

# Fifth Amendment Privilege in Family Law Litigation

by  
Brett R. Turner\*

## Introduction

Family law lawyers are used to practicing in a world where broad financial discovery is mandatory. Courts have a genuine need for a wide variety of evidence in order to divide marital property, award spousal and child support, and determine custody of children.<sup>1</sup> Not uncommonly, parties are required to comply with even the most intrusive requests for information. Objections result only in the entry of a protective order barring disclosure of the produced material to persons other than the parties, their counsel, and the court.<sup>2</sup>

Even in family law cases, however, there are *some* limits on what must be produced in discovery or allowed into evidence at trial. One of the stronger limits is the privilege against self-incrimination. The privilege is recognized by the Fifth Amendment to the U.S. Constitution,<sup>3</sup> and by a similar provision in most state constitutions.<sup>4</sup> Because the privilege is an important consti-

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\* Senior Attorney, National Legal Research Group; Author, *EQUITABLE DISTRIBUTION OF PROPERTY* (4th ed. 2021); Co-author (with Laura W. Morgan), *ATTACKING AND DEFENDING MARITAL AGREEMENTS* (2d ed. 2012); Former Editor, *Divorce Litigation*.

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<sup>1</sup> BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 4:3 (4th ed. 2021).

<sup>2</sup> *Id.* §§ 4:3, 4:6, 4:11.

<sup>3</sup> U.S. CONST. amend. V.

<sup>4</sup> *See, e.g.*, CAL. CONST. art. I, § 15; MASS. CONST. pt. I, art. XII; N.C. CONST. art I, § 23.

tutional right, it is of the few devices that can defeat the public policy of broad financial disclosure in family law cases.

Still, the privilege is not always easy to invoke, and the court's power to draw an adverse inference against the party who invokes the privilege, or to even deny that party all affirmative relief, can be a powerful countervailing force.<sup>5</sup> The clear trend in the cases is to recognize the privilege when it applies; but whether invoking the privilege will actually help the witness over the long run can be a close and debatable question.

Part I of this article will examine the basic parameters of the privilege. Part II will discuss when and how the privilege can be waived, a subject which is essential to determining the practical scope of the privilege. Part III will discuss case law applying the privilege to documents and other forms of nontestimonial evidence. Finally, Part IV will discuss the adverse consequences of asserting the privilege.

This article covers only the Fifth Amendment privilege. Privileges under similar state provisions generally track the protection given by the federal provision,<sup>6</sup> but it is prudent to double-check this point in specific cases, since there is no requirement that the federal and state privileges exactly mirror one another.

## I. Parameters of the Privilege

The Fifth Amendment to the U.S. Constitution provides simply that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>7</sup> While the text of the amendment speaks only of criminal cases, it is settled that a person also may not be compelled to be a witness against himself in a civil case.

The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official ques-

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<sup>5</sup> See Part IV *infra*.

<sup>6</sup> See, e.g., *State v. Kramer*, 2006 WI App 133, ¶8 n.3, 294 Wis. 2d 780, 786, 720 N.W.2d 459, 462 (Wis. Ct. App. 2006) (“Historically, we have interpreted [Wisconsin’s state privilege against self-incrimination] to provide the same scope of protections as the FIFTH AMENDMENT to the United States Constitution.”)

<sup>7</sup> U.S. CONST., amend. V.

tions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.<sup>8</sup>

Thus, the privilege applies in family law litigation.

The most common fact pattern involving invocation of the Fifth Amendment in family law litigation has traditionally been when a party in a divorce case refuses to answer questions on extramarital relationships, on grounds that the answer might lead to a conviction for criminal adultery.<sup>9</sup> As criminal adultery statutes drop in number,<sup>10</sup> and as divorce cases generally attach less weight to fault,<sup>11</sup> this fact pattern has become less common. Modern cases are increasingly seeing the privilege invoked in response to questions about tax returns and other prior statements involving the witness's finances,<sup>12</sup> or in custody or dependency litigation, by a spouse accused of misconduct involving a child.<sup>13</sup>

What does it mean for a person to be a witness against himself? At a minimum, a person is a witness against himself when the answer to a question can be used against him in a criminal

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<sup>8</sup> Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

The privilege applies specifically to juvenile proceedings. “Although the court in this case initially appeared to base its ruling that Abigail could not refuse to testify on an erroneous understanding that she could not invoke her Fifth Amendment privilege in this juvenile adjudication, the court ultimately appeared to recognize that she could invoke the privilege.” *In re Vladimir G.*, 944 N.W.2d 309, 317 (Neb. 2020); *see also* New Jersey Div. of Child Prot. & Permanency v. S.K., 193 A.3d 309 (N.J. Super. Ct. App. Div. 2018).

*Vladimir G.* held, however, that if self-incriminating evidence had improperly been introduced, the remedy was to exclude that evidence in a future criminal prosecution, and not to reverse the trial court for admitting that evidence, especially where the claim that the evidence was incriminating was weak.

<sup>9</sup> *See infra* note 29.

<sup>10</sup> Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK L. REV. 837 (2006) (“[m]any states . . . repeal[ed] their own criminal adultery statutes”).

<sup>11</sup> *See generally* Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243 (2004).

<sup>12</sup> *See, e.g.*, Slater v. Slater, 78 Misc. 2d 13, 14, 355 N.Y.S.2d 943, 944 (N.Y. Sup. Ct. 1974).

<sup>13</sup> *See, e.g.*, *In re Billman*, 634 N.E.2d 1050, 1051 (Ohio Ct. App. 1993) (“the right to refrain from testifying against oneself attaches to a dependency action in juvenile court”).

prosecution.<sup>14</sup> In addition, a person is also a witness against himself if his answer, while not itself admissible in a criminal prosecution, “could lead to other evidence that might be so used.”<sup>15</sup>

Who determines whether the answer to a question might be used against the witness in a criminal production? “The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.”<sup>16</sup>

When the court reviews an attempt to assert the Fifth Amendment privilege, it need not find that an answer to the question certainly would result in a criminal conviction. “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result.”<sup>17</sup> But again, the test is whether answering the question objectively could result in a criminal prosecution, and not whether the witness subjectively believes that a criminal prosecution is likely. “[T]he guiding principle in a self-incrimination inquiry is the objective reasonableness of a witness’s claimed fear of future prosecution.”<sup>18</sup> The Fifth Amendment “protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution.”<sup>19</sup>

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<sup>14</sup> *E.g.*, *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

<sup>15</sup> *Id.* “The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *see also Vladimir G.*, 944 N.W.2d at 317–18.

<sup>16</sup> *Hoffman*, 341 U.S. at 486. “A party is not entitled to decide for himself whether he is protected by the fifth amendment privilege. Rather, this question is for the court to decide.” *SEC v. First Fin. Grp., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981).

<sup>17</sup> *Hoffman*, 341 U.S. at 486–87 (emphasis added).

