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Custodial Statements Made by Youth to His Parent Are Inadmissable Where Youth Was Neither Accorded Privacy Nor Warned that Overheard Statements May Be Used Against Him

Jane M. Knight

and practical difficulties engendered by *Zappone,* therefore, it is hoped that the Court will seize the first opportunity to reevaluate its position regarding the applicability of section 167(8)'s notice requirement when an insurer denies coverage by reason of a "lack of inclusion."

Gerald A. Hefner

DEVELOPMENTS IN NEW YORK LAW

Custodial statements made by youth to his parent are inadmissible where youth was neither accorded privacy nor warned that overheard statements may be used against him

In order to protect the privacy of certain confidential relationships, the New York legislature has created a number of evidentiary privileges which preclude the compelled disclosure of various communications.[92] Notwithstanding the early unwillingness of

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some other reason is of no moment. The statute lays down an unconditional rule." *Id.* at 269-70, 265 N.E.2d at 739, 317 N.Y.S.2d at 314. Indeed, the Court noted that to require such prejudice under the present statute would be to "[miss] the point of the statute, and the evident purpose for its enactment." *Id.* at 269, 265 N.E.2d at 739, 317 N.Y.S.2d at 313. Thus, the Court stated, the insurer's failure to give written notice of disclaimer to the claimant for 7 months was unreasonable despite the fact that no actual prejudice resulted. *Id.*

[92] *See* CPLR 4502(b) (1963) ("husband or wife shall not be required, or, without consent of the other . . . , allowed to disclose a confidential communication made by one to the other during marriage"); *id.* 4503(a) (privilege extending to confidential communications between attorney and client); *id.* 4504(a) (physician-patient privilege); *id.* 4505 (a clergyman "shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor"); *id.* 4507 (confidential communications between a psychologist and his patient are "placed on the same basis as those provided by law between attorney and client"); *id.* 4508 (social worker may "not be required to disclose a communication made by his client to him . . . in the course of his professional employment"). Each privilege specified in the CPLR is subject to exception. The spousal privilege, for example, only protects those exchanges that "would not have been made but for the absolute confidence in, and induced by, the marital relationship." People v. Melski, 10 N.Y.2d 78, 80, 176 N.E.2d 81, 83, 217 N.Y.S.2d 65, 67 (1961). Similarly, the attorney-client privilege only shields those communications made in confidence, or intended to be made in confidence, by a client seeking professional advice. *In re* Jacqueline F., 47 N.Y.2d 215, 219, 391 N.E.2d 967, 970, 417 N.Y.S.2d 884, 887 (1979). The physician-patient privilege is restricted to "medical information, or at least information which is relevant to some medical purpose" given by a patient to his doctor. CPLR 4504, commentary at 197 (McKinney Supp. 1981-1982); *see* Polsky v. Union Mut. Stock Life Ins. Co., 80 App. Div. 2d 777, 778, 436 N.Y.S.2d 744, 745 (1st Dep't 1981) (privilege did not extend to the patient's discussion of suicide with his dentist). To be entitled to claim the clergyman-penitent privilege, the penitent must have been seeking "religious counsel, advice, solace, absolution or ministration" from the clergyman when he made the statement in question. *In re* Fuhrer, 100 Misc. 2d 315, 320, 419

courts to create common-law exemptions from disclosure,[93] in 1978 the judiciary recognized a parent-child privilege.[94] Questions as to the scope of this privilege, however, have gone unanswered.[95] Recently, in *People v. Harrell*,[96] the Appellate Division, Second Department, defining the breadth of the parent-child privilege, held that custodial inculpatory statements made by a minor to his parent are privileged unless the defendant was afforded the right to

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N.Y.S.2d 426, 431 (Sup. Ct. Richmond County), *aff'd mem.*, 72 App. Div. 2d 813, 421 N.Y.S.2d 906 (2d Dep't 1979), *appeal denied*, 48 N.Y.2d 611, 425 N.Y.S.2d 1027 (1980). The privilege that exists for communications between a psychologist and his patient is restricted in the same manner as those between an attorney and his client. *See* CPLR 4507 (McKinney Supp. 1981-1982). Finally, a social worker can be forced to reveal a client's intent to commit a crime or harmful act. CPLR 4508(2) (Supp. 1981-1982); *see* Perry v. Fiumano, 61 App. Div. 2d 512, 518, 403 N.Y.S.2d 382, 386 (4th Dep't 1978).

