

Marital Privilege - Standard Language

A. Marital Privilege Doctrine:

1. Does It Apply In Immigration Proceedings?

Yes. The marital privilege is applicable in immigration proceedings. *See Cahan v. Carr*, 47 F.2d 604, 605 (9th Cir. 1931) (“With certain exceptions not material here, a wife, on grounds of public policy, is not permitted to testify against her husband and we perceive no good reason why the same rule of public policy should not exclude her testimony in a [deportation proceeding]).”

2. What Is It?

The Ninth Circuit recognizes that the marital privilege doctrine is comprised of two distinct privileges: (1) the anti-marital facts privilege and (2) the marital communications privilege. *See United States v. White*, 974 F.2d 1135, 1137 (9th Cir. 1992). The anti-marital facts privilege prohibits one spouse from testifying against another during the length of the marriage. *Id.* The marital communications privilege bars testimony concerning statements privately communicated between spouses. *Id.* Therefore, while the dissolution of the marriage terminates the privilege under the anti-marital facts privilege, if the communication was confidential and occurred during the marriage it would still be privileged. *Pereira v. United States*, 347 U.S. 1, 6 (1954); *United States v. Marashi*, 913 F.2d 724, 729-30 (9th Cir. 1990).

Federal judicial interpretation defines the scope of the privilege in immigration proceedings. *See Matter of Yaldo*, 13 I&N Dec. 374, 375-76 (BIA 1969) (“The question of whether testimony is privileged in a federal proceeding concerned with confidential communications between husband and wife is controlled by federal judicial interpretation in the absence of congressional legislation on the subject and not by local statute.”); *see also Matter of B*, 5 I&N Dec. 738, 741 (BIA 1954) (“It is well established that in judicial proceedings the common law principles of privilege control and not local statutes, where a communication between husband and wife is confidential.”).

Federal common law assumes that private communications between spouses are intended to be confidential, and thus privileged. *United States v. Strobehn*, 421 F.3d 1017, 1021 (9th Cir. 2005). The government has the burden of demonstrating that they are not confidential. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1456 (9th Cir. 1983); *United States v. Weinberg*, 439 F.2d 743, 750 (9th Cir. 1971).

3. Who May Assert It?

Either spouse may assert the privilege as long as there is a valid contract of marriage in existence at the time of the proffered testimony. *Marashi*, 913 F.2d at 729-30. However, it is important to remember that whereas the dissolution of the marriage terminates the privilege under the anti-marital facts privilege, this is not the case with the confidential communications privilege. Confidential communications during the marriage are always privileged (unless certain public policy grounds dictate otherwise, see discussion *infra*). *Id.*

4. Can the Privileges be Waived?

Yes. In order to assert the privilege a timely objection must be made to the allegedly privileged communication. *See United States v. Figueroa-Paz*, 468 F.2d 1055, 1057 (9th Cir. 1972) (finding that when the defendant “failed to object to his wife’s

testimony as to his communications when it was offered," he waived the privilege); *United States v. Montgomery*, 384 F.3d 1050, 1057 (9th Cir. 2004) ("[T]he marital communications privilege will be waived if an objection is not timely made.").

5. What if DHS Alleges Marriage Fraud?

Where a marriage was entered into for fraudulent purposes, neither privilege applies. *Lutwak v. United States*, 344 U.S. 604, 614 (1953); *Matter of Yaldo*, 13 I&N Dec. at 376. Simply alleging fraud is not enough. The DHS must demonstrate a prima facie case that the marriage is fraudulent. *Matter of Yaldo*, 13 I&N Dec. at 376 (relying on the record of the annulment, a public record, which indicated that the marriage was entered into solely for purposes of procuring the alien a viable Immigration status).

In *Lutwak*, the Supreme Court explained why the anti-marital facts privilege would be inapplicable when the legitimacy of the marriage itself is in question.

When the good faith of the marital relation is pertinent and... it...appear[s]...that the relationship was entered into with no intention of the parties to live together as husband and wife but only for the purpose of using the marriage ceremony in a scheme to defraud, the ostensible spouses are competent to testify against each other....[W]e are not concerned with the validity or invalidity of these so-called marriages. We are concerned only with the application of a common-law principle of evidence...The reason for the rule at common law disqualifying the wife is to protect the sanctity and tranquility of the marital relationship. It is hollow mockery for the petitioners...to invoke the reason for the rule...In a sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule.

Id. at 614-15. In *Matter of Yaldo*, the BIA concluded that the marital communications privilege also does not apply when the legitimacy of the marriage itself is in question. *Matter of Yaldo*, 13 I&N Dec. at 376. The BIA concluded that the Supreme Court's reasoning in *Lutwak* was transferable to the marital communications context. *Id.* Because the Supreme Court reasoned in *Lutwak* that the policy reasons necessitating the anti-marital facts privilege were not served if the privilege applied to sham marriages, the BIA similarly reasoned that the marital communications privilege was likewise inapplicable during recission proceedings where the legitimacy of the marriage itself is in question. *Id.* Because "the good faith of the marriage is the very essence of the recission proceeding," the marital communications privilege would be inapplicable in that context. *Id.* The Ninth Circuit has commented that "the marital communications privilege must be narrowly construed because it obstructs the truth seeking process." *White*, 974 F.2d at 1138.

B. Exceptions

1. Anti-Marital Facts Privilege

a. Divorce

Divorce removes the bar of incompetency and terminates the privilege. *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979). Once divorced, a spouse may testify against his or her spouse. *Id.*

b. If Spouse is Victim of Crime

The anti-marital facts privilege does not apply where the spouse or his or her children are the victims of a crime carried out by the other spouse. *White*, 974 F.2d at 1138.

2. Marital Communications Privilege

There are several well settled limitations regarding the applicability of the marital communications privilege. First, the privilege does not apply to communications not intended to be private, for example, if a third party was present at the time of the communication. *Pereira*, 347 U.S. at 6. Second, the privilege does not apply to communications which the speaker intended to be conveyed to a third party. *Id.* Third, the privilege extends only to utterances, not to acts. *Id.* Fourth, the privilege applies only to communications that were confidential and occurred during the marriage. *Id.* Fifth, the privilege may be waived. *Matter of B*, 51 I&N Dec. at 741. Lastly, communications relating to present or future crimes are not privileged. *White*, 974 F.2d at 1138.

The Ninth Circuit has also commented that "the marital communications privilege must be narrowly construed because it obstructs the truth seeking process." *Id.*