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The Mother's Day Column: Parent-Child Evidentiary Privilege in Montana

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The Mother's Day column:

Parent-child evidentiary privilege in Montana?

By Cynthia Ford

This month's column is short, even if not sweet: There is no parent-child evidentiary privilege in Montana or the federal courts. Mothers can be called to the stand to testify against their children, and vice versa.

Game, set, match. See you next month…

A little Explanation for the intellectually curious with time on their hands

As discussed in my previous column, there is a well-recognized and often-used spousal communication privilege in Montana. Married persons who speak to each other in confidence need not fear hearing that spouse recount the communication in court, willingly or unwillingly. M.C.A. 26-1-802. Indeed, this is the very first substantive statute in Title 26, Chapter 1, Part 8, entitled "Privileges." In the last column, I discussed several of the many Montana cases which recognize the public policy in favor of marriage, and which in turn recognize the ability to confide in one's spouse as an important component of marriage.

Many assume that there is a corollary for intergenerational family communications but there is not. Thus, as a technical matter, a party can subpoena a parent to testify against a child or a child to testify against her parent, even if the communication was meant to be and has been kept confidential, and even though that parent could not testify against his wife.

This is true not only in Montana state courts, but also in the federal court system and the vast majority of other states. A famous example comes from the Lewinsky-Clinton scandal. Special prosecutor Ken Starr subpoenaed an unwilling Marcia Lewis, Monica Lewinsky's mother and confidante, to testify before the grand jury. She was forced to give two full days of testimony about what she knew and, more importantly, what her daughter had told her about the relationship with President Clinton.

Montana: Not on the list of privileges

The quickest and easiest explanation for this un-privilege in Montana is that Montana privilege law is statutory[1], and strictly construed. M.C.A. 26-1-801 clearly limits evidentiary privileges to those on the list established by the legislature:

> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in **the cases enumerated in this part.** [Emphasis added].

The Montana Supreme Court is also clear: "¶ 16 Initially, we observe that testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence. *See MacKinnon*, ¶ 21 (citing *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195)." *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307.

The Montana Code Chapter on Privileges lists only thirteen types of relationships in which confidential communications are privileged:

- Spouses (26-1-802)
- Attorney and client (26-1-803)
- Member of the clergy and confessor (26-1-804; the subject of the next "Evidence Corner")
- Doctor and patient (26-1-805)
- Speech-language pathologist or audiologist and patient (26-1-806)
- Psychologist and patient (26-1-807)
- Psychology teacher/researcher and observed child (26-1-808)
- Student to teacher (26-1-808)
- "Official confidences" to public officer (26-1-809)
- Victim to domestic violence or sexual assault advocate (26-1-810)
- Mediation communications (26-1-813)
- In medical malpractice cases, apology made to the family (26-1-814)
- Media member and source (26-1-902)

This is the entire list, and conspicuously does NOT mention the parent-child relationship. Equally telling, I could not find a single Montana case in which a Montana state court was faced with a claim of evidentiary privilege for a communication between a child and his parent. So, this is another good place to stop reading: for sure, there is no parent-child evidentiary privilege in Montana state courts and there won't be one unless the legislature decides to add this category to the list of relationships which outweigh the public interest in obtaining all the information possible for the factfinder's decision.

Montana's failure to recognize a parent-child privilege in

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1 This is a distinct difference from the federal law of privilege, which is entirely judge-made, per Congress' instructions in F.R.E. 501, more fully discussed in the previous "Evidence Corner."

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any form is consistent with the vast majority of other states and the federal courts[2]. Because I, and most of my readers, concentrate on Montana evidence law, this article will not go any further into the law of other states although I will discuss the 9th Circuit decisions below.

Federal Courts: A parent-child privilege was not on the original unenacted list of federal privileges, and only a few lower federal courts have since recognized it by common law

The drafters of the original Federal Rules of Evidence drafted, and the Supreme Court transmitted to Congress, a robust Article V on "Privileges." There were specific rules for specified privileges, akin to the Montana statutory approach to privilege law. This list contained a spousal privilege rule, but no provision for a parent-child privilege (either communications or testimonial). However, Congress rejected the proposed Article V in its entirety, and substituted therefor a single rule, F.R.E. 501, assigning to the courts full responsibility for developing privileges for federal proceedings[3]:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.