<sup>18</sup> *Grosshuesch v. Cramer*, 659 S.E.2d 112, 119 (S.C. 2008).

<sup>19</sup> *Kastigar*, 406 U.S. at 445. “[T]he proper test simply assesses the objective reasonableness of the target’s claimed apprehension of prosecution.” *United States v. Sharp*, 920 F.2d 1167, 1171 (4th Cir. 1990). “A valid assertion of the fifth amendment privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. A witness must, however, show a “real danger,” and not a mere imaginary, remote or speculative possibility of

A good example of how these concerns are balanced is *Slater v. Slater*.<sup>20</sup> There, the husband asserted the privilege when questioned about his tax returns. The basis for the husband's claim was quite specific: "the defendant might be subject to the penalties of perjury under section 6065 of title 26 of the United States Code, were he compelled to answer despite his assertion of the constitutional privilege."<sup>21</sup>

The trial court wrote a curious opinion which acknowledged the importance of the privilege, acknowledged the policies it protected, and then refused to sustain the husband's invocation of the privilege across the board. The stated reasoning was the well-accepted policy that "[i]n this, as in all difficult matrimonial disputes, the wife has a right to inquire into the financial status of her husband," and the comment that "if the bald assertion of the privilege were accepted at face value, the substantive rights of the wife in this instance could be severely prejudiced."<sup>22</sup> This author completely agrees that full disclosure of finances is a critically important policy,<sup>23</sup> but it is questionable whether that policy is of the same magnitude as a constitutional right.<sup>24</sup>

Nevertheless, a somewhat different line of reasoning supports the result reached. It was clearly the husband's burden to prove that answering the question would actually tend to convict him of a specific crime. The crime at issue was a violation of 26 U.S.C. § 6065, which essentially provides that tax returns are filed under penalty of perjury. It is certainly likely that some answers to some questions would tend to convict the husband of perjury. For example, if the question were "why did you not list your gambling winnings as income on your tax return," and a true answer would be "because I did not want to pay income taxes on them and I was trying to cheat the I.R.S.," the privilege would obviously apply. A truthful answer would be a damaging direct admission of perjury. The privilege could be invoked de-

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prosecution." *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983) (citation omitted).

<sup>20</sup> 355 N.Y.S.2d at 944.

<sup>21</sup> *Id.* at 944.

<sup>22</sup> *Id.* at 946.

<sup>23</sup> See TURNER, *supra* note 1, § 4:3.

<sup>24</sup> *Cf. Coronado v. State*, 351 S.W.3d 315, 329 (Tex. Crim. App. 2011) ("There is no 'balancing' the defendant's constitutional right of confrontation and cross-examination against other social policies, even compelling ones").

spite the public policy in favor of full disclosure in divorce cases; the policy is trumped by a constitutional right.

But it is not certain that a truthful answer to *every* conceivable question would tend to convict the defendant of perjury. The court quoted only two specific questions asked of the husband, both of which asked him to state how he arrived at the statement on the return that his gross income was \$21,631. It is quite possible that a truthful answer to the question might not have been incriminating at all. For example, if the true answer were, "I took that amount off the taxable salary line on my W-2 form," there would be no risk of incrimination. Even if the husband lied on the return by understating his income, a truthful answer to the question, how did you compute the amount of income which you *did* report, would not be incriminating. Taxpayers do not generally overstate the amount of their income; there is no financial benefit (and in fact a financial detriment) for doing so.

The husband's claim that he could not answer *any* questions about his tax return was therefore overbroad. In many ways, it was inconsistent with the requirement in civil litigation that the privilege must be invoked on a question-by-question basis.<sup>25</sup> The court's decision that questioning should proceed, subject to specific objections to specific questions, makes considerable sense. But the court should have based its reasoning more on a finding that a truthful answer to at least some questions would not have posed an objectively reasonable risk of self-incrimination, and less upon a questionable suggestion that a public policy could overcome a constitutional right.<sup>26</sup>

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<sup>25</sup> See *infra* note 44.

<sup>26</sup> It might also be noted that to the extent that the privilege was properly invoked by the husband, the wife was permitted to ask the court to draw an adverse inference. See *infra* note 72. In most cases, the adverse inference provides full protection to the public policy in favor of full disclosure. For example, if the husband is asked why he did not report a stated amount of gambling winnings as income, and he properly invokes the privilege, the court may draw an adverse inference that the husband actually earned the stated amount of gambling winnings. Even if there are no records of the husband's gambling winnings, forensic analysis may still permit court to infer the amount of funds unaccounted from paychecks or a bank account. There are ways to accommodate the public policy in favor of full financial disclosure without trampling over the privilege against self-incrimination.

In assessing the objective reasonableness of the witness's fear of future prosecution, the focus is on whether testimony would assist a prosecutor in proving the witness guilty of a criminal offense.<sup>27</sup> Whether a prosecutor would actually be likely to prosecute the offense is not a relevant issue.<sup>28</sup> This point arises often in the family law context with regard to evidence of adultery. Adultery remains a crime in many states, but it is very rarely prosecuted.<sup>29</sup> Nevertheless, if an answer would be admissible evidence against the witness in a prosecution for criminal adultery or a similar sex-related criminal offense, the witness may assert the privilege.<sup>30</sup>

Likewise, a party who seeks to obtain an answer regarding adultery in civil litigation cannot defeat the privilege by arguing

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<sup>27</sup> *Pulawski v. Pulawski*, 463 A.2d 151, 158 n.1 (R.I. 1983) (reversing the trial judge who “uncritically accepted the assertion of the privilege against self-incrimination in many instances when it was perfectly clear that the answers could not ‘furnish a link in a chain of evidence’ that might be utilized in order to prosecute the witness for criminal conduct”).

<sup>28</sup> “[O]nce incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute.” *Sharp*, 920 F.2d at 1171. “[T]he privilege against self-incrimination does not require, or even permit, the court to assess the likelihood of an actual prosecution in deciding whether to permit the privilege. . . . Forcing a witness to make incriminating statements whenever the court feels that actual prosecution is unlikely would impermissibly weaken the privilege against self-incrimination.” *People v. Seijas*, 114 P.3d 742, 751 (Cal. 2005).

<sup>29</sup> *Thomas v. Marion Cnty.*, 652 N.W.2d 183, 186 (Iowa 2002) (referring to “rare prosecutions for adultery”); *Choi v. State*, 560 A.2d 1108, 1113 (Md. 1989) (“prosecutions under [criminal adultery] statutes may be rare”); *In re Knapp*, 536 So. 2d 1330, 1335 (Miss. 1988) (“[a]dultery is a criminal offense in this state, notwithstanding the Circuit Court’s exclamation that it had heard of no prosecutions therefor in the past twenty years”).

