

5.50 Parent-Child Privilege

(1) Subject to the remaining provisions of this rule, a parent or person legally responsible for the care of a child shall not be compelled or allowed, without the consent of the child, to disclose a confidential communication by the child to the parent or person legally responsible for the care of a child for the purpose of obtaining support, advice, or guidance.

(2) A child for purposes of the privilege set forth in this rule is, at least, a person who has not attained the age of 18 years.

(3) The privilege is normally waived when the communication is knowingly made in the presence of a third party. The privilege, however, will not be waived when the child is in police custody and the police decline to afford the parties privacy or in the alternative to warn them that if their communications are overheard, they may be testified to by the person who overhears them.

(4) A communication by a child to his or her parent or person legally responsible for the child's care is not privileged if the communication was contrary to the maintenance of familial relationships and the societal interest in protecting and nurturing the parent-child relationship, such as a communication about a crime committed against a member of the family or household.

Note

This rule sets forth New York's parent-child privilege as recognized by the Appellate Division (*People v Harrell*, 87 AD2d 21 [2d Dept 1982], *affd* 59 NY2d 620 [1983] [albeit the parent-child privilege issue was held not preserved for review]; *People v Stover*, 178 AD3d 1138 [3d Dept 2019]; *Matter of A. & M.*, 61 AD2d 426 [4th Dept 1978]). The Court of Appeals has not decided whether the privilege exists. (*See Harrell*, 59 NY2d at 621 [the issue was not preserved] and *People v Johnson*, 84 NY2d 956 [1994] [the Court chose not to decide whether the

privilege existed, noting that it “would not even arguably apply” in the case]). The full contours of the privilege (including what constitutes an exception) are still evolving, and this rule “shall not be construed” as “precluding change in the law when appropriate.” (Guide to New York Evid rule 1.02, Purpose & Construction; *see generally* Michael J. Hutter, *Parent-Child Privilege: Alive and Well But With Uncertain Conditions*, NYLJ, March. 31, 2023 at 3, col 3.)

The underlying basis and rationale for the privilege is not settled. *A. & M.*, the seminal decision, held that the parents of a 16 year old could refuse to answer grand jury questions concerning admissions their child had made to them in the privacy of their home under a parent-child privilege. The Court determined that the privilege was justified given that “the integrity of family relational interests is clearly entitled to constitutional protection.” (*A. & M.* at 432.) The privilege has also been viewed as a derivative of statutory law (CPL 140.20 [6]; Family Ct Act § 724 [a]) that requires the police to advise a parent when a child is taken into custody. (*See* Note to subd [1].)

The justification for the privilege is well summarized in *A. & M.*:

“It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, ‘Listen to your son at the risk of being compelled to testify about his confidences?’ . . .

“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.” (*A. & M.* at 429, 433-434.)

Subdivision (1), as well as the remaining subdivisions, is derived from *A. & M.* and its progeny.

The key elements of the privilege are that the “communications must originate in confidence,” be for “the purpose of obtaining support, advice or guidance,” and “be essential to the full and satisfactory maintenance” of the parent-child relationship—a relationship which in society’s opinion “ought to be sedulously fostered.” (*Matter of A. & M.*, 61 AD2d at 433-434; *cf. Matter of Mark G.*, 65 AD2d 917, 917 [4th Dept 1978] [“It does not appear that respondent made the statement to his father in confidence and for the purpose of obtaining support, advice or guidance”].)

The Appellate Division has in particular applied the privilege to parent-child conversations where the parent’s presence with the child was pursuant to a statutory requirement (CPL 140.20 [6]; Family Ct Act § 724 [a]) that the police contact a parent or guardian when a child is taken into custody, and the parent’s resulting presence is, naturally, to assist their child. (*See People v Kemp*, 213 AD3d 1321, 1322 [4th Dept 2023] [noting the statutory requirement to advise a parent when a child is taken into custody, the Court applied the privilege to the communications a 15 year old made to his father in a police station interview room]; *Harrell*, 87 AD2d at 26 [the “privilege is rarely more appropriate than when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct. . . . (F)or such a youth, his parent is the primary source of assistance. It would not be consistent with basic fairness to exact as a price for that assistance, his acquiescence to the overhearing presence of government agents”], *affd* 59 NY2d 620 [1983] [albeit the parent-child privilege issue was held not preserved for review]; *Matter of Michelet P.*, 70 AD2d 68, 74 [2d Dept 1979] [“I hold that a conversation between a child (15 years old) and his guardian who appears pursuant to (statutory law) is privileged. Respondent had the right to assume that a statement confidentially made to one who was presented as his guardian would not be divulged].)

Notably, *Michelet P.* applied the privilege to a “guardian” of a child and *Matter of Ryan* (123 Misc 2d 854, 855 [Fam Ct, Monroe County 1984]) applied the privilege to the child’s grandmother because “the relationship as testified to by respondent’s grandmother . . . leads to the inference that she stands in the place and stead of his parent. To infer otherwise would destroy the familial setting.”

An issue may be whether a parent can voluntarily testify to a child’s communication even though the communication was made in confidence and for the purpose of obtaining support, advice, or guidance. Thus far cases have granted a child’s application to preclude the parent from testifying without adding that the parent could chose to testify voluntarily (*e.g. Kemp*, 213 AD3d 1321; *Michelet P.*,

70 AD2d 68, 74 [2d Dept 1979]). There is language in some cases that gives rise to the question whether the parent may breach the privilege by voluntarily testifying; in those instances, however, the communication was not privileged regardless of whether the parent chose voluntarily to testify to it.