Since the adoption of Rule 501, federal courts have faced multiple assertions that they should recognize a privilege for communications between parents and their children. No federal circuit court has taken the bait so far, although a few district courts have. The U.S. Supreme Court has not found any such privilege.

Wright and Miller's treatise contains a fairly succinct status report on the issue:

> The last decade has seen a sudden flurry of interest in the development of some form of parent-child privilege. A number of scholars, lawyers, and law students produced articles advocating the creation of such a privilege and a few judges have seen fit to create one by judicial decision. Minnesota and Idaho have enacted parent-child privilege statutes and New York has proposed the codification of its common law privilege. Recently a committee of the American Bar Association has drafted a model statute that would recognize both a witness and a communications privilege for parents and children. It is too early to say how this will come out; the judicial decisions have been overwhelmingly hostile. Nonetheless, it may be helpful to sketch the arguments for and against the creation of a broader family privilege to aid courts and legislators who have yet to consider such a privilege and to assist those who are in the process of developing a common law or statutory privilege for parents and children.
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> § 5572 Policy of the Privileges, 25 Fed. Prac. & Proc. Evid. § 5572 (1st ed.) (Footnotes omitted).

Ninth Circuit Jurisprudence

A. The Ninth Circuit cases

The 9th Circuit has never recognized a parent-child evidentiary privilege, although it has discussed the issue in two cases in the last twenty years. The more recent was in 1993. Nancy Alba and her husband were held in contempt for refusing to testify against Nancy's father before the grand jury. On appeal, the 9th Circuit rejected the Albas' claim that it should recognize a "family privilege:"

> We have previously held that **"there is no judicially or legislatively recognized general 'family' privilege."** *United States v. Penn,* 647 F.2d 876, 885 (9th Cir.) (en banc), *cert. denied,* 449 U.S. 903 (1980). Six other circuits have also rejected the concept of a family privilege. *See Grand Jury Proceedings of John Doe v. United States,* 842 F.2d 244, 247 (10th Cir.1988); *United States v. Ismail,* 756 F.2d 1253, 1258 (6th Cir.1985); *United States v. Davies,* 768 F.2d 893, 896-98 (7th Cir.1984), *cert. denied,* 474 U.S. 1008 (1985); *In Re Grand Jury Subpoena of Dominic Santarelli,* 740 F.2d 816, 817 (11th Cir.1984) (per curiam); *In Re Grand Jury Subpoena Issued to Lawrence Mathews,* 714 F.2d 223, 224-25 (2d Cir.1983); and *United States v. Jones,* 683 F.2d 817, 818-19 (4th Cir.1982). (Emphasis added).

In re Grand Jury Proceedings (Alba), 12 F.3d 1106 (9th Cir. 1993). The Court concluded:

> **There is no general family privilege that would prohibit the government from compelling the Albas to testify against Richichi.** ...The Albas have failed to show that the district court abused its discretion by declining to recognize such a privilege. (Emphasis added).

12 F.3d at 1106. Although this opinion is "unpublished,"

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2 "Similar to the federal courts, a substantial majority of state legislatures and courts do not recognize a parent-child privilege. No state supreme court has recognized the privilege, and only five states--Idaho, Connecticut, Washington, Minnesota, and Massachusetts--explicitly recognize some limited form of the parent-child privilege in their statutory schemes. Only one state, New York, recognizes a relatively broad parent-child privilege under case law. The legislatures of a handful of states, including California, Florida, New Jersey, and Illinois, have expressed interest in a state parent-child privilege, but nothing has come of this interest." Catherine Chiantella Stern, Don't Tell Mom the Babysitter's Dead: Arguments for A Federal Parent-Child Privilege and A Proposal to Amend Article V, 99 Geo. L.J. 605, 617-18 (2011). Because I am only concerned with Montana here, I have not updated this list.

3 Note, however, that the last sentence of F.R.E. 501 explicitly commands use of state privilege law in diversity cases: "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

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it is both quite clear and the most recent statement from the Circuit.