<sup>30</sup> For sample cases in which a spouse successfully asserted the Fifth Amendment privilege on grounds that answering might help establish criminal liability for adultery, see, e.g., *Webb v. Webb*, 950 So. 2d 322, 325 (Ala. Civ. App. 2006); *Hathcock v. Hathcock*, 287 S.E.2d 19 (Ga. 1982); *Choi*, 560 A.2d 1108; *Payne v. Payne*, 366 A.2d 405 (Md. Ct. App. 1976); *S.K.*, 193 A.3d 309, 324 (N.J. Super. Ct. App. Div. 2018); *S.K. v. I.K.*, 27 Misc. 3d 1205(A), 910 N.Y.S.2d 408 (N.Y. Sup. Ct. 2010); *Cantwell v. Cantwell*, 427 S.E.2d 130 (N.C. Ct. 1993); *Griffith v. Griffith*, 506 S.E.2d 526, 529 (S.C. Ct. App. 1998) (“it is legally proper for persons facing criminal prosecution for adultery to invoke their Fifth Amendment privilege against self-incrimination”); see generally James H. Feldman & Carolyn Sievers Reed, *Silences in the Storm: Testimonial Privileges in Matrimonial Disputes*, 21 FAM. L.Q. 189, 224-25 (1987).

that criminal adultery statutes are unconstitutional.<sup>31</sup> The key point is whether answering the question creates a reasonable risk of self-incrimination. There exists at least a reasonable chance that criminal adultery statutes are constitutional.<sup>32</sup> The court that is asked to compel the witness to answer cannot reduce that risk to zero, because the question of constitutionality will be decided in future criminal litigation between the witness and the state. That litigation will be heard by a different judge, and the party arguing for constitutionality will be the state, which is not a party to the civil action. So long as there exists any reasonable risk that criminal adultery statutes will be upheld, the witness can assert the Fifth Amendment privilege when asked to testify about adultery in civil cases.

For similar reasons, legal disputes over the definition of adultery do not prevent a witness from asserting the privilege, if there is a reasonable risk that adultery might be defined in a manner that includes the conduct about which the witness is asked.<sup>33</sup>

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<sup>31</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that Texas' sodomy statute was unconstitutional, because unmarried persons have a right of privacy in their intimate personal relationships).

<sup>32</sup> See *Ingleson v. Burlington Med. Supplies, Inc.*, 141 F. Supp. 3d 579, 588 n.4 (E.D. Va. 2015) (recognizing "a clear distinction between the private, consensual sexual activity at issue in *Lawrence* and the Commonwealth's other statutes criminalizing certain sexual conduct, including the prohibition against adultery"); *Commw. v. Stowell*, 449 N.E.2d 357 (Mass. 1983) (upholding an adultery statute against constitutional attack); *United States v. Orellana*, 62 M.J. 595, 596 (N.M. Ct. Crim. App. 2005) ("We specifically hold that *Lawrence v. Texas* does not bar the prosecution of adultery under the [Uniform Code of Military Justice]"); *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996) (same); see also *Malecek v. Williams*, 804 S.E.2d 592, 594 (N.C. Ct. 2017) (upholding torts of alienation of affections and criminal conversation against a constitutional attack based upon *Lawrence*); see generally Brett R. Turner, *Justice Scalia's "Wild Ride": Lawrence v. Texas and the Constitutionality of Penalizing Adultery*, 17 *DIVORCE LITIG.* 109 (July 2005) (arguing at length that *Lawrence* does not apply to adultery statutes, because unlike the sodomy at issue in *Lawrence*, adultery is misconduct with a victim: the innocent spouse).

<sup>33</sup> See *Payne*, 366 A.2d at 410 (where legal uncertainty existed as to whether sexual relations with an unmarried woman constituted adultery, the husband was permitted to invoke the Fifth Amendment privilege when asked about such relations; a reasonable risk existed that sexual relations with an unmarried woman could constitute adultery).

While rarity of prosecution does not alone prevent a party from asserting the Fifth Amendment privilege, there are more substantial obstacles to prosecution that will bar assertion of the privilege. “The privilege cannot be asserted” when there are real questions concerning the government’s *ability* to [prosecute the witness] because of legal constraints such as statutes of limitation, double jeopardy, or immunity.<sup>34</sup>

The most common of these obstacles is the statute of limitations. Many criminal adultery statutes have a limitations period.<sup>35</sup> If the witness is asked about commission of adultery, and the question applies only to conduct older than the statute of limitations, some authority holds that the privilege cannot be asserted.<sup>36</sup> For example, if the statute of limitations for criminal adultery is one year, then there is no risk of prosecution for adultery that occurred more than a year ago, as the statute of limitations would be an absolute bar to prosecution.

But there are certain countervailing arguments. A prosecutor could use adultery occurring before the statute of limitations ran as a tool to obtain evidence of more recent adultery—for example, to identify a long-term paramour or to locate a place in which adultery was often committed. There is substantial authority from criminal adultery cases that misconduct occurring outside the limitations period is admissible evidence of more recent adultery.<sup>37</sup> Some courts, relying on this point, have held

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<sup>34</sup> *Sharp*, 920 F.2d at 1171 (emphasis added).

<sup>35</sup> See, e.g., VA. CODE ANN. § 18.2-365 (adultery is a misdemeanor); *id.* § 19.2-8 (providing a one year statute of limitations for misdemeanors).

<sup>36</sup> See, e.g., *Ex parte Edmondson*, 238 So. 3d 85 (Ala. Civ. App. 2017) (rejecting an argument that adultery is a continuing offense, so that the statute does not start to run until the last act of adultery between a spouse and a paramour); *Howard v. Howard*, 422 So. 2d 296 (Ala. Civ. App. 1982); *Messiah v. Messiah*, Ch. No. 110950, 17 Va. Cir. 365, 1989 WL 646415 (Fairfax Cnty. Oct. 25, 1989) (holding that a witness cannot invoke the Fifth Amendment privilege when asked about adultery occurring outside of the limitations period).

<sup>37</sup> See, e.g., *State v. Dukes*, 25 S.E. 786 (N.C. 1896) (adultery occurring before the limitations period can be introduced as corroborative evidence of adultery committed during the limitations period); *State v. Potter*, 52 Vt. 33, 40-41 (1879) (“The evidence as to acts and instances of intercourse prior to the time limited by the statute, was admissible in connection with the other evidence that was not objected to, as tending to show that he was the guilty party to the acts of intercourse which were admitted to have occurred with the girl within the time covered by the indictment”).

that the privilege can be asserted even as to acts occurring outside of the limitations period.<sup>38</sup>

In addition, some adultery is criminal under the federal Mann Act,<sup>39</sup> which bars transportation of persons across state lines for purposes of sexual activity. The statute of limitations under the Mann Act is five years<sup>40</sup>—longer than many limitations periods under state adultery statutes.<sup>41</sup>

Likewise, a grant of immunity by a prosecutor is an absolute bar to criminal prosecution. Such waivers have been rare in the reported domestic relations case law, but where they exist, they are a bar to asserting the privilege.<sup>42</sup>

It is worth noting that only a formal grant of immunity bars assertion of the privilege. A mere informal promise by a prosecutor is not sufficient, because the promise would not be legally binding upon the prosecutor's successor, or upon a prosecutor in a different jurisdiction.<sup>43</sup> To bar assertion of the privilege, a grant of immunity must be legally binding on all future prosecutors.