In *A. & M.* (61 AD2d at 435 n 9), the Court in a footnote indicated that there was an “argument” that a parent was not barred from testifying to a child’s communication when “for example” in a proceeding where the child was seeking “to prevent his parents from testifying about matters in which they were seeking the intervention and assistance of the court in controlling the child’s behavior.” In that instance, however, the privilege is not breached by the prospective voluntary testimony of the parent; rather, there is no privilege given that the communication would be “contrary to the maintenance of familial relationships and the societal interest in protecting and nurturing the parent-child relationship,” as provided in subdivision (4).

In *Matter of Mark G.* (65 AD2d 917, 917 [4th Dept 1978]), the Court rejected a law guardian’s claim of privilege on behalf of a child stating: “It does not appear that respondent made the statement to his father in confidence and for the purpose of obtaining support, advice or guidance, nor that the father wished to remain silent and keep respondent’s answer confidential.” The father, however, was compelled to testify to the communication when the objection of a law guardian to his testimony was overruled. In any event, here again the privilege was breached when there was a finding that the communication was not made in confidence for the requisite purposes.

In the Court of Appeals case that listed in dicta the reasons the privilege may not have “arguably” applied, one of the listed reasons was that “the mother testified before the Grand Jury hearing evidence against defendant” (*Johnson*, 84 NY2d at 957); however, the defendant in *Johnson* was charged with killing a member of the household (i.e. “his mother’s long-time live-in companion”) and as detailed in subdivision (4), a parent-child communication about the killing of a household member would not be privileged.

By contrast, in *People v Fitzgerald* (101 Misc 2d 712, 723 [Westchester County Ct 1979]), the court held that the father in that case, who testified to the child’s communication in the grand jury, had been compelled pursuant to law to testify in the grand jury and he had not therefore waived the privilege by testifying to the communication, “and even if it be deemed he has, such waiver cannot effect the jointly existing and independent right of his son to claim such a privilege.”

Subdivision (2) addresses the issue of whether the privilege presently extends to all confidential communications by a child regardless of the child’s age. Review of the decisional law reveals there is no definitive answer to that issue.

The child in *Matter of A. & M.* was 16 years old, and the Fourth Department emphasized the importance of the privilege to the promotion of the child’s emotional development (61 AD2d at 432-433). The child in *Harrell* was 17 years old, and the Second Department in applying the privilege commented that the privilege “is rarely more appropriate than when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct.” (87 AD2d at 26.) In recognizing that the privilege extended to minor children, the Second and Fourth Departments did not hold the privilege was limited to minor children. The Third Department, however, in *Stover* expressly held the privilege did not apply to a confidential communication to the parent of the defendant child because the child was 19 years old. (178 AD3d at 1144-1155.) Although the question of whether the parent-child privilege existed was not preserved for review in *Johnson*, the Court of Appeals ventured forward in dicta to state that the privilege would not even “arguably” apply in the case because the defendant “was 28 years old at the time of the conversation with his mother.” (84 NY2d at 957.) By contrast, *Fitzgerald* (101 Misc 2d at 719) applied the privilege to a person who was 23 years of age, noting that the “trust and understanding, if such exists, between the parent and child cannot be made subject to the intrusion of the State merely because of a proposed artificial barrier of age.”

Subdivision (3) recognizes specifically the Appellate Division holding that the privilege does not “attach to ‘communications made in the presence of [a] third part[y], whose presence is known to the defendant.’ ” (*People v DiLenola*, 245 AD2d 1132, 1133 [4th Dept 1997] [rejecting a claim that a conversation the defendant had with his guardian (his aunt) was privileged because the conversation was held in the presence of a third party whose presence was known to the defendant]; see *Johnson*, 84 NY2d at 957 [stating in dicta that the privilege did not arguably apply in that case because another family member was present].)

The rule also addresses whether an intended confidential communication will be privileged when the police decline to provide the parent and child privacy, perhaps situating themselves so as to overhear the conversation. *Harrell* (87 AD2d at 27) held that the parties should be granted privacy or warned that, if the communications are overheard, they may be testified to by the person who

overhears them, and, if neither privacy nor a warning is given, the person who overhears the communications will be barred from testifying to them.

Subdivision (4) addresses the exemptions that apply to the rule. To understand these exemptions, it must be noted that the central purpose of the privilege is to maintain the familial relationship that society deems important (*Matter of A. & M.*, 61 AD2d at 433-434 [“the interest of society in protecting and nurturing the parent-child relationship is of such overwhelming significance”]; *see* Social Services Law § 384-b [1] [a] [i] [the legislative intent regarding guardianship and custody of destitute or dependent children states: “it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive”]).

Given that purpose, a communication that is antithetical to maintaining the familial relationship or societal interest in the relationship will not be privileged. (*See e.g.* Family Ct Act § 1046 [a] [vii] [excluding the applicability of statutory privileges in child protective proceedings]; *Matter of Harry R. v Esther R.*, 134 Misc 2d 404 [Fam Ct, Bronx County 1986] [discussing the privilege in the context of Family Court proceedings]; Proposed NY Code of Evid § 507(d) [1982] [exempting the privilege when the communication related to: the furtherance of crime or fraud; a crime committed against a member of the family or household; civil actions between the parent and child; actions involving custody; and a communication offered in a criminal case by the accused parent or child]; *Johnson*, 84 NY2d at 957 [stating in dicta that the privilege did not arguably apply where the conversation in that case “concerned a crime committed against a member of the household”].)