The single published opinion from the Ninth Circuit is similarly clear in its rejection of a parent-child privilege, and the fact that the U.S. Supreme Court denied cert indicates that it is not ready to implement such a privilege either. In U.S. v. Penn, 647 F.2d 876 (1980), cert. denied 449 U.S. 903, the defendant mother was accused of dealing heroin. An important part of the government's evidence was the jar of heroin which the Washington state police found buried in Ms. Penn's backyard after a two-year investigation, enlisting the help of her small son:

> Officers conducting the search found a quantity of cocaine in the Penn home. After a half hour of looking they had found no heroin. At that point, Reggie, the youngest of Clara Penn's children (age 5), asked to go to the bathroom. A police officer took him. While in the bathroom with the child the policeman asked Reggie (as an "afterthought," according to the officer's testimony) if Reggie knew where the little balloons (of heroin) were hidden. Reggie nodded in the affirmative to the officer's question, indicating that he knew where the heroin could be found....
>
> Because of a commotion outside the bathroom door, the officer did not pursue his conversation with Reggie. But 10 minutes later, when the commotion had ended, the officer spoke with Reggie again, this time in the kitchen. The officer asked Reggie if Reggie would take him out to where the heroin was located. Reggie answered yes, then hesitated. The officer then offered to give Reggie five dollars if Reggie would show him the location of the cache. The boy thereupon walked out to the backyard and pointed to some soft sod. Under the sod the police discovered a glass jar containing 132.9 grams of heroin. Police later found in the yard, but without Reggie's assistance, a second jar containing 14.6 grams of heroin. (Because of the hostility of Reggie's brothers, the officer was unable to give Reggie the five dollars.)

647 F.2d at 879. The State first prosecuted Ms. Penn, but lost a motion to suppress evidence.

The United States then prosecuted her for federal offenses, and also lost a suppression motion at the trial level.

The prosecution sought to introduce the state-suppressed evidence taken from the yard. On motion by the defense, the district court suppressed the jar of heroin that had been found with Reggie's help, on the ground that the police conduct violated the due process clause of the Fifth Amendment. According to the court's memorandum:

> The bribery of a child of tender age by a policeman in order to obtain evidence to be used against a parent represents police conduct which is shocking to the conscience and is, in the opinion of this Court, so violative of the decencies of civilized conduct to be a deprivation of due process. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). (Footnote omitted).

Id. On appeal, a majority of the 9th Circuit en banc reversed the Due Process holding, although it stated that it "disapproved" of the police tactic. The Court observed:

> Moreover, we think that there is general agreement that the combination of any two of these factors would not violate due process. A very young child may be given money in exchange for information about a non-family member; an adult son (or brother, or spouse) may be paid to inform against his mother, etc.; and a **very young son may freely inform or testify against his mother.** (Emphasis added).

647 F.2d at 880. After dispensing with the defendant's other constitutional arguments, the majority went on to discuss more specifically her parent-child evidentiary privilege claim[4]:

> Federal Rule of Evidence 501 declares that the existence and extent of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."
>
> **There is no judicially or legislatively recognized general "family" privilege**, cf. Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (spouse may testify against her mate over his objection); United States v. Lefkowitz, 618 F.2d 1313 (9th Cir. 1980) (spouse may provide information to police for use in search directed against her mate), **and we decline to create one here.** (Emphasis added).
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> 647 F.2d 884-85.[5]

B. Anomalous District Courts in the 9th Circuit

Despite these Circuit Court opinions, a couple of District Courts in the 9th Circuit have held that a parent-child privilege should exist, and applied it in the cases before them. Although these cases are not likely to become the law circuit-wide any time soon, their reasoning illustrates some of the arguments[6] for such a privilege.

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4 Arguably, this quotation is dicta. Whether that is true or not, it has not been disapproved in any subsequent 9th Circuit ruling, and it is **extremely** clear.

5 Four (Judges Goodwin, Kennedy, Hug and Tang) of the nine en banc judges dissented sharply on constitutional Fourth Amendment grounds, citing the importance of the family unit as one consideration, but did not discuss the parent-child privilege per se. The Circuit also split on the petition for rehearing, but the majority denied the request for rehearing by the full court.

