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INSIDER TRADING CASE REMINDER OF LONG-SIMMERING PARENT-CHILD PRIVILEGE DEBATE

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History is replete with examples of the law intersecting with the relationship between parents and their children, sometimes in heartbreaking ways. In many cases, judges, juries and prosecutors must decide what special status, if any, to afford parent-child conversations.

Wall Street, of course, has served as a frequent backdrop for family legal dramas, pitting family members against each other, often in cases of financial fraud. In a recent high-profile example, former New York investment banker Sean Stewart was accused by federal prosecutors in the Southern District of New York of providing his father tips about pending health care mergers he learned about from his work at several employers including JPMorgan & Chase. Prosecutors alleged that Stewart's father, Robert Stewart, made $150,000 on trades based on the inside information provided by his son, Sean.

At trial, Sean's defense strategy emphasized the unique parent-child relationship, seemingly suggesting to the jury that it deserves special legal status. On the witness stand, Sean admitted he had discussed material, nonpublic information with his father and lied to compliance officials at JPMorgan when questioned about trades. But he testified that he talked to his father about his work like any son might, without any intention for the information to be used to commit a crime.

"At the time, it felt completely natural to have these discussions," he testified, according to one news report.

The jury ultimately appeared not to have credited Sean's explanation, and convicted him on all nine counts of insider trading and related charges.

Still, the case is a reminder of important policy questions that the parent-child relationship has long raised: How should the public's right to evidence be balanced with the need to foster trust and confidence between a child and his or her parent? Do communications between parents and children deserve special protection or privilege, perhaps similar to the spousal privilege?

Parent-Child Privilege

The Federal Rules of Evidence recognize several privileges, including the attorney-client privilege, the spousal privilege and a psychotherapist-patient privilege. Lawmakers have concluded that

the public benefits of those privileges, designed to strengthen critical relationships, outweigh the value of evidence that might be obtained without those protections.

But there is no federal parent-child privilege. And the vast majority of states do not have a parent-child privilege. In the handful of states that do have a parent-child privilege statute, it is limited and applies mostly to minors in connection with potential or actual criminal charges.

For example, in Massachusetts, the privilege protects "an unemancipated, minor child, living with a parent," from testifying in a 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."

Advocates for a broader recognition of parent-child privilege, which have included the National Association of Criminal Defense Lawyers, have long argued, among other things, that such a privilege would serve the public's interest in privacy and promoting an important relationship that otherwise could be damaged as a result of forced testimony.

Legislative Efforts

In the wake of former Independent Counsel Kenneth Starr's investigation into President Clinton's relations with Monica Lewinsky in the mid-1990s, federal legislators debated proposed legislation creating a broad parent-child privilege. During his investigation, Starr successfully sought to compel Lewinsky's mother to testify against her daughter, which angered and shocked some lawmakers.

The proposed legislation prohibited parents and their children from being compelled to testify against each other, and protected confidential communications between them. The bill's proponents argued that the parent-child relationship was no less sacred than the spousal relationship, which had long enjoyed privileged communication.

But the bill never made it out of the U.S. House of Representatives. At least one critic of the bill voiced concerns about providing the privilege to family members involved in insider trading.

Similar efforts have failed in New York. In 2004, the Advisory Committee on Criminal Law and Procedure, which annually recommends legislative proposals to the Chief Administrative Judge of the State of New York, endorsed a parent-child privilege that would have covered adult children. But the proposal never became law.

Court-Created Privileges

Supporters of a parent-child privilege have been forced to turn to the courts, which have historically been reluctant to recognize testimonial privileges. In *Jaffee v. Redmond*,[1] a case decided in 1996 and which recognized the psychotherapist-patient privilege, the U.S. Supreme Court provided updated guidance on the expansion of privileges. It held that a court should balance the "public and private interests supporting recognition of the privilege" against the need for evidence and the "likely evidentiary benefit that would result from the denial of the privilege."

The vast majority of courts considering the issue post-*Redmond* have declined to recognize a parent-child privilege. In a 2014 decision, *Under*

Seal v. United States of America,[2] the U.S. Court of Appeals for the Fourth Circuit joined every other federal appeals court in refusing to do so. The case involved a request by a 19-year-old son to quash a request to testify against his father in an investigation in which law enforcement found drug paraphernalia and firearms in the father's house.

The court in *Under Seal* found that the privilege *could* exist, but that the son's circumstances did not warrant the creation of one. It noted the son's testimony, which would be limited to the subject of the firearms, would not likely injure his relationship with his father. "Under the circumstances, Doe Jr. has not provided a strong showing that adoption of the parent-child privilege would 'promote[ ] sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice,' " the court wrote.

New York state courts have been among the few to create a common law parent-child privilege, albeit a narrow one. In its 1978 decision, *In re A&M v. Doe*,[3] the Fourth Department of the Appellate Division held that "communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the 'private realm of family life' which the state cannot enter."

The *A&M* case involved an arson investigation by local prosecutors in New York's Erie County who sought to compel testimony from the parents of a suspect, a 16-year-old boy who prosecutors believed had confessed the arson to his parents. In ruling against the government, the court wrote that a state compelling parents to disclose their child's misdeeds "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."

The next year, in *People v. Fitzgerald*,[4] a New York trial court expanded the holding in *A&M* by finding that a parent-child privilege arising out of a constitutional right to privacy could not be limited to age. The court addressed this issue in a case in which the father of a 23-year-old suspect in a fatal hit-and-run incident sought an order to preclude testimony of his confidential communications with his son. In granting the father's preclusion order, the court recognized a broader privilege that "prevent[s] forced disclosure by the State of confidential communications between a parent and a child of any age when the parties to such communication mutually assert such a privilege."

Conclusion

The debate about the parent-child privilege pits important competing policy goals against each other: an unfettered search for the truth on the one hand, and a desire to foster trust and candid conversations between parents and their children on the other hand. So far, the former has been favored by courts and legislators. But the debate is not likely to end anytime soon and will continue to play out in courts across the country.

ENDNOTES:

[1] *Jaffee v. Redmond*, 518 U.S. 1 (1996).

[2] *Under Seal v. United States*, 755 F.3d 213 (4th Cir. 2014).

[3] *In re A&M*, 403 N.Y.S.2d 375, 381 (App. Div. 1978).

[4] *People v. Fitzgerald*, 422 N.Y.S. 2d 309, 310 (Westchester Cty. Ct. 1979).