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HOUSE BILL NO. 2174

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Courts of Justice
on February 21, 2005)

(Patron Prior to Substitute—Delegate Johnson)

*A BILL to amend and reenact §§ 8.01-398 and 19.2-271.2 of the Code of Virginia, relating to marital communications; privilege.***Be it enacted by the General Assembly of Virginia:****1. That §§ 8.01-398 and 19.2-271.2 of the Code of Virginia are amended and reenacted as follows:**

§ 8.01-398. Privileged marital communications.

A. Husband and wife shall be competent witnesses to testify for or against each other in all civil actions; ~~provided that neither husband nor wife shall, without the consent of the other, be examined in any action as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted.~~

B. The proviso in subsection A of this section shall not apply in those instances where the law of this Commonwealth confers upon a spouse a right of action against the other spouse. *In any civil proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between his spouse and him during their marriage, regardless of whether he is married to that spouse at the time he objects to disclosure. This privilege may not be asserted in any proceeding in which the spouses are adverse parties, or in which either spouse is charged with a crime or tort against the person or property of the other or against the minor child of either spouse. For the purposes of this section, "confidential communication" means a communication made privately by a person to his spouse that is not intended for disclosure to any other person.*

§ 19.2-271.2. Testimony of husband and wife in criminal cases.

In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses and ~~subject to the exception stated in § 8.01-398~~, may be compelled to testify in behalf of each other, but neither shall be compelled to be called as a witness against the other, except (i) in the case of a prosecution for an offense committed by one against the other ~~or~~, against a minor child of either, ~~or against the property of either;~~ (ii) in any case where either is charged with forgery of the name of the other or uttering or attempting to utter a writing bearing the allegedly forged signature of the other; or (iii) in any proceeding relating to a violation of the laws pertaining to criminal sexual assault (§§ 18.2-61 through 18.2-67.10), crimes against nature (§ 18.2-361) involving a minor as a victim and provided the defendant and the victim are not married to each other, incest (§ 18.2-366), or abuse of children (§§ 18.2-370 through 18.2-371). The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by any attorney.

Except in the prosecution for a criminal offense as set forth in (i), (ii) or (iii) above, each shall be a competent witness except as to privileged communications in any criminal proceeding, a person has a privilege to refuse to disclose, and to prevent anyone else from disclosing, any confidential communication between his spouse and him during their marriage, regardless of whether he is married to that spouse at the time he objects to disclosure. For the purposes of this section, "confidential communication" means a communication made privately by a person to his spouse that is not intended for disclosure to any other person.