6 There are several good law review articles which elaborate on these arguments. E.g., Stern, *Don't tell Mom the Babysitter's Dead: Arguments for a Federal Parent--Child Privilege and a Proposal to Amend Article V* (Note), 99 Geo. L.J. 605 (2011); Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 Wm. & Mary L. Rev. 583 (1987); Coburn, *Parent-Child Communications: Spare the Privilege and Spoil the Child*, 74 Dickinson L.Rev. 599, (1969–70); Comment, *The Child-Parent Privilege: A Proposal*, 47 Fordham L.Rev. 771 at 772 (1978–79).

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In *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F.Supp. 1487 (E.D. Wash., 1996), the government subpoenaed a 17-year-old son to testify before a grand jury investigating charges against both his parents. He moved to quash the subpoena on the grounds of parent-child privilege. Although the motion was denied, the district judge specifically considered the application of such a privilege to the son's testimony. The Court found no constitutional basis for a parent-child privilege, but went on to consider the public policy arguments in favor of common-law adoption of this familial protection:

> Thus, mindful of the presumption against recognizing new privileges and guided by "reason and experience," the Court must analyze whether a parent-child privilege should be recognized because there is a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth," which also serves public ends.... The Court finds it does.
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> 949 F. Supp. at 1494.

In reaching this decision, the Court surveyed state and federal cases across the country, and acknowledged that

> What case law exists does not reveal a groundswell in favor of recognizing a broad privilege. To the contrary, the vast majority of states that have considered this issue have declined to recognize a parent-child privilege, or some variation thereof, on the facts presented to them.

949 F. Supp. at 1495. Nonetheless, the Court compared the relationship of the parent and child to the types of relationships protected by existing privileges, concluding that law should support the family unit, and confidential communications between family members would help do so:

> In this Court's experience—as a judge, parent, child, and spouse—there is no meaningful distinction between the policy reasons behind the marital communications privilege and those behind a parent-child privilege. The same needs that are met by confessing to a priest, divulging fears and wrongdoings to a psychotherapist, or confiding in a spouse are present—and should be encouraged to be fulfilled—in the context of parent-child relationships....
>
> Likewise, children should not be dissuaded from seeking guidance and support from parents during difficult times. Parents should not be discouraged from participating in their children's lives by sharing their joys and providing firm direction when that is needed. As many parents know, supervision of a child takes on many forms. At times it may include honest and forthright discussion. At other times it may take the form of cross-examination to discover, punish, or correct wrongdoing by the child. Especially in light of this society's increasing concern with the weakening of the family structure, such communication and parental guidance should be encouraged, not discouraged, by the judiciary.

Id. The *Unemancipated Minor* case ultimately held that a parent-child privilege might apply in the questioning of the son before the grand jury[7], but that its exact parameters and application should be decided on a question-by-question basis.[8]

The District of Nevada also ruled in favor of a parent-child privilege *In re Agosto*, 553 F. Supp. 1298 (D. Nev., 1983). Joseph Agosto was the target of a grand jury investigation in Las Vegas. His adult son, Charles, was subpoenaed to testify against him. In support of his motion to quash the subpoena, Charles submitted an affidavit showing that this was the third time in 18 months that federal prosecutors and a grand jury in the same district had subpoenaed children to testify against their parents, who were targets of an investigation.

The trial judge commented:

> Because the issues presented to the Court are of such an interesting and important nature, and because the law in this area is relatively undeveloped at the present time, this Court will endeavor to examine the requested motion in depth both as to law and policy.
>
> For analysis, Movant's argument can be divided into three categories of "harm" which he urges the Government's subpoena, if enforced, would perpetrate upon him. First, Movant urges that the harm done to him as an individual, both physically and emotionally, renders the Government's actions an impermissible invasion upon his personal autonomy and religious [Catholic] beliefs. Second, Movant argues that the implications to his family from such a coercion are permanently detrimental. And finally, Movant argues that the damage to society as a whole should such a practice be permitted far outweighs any goal that the government is trying to reach by requiring such testimony by family members against one another.
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> 553 F. Supp. at 1299-300.

