

Remedies Available Following Claim Of Fifth Amendment Privilege In Divorce

The constitutional privilege against self-incrimination under the Fifth Amendment to the United States Constitution is typically associated with parties in a criminal action. However, the privilege may also be asserted by a party in a civil action, such as a divorce. For example, the issue may arise if a spouse faces a criminal investigation by the Internal Revenue Service and asserts the privilege in response to questions regarding tax returns or other financial information. When a spouse asserts the privilege against self-incrimination in a divorce proceeding and blocks the other party's access to relevant, and often critical, information, the court must balance the rights of both parties to ensure that the case proceeds equitably and does not stagnate.

Kentucky is among those states that have yet to address the issue of a party asserting the Fifth Amendment privilege against self-incrimination within the context of a divorce proceeding. Although the issue seldom arises, an ample body of case law exists among the other states that can act as a guide when it does. Courts have a variety of remedies available to ensure the equitable and expeditious adjudication of both parties' rights and claims. Just as important as one party's right to claim the privilege against self-incrimination, is the other party's right to discover evidence relevant to the fair resolution of his or her claims and defenses without undue delay.

Among the states that have addressed the issue, there are two widely accepted remedies. One allows the fact finder to draw an adverse inference against the party invoking the Fifth Amendment privilege against self-incrimination. This remedy follows the established rule recognized by the United States Supreme Court in *Baxter v. Palmigiano*¹ that

the Fifth Amendment does not forbid adverse inferences against parties to civil actions. The other common remedy allows the court to deny the spouse who invokes the privilege affirmative relief² if he or she refuses to answer questions relevant to the issues.

For instance, in *Griffith v. Griffith*,³ a divorce proceeding, the wife sought the affirmative relief of permanent alimony. Since adultery was a criminal offense in South Carolina, the parties stipulated that they had been granted immunity from prosecution for adultery. Nevertheless, the wife still invoked the privilege against self-incrimination and refused to answer questions regarding adultery, since proof of adulterous conduct under some circumstances acted as a bar to alimony. In affirming the trial court's decision that the immunized wife could not assert the privilege and seek the affirmative relief of alimony, the appellate court noted that almost all of the states that have confronted the issue of whether a spouse may continue to request the affirmative relief of alimony while denying the opposing party the opportunity to cross-examine on the subject of the alleged adultery have held that the spouse must choose between invoking the privilege and seeking affirmative relief.⁴ The denial of the right to seek affirmative relief under such circumstances does not violate any right guaranteed by the Fifth Amendment. The court reasoned that "[i]f any prejudice is to come from such a situation, it must, as a matter of basic fairness . . . be to the party asserting the claim [of privilege] and not to the one who has been subjected to its assertion. It is the former who has made the election to create an imbalance in the pans of the scales."⁵ In addition to denying the wife affirmative relief, the court also held that the trial court erred in not drawing an adverse inference from the wife's refusal to answer questions regarding her alleged adultery. In so doing, the court again noted that the majority of

jurisdictions confronted with the issue have followed the rule articulated in *Baxter, supra*, and held the same.⁶

Likewise, the Supreme Court of Rhode Island in *Pulawski v. Pulawski*⁷ held that the trial court erred in a divorce action by granting affirmative relief to the wife and in failing to draw any negative inference against the wife even though she invoked the privilege against self-incrimination. The Court found that “the imposition of sanctions upon a party who seeks affirmative relief and the drawing of adverse inferences against such a party when he refuses to answer relevant questions on self-incrimination grounds are widely accepted in both state and federal courts.”⁸

In Kentucky, practitioners can ask the court to deny relief to a spouse who invokes the privilege and to draw adverse inferences against him or her using the same legal principles. For instance, if a spouse invokes the privilege as to financial information and also asserts a claim for maintenance, then the practitioner should ask the court to deny that spouse’s claim for said relief. While the case law cited herein refers to affirmative relief, logic and equity dictate that this remedy also be available when any spouse requests relief and then invokes the privilege regarding the discovery of relevant information for the fair adjudication of that relief. The practitioner can also ask the court to draw adverse inferences against that same party in relation to other issues that factor in the spouse’s financial circumstances, such as child support or property division.

In addition to the use of the two remedies discussed above, courts have fashioned other solutions. For instance, some courts have required the dismissal of the divorce petition when the plaintiff spouse refuses to waive his or her privilege against self-incrimination.⁹ In so holding, those courts reason that in cases with private litigants, one party’s right to claim

the privilege against self-incrimination must be balanced against the other party's right to due process and a fair trial.¹⁰ If a plaintiff is allowed to present sufficient facts to state a cause of action in order to seek affirmative judicial relief, the defendant cannot be denied the right to discover all relevant facts and evidence in his or her attempt to avoid liability.¹¹ As one court succinctly stated, "one seeking equity must do equity."¹² A party should not be allowed to use the privilege against self-incrimination as both a shield and a sword.