In a criminal case, the defendant can generally exercise the privilege on a broad basis and refuse to testify at all. In a civil case, the procedure is somewhat different. The privilege cannot

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<sup>38</sup> See *Zohn v. Zohn*, No. 11415., 1989 WL 646156 at \*2 (Va. Cir. Ct. Loudoun Cnty. Jan. 12, 1989) (sustaining the invocation of privilege; “I can easily see how a prosecutor could take the witness’ answer concerning a time barred misdemeanor sexual offense and use it as a starting place for further inquiry and investigation that could link the witness to a non-time barred sexual offense”).

<sup>39</sup> 18 U.S.C. § 2421 (2021).

<sup>40</sup> 18 U.S.C. § 3282. The limitations period is even longer if the victim is a minor. *Id.* § 3283.

<sup>41</sup> See *Fisher v. Fisher*, No. 90-113, 1992 WL 884615, at \*1 (Va. Cir. Ct. Warren Cnty. Apr. 1, 1992) (upholding the assertion of the Fifth Amendment privilege, based upon the risk of prosecution under the Mann Act).

<sup>42</sup> “The parties stipulated that they had been granted immunity from prosecution for adultery. Thus, there was no legal justification for the wife’s refusal to answer the questions.” *Griffith*, 506 S.E.2d at 531; see, e.g., *United States v. Wilson*, 421 U.S. 309, 311 (1975).

<sup>43</sup> See *Temple v. Commonwealth*, 75 Va. 892, 1881 WL 6314 at \*4 (Mar. 1881) (holding that an informal promise by the Commonwealth’s Attorney not to prosecute a witness did not prevent invocation of privilege; the promise did not grant immunity, because the Commonwealth’s Attorney “might die, or be removed, or resign, and his successor might see fit to institute a prosecution”).

be asserted to prevent testimony entirely, and instead must be asserted during testimony on a question-by-question basis.<sup>44</sup>

## II. Waiver of the Privilege

The Fifth Amendment privilege, like constitutional rights generally, is subject to waiver. An express waiver of the privilege must be made “voluntarily, knowingly and intelligently,” which is a high standard to meet.<sup>45</sup>

But there are cases where the high bar of an express waiver was cleared. In *Feig v. Feig*,<sup>46</sup> a property settlement agreement required the husband to provide the wife with a financial statement and a copy of his tax return upon her written request. The wife issued such a request, and the husband refused to comply, asserting his Fifth Amendment privilege. The trial court held the husband in contempt. The Georgia Supreme Court affirmed, finding that the privilege had been waived:

It is patent that Mr. Feig, who was represented by counsel, voluntarily and intelligently waived his constitutional and statutory safeguards as part of the quid pro quo of the property settlement agreement. The privilege against self incrimination can be waived in praesenti. We hold that it can be voluntarily waived by property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract. We further hold that where a person represented by counsel enters into a property settlement agreement which has the necessary effect of waiving a constitutional right, express notice of or reference to such waiver is not required. . . . We find that in light of his voluntary contractual waiver of a known constitutional right, Mr. Feig must produce the agreed and requested financial information.<sup>47</sup>

Note that the agreement in *Feig* required only that the returns and the statement be produced. There was no express reference to the privilege against self-incrimination. The court nevertheless held that the privilege had been waived. The clear lesson is that a voluntary agreement to produce documents upon request, or at a stated time, may well waive any Fifth Amendment objection to production.

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<sup>44</sup> *Knapp*, 536 So. 2d at 1334.

<sup>45</sup> *Colorado v. Spring*, 479 U.S. 564, 572-73 (1987).

<sup>46</sup> 272 S.E.2d 723, 724 (Ga. 1980).

<sup>47</sup> *Id.* at 724.

The standard for an implied waiver is lower than the standard for an express waiver. Implied waivers are common because the Fifth Amendment privilege is a yes-or-no matter. The witness can invoke the privilege and refuse to testify on incriminating matters at all, or waive the privilege and testify freely. But the witness cannot invoke the privilege selectively, waiving it for favorable testimony and asserting it for unfavorable testimony. Such selective assertion would convert the Fifth Amendment, in the language of countless cases, from a defensive shield into a powerful sword.<sup>48</sup>

The most common application of implied waiver involves the testimony of the defendant in a criminal case. The defendant can assert the privilege and remain silent, or waive the privilege and testify. But if the defendant elects to waive the privilege upon direct examination, he cannot assert the privilege to bar cross-examination.<sup>49</sup>

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<sup>48</sup> See, e.g., *United States v. Rylander*, 460 U.S. 752, 758 (1983) (refusing to “convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his”); *Steinbrecher v. Wapnick*, 300 N.Y.S.2d 555, 563, 248 N.E.2d 419, 425 (1969) (“[s]ince the sole purpose of the privilege is to shield a witness against the incriminating effects of his testimony, the courts will not permit its use as a weapon to unfairly prejudice an adversary”); *Cantwell v. Cantwell* 427 S.E.2d 129, 130 (N.C. Ct. App. 1993) (“The privilege against self-incrimination is intended to be a shield and not a sword”); *Pulawski*, 463 A.2d at 157 (“[w]hen the court deals with private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial. The shield of the privilege must not be converted into a sword”).

<sup>49</sup> “[A witness] cannot reasonably claim that the Fifth Amendment gives him . . . an immunity from cross-examination on the matters he has himself put in dispute.” *Brown v. United States*, 356 U.S. 148, 155-56 (1958). “When a defendant voluntarily testifies, he waives his fifth amendment right and places himself in the same position as any other witness, subject to cross examination as to matters revealed in his direct testimony.” *McGahee v. Massey*, 667 F.2d 1357, 1362 (11th Cir. 1982).

In a civil case, a witness cannot invoke the privilege and refuse to testify at all.<sup>50</sup> The witness must take the stand and invoke the privilege on a question-by-question basis.<sup>51</sup>

The rule against selective assertion applies regardless of the depth and detail of the question. A simple admission of misconduct in direct testimony allows considerable exploration of the details of misconduct upon cross-examination. “It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.”<sup>52</sup>

Applying these points in the domestic relations context, a witness who wishes to assert the privilege must assert the privilege consistently. For example, if witness is accused of adultery, the witness must remain completely silent on the question of adultery. If the witness gives testimony denying adultery, the privilege is waived, and the witness can then be cross-examined

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<sup>50</sup> See *Warford v. Medeiros*, 160 Cal. App. 3d 1035, 1045, 207 Cal. Rptr. 94, 102 (1984) (“a blanket refusal to testify is unacceptable; a person claiming the Fifth Amendment privilege must do so with specific reference to particular questions asked”); *In re M.J.*, No. 2011-A-0014, 2011 WL 2183787 (Ohio Ct. App. June 3, 2011) (“the Fifth Amendment protection against self-incrimination did not permit Ms. Schreiber to completely refuse to testify”); *In re Myers*, No. 13-06-48, 2007 WL 1039260 (Ohio Ct. App. Apr. 9, 2007) (where witness “did not answer a single question or make a statement that would incriminate him in a subsequent criminal proceeding,” the trial court did not err by allowing him to testify and by relying upon the answers he gave).