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7 District Judge Whaley also discussed the two 9th Circuit cases which appear to reject a parent-child privilege, but distinguished them: "The Court is not dissuaded from recognizing a parent-child privilege by either of the Ninth Circuit cases that have discussed similar issues. *See, e.g., In re Grand Jury Proceedings (Alba)*, No. 93–17014, 1993 WL 501539 (9th Cir. Dec. 2, 1993) (unpublished); *Penn*, 647 F.2d 876." *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. at 1496. The judge found *Penn*'s statement declining to recognize the privilege to be dicta. He observed that *Alba* was distinguishable both on its facts and because it was an unpublished opinion.

8 There is no reported history of the subsequent proceedings in this case, or, indeed, whether the U.S. did actually call the son to testify after all. There is no 9th Circuit appeal of the district court ruling, and I could find no indirect comment from the Circuit either.

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The son in *Agosto* argued that society's need to protect the parent-child relationship was even greater than for the husband-wife relationship, because spouses can divorce. Interestingly, some courts have found that the inability to dissolve the parent-child legal relationship is precisely why that bond does not need to added protection of an evidentiary privilege. In that view, parents and children talk intimately all the time, even though there is no privilege, so there is no need which offsets the public's right to know. Furthermore, the bond is so strong naturally that contrary testimony is unlikely to destroy it: a mother will love her son even if he testifies against her, at least under compulsion.

The *Agosto* judge discussed the 9th Circuit's *Penn* decision at length, and concluded that the Penn majority limited its holding on the constitutional issues because it felt that the situation was unique, leaving a door open for a different determination if a pattern of violation of familial relationships became clear. 553 F.Supp. at 1320. He echoed this with regard to the privilege holding, too:

> And the court concluded, again specifically limiting their conclusion to the facts before them, that "[t]here is no judicially or legislatively recognized general 'family' privilege ... and we decline to create one here." *Id.* at 885.

Id, at 1321. (Later in the opinion, the judge also distinguished the Penn case on its facts). After a lengthy and useful review of the history of the F.R.E. privilege provisions, the judge stated:

> The expansive posture taken by Congress, in enacting Federal Rule of Evidence 501, allows this Court to analyze case law, scholarly opinion, and political and social policy issues in considering Movant's claim of a parent-child privilege. As a case-by-case development of the law of privileges is indicated in the legislative history of Rule 501, this Court is free to extend the present law of privileges to deal with those situations encountered in which constitutional protection is deemed essential.
>
> *Id* at 1325.

The judge did quash the subpoena issued to the son, finding both parent-child testimonial and confidential communications privileges, even for adult children:

> There can be little doubt that the confidence and privacy inherent in the parent-child relationship must be protected and sedulously fostered by the courts. 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 interests in its integrity and inviolability, which spring from the rights of privacy inherent in the family relationship itself. There is no reasonable basis for extending a testimonial privilege for confidential communications to spouses, who enjoy a dissoluble legal contract, while yet denying a parent or child the right to claim such a privilege to protect communications made within an indissoluble family unit, bonded by blood, affection, loyalty and tradition. And further, if the rationale behind the privilege of a witness-spouse to refuse to testify adversely against his or her spouse in a criminal proceeding serves to prevent the invasion of the harmony and privacy of the marriage relationship itself, then affording the same protection to the parent-child relationship is even more compelling....
>
> Charles Agosto may claim the parent-child privilege not only for confidential communications which transpired between his father and himself, but he may likewise claim the privilege for protection against being compelled to be a witness and testify adversely against his father in any criminal proceeding. The parent-child privilege, then, is based not only on the confidential nature of specific communications between parent and child, but also upon the privacy which is a constitutionally protectable interest of the family in American society.

Id. at 1325. Thus, despite the 9th Circuit's holding in Penn, the District Court for the District of Nevada adopted the most expansive possible version of a parent-child evidentiary privilege, covering both generations, even after the child has become an adult living a separate life in a separate house.

Although these two trial court opinions within the 9th Circuit illustrate the possibility that the federal courts could conceivably recognize some form of a parent-child privilege in the future, the probability remains quite remote. In 2010, a judge in the District of Oregon assessed the vitality of *Agosto*:

> As the court in *United States v. Red Elk noted,* however,
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> *Agosto* has never been followed by the Eighth Circuit and has been rejected by virtually every other federal court that has been called upon to recognize and apply a parent-child/family privilege. ... *United States v. Penn,* 647 F.2d 876, 885 (9th Cir.) (*en banc*), *cert. denied,* 449 U.S. 903, 101 S.Ct. 276, 66 L.Ed.2d 134 (1980) [citations from other circuits omitted]...

