

CASE COMMENTS

Evidence—Massachusetts Explains “Living with a Parent” Requirement of Parent-Child Testimonial Exclusion—*In the Matter of a Grand Jury Investigation*, 819 N.E.2d 171 (Mass. 2004)

Massachusetts General Laws chapter 233, § 20 states that all people of “sufficient understanding” may offer evidence in criminal and civil proceedings in the Commonwealth of Massachusetts.¹ Notwithstanding this broad principle of inclusion, the statute’s fourth clause expressly defines an exception that prevents children *living with a parent* from testifying against that parent.² In *In the Matter of a Grand Jury Investigation*,³ the Supreme Judicial Court of Massachusetts considered the exclusion’s intent and questioned the breadth of the phrase “living with a parent.”⁴ The court commented that privileges and exclusions were to be narrowly construed, and concluded that the statutory exception should be given its plain, unambiguous meaning.⁵

In the summer of 2004, two minor females filed a criminal complaint alleging that while visiting the home of a girlfriend, the girlfriend’s father provided them with alcohol, engaged them in drinking games, and subsequently raped them.⁶ The Commonwealth maintained that two children of the accused (his son and his daughter, the girlfriend of the complainants) were home at the time of the incident.⁷ Accordingly, the Commonwealth issued duces tecum summonses to both children, requesting their testimony at a grand jury proceeding against their father.⁸

1. MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2005). Specifically, the preamble of the statute states that “any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence . . .” *Id.*

2. *Id.* The parent-child testimonial exclusion states that an “unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent’s family and who does not reside in the said parent’s household.” *Id.*

3. 819 N.E.2d 171 (Mass. 2004).

4. *See id.* at 173-74 (explaining complainants’ appeal based on claimed testimonial exception).

5. *See id.* at 174-75 (rejecting broad construction proposed by petitioners and concluding more narrow construction appropriate).

6. *Id.* at 173. The incidents allegedly took place in the “marital home” where the children lived with their mother. *Id.* The father did not live with his children in that home but had instead, for fourteen months prior, maintained his own residence. *Id.* On the evening of the alleged events, the father was caring for his children while their mother was out of the country. *Id.*

7. 819 N.E.2d at 173.

8. *See id.* at 172 (identifying appropriateness of denial of motion to quash summonses as central issue in case).

In response, both children filed motions to quash the summonses.⁹ They argued that the parent-child testimonial exclusion provided by Massachusetts General Laws chapter 233, § 20 prohibited their testimony at a grand jury proceeding against their father.¹⁰ The superior court judge disagreed and denied the motions to quash, concluding that the children did not live with their father when the summonses were served, and therefore did not meet the requirements of the statutory exclusion.¹¹ Upon review, the Supreme Judicial Court focused on the language of the exclusion to determine the intended extent of the parent-child privilege.¹² The court reasoned that because testimonial privileges are limited exceptions, and the statutory language requiring a child to be living with a parent was unambiguous in its intent, it would afford the language of the exclusion its plain meaning.¹³

Testimonial privileges constitute specific exceptions to the more general rule imposing a duty to testify on all persons deemed competent to offer evidence.¹⁴ Courts have stated that the justification for this rule is based on the notion that testimonial privileges reduce the total amount of evidence in front of the tribunal, making the search for truth more difficult.¹⁵ Therefore, invocation of

9. *Id.* at 173 (recounting case's procedural history). The grand jury subsequently returned multiple indictments against the accused without the testimony of his children, seemingly rendering the motion irrelevant. *Id.* The court, however, cited the importance of the issue and the possibility that the children would be called to testify at trial as grounds for the exercise of their review. *Id.*

10. *See id.* (describing grounds upon which children objected to summonses). In support of the motion, the children's mother filed an affidavit claiming that the living arrangement in which the children lived with only their mother was not an attempt to limit the father's role in their lives. *Id.* at 173-74. Rather, she claimed that the father continued to play an active role in the lives of their children. *Id.* at 174.

11. *See* 819 N.E.2d at 174 (describing basis of superior court decision).

12. *See id.* (discussing rejection of children's interpretation and implicitly identifying interpretative question as central issue in case).

13. *See id.* at 174-75 (providing court's reasons for rejecting children's argument in favor of plain construction); *see also infra* notes 30-31 and accompanying text (providing more detailed explanation of Supreme Judicial Court's reasoning).

