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Sham Marriage and Privilege

BY STEPHEN A. SALTZBURG

A CASE IN POINT

United States v. Fomichev, 899 F.3d 766 (9th Cir. 2018), discusses the effect that a sham marriage has on marital privileges. The court draws a line between the spousal immunity (or spousal witness) privilege and the marital communications privilege.

THE FACTS

Dimitry Fomichev came to the United States in 2003 from his Russian birthplace on a student visa. Three years later he met and married Svetlana Pogosyan. Pogosyan applied for an alien relative visa for Fomichev in 2007, and he applied to adjust his immigration status. The U.S. Department of Homeland Security found the marriage bona fide, approved the visa, and granted Fomichev conditional residence.

With the assistance of counsel, Fomichev and Pogosyan petitioned in 2009 to remove the conditions on Fomichev's residence. They indicated that they shared an address, certified that their petition and evidence were true and correct, and also declared that they married pursuant to California law and did not do so for the purpose of procuring an immigration benefit. They attached copies of their jointly filed tax returns to the petition.

The next year, agents of the Internal Revenue Service approached Pogosyan to inquire about her marriage. The reported opinion does not indicate what caused the IRS to focus on her, but regardless of the cause, she agreed to meet with IRS agents at a coffee shop. The agents asked where she and Fomichev actually lived and about the jointly filed tax returns. When she gave conflicting answers to these questions, the agents cautioned her that lying to federal agents is a felony and that she could owe back taxes and be held culpable for filing false returns.

The agents' warnings appeared to hit home because Pogosyan stated she wanted to "come clean" and tell the agents the truth. She told them that she married Fomichev so that he could secure U.S. citizenship, and

that in exchange for her marrying him, Fomichev would pay her rent. Pogosyan agreed to record telephone calls with Fomichev and to wear a concealed recording device when she met with Fomichev in person. The recorded conversations revealed that Fomichev was concerned about his immigration status and at one point said, "do not set us up, me and you, in regards to the immigration as no one knows, . . . no one can prove anything."

Pogosyan testified before a federal grand jury in 2011 about the arrangement to which she had agreed: namely, to marry Fomichev so that he could obtain U.S. citizenship in exchange for his paying her rent. She also testified that she and Fomichev never lived together and from the beginning they did not intend for the marriage to last more than a couple of years. In 2012 the couple divorced.

THE CHARGES, MOTIONS, AND TRIAL

The government charged Fomichev in 2013 with three years of filing false income tax returns, two counts of falsely certifying that his marriage was not for the purpose of procuring an immigration benefit; and two counts of making the same false statements in immigration documents. Fomichev filed a motion to suppress the recorded conversations between him and Pogosyan and to bar Pogosyan's testimony about the content of those conversations on two grounds: The conversations were protected by the marital communications privilege and they were obtained in violation of the Fourth Amendment.

The government argued that Fomichev could not claim the marital communications privilege because the wife had agreed to act as a government informant, so there was no valid Fourth Amendment argument, and that because Fomichev married Pogosyan for fraudulent purposes, the marital communications privilege did not apply. The trial judge was called upon to decide two questions upon which the Ninth Circuit had not ruled. The judge recognized that the Circuit had not decided whether one spouse has a reasonable expectation of privacy when only the other spouse consents to electronic monitoring, but relied on Supreme Court cases holding that individuals have no reasonable expectation of privacy in the statements they make to government informants.

The judge noted on the marital communications issue that the parties agreed that, unless an exception applied, the marital communications privilege would bar the introduction of the recorded conversations and Pogosyan's testimony about their content. The agreement reflected the fact that there was a valid marriage, the words spoken by the two spouses were communications between them, and at least Fomichev intended that they be confidential and had no reason to believe that Pogosyan had any different intent.