955 F.Supp. 1170, 1178 (D.S.D.1997). In *Penn* the Ninth Circuit noted in *dicta* that "[t]here is no judicially or legislatively recognized general 'family' privilege." 647 F.2d at 885. Thus, it does not appear the Ninth Circuit would likely adopt the privilege set out in *Agosto.*

U.S. v. Krstic, 708 F.Supp.2d 1134, 1149 (D.Or. 2010).

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Practical Considerations: "Can" is not "Should"

The law on parent-child privilege is about as clear as law gets: there is no privilege, and either parent or child can be compelled to testify against the other. If the subpoenaed witness refuses to do so, she can be held in contempt of court and actually jailed until she relents and dimes her little boy.

So, what would June Cleaver do if called to testify against the Beaver[9]? The *Agosto* judge did not think she (or Beaver, if he were called to incriminate his mother) would tell the truth:

> [C]oercing testimony from a parent against his child would, in point of fact, place parties in a posture of committing perjury to protect one another... requiring or yet coercing testimony within the realm of the family in all possibility could be a complete exercise in futility. ...
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> [T]here is "the gravest temptation to perjury by the holder of the secret. This is apparently why in the legal thought of a number of European countries, emphasis is placed upon the moral importance of refraining from coercion of witnesses as matters of conscience. Such coercion, in the face of conflicting concepts of loyalty and duty, is considered to be productive of perjury." Louisell, *The Psychologist in Today's Legal World: Part II,* 41 Minn.L.Rev. 731 at 750 (1957). Louisell also noted that the benefits in the administration of justice were "overbalanced by: (1) the inducement to perjury inherent in such attempts, and (2) the harm to the human personality, and hence, to freedom, in governmental forcing of a serious conflict of conscience." *Id.* Ascertainment of the truth, then, while an important goal, is not the only important goal. And indeed, if a parent-child privilege is foreclosed, the truth may yet remain elusive and even just as unattainable, in light of the perjury which could take place if such testimony is coerced....
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> The practical effect of allowing the government to coerce testimony by parent and child against one another is that individuals totally uninvolved in and innocent of the alleged wrongdoing will be jailed for contempt, solely because of a strong sense of family loyalty. The government, then, is essentially in a position of actively punishing selflessness and loyalty which are inculcated into the child by family, church, and even the state itself. It is inconsistent with a free society to place a child in the position of choosing between loyalty to his parent and loyalty to his state. In this instance, a child is delivered into a psychological double-bind in which he is scorned and branded as disloyal if he does testify and jailed if he does not. The child is required, then, to have a contingent loyalty to the family which reared him and taught him the basic values of honesty, integrity, and respect for authority.
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> *In re Agosto*, 553 F. Supp. at 1309-1310, 1326.

When we discuss this privilege in my Evidence class every year, I ask the students to raise their hands if they think their mothers would lie on the stand to protect them. Consistent with the quotation above, most students, perhaps 95%, do raise their hands; only 2 or 3 every year say they expect their mothers would tell the truth in court, even if that truth resulted in the conviction and incarceration of the students. That small minority reports that their mothers have a deep commitment to the truth and strongly believe in their children accepting consequences for bad decisions. For this group of parents, the act of testifying is actual consistent with their parenting responsibilities. If any sort of parent-child privilege were developed, the legislature or court enunciating its boundaries could protect both categories of parents by vesting the privilege in the parent, rather than in the child.[10]

Even without a formal privilege, in my observation and reading, it is a fact that parties do not often call their opponents' parents (or children) to give testimony adverse to their children (or parents). There are several probable practical reasons for this rarity. As with my class and the *Agosto* court, most lawyers may not believe they would get the truth anyway. Even if the parent does testify, juries (grand or petit) observing a parent's compelled testimony may discount that evidence, assuming that the parent is not likely to jeopardize her child. It might even be that a juror would be so offended by the proponent's insistence on placing the parent-witness into an untenable position, and actively determine to find against that party as a result. The proponent lawyer herself might simply be offended by the prospect. Lastly, the lawyer might be reluctant to instigate a judicial review or legislative action which could result in institution of a system-wide parent-child privilege for the first time. As a result of all these factors, most of the lawyers and judges reading this article won't have to face this issue.