<sup>51</sup> *Kaye v. Newhall*, 249 N.E.2d 583, 586 (Mass. 1969) (“[t]he plaintiff had the right to call the defendant as a witness and to cross-examine him . . . even though the plaintiff knew that the defendant would claim his privilege”).

<sup>52</sup> *Mitchell v. United States*, 526 U.S. 314, 321 (1999); see also *Rogers v. United States*, 340 U.S. 367, 373 (1951) (holding that “[d]isclosure of a fact waives the privilege as to details”); *Bonham v. Bonham*, 489 So. 2d 578, 581 (Ala. Civ. App. 1985) (“[t]he contention by husband in brief, that by making the admission it was not intended that all the ugly details would be disclosed, is of no avail”), *overruled on other grounds*, *Ex parte Bayliss*, 550 So. 2d 986 (Ala. 1989).

Note that the privilege is waived as to details only where the details are no more incriminating than the original admission. “Although a witness who testifies to incriminating facts waives the privilege as to the details of the events he relates, . . . , he does not waive the privilege as to collateral criminal activity.” *Woody v. Commonwealth*, 199 S.E.2d 529, 531 (Va. 1973).

on the subject.<sup>53</sup> The cross-examination can be quite detailed; for instance, following a simple summary denial, the witness can be asked questions about adultery at specific times with specific persons.

The rule against selective assertion applies not only to testimony in court, but also to admissions in other contexts. For example, a witness who waives the privilege and testifies voluntarily in discovery cannot assert the privilege when asked to testify on the same subject at trial.<sup>54</sup> Likewise, a witness who asserts the privilege to bar discovery cannot then waive the privilege at trial.<sup>55</sup>

A closer question is whether admission of conduct in a pleading constitutes waiver of the privilege. If a party admits to incriminating conduct in a complaint or counterclaim, there is a good argument that the privilege was waived.<sup>56</sup> But the cases hold that a denial of incriminating conduct in an answer is not a waiver, as an answer is compelled and not voluntary.<sup>57</sup> This is

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<sup>53</sup> “[A] witness who voluntarily takes the stand in a civil case has been held to waive the privilege against self-incrimination in respect to cross-examination that is relevant to the issues raised by such testimony.” *Pulawski*, 463 A.2d at 155.

The waiver is even more clear if the witness admits adultery. *See Bonham*, 489 So. 2d at 581 (the husband waived his Fifth Amendment privilege “by admitting in open court the act of adultery charged in the complaint”).

<sup>54</sup> *See Bonham*, 489 So. 2d 578 (finding that the husband who testified on adultery at his deposition waived the right to invoke the Fifth Amendment privilege at trial).

<sup>55</sup> *See S.E.C. v. Zimmerman*, 854 F. Supp. 896, 899 (N.D. Ga. 1993) (“The Fifth Amendment privilege cannot be invoked to oppose discovery and then tossed aside to support a party’s assertions”); *Knapp*, 536 So. 2d at 1336 n.12 (“[i]f he intends to waive his privilege, he must do so reasonably in advance of trial and afford Hutchins reasonable opportunity for discovery”).

<sup>56</sup> *See Minnesota State Bar Ass’n v. Divorce Assistance Ass’n, Inc.*, 248 N.W.2d 733, 740 (Minn. 1976) (“the fact that Doyle had already admitted in the pleadings that he was not so licensed [to practice law] obviously constituted a waiver of his right to refuse to testify on this matter at the deposition”).

<sup>57</sup> *See Mahne v. Mahne*, 328 A.2d 225, 226 (N.J. 1974) (“the mere filing of their pleadings by the defendants is not fairly to be viewed as having effectuated a waiver”); *Knapp*, 536 So. 2d at 1336 (“Knapp certainly has not waived his privilege against self-incrimination by filing an answer in the civil action commenced by Hutchins. Knapp did not bring this lawsuit. He was sued”).

especially true where the answer is a blanket general denial of the allegations of the complaint, even if the answer is verified.<sup>58</sup>

### III. Documents and Other Written Material: Testimonial Versus Nontestimonial Evidence

When the Fifth Amendment privilege is properly invoked, a witness is not required to answer questions or give testimony. The question of whether the privilege applies to documents poses a much harder issue.

To begin with, the Fifth Amendment privilege applies only to *self*-incriminating material. The privilege therefore does not apply to documents obtained through persons other than the witness. Stated differently, the mere fact that a document *could* have been obtained from the witness does not make the document subject to the privilege, if the document was in fact obtained from other sources. Under the Fifth Amendment, “[a] party is privileged from producing the evidence, but not from its production.”<sup>59</sup>

For example, if a taxpayer creates financial records, and then gives those records to the taxpayer’s attorney or accountant, the taxpayer cannot assert the Fifth Amendment privilege to prevent the IRS from obtaining the records from the attorney or accountant.<sup>60</sup> The compelled production of business records, from someone other than the witness, does not violate the privilege.<sup>61</sup>

In the family law context, tax returns obtained from someone other than the person invoking the privilege are not inadmissible on Fifth Amendment grounds.<sup>62</sup> Case law is divided on

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<sup>58</sup> See *Crittenden v. Superior Ct.*, 225 Cal. App. 2d 101, 105, 36 Cal. Rptr. 903, 906 (1964) (“merely because petitioner filed a verified answer to the affidavit for the order to show cause, denying its allegations, he did not waive his right to refuse to testify”); *Gunn v. Hess*, 367 S.E.2d 399, 401 (N.C. Ct. App. 1988) (“the mere filing of a verified answer does not operate to effectuate a waiver of the right to assert the privilege against self-incrimination”).

<sup>59</sup> *Johnson v. United States*, 228 U.S. 457, 458 (1913).

<sup>60</sup> *Fisher v. United States*, 425 U.S. 391 (1976); *Couch v. United States*, 409 U.S. 322 (1973); *Johnson*, 228 U.S. 457.

<sup>61</sup> *Andresen v. Maryland*, 427 U.S. 463 (1976).