14. *See id.* 174-75 (citing earlier Massachusetts cases describing testimonial privileges as exception to general rule); *Commonwealth v. Corsetti*, 438 N.E.2d 805, 808 (Mass. 1982) (declaring testimonial privileges exceptions to general rule imposed on all people to testify); *In re Pappas*, 266 N.E.2d 297, 299 (Mass. 1971) (stating "privileges are exceptional"); *see also* Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85, 87 (2003) (providing background on general rule and describing testimonial privileges as "strongly disfavored" exceptions); Catherine B. Sarson, Note, *The Child-Parent Testimonial Privilege: Attempts at Codification Have Missed Their Mark*, 12 GEO. J. LEGAL ETHICS 861, 863 (1999) (describing testimonial privileges as exception to standard rule of evidence); Kimberly L. Schilling, Note, *Intrafamilial Communications: An Analysis of the Parent-Child Privilege*, 37 FAM. & CONCILIATION CTS. REV. 99, 100 (1999) (noting testimonial privileges as exceptions to general rule). One commentator, referencing Dean Wigmore's enduring treatise on evidence, states that the privilege stems from a behavioral assumption that absent the privilege, the communication in question between the parties would be chilled. Edward J. Imwinkelreid, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317 (2003). In other words, courts should construe the privilege to exist only in those narrow circumstances in which "the average layperson is so concerned about subsequent evidentiary protection of his or her revelations that the privilege is a 'but-for cause' of privileged communications." *Id.*

15. *See* 819 N.E.2d 171 at 175 (noting privileges reduce total amount of information available to court).

a witness's testimonial privilege requires a substantial individual interest that outweighs the fact-finding needs of the court.¹⁶

In light of the tendency of testimonial privileges to reduce the amount of evidence before the tribunal, most state and federal jurisdictions have been reluctant to create a parent-child privilege.¹⁷ In the federal system, no such privilege is granted by statute, and the two district court cases that suggest the existence of one have done so in the context of whether a *parent need testify against a child*.¹⁸ State jurisdictions, though generally demonstrating restraint,

Other Massachusetts cases have expounded on this notion, one stating that "a privilege suppresses valuable evidence to which the trier of fact is competent to give its proper weight. So serious an interference with a rational inquiry can be justified only by accompanying social benefits of high worth." *In re Pappas*, 266 N.E.2d 297, 301 (Mass. 1971) (internal citations and quotations omitted). Similar notions of the limited role of testimonial privileges exist at the federal level, as exemplified in *United States v. Bryan*, in which the Supreme Court commented on the potentially ruinous effects that unrestrained testimonial privileges might have on such testimony, stating that a "subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion . . . would be a nullity." *United States v. Bryan*, 339 U.S. 323, 331 (1950); see also *Commonwealth v. Corsetti*, 438 N.E.2d 805, 808 (Mass. 1982) (noting reasons for narrow construction of testimonial privileges). Corsetti was a journalist for the Boston Herald American newspaper. *Id.* at 807. Asserting a "reporter's privilege" that he claimed was grounded in the First Amendment, Corsetti refused to testify regarding statements the defendant allegedly made to him in his capacity as a reporter. *Id.* The Supreme Judicial Court upheld the trial judge's citation of contempt and remarked that testimonial privileges "necessarily diminish the quantum of evidence that is before the court." *Id.* at 808.

16. See *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1207 (1983) (offering rationale for creation of additional testimonial privileges). The *Three Juveniles* court concisely stated the widely-held view, commenting that "[i]n the last analysis, the question comes down to a balancing of the public's interest in obtaining every person's testimony against public policy considerations in favor of erecting a testimonial privilege in the circumstances." *Id.* The Supreme Court has espoused similar policy rationales. See *United States v. Bryan*, 339 U.S. 323, 331-32 (1950). In *Bryan*, the Court emphasized that "[c]ertain exemptions from attending or, having attended, giving testimony are recognized by all courts. But every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth." *Id.* at 331 (emphasis added).

17. See *In re Grand Jury*, 103 F.3d 1140, 1146 (3d Cir. 1997) (commenting no federal appellate court and no state supreme court has recognized parent-child privilege); *In the Matter of a Grand Jury Subpoena*, 722 N.E.2d 450, 454 (Mass. 2000) (stating most jurisdictions have rejected recognition of parent-child privilege); *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1207 (Mass. 1983) (suggesting majority of courts reject privilege of child not to testify against parents); see also Maureen P. O'Sullivan, *An Examination of the State and Federal Courts' Treatment of the Parent-Child Privilege*, 39 CATH. LAW. 201, 212 (1999) (noting refusal of majority of states to recognize parent-child testimonial privilege); Ross, *supra* note 14, at 90 (stating most federal and state courts decline to find common law parent-child privilege); Schilling, *supra* note 14, at 109 (noting only two federal courts considered idea of parent-child privilege). But see notes 18-19 and accompanying text (offering discussion of decisional and statutory law indicating existence of parent-child testimonial privilege).