The judge recognized that there is a "sham marriage" exception to the spousal immunity privilege, but that

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there was no Ninth Circuit authority for holding that the sham marriage exception applied to the marital communications privilege and no cases decided elsewhere that supported the government's argument. The judge expressed awareness of Ninth Circuit decisions cautioning against what the judge described as "engaging in 'the business of opining on which reasons for marriage are legitimate or deserving of marital privileges and which ones are not.'" Nevertheless, he determined that there was no principled reason not to extend the sham marriage exception to the marital communications privilege on the facts presented.

The judge found that when Fomichev and Pogosyan married in 2006, they initially planned to live together; they looked at 25 options before leasing a residence; and thereafter they never resided together, slept in the same bed, or engaged in sexual relations together. These facts caused the judge to conclude that "[o]n the particular facts of th[e] case, the policy interests behind the marital communications privilege would not be advanced and would surely be outweighed by the competing societal interest for truth and the administration of justice."

The judge denied Fomichev's motion, the government dropped one tax count prior to trial, a jury convicted Fomichev on the four false-statement counts, and the judge granted a motion for judgment of acquittal on the remaining tax counts. The judge sentenced Fomichev to only three years of probation.

THE NINTH CIRCUIT'S ANALYSIS

The Ninth Circuit held that the trial judge was wrong to hold that a sham marriage warranted an exception from the marital communications privilege after distinguishing between the spousal immunity and the marital communications privileges. The court cited cases holding that a "sham marriage" bars invocation of the spousal immunity privilege:

The spousal testimonial privilege * * * prohibits one spouse from testifying against the other in criminal cases during the course of their marriage, and "the witness-spouse alone has a privilege to refuse to testify adversely." *Trammel v. United States*, 445 U.S. 40, 53, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980). The spousal testimonial privilege ends when a marriage ends. * * * The sham marriage exception to the spousal testimonial privilege is a narrow exception that has typically arisen when there has been a close temporal proximity between the date of a marriage and the date when a witness-spouse has been expected to testify. See *In re Grand Jury Proceedings (84-5)*, 777 F.2d 508, 509 (9th Cir. 1985) (per curiam) (considering applicability of sham marriage exception because couple married on the eve of trial); *United States v. Apodaca*, 522 F.2d 568, 571 (10th Cir. 1975)

(holding the spousal testimonial privilege could not be invoked by a witness-spouse because she and the defendant "were married only three days before trial"). We have affirmed a district court's ruling that the spousal testimonial privilege was not available to a witness-spouse because "the purpose of the marriage was for . . . invoking the [spousal testimonial] privilege." *United States v. Saniti*, 604 F.2d 603, 604 & n.1 (9th Cir. 1979) (per curiam).

The Ninth Circuit cited to *Lutwak v. United States*, 344 U.S. 604, 614 (1953), in which the Supreme Court addressed the concept of a "sham marriage" in the immigration context:

When the good faith of the marital relation is pertinent and it is made to appear to the trial court, as it was here, 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.

The Ninth Circuit spent almost no time identifying the rationale for the sham marriage exception as applied to the spousal immunity privilege, but the rationale appears to be twofold. First, the notion that a person is marrying a potential witness to make that witness unavailable in a criminal case suggests a kind of obstruction of justice. This rationale had even greater strength before the Supreme Court's *Trammel* decision (*supra*) because until that decision the spousal immunity privilege could be claimed by either spouse. This meant that if a defendant was about to be charged or go to trial and the defendant could coerce, bribe, or otherwise compel a witness to marry, the defendant could claim the privilege and essentially close the witness's mouth. This possibility led one court, *United States v. Clark*, 712 F.2d 299 (7th Cir. 1983), to hold that the difficult proof problems in determining a sham marriage warrant an exception to the spousal immunity privilege for all premarital acts.

Second, marriage should not be a step in carrying out a conspiracy to defraud in contexts like immigration. Immigration law requires a couple in the position of Fomichev and Pogosyan to certify that they did not marry for the purpose of obtaining an immigration benefit. A couple that knows that it married to obtain an immigration benefit and intends to lie to government agencies to obtain that benefit conspire to violate federal law.

The Ninth Circuit placed the burden on the government to persuade it that the sham marriage exception should be extended to the marital communications privilege.