<sup>62</sup> *Lanier v. Lanier*, 608 S.E.2d 213, 216 (Ga. 2005); *Harrison v. Harrison*, 285 So. 2d 752, 755 (Miss. 1973).

whether the party who filed the return must answer questions about it.<sup>63</sup>

Likewise, if evidence of adultery or financial misconduct is in the hands of persons other than a party to a divorce case, that party probably cannot use the Fifth Amendment to bar production of the documents.<sup>64</sup>

When production of documents or other material is sought directly from the witness, the privilege applies. But even then, the privilege does not apply to everything. “[T]he protection of the privilege reaches an accused’s *communications*, whatever form they might take.”<sup>65</sup> Thus, the privilege prevents a party from subpoenaing the witness’ own papers directly from the witness.<sup>66</sup> Documents or other communications protected by the privilege are said to be *testimonial*.

Conversely, the privilege “offers no protection against compulsion to submit to fingerprinting, photographing, or measure-

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<sup>63</sup> *Contrast* Lanier, 608 S.E.2d 216 (questions not permitted), with *In re Marriage of Sachs*, 95 Cal. App. 4th 1144, 1161, 116 Cal. Rptr. 2d 273, 287 (2002) (“where husband was in arrears in support, wife could obtain a copy of Jeffrey’s income tax returns and *examine him about their contents*, subject to the statutory requirement of confidentiality”) (emphasis added); *Slater*, 355 N.Y.S.2d at 944 (allowing questioning, subject to careful control of the court).

<sup>64</sup> See, e.g., *Fisher v. United States*, 425 U.S. 391 (1976).

<sup>65</sup> *Schmerber v. California*, 384 U.S. 757, 763–64 (1966) (emphasis added).

<sup>66</sup> *Boyd v. United States*, 116 U.S. 616, 633 (1886) (“we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself”).

The holding in *Boyd* has been considerably weakened by later cases. For a good discussion, see *Moyer v. Commonwealth*, 531 S.E.2d 580 (Va. Ct. App. 2000). It is now clear that the Fifth Amendment does not prevent the introduction of a witness’s private papers into evidence through third persons. *United States v. Doe*, 465 U.S. 605, 613 (1984). But it does still prevent the use of court processes to obtain private documents *from the witness himself or herself*. *Id.*; *Fisher*, 425 U.S. at 398 (“the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession”). This exception can be narrow in the criminal context, since the government can obtain private documents through a search warrant and then admit them into evidence directly. *Moyer*, 531 S.E.2d 580 (holding that the defendant’s personal diaries were admissible on this basis). In civil litigation, however, it remains difficult to obtain introduce testimonial documents directly from the witness.

ments, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.<sup>67</sup> This point also applies to blood tests.<sup>68</sup> The defendant in a paternity case therefore cannot assert the Fifth Amendment privilege to prevent the plaintiff from collecting a blood or DNA sample.<sup>69</sup> Material that is not a communication, and therefore not subject to the privilege, is said to be *nontestimonial*.

#### **IV. Consequences of Exercising the Privilege: Denial of Affirmative Relief and Adverse Inferences**

The Fifth Amendment states that no person shall be compelled to give evidence against himself. But it does not say that no penalty shall ever attach when a person refuses to give evidence against himself. If a penalty is so severe that production is essentially compelled, the privilege protects against the penalty.<sup>70</sup> A number of lesser penalties, however, are not so severe. "[T]he fact that there may be adverse consequences when a defendant invokes the fifth amendment in a civil proceeding does not necessarily mean that the defendant is subject to unlawful compulsion for fifth amendment purposes."<sup>71</sup> In practice, therefore, in a civil case, invocation of the privilege can have significant adverse consequences.

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<sup>67</sup> *Schmerber*, 384 U.S. at 64.

<sup>68</sup> *Id.*

<sup>69</sup> *See Salicco v. Salicco*, 125 Misc. 2d 137, 146, 479 N.Y.S.2d 313, 318 (1984) ("the privilege against self incrimination of the Fifth and Fourteenth Amendments is not triggered when a person is subjected to a blood test"); *State v. Kuehlewind*, 570 So. 2d 179, 181 (La. Ct. App. 1990) (blood test for purposes of determining paternity is not testimonial); *Lawrence v. Bluford-Brown*, 336 S.E.2d 899, 901 (Va. Ct. App. 1985) ("the genetic blood grouping test required in this case did not violate the appellant's privilege against self-incrimination").

<sup>70</sup> "[C]ertain penalties, even those outside the criminal context, are severe enough to constitute compulsion to speak." *In re Ivory W.*, 271 A.3d 633, 646 (Conn. 2022). "Testimony is deemed compelled in violation of the Fifth Amendment when the state threatens to impose severe sanctions on a witness unless the constitutional privilege is waived or imposes 'substantial penalties' on a witness who invokes his right not to testify. *People v. O'Day*, No. 19CA2314, 2022 WL 552927 (Colo. App. Feb. 24, 2022).

<sup>71</sup> *Ivory W.*, 271 A.3d at 645.

The most basic penalty that can attach to invocation of the Fifth Amendment privilege in a civil case is an adverse inference. “[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”<sup>72</sup> Thus, if a witness is asked about adultery, and asserts the privilege, the court is permitted to draw an adverse inference that the witness actually committed adultery.<sup>73</sup> Likewise, if a spouse asserts the Fifth Amendment when asked about financial misconduct<sup>74</sup> or misconduct involving children,<sup>75</sup> the court may draw an inference that the spouse is guilty of the misconduct he or she was asked about. It may not be possible, however, to draw an adverse inference from *another* witness’s invocation of the Fifth Amendment.<sup>76</sup>

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<sup>72</sup> *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

“In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn from exercise of the [Fifth Amendment] privilege does not implicate the policy considerations underlying the privilege.” Robert Heidt, *The Conjurer’s Circle - The Fifth Amendment Privilege in Civil Cases*, 91 *YALE L.J.* 1062, 1111 (1982).

<sup>73</sup> “There being no good faith reason for the refusal to testify, we can think of but one logical explanation for her reticence; that is, the answers would have tended to establish the adulterous conduct which the husband sought to prove.” *Griffith*, 506 S.E.2d at 532; *see also* *Kaye*, 249 N.E.2d at 586 (holding that the trial court did not err by allowing the husband’s attorney to comment upon the wife’s invocation of the Fifth Amendment in his closing).

<sup>74</sup> *Long v. Long*, 785 A.2d 818, 823 (Md. Ct. Spec. App. 2001) (“the trial court was entitled to draw an adverse inference against appellant when appellant invoked the Fifth Amendment in response to questions about the status of his 1998 and 1999 tax returns”).

<sup>75</sup> [W]here the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual’s silence as affirmative evidence of that individual’s culpability.“ *W. Va. Dep’t of Health & Human Res. ex rel. Wright v. Doris S.*, 475 S.E.2d 865, 874 (W. Va. 1996).

<sup>76</sup> *See* *Levy v. Levy*, 53 A.D.2d 833, 833, 385 N.Y.S.2d 314, 315 (N.Y. App. Div. 1976) (“the Trial Justice was in error in drawing an unfavorable inference against plaintiff from the [wife’s alleged paramour’s] invocation of the privilege against self incrimination“; although error harmless on the facts).