[93] *See* People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936) (the trend is to restrict, rather than to expand, the classes to whom the privilege from disclosure is granted).

[94] *See In re* A & M, 61 App. Div. 2d 426, 429, 434-35, 403 N.Y.S.2d 375, 378, 381 (4th Dep't 1978); *see also* People v. Fitzgerald, 101 Misc. 2d 712, 716, 422 N.Y.S.2d 309, 312 (Westchester County Ct. 1979). *See generally* Kaplan, *Mason Ladd and Interesting Cases*, 66 IOWA L. REV. 931, 944-47 (1981); Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 ALB. L. REV. 142, 142-45 (1980); Comment, People v. Doe: *Alternative Means of Protecting the Child-Parent Relationship*, 36 WASH. & LEE L. REV. 223, 226-29 (1979) (right of privacy within the family). In *A & M*, the court concluded that, although the creation of a privilege is within the province of the legislature, communications between a minor and his parents made in the privacy of the home should be accorded constitutional protection. 61 App. Div. 2d at 434-35, 403 N.Y.S.2d at 381. The defendant's parents, therefore, were permitted to refuse to answer questions at a grand jury proceeding investigating an arson allegedly committed by the defendant. *Id.* at 435, 403 N.Y.S.2d at 381. In *Fitzgerald*, the court held that a privilege attached to a conversation between a father and his adult son regarding the latter's involvement in a hit-and-run accident. 101 Misc. 2d at 724-25, 422 N.Y.S.2d at 317; *see also* Michelet P. v. Gold, 70 App. Div. 2d 68, 73-74, 419 N.Y.S.2d 704, 708 (2d Dep't 1979) (parent-child privilege applies to confession made by child to guardian during police interrogation). *But see In re* Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970) (motion to quash a grand jury subpoena was denied upon the ground that no parent-child privilege existed); Berggren v. Reilly, 95 Misc. 2d 486, 489, 407 N.Y.S.2d 960, 962 (Sup. Ct. Nassau County 1978) (in personal injury action, father could be questioned as to what his infant son told him about the accident).

An additional judicially created privilege extends to "confidential communications between public officers, and to public officers, in the performance of their duties," where secrecy is found to be in the public interest. People v. Keating, 286 App. Div. 150, 152-53, 141 N.Y.S.2d 562, 565 (1st Dep't 1955).

[95] *See* People v. Fitzgerald, 101 Misc. 2d 712, 714, 422 N.Y.S.2d 309, 311 (Westchester County Ct. 1979). Proposed legislation, which recognizes a qualified parent-child privilege, provides that neither a parent nor a child should be required or allowed to divulge the substance of their communications with each other except in proceedings between the parents, or between the parent and child, or in proceedings involving an act committed by one of the parties against the other. N.Y.S. 9090, N.Y.A. 221, 205th Sess. (1982).

[96] 87 App. Div. 2d 21, 450 N.Y.S.2d 501 (2d Dep't 1982).

communicate privately or was warned that any overheard utterances may be used against him.[97]

In *Harrell,* the defendant, a 17-year-old youth, was arrested shortly after stabbing the proprietor of a stationery store during the course of a robbery.[98] The police brought the defendant into custody and, although no interrogation was conducted, advised him of his *Miranda* rights.[99] The defendant's mother arrived at the police station later that evening.[100] For alleged "security" purposes, a detective accompanied her to the defendant's cell and stood "nearby" while mother and son conferred.[101] The detective, having overheard the defendant confess to the stabbing, was permitted to testify against the defendant at trial.[102]

On appeal, the Appellate Division, Second Department, held that the trial judge erred in admitting the defendant's statement into evidence.[103] Presiding Justice Mollen, writing for a unanimous court,[104] initially stated that although the detective's conduct could not be considered a sham designed to overhear the defendant's statements, the lack of police misconduct was not determinative of admissibility.[105] After examining recent New York cases in which a

