuse of children in order to decide this case.").^[9] The court, however, stated that the CPSL destroyed any reasonable expectation of privacy that Spetzer had in his threats to his wife.

Even if it is assumed that §6381(c) does not act directly to provide a broad child abuse "exception" to §5914's application in criminal proceedings, it certainly affects what a spouse's "reasonable expectation" of continued confidentiality may be with respect to marital communications that reveal the previous or intended abuse and intimidation of a child. Thus, in light of §6381(c), a husband who describes to his spouse his previous rape of her child, for example, or his plans to abduct and rape her children in the future, can have no reasonable expectation under Pennsylvania law that that communication will "remain confidential." Indeed, appellee admits as much, as he concedes that, "Statements made by the Defendant to his wife that are in question in this appeal could certainly have been used at, and most likely were used at, the Children and Youth Services matter seeking to have the children adjudicated dependent."

Id. at 41-42, 813 A.2d at 722.

The court found further support for its holding in the underlying crimes. It noted that child abuse generally occurs in the home and is often cloaked in secrecy. Id. 42, 813 A.2d at 723 (quoting United States v. Bahe, 128 F.3d 1440, 1446 (10th Cir. 1997)). Finally, the court looked to the laws of other jurisdiction: "The experience of other jurisdictions, with their versions of the privilege we are called upon to construe here, lends further support to our conclusion that the communications in this case are not privileged under §5914." Id. at 43, 813 A.2d at 723. The court also suggested that the General Assembly might want to make more explicit the limitations of the privilege by amending §5914. Id.

C. Applying the Privilege to This Case

Based on the above analysis, the Court holds that the text messages are not privileged as confidential communications. Rotely applying the privilege makes no sense, the history of the privilege does not support it, and recognizing it would defeat its very purpose.

Unlike Spetzer and Seitz, the communications in this case were not intended to further marital disharmony, though subsequent animosity between the Hunters appears to have been an ancillary effect. In Spetzer and Seitz, the spouse was the victim, and the communications were part of the defendant's victimization. Here, the witness-spouse is a codefendant, and the alleged victim is the couple's child. In reviewing the messages, there is no hint of marital disharmony. But it would make a mockery of the privilege to hold that a person can keep secret her spouse's knowledge of her child abuse or neglect. The text messages are not protected by the privilege, the spouses' position as codefendants notwithstanding.

The rationale for the privilege rests on the legal fiction that married couples are aware of its existence, and choose to

confide more in their spouses than they would in the absence of the privilege. 1 McCormick on Evidence §86. The Court cannot determine whether the Hunters were aware that their text conversation might be privileged. Like many text messages, the communications seem to have been sent with little thought. To the extent that the privilege is based on the above legal fiction, it must also take into account the fiction that spouses are aware of its exceptions. As the Spetzer court noted, a person has no reasonable expectation of privacy in confidential spousal communications concerning child abuse. Thus, Michele Hunter had no reasonable expectation of privacy in her communications with William Sr., because the conversation is admissible in hearings before Children and Youth Services. Indeed, the record reflects that the text messages were at issue in a Children and Youth Services hearing. Recognizing a privilege would allow a person to avoid criminal prosecution for child abuse if she tells only her spouse about the abuse. That would defeat the purpose of the CPSL, which is "to encourage more complete reporting of suspected child abuse." 42 Pa. C.S. §6302.

The foundations of the privilege make less sense in modern times because a divorce is rightly much easier to obtain and a good number of marriages end in divorce. And in this case, the rationale behind the privilege makes no sense. William Sr. apparently is cooperating with the Commonwealth, and he may testify at trial against his wife. At a bail modification hearing, Michele testified that her marriage was finished, that she was going through a process at the jail to obtain a divorce, and that she had no intention of rehabilitating the marriage. N.T., 8/23/11, at 19-20. To put it bluntly, keeping the text messages from evidence at trial would be like rearranging the deckchairs on the Titanic. And as a general rule, abrogating the privilege as to statements of child abuse might have a salutary effect on marriage. It might discourage the concealment of suspected child abuse.

Finally, Pennsylvania is one of only seven jurisdictions in the United States that have not abolished the confidential spousal communications privilege in all cases involving child abuse.^[10] The other 44 jurisdictions have done so, either by statute, rule of evidence, or court decision. The Uniform Rules of Evidence Act of 1990 expressly abolishes the privilege in child abuse cases, as did the Model Code of Evidence of 1942.^[11]

In summary, the Court will not apply the confidential communications privilege to the text message conversation between Michele and William Sr. Neither history, the purpose thereof, nor Michele's reasonable expectation of privacy support the privilege. In fact, those factors, the existence of the CPSL, and the law of other jurisdictions counsel against holding the communications privileged. It does not make sense to uphold the privilege, and we will not do so.