18. See *In re Grand Jury*, 103 F.3d 1140, 1148 (3d Cir. 1997) (stating only two district court decisions suggest parent-child privilege exists). In the first case, the petitioner sought permission *not* to testify against his father, citing the personal emotional harm that would necessarily follow his testimony against his father and the inevitable damage that would befall the family as a social unit. *In re Grand Jury Proceedings Witness: Agosto*, 553 F. Supp. 1298, 1300 (D. Nev. 1983). The court, in concluding that the petitioner could claim a parent-child privilege that prevented him from testifying against his parent, commented that "while the government has an important goal in presenting all relevant evidence before the court in each proceeding, this goal does not outweigh an individual's right of privacy in his communications within the family unit, nor does it outweigh the family's interest in its integrity and inviolability." *Id.* at 1325. In the other case, petitioner asserted that her

have indicated a tendency to take a slightly more progressive view in this area of the law.¹⁹ In contrast to decisional and statutory authority on the matter, the overwhelming majority of academic literature argues that the policy rationales for the creation of additional testimonial privileges—namely that a compelling interest outweighs the public's and the tribunal's need for information—merits the creation of a parent-child privilege.²⁰ Despite the general lack of persuasive authority from other jurisdictions and pleas from the academic community, courts have tended to rely almost exclusively on their own past decisions to reach conclusions maintaining the status quo.²¹

In *Three Juveniles v. Commonwealth*²² (decided prior to the applicable portion of § 20), the Supreme Judicial Court considered whether the body of testimonial privileges should extend to a parent-child privilege.²³ The court

Jewish faith prevented her from testifying against her daughter. *In re Grand Jury Proceedings* (Greenberg), 1982 WL 597412, at *2 (D. Conn. June 25, 1982). In contrast to the other district court decision finding the petitioner free not to testify *at all*, the court in this instance allowed the privilege “only to the extent that her answers would incriminate her daughter.” *Id.*

19. See *In re Grand Jury*, 103 F.3d 1140, 1146-47 n.13 (3d Cir. 1997) (explaining New York, Idaho, and Minnesota only states to recognize any form of parent-child privilege). Idaho's statute states in relevant part that “any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected.” IDAHO CODE § 9-203(7) (Michie 2004). The Minnesota statute is substantially similar and states that “a parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same household.” MINN. STAT. ANN. § 595.02(j) (West 2000). New York is the only state with a judicially created parent-child privilege. See *In re Grand Jury*, 103 F.3d 1140, 1146-47 n.13 (3d Cir. 1997) (comparing New York to states with statutory parent-child privilege). The appellate division of the Supreme Court of New York has concluded that the parent-child privilege exists and that a witness may invoke the privilege in the proper circumstances. *Application of A and M*, 403 N.Y.S.2d 375, 381 (N.Y. App. Div. 1978). Offering its reasoning for the recognition of such a privilege, the court commented that “there can be no doubt what the effect on that relationship would be if the State could compel parents to disclose information given to them in the context of that confidential setting.” *Id.* at 380.

20. See O'Sullivan, *supra* note 17, at 222 (arguing no significant policy considerations distinguish existing privileges from contemplated parent-child privilege); Ross, *supra* note 14, at 102-15 (citing constitutional reasons for creating parent-child privileges); Ameer A. Shah, *The Parent-Child Testimonial Privilege—Has the Time For It Finally Arrived?*, 47 CLEV. ST. L. REV. 41, 45-46 (1999) (stating most legal commentators favor creation of privilege and providing reasons why); Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 600-05 (1987) (arguing Constitutional grounds for creating parent-child privilege); Sarson, *supra* note 14, at 869 (suggesting protection of parent-child privilege even more important than protection of spousal privilege).

21. See 819 N.E.2d at 174 (discussing *Three Juveniles* and ensuing legislative response). See also *id.* at 175 (stating general rule of evidence and policy dictate strict construction of testimonial privileges).

22. 455 N.E.2d 1203 (Mass. 1983).