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[97] *Id.* at 26, 450 N.Y.S.2d at 504. The court ruled that if neither privacy nor warnings are given to a detained youth and his parent, all listeners should be barred from testifying against him at trial. *Id.*

[98] *Id.* at 22, 450 N.Y.S.2d at 502-03. The police arrived at the scene of the robbery and, within minutes, were told that three black men, one of whom was wearing a brown coat, were involved in the incident and had been seen running toward a particular apartment house. *Id.* at 22, 450 N.Y.S.2d at 502. The officers thereafter pursued several men who fit the description. *Id.* Although the defendant, Harrell, violently resisted arrest, he eventually was subdued by two police officers. *Id.*

[99] *Id.* at 23, 450 N.Y.S.2d at 503.

[100] *Id.*

[101] *Id.* The detective who remained near the defendant's cell explained that his conduct was necessary for " 'security' " purposes. *Id.* Indeed, in addition to resisting arrest, the defendant had continued his "belligerent posture" while in custody. *Id.* at 24, 450 N.Y.S.2d at 503.

[102] *Id.* at 23, 450 N.Y.S.2d at 503. When asked by his mother whether he had stabbed anyone, the defendant answered "Yes." *Id.* When asked why he stabbed the victim, the defendant responded that he did not know. *Id.*

[103] *Id.* at 27, 450 N.Y.S.2d at 505. Although the Second Department held that a parent-child privilege prevented the admission of the defendant's statement to his mother, the court nevertheless found that such error was harmless in view of the other evidence against him. *Id.*

[104] Justices Titone, Gibbons, and Thompson joined in the opinion of Presiding Justice Mollen.

[105] *Id.* at 24, 450 N.Y.S.2d at 503. Presiding Justice Mollen noted that although there was no "definite indication that the defendant would actually turn violent against his own mother," the detective's insistence on remaining close to the defendant's cell could not be

parent-child privilege was found to exist,[106] the court recognized the appropriateness of the privilege when a youth, arrested for a serious crime, seeks parental assistance "in the unfriendly environs of a police precinct."[107] Turning to the scope of the privilege in such a setting, Justice Mollen ruled that the law enforcement agents either must afford the defendant conditions of privacy for his communication, warn him of the possibility that overheard statements may be attested to at trial, or bar all hearers from testifying where neither privacy nor warnings are given.[108] The *Harrell* court, determining that these conditions were not met, concluded that the detective's testimony should not have been admitted at trial.[109]

It is submitted that the *Harrell* court, in defining the parameters of the parent-child privilege for custodial statements uttered

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viewed as a pretext. *Id.*

[106] *See In re* A & M, 61 App. Div. 2d 426, 435, 403 N.Y.S.2d 375, 381 (4th Dep't 1978); People v. Fitzgerald, 101 Misc. 2d 712, 717, 422 N.Y.S.2d 309, 313 (Westchester County Ct. 1979); *supra* note 94.

[107] 87 App. Div. 2d at 26, 450 N.Y.S.2d at 504. Concluding that the parent-child privilege is appropriate for statements made by a youth in a custodial setting, the court reasoned that it is "fair" that a parent be permitted to converse with his or her child free from "the overhearing presence of government agents." *Id.* Moreover, the court, recognizing that a youthful prisoner often will turn to his parents for assistance, stated that "the law will brook no police conduct aimed at isolating a youthful suspect from his family." *Id.* at 24, 450 N.Y.S.2d at 503; *see* People v. Bevilacqua, 45 N.Y.2d 508, 511, 382 N.E.2d 1326, 1327, 410 N.Y.S.2d 549, 550 (1978) (police refused defendant's requests to notify his mother); People v. Townsend, 33 N.Y.2d 37, 41, 300 N.E.2d 722, 724, 347 N.Y.S.2d 187, 190 (1973) (police denied that the defendant was in custody when his parent sought to locate him); People v. Evans, 70 App. Div. 2d 886, 887, 417 N.Y.S.2d 99, 101 (2d Dep't 1979) (police moved the defendant to another station in order to prevent his mother from being present at the interrogation).