The Court recognizes that this is a novel holding because of the lack of applicable authority. We believe, however, that our appellate courts would agree with our holding, and that it is the logical conclusion of Spetzer. The Court is further comforted by the fact that this ruling is probably appealable as of right. See Pa. R.A.P. 313; Commonwealth v. Harris, 32 A.3d 243 (Pa. 2011) (holding that orders overruling claims of privilege and ordering disclosure are immediately appealable).

Based on the above analysis, the Court finds that the confidential communications privilege does not apply to the text message conversation between Michele and William Hunter Sr. The text messages will not be excluded from evidence on the grounds of privilege. Furthermore, we deny Michele Hunter's recusal motion, and we will reserve ruling on her motion for individual voir dire until jury selection.

Unlike Spetzer and Seitz, the communications in this case were not intended to further marital disharmony, though subsequent animosity between the Hunters appears to have been an ancillary effect. In Spetzer and Seitz, the spouse was the victim, and the communications were part of the defendant's victimization. Here, the witness-spouse is a codefendant, and the alleged victim is the couple's child. In reviewing the messages, there is no hint of marital disharmony. But it would make a mockery of the privilege to hold that a person can keep secret her spouse's knowledge of her child abuse or neglect. The text messages are not protected by the privilege, the spouses' position as codefendants notwithstanding.

The rationale for the privilege rests on the legal fiction that married couples are aware of its existence, and choose to confide more in their spouses than they would in the absence of the privilege. 1 McCormick on Evidence §86. The Court cannot determine whether the Hunters were aware that their text conversation might be privileged. Like many text messages, the communications seem to have been sent with little thought. To the extent that the privilege is based on the above legal fiction, it must also take into account the fiction that spouses are aware of its exceptions. As the Spetzer court noted, a person has no reasonable expectation of privacy in confidential spousal communications concerning child abuse. Thus, Michele Hunter had no reasonable expectation of privacy in her communications with William Sr., because the conversation is admissible in hearings before Children and Youth Services. Indeed, the record reflects that the text messages were at issue in a Children and Youth Services hearing. Recognizing a privilege would allow a person to avoid criminal prosecution for child abuse if she tells only her spouse about the abuse. That would defeat the purpose of the

CPSL, which is “to encourage more complete reporting of suspected child abuse.” 42 Pa. C.S. §6302.

The foundations of the privilege make less sense in modern times because a divorce is rightly much easier to obtain and a good number of marriages end in divorce. And in this case, the rationale behind the privilege makes no sense. William Sr. apparently is cooperating with the Commonwealth, and he may testify at trial against his wife. At a bail modification hearing, Michele testified that her marriage was finished, that she was going through a process at the jail to obtain a divorce, and that she had no intention of rehabilitating the marriage. N.T., 8/23/11, at 19-20. To put it bluntly, keeping the text messages from evidence at trial would be like rearranging the deckchairs on the Titanic. And as a general rule, abrogating the privilege as to statements of child abuse might have a salutary effect on marriage. It might discourage the concealment of suspected child abuse.

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In summary, the Court will not apply the confidential communications privilege to the text message conversation between Michele and William Sr. Neither history, the purpose thereof, nor Michele’s reasonable expectation of privacy support the privilege. In fact, those factors, the existence of the CPSL, and the law of other jurisdictions counsel against holding the communications privileged. It does not make sense to uphold the privilege, and we will not do so.

The Court recognizes that this is a novel holding because of the lack of applicable authority. We believe, however, that our appellate courts would agree with our holding, and that it is the logical conclusion of Spetzer. The Court is further comforted by the fact that this ruling is probably appealable as of right. See Pa. R.A.P. 313; Commonwealth v. Harris, 32 A.3d 243 (Pa. 2011) (holding that orders overruling claims of privilege and ordering disclosure are immediately appealable).

Based on the above analysis, the Court finds that the confidential communications privilege does not apply to the text message conversation between Michele and William Hunter Sr. The text messages will not be excluded from evidence on the grounds of privilege. Furthermore, we deny Michele Hunter’s recusal motion, and we will reserve ruling on her motion for individual voir dire until jury selection.