23. See *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1205 (Mass. 1983) (stating central issue as whether contemplated privilege “promotes sufficiently important interests”) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). In *Three Juveniles*, the Commonwealth subpoenaed the two minor children of a man suspected in the murder of a missing woman. *Id.* at 1204. The children filed motions to quash the subpoenas, asserting a parent-child privilege. *Id.* The court noted that new testimonial privileges typically arise out of constitutional principles, common-law principles, or statutory authority. *Id.* at 1205-06. The court stressed that, with the exception of the privilege against self-incrimination and a narrowly construed executive privilege,

focused on the overwhelming lack of common-law and statutory authority in favor of the creation of such a privilege.²⁴ Given such little substantive support, the court implied that the creation of a parent-child privilege would constitute an inappropriate exercise of judicial authority.²⁵ In the wake of that decision, and largely in response to the outcome, the state legislature enacted the testimonial exclusion now codified in the fourth clause of Massachusetts General Laws, chapter 233, § 20.²⁶

In the Matter of a Grand Jury Investigation presented the Supreme Judicial Court with the task of interpreting the statute passed in response to its decision in *Three Juveniles*.²⁷ While the legislature had nominally created a parent-child privilege, the interpretative question facing the Supreme Judicial Court would define its scope and practical utility.²⁸ In considering the legislative intent of the language “living with a parent,” the prerequisite to the statutory privilege, the court returned to a fundamental precept of the law of evidence: testimonial privileges are exceptions to the general requirement for testimony from otherwise competent witnesses, and are to be strictly construed because they reduce the total amount of evidence before the tribunal.²⁹ Based on this rationale and the fact that the statute was a response to a case reflecting the lack of such a privilege in most other jurisdictions, the court concluded that a narrow reading of the statutory language was appropriate.³⁰ As such, they reasoned that the legislature had intended the phrase “living with a parent” to be limited to its plain meaning, and thereby concluded that the petitioner in this

constitutional law has rarely served as the grounds for new privileges. *Id.* at 1205. The court therefore turned its focus to common law and statutory authority. *Id.* at 1206-08.

24. *See Three Juveniles v. Commonwealth*, 455 N.E.2d 1205, 1207 (Mass. 1983) (suggesting most jurisdictions do not recognize parent-child testimonial privilege).

25. *See Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1205-06 (Mass. 1983) (suggesting courts tend to leave decision to create new testimonial privileges to legislature). Noting that “neither Congress nor the Legislature of any State has seen fit to adopt a rule granting a privilege to one family member not to testify against another (except between spouses),” the court declined to act where Congress and the state legislature had chosen not to. *Id.* at 1207.

26. *See In re Grand Jury Subpoena*, 722 N.E.2d 450, 453 (Mass. 2000) (describing enactment of “testimonial disqualification for minor children”). Implicit in the court’s observation is recognition that the statutory exclusion resulted from a need to balance individual interests against the fact-finding mission of the court. *Id.* As the court remarks, “the statute was enacted after various amendments, revisions, and a public hearing date, and the privilege that thus emerged had the benefit of public debate during its creation and definition.” *Id.*

27. *See* 819 N.E.2d at 174 (identifying central issue by rejecting contention district court construed statutory language too narrowly).

28. *See id.* (rejecting argument to broaden scope of statutory privilege based on notion of changing family units).

29. *See id.* at 174-75 (quoting *Three Juveniles*, *Corsetti*, and *Bryan* as statements of general rule of evidence).

30. *See id.* at 174 (discussing *Three Juveniles* and legislative response); *supra*, note 17 and accompanying text (surveying various jurisdictions and demonstrating minimal support for parent-child privilege); *see also* 819 N.E.2d at 175 (citing general rule of evidence and policy rationales as dictating strict construction of testimonial privileges).

instance could not invoke the statutory privilege at issue.³¹

Though *In the Matter of a Grand Jury Investigation* might appear to be the product of a regressive area of common law that has failed to meet the demands of today, such a conclusion is misleading.³² In actuality, the statute at issue stands in stark contrast to *most* state and federal jurisdictions which recognize *no variant* of the parent-child privilege.³³ As such, the Commonwealth's efforts at codification actually represent a progressive attempt to modernize an area of the law that has traditionally been dominated by unwavering dedication to common-law principles.³⁴ In contrast to jurisdictions such as New York where the privilege was created judicially, the creation of the privilege in the Commonwealth is the result of legislative action taken pursuant to judicial recommendation.³⁵ As such, the creation of the privilege was the product of a reasoned and democratic determination that the balance between the individual's needs and those of society tilt in favor of protection of the individual—a conclusion that all jurisdictions agree should serve as the basis for any expansion of testimonial privileges.³⁶

Though Massachusetts law represents a progressive stance when compared to the decisional and statutory law of other state and federal jurisdictions, it does not fully embrace the vision of academics and commentators.³⁷ While many in that community see no compelling policy that distinguishes the protection of parent-child communications from, for example, spousal

31. See 819 N.E.2d at 175 (suggesting ordinary meaning of phrase "living with a parent" not ambiguous). Based on its determination that the statutory language was to be afforded its ordinary meaning, the court concluded that "only unemancipated, minor children who actually reside with the accused parent may invoke the disqualification." *Id.*

32. See *id.* at 174 (discussing petitioners' view of results attending potentially adverse outcome). The court summarized petitioners' argument by saying "the father is an important and significant part of the lives of the children, and the mother maintains that to force the children to testify against their father 'will be devastating to them and to [the] family.'" *Id.* (alteration in original).