[108] 87 App. Div. 2d at 27, 450 N.Y.S.2d at 505; *see* People v. Brown, 82 Misc. 2d 115, 120-21, 368 N.Y.S.2d 645, 651 (Sup. Ct. N.Y. County 1974). In *Brown*, policemen standing nearby, overheard a telephone conversation between the defendant and his minister. 82 Misc. at 119, 368 N.Y.S.2d at 650. During the conversation, the defendant loudly declared that he had killed a man. *Id.* After noting that a communication made to a minister typically is privileged, the court, promulgating the guidelines which the *Harrell* court applied to the parent-child privilege, *see supra* note 97 and accompanying text, held that the defendant's statement was inadmissible. *Id.* at 120-21, 368 N.Y.S.2d at 651.

[109] 87 App. Div. 2d at 27, 450 N.Y.S.2d at 505. In addition to the defendant's declaration to his mother, the other evidence tending to establish the defendant's guilt included an admission which he made to a companion while riding in a patrol car. *Id.* at 23, 450 N.Y.S.2d at 503. The defendant's admission was overheard, and thereafter testified to by the accompanying police officers. *Id.* The court stated that such declaration was admissible since it was not in response to any police interrogation in the absence of counsel, but rather was spontaneous and voluntary. *Id.* at 23-24, 450 N.Y.S.2d at 503; *see* People v. Kaye, 25 N.Y.2d 139, 143-44, 250 N.E.2d 329, 331-32, 303 N.Y.S.2d 41, 44-46 (1969).

by a detained youth, has adopted an approach which preserves the vitality of the privilege without placing undue restrictions upon the admissibility of probative evidence. While it is recognized that the creation of the privilege was based largely upon the reluctance of courts to compel parents to testify against their children,[110] it is nevertheless apparent that the privilege is designed to prevent an inadvertent waiver of the child's fifth amendment right against self-incrimination.[111] The *Harrell* decision, though not guaranteeing private conferences between a youth and his parent,[112] protects the parent-child relationship by assuring that a parent will not unknowingly induce his or her child into making inculpatory statements which subsequently may be used against him.[113]

It is suggested further that the approach taken by the *Harrell* court is preferable to the analyses employed in the attorney-client and spousal privilege contexts. First, the court's reluctance to establish an absolute right of privacy under the present circumstances heeds the notion that the parent-child relationship, unlike the relationship between attorney and client, is not protected by the sixth amendment.[114] Indeed, it is clear that, notwithstanding

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[110] *See In re* A & M, 61 App. Div. 2d 426, 433, 403 N.Y.S.2d 375, 380 (4th Dep't 1978). The *A & M* court, in recognizing the existence of a parent-child privilege, stated:

> Surely the thought of the State forcing a mother and father to reveal their child's alleged misdeeds, as confessed to them in private, to provide the basis for criminal charges is shocking to our sense of decency, fairness and propriety. It is inconsistent with the way of life we cherish and guard so carefully and raises the specter of a regime which encourages betrayal of one's offspring.

Id.

[111] *See* Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 34 (1982). New York courts have exhibited concern over the possibility that a minor in custody, who is without the advice of a parent or guardian, might unintentionally waive his right against self-incrimination. *See In re* Aaron D., 30 App. Div. 2d 183, 185, 290 N.Y.S.2d 935, 937 (1st Dep't 1968) (parents must be notified of youth's rights to remain silent and to have counsel present at interrogation in order to safeguard the child's fifth amendment right); *In re* William L., 29 App. Div. 2d 182, 184, 287 N.Y.S.2d 218, 221 (2d Dep't 1968) (delinquency adjudication reversed because child's mother was not informed of son's rights). *But cf.* People v. Taylor, 16 N.Y.2d 1038, 1039-40, 213 N.E.2d 321, 321, 265 N.Y.S.2d 913, 913 (1965) (a defendant does not have a constitutional right to consult with his family prior to interrogation).

[112] *See* 87 App. Div. 2d at 26, 450 N.Y.S.2d at 504.