ORDER OF COURT

February 13, 2012, concerning Defendant’s Omnibus Pretrial Motion, and for the reasons in the attached opinion, it is ordered as follows:

1. Defendant’s Motion Requesting Suppression of Evidence/ Motion in Limine to Exclude Evidence be, and hereby is, denied;
2. Defendant’s Motion Requesting the Court Recuse Itself From Further Proceedings in this Concern be, and hereby is, denied;
3. Defendant’s Motion Requesting Individual Voir Dire be, and hereby is, taken under advisement, to be decided closer to jury selection.

[¹]18 Pa. C.S. §2702(a)(1), Id. §4304; Id. §2701(a)(1); and Id. §903, respectively.

[²]William Sr.’s case is docketed at CP-28-CR-1473-2011. He is charged with endangering the welfare of a child and conspiracy to endanger the welfare of a child.

[³]Hunter has styled her motion a “Motion Requesting Suppression of Evidence/ Motion to Exclude.” The Court will treat it as a motion to exclude, that is, a motion in limine. Suppression motions seek to exclude unconstitutionally seized evidence. Because this motion does not implicate a constitutional right, we will treat the motion as a motion in limine. The difference is immaterial because the burden remains on the Commonwealth.

[4]The statement that the law has a right to “every man’s evidence” is from a 1742 parliamentary debate. New Wigmore on Evidence: Evidentiary Privileges §2.1.

[5]See May, 540 Pa. at 249, 656 A.2d at 1341-42 (letters sent from imprisoned husband to wife were not privileged where husband had signed a form allowing prison officials to read his mail); Commonwealth v. Small, 602 Pa. 425, 446-47, 980 A.2d 549, 562 (2009) (defendant’s confession to wife not protected where he repeated statements to many other parties); Commonwealth v. McBurrows, 779 A.2d 509 (Pa. Super. 2001) (wife’s observing of husband disposing murder weapon did not fall under the privilege).

[6]Under the Statutory Construction Act, §5914 is strictly construed because it is substantially the same as the original 1887 Act. Under 1 Pa. C.S. §1962, a substantially similar reenacted statute is given an effective date of its original enactment, and under 1 Pa. C.S. §1928(b)(8), statutes passed before 1937 and in derogation of the common law are strictly construed. Furthermore, the scope of the privilege must be determined by looking to the common law — and not legislative intent. Commonwealth v. Chiappini, 566 Pa. 507, 512, 782 A.2d 490, 511-12 (2001) (plurality opinion), overruled on other grounds by Commonwealth v. Kyle, 582 Pa. 624, 874 A.2d 12 (2005).

[7]In 1887, the General Assembly codified common law spousal witness incompetency. The 1887 Act created several broad exceptions to the rule: actions for desertion and maintenance, spousal and child abuse, and bigamy. Commonwealth v. Newman, 534 Pa. 424, 427, 633 A.2d 1069, 1070 (1993). The Act, however, created an incompetency bar for and against spousal witness testimony. This may have been based on a misunderstanding of the common law. Moore, 453 Pa. at 313, 309 A.2d at 574 (Pomeroy, J., dissenting). Pennsylvania retained spousal witness incompetency until 1989, when the Legislature enacted the current §5913. The amendment changed spousal witness incompetency into a privilege held by the witness-spouse. Newman, 534 Pa. at 427, 633 A.2d at 1070; see Part III(B)(1), *supra*.

[8]For example, the clergy-communicant privilege, 42 Pa. C.S. §5943, requires that the communications be made to the clergyperson in his or her capacity as a spiritual advisor. Spetzer, 572 Pa. at 36 n.3, 813 A.2d at 718 n.3 (citing Commonwealth v. Stewart, 547 Pa. 277, 690 A.2d 195 (1997)). And the attorney-client privilege, 42 Pa. C.S. §5928 (civil cases), applies only where the client is seeking legal advice. Joe v. Prison Health Servs., Inc., 782 A.2d 24, 31-32 (Pa. Cmwlth. 2001).

[9]Justice Nigro concurred and would have held that the CPSL abrogates the privilege in criminal matters. Spetzer, 572 Pa. at 45, 813 A.2d at 724 (Nigro, J., concurring).

[10]The other six are Indiana, Maryland, New Jersey, North Carolina, Rhode Island, and Wyoming.

[11]Uniform R. Evid. 504(d)(3) (1990), as reprinted in New Wigmore on Evidence: Evidentiary Privileges, App’x B; Model Code Evid. 216(c)(i) (1942), as reprinted in New Wigmore on Evidence: Evidentiary Privileges, App’x C.