Courts have also utilized the remedy of striking a party's pleadings. In *Franklin v. Franklin*,¹³ the wife refused to answer interrogatories and testify regarding the status of her prior marriage, invoking the privilege against self-incrimination. At the same time, the wife, plaintiff in the divorce action, sought temporary alimony. By invoking the privilege, she refused to reveal facts that were critical to an accurate and fair adjudication of her right to divorce and to temporary support. The Supreme Court of Missouri, applying principles of equity, found that if a party refuses to answer oral or written interrogatories which request relevant and material facts that are solely within the knowledge of the party, the court may strike that party's pleadings.¹⁴

Lastly, courts have denied a party the right to rely on evidence about which they refuse to testify. In *In re the Marriage of Hassiepen*,¹⁵ the husband invoked the privilege against self-incrimination during cross examination when asked questions regarding why he had filed multiple tax returns late and why he had yet to file one year of returns. However, the husband wanted the trial court to consider those same returns as evidence of his income in determining the amount of his child support obligation. The appellate court held that if the husband wanted the trial court to consider the tax returns as evidence, then he must testify regarding any relevant questions about them, reasoning that the cross examination of the

husband goes to his credibility and the legitimacy of the tax returns. Therefore the court held that the trial court erred in considering the tax returns. The husband needed to choose either to assert the privilege against self-incrimination and not rely upon the tax returns as evidence of his income, or to submit the tax returns as evidence and not assert the privilege during cross-examination. It is important to note that the court's limitation on the husband's use of the tax returns did not extend to the wife. The wife was free to use the returns in any legitimate way that she desired.

This review of case law reveals that the remedies available to a Kentucky court span a wide range of extremes and potential efficacy. On the one extreme, courts may dismiss the divorce petition altogether if the plaintiff spouse invokes the privilege. However, this solution not only penalizes the plaintiff spouse, but also unfairly penalizes the defendant spouse if he or she wants a divorce. Instead of balancing the parties' rights, this remedy voids everyone's rights. Of course, the defendant spouse may then file his or her own petition, but not without the likelihood of incurring additional court costs and attorney fees. On the other hand, the least extreme remedy, drawing adverse inferences against the party that invokes the privilege, is inadequate. While this remedy may be helpful to parties not claiming the privilege, it does not necessarily get them where they need to go. In many instances, when the court "draws all adverse inferences," the resulting conclusion will still fail to provide an accurate picture of the parties' finances. Thus, the non-invoking spouse may still receive significantly less in a division of property or determination of maintenance or child support than he or she is due. Those remedies that fall somewhere in between the two extremes seem to offer the most effective and equitable solution to the court's need to balance the rights of both parties. Denying affirmative relief, striking a pleading, and/or denying the right

to rely on certain evidence, all seem to strike the right balance, maintaining a spouse's right to invoke the privilege as well as the other's spouse's right to a fair adjudication of his or her rights and claims without unwarranted delay. As such, Kentucky practitioners should carefully examine the facts and circumstances of their case to determine which remedy would best benefit their client.

¹ 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

² Affirmative relief is defined as the "relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action." *Black's Law Dictionary* (8th ed. 2004), relief.

³ 506 S.E.2d 526 (S.C. App. 1998).

⁴ *Id.* at 529-530.

⁵ *Id.* at 530. (citations omitted).

⁶ *Id.* at 531-532.

⁷ 463 A.2d 151 (R.I. 1983).

⁸ *Id.* at 156. (citations omitted).

⁹ See *Christenson v. Christenson*, 162 N.W.2d 194 (Minn. 1968), *Stockham v. Stockham*, 168 So.2d 320 (Fla. 1964), and *Minor v. Minor*, 232 So.2d 746 (Fla. App. 1970), *affirmed by Minor v. Minor*, 240 So.2d 301 (Fla. 1970).

¹⁰ *Id.*

¹¹ *Christenson v. Christenson*, 162 N.W.2d 194, 202-203 (Minn. 1968)

¹² *Minor v. Minor*, 232 So.2d 746, 747 (Fla. App. 1970) *affirmed by Minor v. Minor*, 240 So.2d 301 (Fla. 1970).

¹³ 283 S.W.2d 483 (Mo. 1955).

¹⁴ *Id.*

¹⁵ 646 N.E.2d 1348 (Ill. App. 4 Dist. 1995).

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