[113] *See* Stanton, *supra* note 111, at 36-37. It has been suggested that privacy for custodial communications between parent and child is necessary to decrease the possibility that the latter's incriminating statements subsequently will be used against him. *Id.* at 36. Without such privacy, the child who is accompanied by a parent may be more likely to waive his rights inadvertently than the unaccompanied youth, thereby defeating the policy underlying the encouragement of a parent's presence. *Id.*

[114] *See* People v. Bryne, 47 N.Y.2d 117, 123, 390 N.E.2d 760, 763, 417 N.Y.S.2d 42, 45

the state's interest in obtaining evidence, an absolute privilege for attorney-client communications[115] is justified by the lawyer's unique ability to safeguard constitutional rights.[116] It is submitted, however, that there is no similar vindication for a broad parent-child privilege. In addition, the protection afforded by the qualified spousal privilege, which permits eavesdroppers to testify to overheard conversations,[117] does not afford a level of privacy sufficient to prevent unwitting waivers of the child's fifth amendment right against self-incrimination.[118] It appears, therefore, that the *Harrell* court indeed has applied the "fair[est] and [most] reasonable" approach[119] to the question of whether custodial statements made by a youth to his parent may be testified to by an overhearing third party.

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(1979); *see also* Fusco v. Moses, 304 N.Y. 424, 433, 107 N.E.2d 581, 585 (1952) (petitioner's right to private consultation with an attorney was impaired by the presence of an informer posing as a codefendant); People v. McLaughlin, 291 N.Y. 480, 482-83, 53 N.E.2d 356, 357 (1944) (defendant has a right to a "private interview" with attorney).

[115] Unlike the spousal privilege, which allows eavesdroppers to testify to overheard communications between a husband and wife, the attorney-client privilege does not permit unknown third parties to testify to conversations between an attorney and his client. *See* CPLR 4503(a) (Supp. 1981-1982). It should be noted, however, that the privilege extending to communications between attorney and client did not always prevent eavesdroppers from testifying to the content of such communications. *See* Lanza v. New York State Joint Legislative Comm. on Gov't Operations, 3 N.Y.2d 92, 97-98, 143 N.E.2d 772, 774-75, 164 N.Y.S.2d 9, 12-13, *cert. denied*, 355 U.S. 856 (1957). Additionally, while it is clear that the known presence of a third party will destroy the spousal privilege, *see* People v. Ressler, 17 N.Y.2d 174, 179, 216 N.E.2d 582, 584, 269 N.Y.S.2d 414, 416 (1966); People v. Melski, 10 N.Y.2d 78, 80, 176 N.E.2d 81, 83, 217 N.Y.S.2d 65, 67 (1961); People v. Allen, 104 Misc. 2d 136, 137, 427 N.Y.S.2d 698, 699 (Sup. Ct. Westchester County 1980), the attorney-client privilege is not abrogated by the known presence of an indispensible third party, *see* People v. Harris, 84 App. Div. 2d 63, 108, 445 N.Y.S.2d 520, 548 (2d Dep't 1981). In *Harrell*, the factual circumstances did not indicate clearly whether the detective's presence was known to the defendant and his mother. *See* 87 App. Div. 2d at 23, 450 N.Y.S.2d at 503. It is suggested, therefore, that the applicability of the parent-child privilege, at least for communications that take place in a custodial setting, is not dependent upon the known or unknown presence of eavesdropping law enforcement agents.

[116] *See* Fare v. Michael C., 442 U.S. 707, 719, 722 (1979). In *Fare*, the Supreme Court observed that the attorney is "the one person to whom society as a whole looks as the protector of . . . legal right," *id.* at 719, and that this role justifies a distinction between requests for a lawyer and requests for a "probation officer, a clergyman, or a close friend," *id.* at 722; *see also* People v. Byrne, 47 N.Y.2d 117, 123, 390 N.E.2d 760, 763, 417 N.Y.S.2d 42, 45 (1979) (there is no constitutional right to consult with those who do not possess the lawyer's special abilities).

[117] *See supra* note 115.

[118] *See supra* note 113 and accompanying text.

[119] 87 App. Div. 2d at 27, 450 N.Y.S.2d at 505.