“[W]e have concerns over the appropriateness of drawing an inference adverse to a party based on another witness’s invocation of the privilege against self-incrimination in a civil case.” *Griffith*, 506 S.E.2d at 532. The husband in *Griffith* argued that the court could draw an adverse inference of adultery

The scope of the adverse inference must match the scope of the question not answered. For example, in *Long v. Long*,<sup>77</sup> a husband failed to answer a question as to whether he had filed tax returns. The court permitted an adverse inference, but limited the scope. “[A] court, based on such an inference, may not find a specific amount of imputed or undisclosed actual income without supporting evidence.”<sup>78</sup> Thus, an adverse inference based on failure to answer questions about tax returns cannot be the only evidence to support a finding as to income.

The mere fact that the Fifth Amendment privilege was claimed does not require an adverse inference; the inference is discretionary with the court. In *Commonwealth ex rel. McGovern v. McGovern*,<sup>79</sup> the husband invoked the Fifth Amendment privilege, but he also “did testify and both [parties] presented contradictory testimony as to the financial status of the husband.” A trial court decision refusing to draw an adverse inference was affirmed.<sup>80</sup>

Logically, whether an adverse inference is drawn in any specific case should depend upon the degree of harm resulting from invocation of the privilege. For example, if the husband asserts the privilege when faced with a question involving drug use, but the issues in the case are entirely financial, it is doubtful whether the invocation of the privilege imposed any real prejudice upon the opposing party. A truthful answer might well have been entirely irrelevant. In that sort of situation, the argument against drawing an inference seems strong. Even if the questions at issue involved financial matters, the invocation of the privilege would still seem to be without prejudice if there was ample other evidence introduced, allowing the court to confidently determine the invoking party’s income and assets. Conversely, if the ques-

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against the wife on grounds that her alleged paramour pled the Fifth Amendment privilege. While the court had doubts whether this was proper, it avoided the issue by finding that the wife’s own invocation of the privilege was alone sufficient to prove adultery.

<sup>77</sup> 785 A.2d 818.

<sup>78</sup> *Id.* at 823.

<sup>79</sup> 301 A.2d 905, 907 (Pa. Super. Ct. 1973).

<sup>80</sup> See also *Tarro v. Tarro*, 485 A.2d 558, 563 (R.I. 1984) (“nowhere in [prior case law] do we state that negative inferences, or action, *must* be drawn, or taken, against the party asserting the privilege by the trial justice in these situations” (emphasis in original)).

tion was highly relevant and no evidence existed, the argument for drawing an adverse inference would seem to be much stronger.

A stricter remedy is to hold that the spouse asserting the privilege cannot testify at trial. In *Meyer v. Second Judicial District Court*,<sup>81</sup> the mother refused to answer any questions about the purchase or use of drugs, asserting her Fifth Amendment privilege. The trial court held that the mother would not be permitted to testify at trial at all unless she waived her privilege and answered the questions. If the wife elected to answer the questions, the deposition would be sealed. The Nevada Supreme Court upheld the order:

In the case at hand, the questions which petitioner has refused to answer go to the heart of the major issues before the court; her fitness, and the fitness of the children's father and his present wife, to serve as custodial parents of the couple's three minor children. As the Supreme Court of Minnesota observed when faced with a similar refusal by a mother to answer questions, on Fifth Amendment grounds, which related directly to her alleged misconduct as a wife and mother; "a person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened."<sup>82</sup>

The law generally does not permit the court to sanction a party who invokes the Fifth Amendment privilege by a direct decrease in that spouse's property or support award, or by a direct increase in the property or support awarded to the other party:

[In a prior case,] we held that the trial justice's neglect to draw even the slightest inference against [the party who invoked the privilege] was prejudicial error. . . . Thus, we implied that *negative* action by the court (e.g., summary denial) may be warranted against a party seeking affirmative relief (e.g., a cross-petition for divorce, alimony, and division of marital property) who refuses to testify on self-incrimination grounds. Nowhere in that decision did we state or otherwise intend to suggest that the other spouse, who is trying to cross examine the party remaining silent, is automatically entitled to such *positive* court action as a larger alimony award or a larger share of the marital assets simply

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<sup>81</sup> 591 P.2d 259, 260-61 (Nev. 1979).

<sup>82</sup> *Id.* at 262-63, quoting *Christenson v. Christenson*, 162 N.W.2d 194, 202 (Minn. 1968); see also *Ivory W.*, 271 A.3d at 658 (finding that the trial court did not err in holding that the mother who invoked the privilege could not testify at the hearing on termination of parental rights).

as a result of the other spouse's refusal to answer; we merely stated that negative action may be merited against the silent party.<sup>83</sup>

It may be possible to reach a similar result, however, by drawing an adverse inference sufficient to justify a different property or support award, such as an inference that a spouse has committed marital or financial misconduct.

The stiffest penalty is the denial of all affirmative relief. The general rule in many states is that a witness who fails to answer questions when asked, either in discovery or at trial, is in no position to seek affirmative relief from the court.<sup>84</sup> The rule is a remedy of last resort, and it should not be used where lesser measures, such as an adverse inference, will provide complete relief.<sup>85</sup> But the Fifth Amendment gives the spouse a right to completely refuse to answer questions. If that right is invoked, the court may deny the invoking spouse the right to seek affirmative relief.

For example, in *Christenson v. Christenson*,<sup>86</sup> the plaintiff wife refused to answer discovery questions regarding adultery, asserting her Fifth Amendment privilege. The court held that the wife's failure to answer created a serious risk that she might prevail in the action even though the true facts were against her. "The risk that plaintiff might thereby succeed in an unmeritorious claim would seem to be so substantial that she must either divulge the information or abandon her claim."<sup>87</sup> The wife could not be forced to waive the privilege, but "in this divorce action, as in any other civil action, she must either waive it or have her action dismissed."<sup>88</sup>

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<sup>83</sup> *Tarro*, 485 A.2d at 563 (emphasis in original).

<sup>84</sup> "[U]pon oral or written interrogatories being properly propounded to discover relevant and material facts peculiarly and exclusively within the knowledge of the party, his refusal to answer justifies striking his pleadings." *Franklin v. Franklin*, 283 S.W.2d 483, 486 (Mo. 1955).

<sup>85</sup> "The adverse inference drawn from the invocation of the Fifth Amendment privilege should not be followed with the draconian result of denial of affirmative relief." *Griffith*, 506 S.E.2d at 536.