In the unlikely event that the prosecutor or civil opponent of The Beaver did subpoena Mrs. Cleaver to testify against her

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9 I know for a fact that all the readers of my mature age recognize this reference. I also know, from my experience of 24 years teaching law students, that there are many readers younger than we who won't. Here is what that excellent source, Wikipedia, says: "***Leave It to Beaver*** is an American television situation comedy about an inquisitive and often naive boy named Theodore "The Beaver" Cleaver (portrayed by Jerry Mathers) and his adventures at home, in school, and around his suburban neighborhood. The show also starred Barbara Billingsley and Hugh Beaumont as Beaver's parents, June and Ward Cleaver, and Tony Dow as Beaver's brother Wally. The show has attained an iconic status in the US, with the Cleavers exemplifying the idealized suburban family of the mid-20th century."

10 The U.S. Supreme Court did a similar thing when it announced that the federal spousal testimonial privilege henceforth belongs to the witness-spouse rather than to the defendant-spouse. The Court cited the witness' un/willingness to testify as a rationale barometer of the health of the marriage, observing that it did not make judicial sense to forego relevant information if there was no viable marriage to preserve via the privilege. See, *Trammel v. U.S.* 445 U.S. 40 (1980).

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own son[11], she has several options:

- She could flat-out refuse to testify, attempt to assert a privilege, and be ordered to testify or go to jail until she does;
- She could testify and tell the truth, maybe sending The Beaver to Pine Hills or Deer Lodge;
- She could testify and lie, now committing a crime of her own; or She could take refuge in a totally-mom device, forgetfulness: "I don't remember anything at all about that." Isn't this the most likely, and the most believable? And how could the proponent disprove this, and/or prove perjury? "You do too so remember, don't you?" is not going to get the desired testimony.

Don't get me wrong: I am totally committed to prevention of, and would never suborn, perjury. I would never advise anyone who consulted me in such a situation to say she does not remember, if in fact she does remember and just doesn't want to say. As the Preamble to the Montana Rules of Professional Conduct says in its very first provision: "(1) A lawyer shall always pursue the truth." Part (6) of the Preamble also applies:

> A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Rule 3.3 provides:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.4 states:

> A lawyer shall not:
> (a) unlawfully obstruct another party's access to evidence, unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

These authorities, as well as my own moral compass, tell me that if I do represent a parent or child called to testify, I should advise her that she can try to raise a claim of privilege, but would almost surely lose that under the current law. I would then counsel her that she only has two defensible choices: refuse to testify and bear the consequences, including possible coercive jailing for contempt, or tell the truth. To preclude a standoff in court, I would call the attorney who subpoenaed my client and inform that lawyer that the client would rather go to jail than testify. In the perfect world, that call would cause the lawyer to rethink his trial strategy and revoke the subpoena.

All in all, privilege or not, most lawyers won't call their opponents' parents or children. If they do, the harsh reality is that they are not likely to gain usable evidence if they do, and may stand to alienate the juror they are trying to woo. In this landscape, the need for a formal privilege to protect the parent-child relationship has not been compelling to most legislatures (including Montana) or to most courts (including the Montana Supreme Court, the 9th Circuit, or the U.S. Supreme Court).

Conclusion: It's a long way to Tipperary

I don't think I will live long enough to see a parent-child privilege in Montana, in the federal courts, or in the majority (actually, even a substantial minority) of other states. I also don't think I will see many cases in which a party calls a resistant child or parent to the stand and gets usable information. The parent-child privilege debate may be a tempest in a teapot, after all. The best advice clearly is: Don't do anything which would make your mother have to tell on you. And, if you are my child, remember: there is still time to buy a present.[12]

Happy Mothers' Day.

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11 I think this would have been a very interesting episode. There probably is a "Law and Order" episode raising this issue, but I couldn't find one easily. If you do, please send me the link; thanks.

12 How about a bike ride on the Trail of the Coeur D'Alenes?