This meant that the government had to demonstrate that the rationale for the exception as developed in the spousal immunity context also applied to marital communications. The court concluded that the government had not met its burden. The substance of the court's reasoning is contained in a footnote:

We recognize that people marry for many different religious, cultural, and social reasons. Marriages that are entered into for practical reasons may ripen into loving relationships, and happily unmarried couples may decide to marry for estate planning purposes, to secure health benefits, or to increase their chances of successfully adopting children, *Piper v. Alaska Airlines, Inc.*, No. 93-35575, 1994 U.S. App. LEXIS 22022, 1994 WL 424292 at *2-3 (9th Cir. Aug. 12, 1994). See *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002) (“Just as marriages for money, hardly a novelty, or marriages among princes and princesses for reasons of state may be genuine and not sham marriages, so may marriages for green cards be genuine.”). Under our case law, determining the applicability of the sham marriage exception requires a limited inquiry into whether parties married for the purpose of invoking the testimonial privilege. This is consistent with our previous admonitions that courts should be wary of passing judgment on parties’ personal reasons for marrying. See [*United States v.*] *Roberson*, 859 F.2d [1376], at 1380 [(9th Cir. 1988)] (observing that adjudicating the applicability of marital privileges can “involve district judges in difficult and sometimes inappropriate inquiries”).

Thus, the reason why the sham marriage exception does not apply to marital communications is that as long as a couple is legally married, there is nothing “sham” about their relationship in the eyes of the law. As the footnote quoted above indicates, people marry and stay married for many reasons. The sham marriage exception as applied to the spousal immunity privilege prevents obstruction of justice and fraud. When there is no obstruction or fraud, a marriage that is completely legal is a relationship that the marital communications privilege is intended to foster. As the Ninth Circuit said in *Fomichev*, “[l]ike the physician-patient and clergy-penitent privileges, the marital communications privilege recognizes that society has an enormously strong interest in preserving a particular social institution—here, the institution of marriage.”

THE REMAND

Although the Circuit rejected the government's effort to extend the sham marriage exception beyond spousal

testimony to the marital communications privilege, it declined to reverse Fomichev's conviction. It noted that “it appears that the parties mistakenly focused on litigating exceptions to the marital communications privilege, without recognizing that it only extends to communications made during the marriage or until a marriage becomes irreconcilable”; found that “[i]rreconcilability was not the focus of the government's argument in the district court, but the government did advance this argument in the district court and it continues to argue this point on appeal”; and decided that “because the district court did not make a finding about whether the subject marriage was irreconcilable when the IRS recorded Fomichev's statements, we remand for the district court to rule on irreconcilability.”

LESSONS

1. Federal law on privilege continues to recognize two distinct marital privileges: spousal immunity and marital communications.
2. Each of these privileges provides different protections. The testifying spousal holds the spousal immunity privilege and may only exercise it in criminal cases, and it ends when the marriage ends. Both spouses hold the marital communications privilege, and it continues after the marriage ends to protect confidential communications made during the marriage.
3. Different exceptions may apply to the two privileges, as illustrated by *Fomichev*, as the court holds that the sham marriage exception, established as an exception to spousal immunity, is not extended to the marital communications privilege.
4. On remand, the district court will have to resolve a knotty issue: What does it mean for a marriage to become irreconcilable? Fomichev and Pogosyan stayed married, even while living separately, for six years. Because the Ninth Circuit indicated that “courts should be wary of passing judgment on parties’ personal reasons for marrying,” it would seem that courts also should be wary of passing judgments on why married couples stay married. During the period that Pogosyan was secretly engaging in recorded conversations with Fomichev, she obviously was willing to assist the government and thereby hurt Fomichev. From her perspective she must have decided that the marriage was irreconcilable once she became a government cooperator. But Fomichev might have had no idea that Pogosyan was cooperating and apparently willing to damage the man who was still her legal spouse. Does irreconcilability require acknowledgment by both spouses? The answer would appear to be a question of law, which means that there may be another legal question for the Ninth Circuit on a second appeal. ■