<sup>86</sup> 162 N.W.2d at 202.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 204; see also *Stockham v. Stockham*, 168 So. 2d 320, 322 (Fla. 1964) ("in civil litigation where it is manifest the exercise of the privilege would operate to further the action or claim of the party resorting to the privilege against his adversary contrary to equity and good conscience, the party assert-

The same principle applies where the privilege is invoked by a defendant. For example, in *Cantwell v. Cantwell*,<sup>89</sup> the plaintiff husband asked the defendant wife discovery questions about adultery, and the defendant pled the Fifth Amendment privilege. The trial court held she thereby waived her claim for alimony, and the appellate court affirmed. “[T]he defendant in the present case was properly given the choice to either shield herself from criminal charges by refusing to answer questions regarding her alleged adultery, and in so doing abandon her alimony claim, or waive her privilege and pursue her claim.”<sup>90</sup>

While it is proper to strike the affirmative claims of a party who invokes the Fifth Amendment privilege, it is not proper to strike all of that party’s pleadings, resulting in a default judgment.<sup>91</sup>

It may be error to dismiss a claim for affirmative relief which is unrelated to the questions not answered. For example, in *Mahne v. Mahne*,<sup>92</sup> where the wife invoked the privilege when asked about adultery, the court held that it was error to dismiss a counterclaim for divorce based upon extreme cruelty. “The counterclaim was based on extreme cruelty and did not relate to the alleged adultery on which the complaint was grounded.”<sup>93</sup>

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ing privilege will not be permitted to proceed with his claim or action”); *Minor v. Minor*, 240 So. 2d 301, 302 (Fla. 1970) (“affirming a trial court order that compels the plaintiff wife in a divorce action to answer over objections invoking the Fifth Amendment protection against self-incrimination certain pretrial deposition questions relating to the husband’s counterclaim of adultery, or suffer dismissal of her complaint”; reaffirming *Stockham*); *Franklin*, 283 S.W.2d 483; *Pulawski*, 463 A.2d at 157 (“one who seeks affirmative relief by way of counterclaim, cross-petition, or otherwise, may appropriately be subjected to the sanction of dismissal of such claim for affirmative relief when he or she refuses to answer questions in discovery or at trial which are relevant and material to the issues presented”); *Griffith*, 506 S.E.2d at 529-30 (“those states confronted by this issue have almost uniformly concluded that one who seeks this affirmative relief in a civil case may not invoke the Fifth Amendment privilege against self-incrimination in response to proper questions relating to the subject matter in issue”).

<sup>89</sup> 427 S.E.2d 129, 130 (N.C. Ct. App. 1993).

<sup>90</sup> *Id.* at 131.

<sup>91</sup> *Mahne v. Mahne*, 328 A.2d 225, 229 (N.J. 1974).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

A court also cannot require a party to positively admit wrongdoing as a condition upon receiving affirmative relief. This issue looms large in abuse and neglect cases, because experts may deem admission of wrongdoing to be an essential first step for treatment necessary for a defendant parent to recover custody of children.<sup>94</sup> The Fifth Amendment generally requires that any admissions of abuse made in treatment be inadmissible as evidence against the parent in future criminal prosecutions.<sup>95</sup>

As between an adverse inference and dismissal of claims for affirmative relief, the choice of remedy is within the trial court's discretion. There is a general reluctance to strike claims for relief in fact situations where an adverse inference provides sufficient relief. For example, in *Mahne*, the court held that an adverse inference was sufficient:

[T]here is no suggestion by [the husband] that he will be unable to proceed expeditiously with his case without the aid of the pretrial testimony from the [wife and her alleged paramour.] At the trial the plaintiff will have the benefit not only of his own showing but also of any inferences to be drawn from the defendants' pretrial testimonial refusals.<sup>96</sup>

The choice of remedy is less critical when a spouse who committed adultery cannot be awarded any alimony, so that an adverse inference of adultery and denial of affirmative relief reach the same practical result. That rule was more common in the

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<sup>94</sup> “[T]he lower court took evidence from a psychologist to the effect that there was no hope of correcting the conditions of abuse because the Appellant, in the exercise of his privilege against self-incrimination, failed to admit the abuse during a psychological examination.” *In re Daniel D.*, 562 S.E.2d 147, 158 (W. Va. 2002).

<sup>95</sup> See *E.S. v. H.A.*, 167 A.3d 685, 694-95 (N.J. Super. Ct. App. Div. 2017) (holding that a requirement that abuse be admitted “compels defendant to waive his privilege against self-incrimination and violates his rights under the Fifth Amendment and our State Constitution”); *In re Amanda W.*, 124 Ohio App. 3d 136, 141, 705 N.E.2d 724, 727 (Ohio Ct. App. 1997) (where the father’s “failure to admit meant he would not be likely to regain custody,” his Fifth Amendment privilege was violated; “in order to avoid a Fifth Amendment infringement, the state was required to offer Alan and Sandra protection from the use of any compelled statements and any evidence derived from those answers in a subsequent criminal case against either one or both of them”); cf. *Daniel D.*, 562 S.E.2d 147 (construing the West Virginia immunity statutes broadly to avoid this sort of violation).

<sup>96</sup> *Mahne*, 328 A.2d at 229.

past, and much less common now.<sup>97</sup> In jurisdictions where fault is not relevant at all, a question regarding adultery can probably be avoided as irrelevant before the privilege is asserted.

In the majority of states which treat adultery as one relevant factor in determining property division and/or alimony,<sup>98</sup> the modern trend is toward drawing an adverse inference, since a finding of adultery would be only a negative factor and would not result in complete denial of relief. This trend makes considerable sense. It is logical to treat invocation of the Fifth Amendment privilege, in a civil case, as a permissible basis for assuming that the witness committed the misconduct charged. It is much less logical to impose upon the invoking spouse a penalty larger than what the penalty would be if the accusation of misconduct is deemed to be well-founded.

## V. Conclusion

The Fifth Amendment privilege remains alive and well in family law litigation. The setting in which it is most commonly invoked is slowly changing; it is used less often in response to questions about sexual misconduct, and more often in response to questions about financial matters or matters involving children. In all settings, the privilege is regularly claimed by litigants and regularly sustained by the courts.

The difficult question is the consequences that ensue when the privilege is invoked. Essentially all states permit the court to draw an adverse inference against a party who invokes the privilege in a civil case, and such inferences have often been drawn in the reported cases. Where necessary, the courts have also refused to allow parties invoking the privilege to testify, and even refused to grant those parties affirmative relief. The U.S. Supreme Court has allowed imposition of these penalties in civil litigation generally,<sup>99</sup> and there is no reason why it would not likewise allow them to be imposed in family law litigation. Thus,

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<sup>97</sup> See generally Kirsten Gallagher, *Fault-Based Alimony in No-Fault Divorce*, 22 J. CONTEMP. LEGAL ISSUES 79 (2014/2015); Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14 (Spring 2003).

<sup>98</sup> “[A] majority of states — approximately twenty-eight — still consider marital fault factors in determining spousal support and the distribution of marital property.” Swisher, *supra* note 11, at 248 (emphasis in original).

<sup>99</sup> E.g., *Baxter*, 425 U.S. at 318 (1976).

while the privilege can permissibly be asserted, its assertion comes with a price. Whether the benefit of invoking the privilege justifies that price is a question which must be answered on a case-by-case basis.