33. See *supra* notes 17-19 and accompanying text (indicating balance of authority strongly favors *no* recognition of any variant of parent-child privilege).

34. See *supra* note 14 and accompanying text (citing various authorities describing nearly universal common-law rule of testimonial privileges as *strict exceptions*); see also *supra* notes 17-19 and accompanying text (surveying jurisdictions and demonstrating preference for adherence to common-law rule in disfavoring new parent-child privilege).

35. See *supra* note 19 (indicating New York *only* state to judicially recognize parent-child testimonial privilege); *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1205-06 (Mass. 1983) (suggesting legislature best suited to create new privileges).

36. See *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1205-06 (Mass. 1983) (suggesting legislature should bear responsibility for creation of testimonial privileges, not courts); *supra* note 16 and accompanying text (stating new testimonial privileges demand compelling individual interest which outweighs public need for information). Given the majority view that the legislature is the body appropriately charged with the creation of new testimonial privileges, and that the recommended inquiry seeks to balance individual needs against those of society, the statute, while progressive, is an appropriate development in the law. See *In re Grand Jury Subpoena*, 722 N.E.2d 450, 453 (Mass. 2000) (describing privilege which emerged as having benefit of open debate afforded by legislative process).

37. See *supra* note 20 (citing examples of rationale for *broad* implementation of parent-child privilege urged by academic community).

communications, the Massachusetts legislature has been decidedly more cautious, concluding that *only the interests of the child* outweigh the fact-finding interests of the tribunal and society at large.³⁸ Similarly, though the academic community has urged that constitutional considerations such as the integrity of the family demand the creation of an expansive parent-child privilege, Massachusetts courts and legislature have been more circumspect, approaching the issue in terms of the traditional rules of evidence, privileges, and policy considerations that affect the role of the fact-finder.³⁹ Though Massachusetts's implementation of the privilege constitutes a more narrow incarnation of the parent-child privilege than that preferred by academics, given the state's historical approach to issues of testimonial privileges, it is arguably the *only viable implementation*.⁴⁰

In *In the Matter of a Grand Jury Investigation*, the Supreme Judicial Court of Massachusetts faced the questioning of a statute that provided a limited testimonial privilege to children *living with a parent*. In construing the specific language at issue, the court was effectively determining the extent of the privilege. Given the Commonwealth's traditional view of the role of evidence and its belief that privileges reduce the amount of evidence available to the court, and because the statute at issue was the product of extended legislative deliberation, the Supreme Judicial Court concluded that a strict reading of the statutory language and the privilege which it created was necessary.

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38. See *supra* note 20 (suggesting academic community does not discern policy differences between protection of spousal and parent-child communications). In contrast to the broad right urged by academics that would protect communications from a child to a parent *as well as from a parent to a child*, the Massachusetts statute protects only the former. See MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2005). Commenting on its view as to why parents are in less need of the privilege than children, the court in *Three Juveniles* commented that “because a parent does not need the advice of a minor child in the same sense that a child may need the advice of a parent, the case for a testimonial privilege as to confidential communications from parent to child seems weaker. . .” *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1206 (Mass. 1983) (emphasis added).

39. See *supra* note 20 (indicating academic community claims constitutional considerations demand creation of parent-child testimonial privilege). While recognizing their authority to create new testimonial privileges should constitutional considerations merit it, the courts in Massachusetts have consistently approached the issue from a perspective grounded in the traditional rules of evidence. See 819 N.E.2d at 175 (suggesting general rule disfavors exceptions as reducing total amount of evidence available to fact-finder).

40. See *supra* notes 25-26 and accompanying text (suggesting courts deferral to legislature and describing legislative creation of parent-child privilege). Though not as expansive as that sought by the academic community, the Massachusetts statutory privilege is the product of deliberation and a weighing of the policies recommended by the courts. See *supra* note 26 (stating creation of privilege appropriate when legislature determines personal benefits outweigh public policy goals). The judicial creation of a privilege based on constitutional concerns, while more in keeping with the modern view of the academic community, would have represented a distinct reversal of policy that had traditionally placed the burden of creating new privileges on the legislature. See *supra* note 25 (explaining primacy of legislative role in creating new privileges).