COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
No. M-2152

SUFFOLK, s.s. SITTING, 1982

COMMONWEALTH v. MARK COLLETT

ON DIRECT APPELLATE REVIEW

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SOCIAL WORKERS, MASSACHUSETTS CHAPTER

BARRY L. MINTZER
27 State Street
Boston, MA 02109
(617) 720-1000

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INTEREST OF THE AMICUS CURIAE

The National Association of Social Workers, Massachusetts Chapter (NASW) submits this brief as amicus curiae because the issues raised on appeal substantially effect the professional relationship its more than four thousand six hundred members have with their clients. The ruling of the Superior Court interpreting G.L. c. 112, § 135 (the social worker-client privileged communications statute) establishes a procedure which will so compromise the protections of § 135 as to make the privilege a nullity. If allowed to stand, the Superior Court Ruling will seriously impair the creation and maintenance of a therapeutic relationship between the social worker and the client. To this extent, NASW's members have a direct and substantial stake in the outcome of this appeal.

NASW was the prinicpal sponsor of St. 1977, c. 818 which inserted G.L. c. 112, § 135.

STATEMENT OF ISSUES

I. Whether the exception to the social worker-client privilege contained in G.L. c. 112, § 135(b) gives a social worker discretion to decide whether or not to reveal communications with persons consulting with her in her professional capacity where such communications reveal the contemplation or commission of a crime or harmful act.

II. Whether the court may properly compel the social worker to reveal communications with clients which are privileged pursuant to G.L. c. 112, § 135 and do not come within an exception to § 135.

III. Whether the social worker or the court should determine which communications reveal the contemplation or commission of a crime or harmful act.

STATEMENT OF THE CASE

Pursuant to Mass. R. App. P. 16(b) NASW hereby adopts the statement of the case as presented by the witness-appellant.

STATEMENT OF THE FACTS

Pursuant to Mass. R. App. P. 16(b) NASW hereby adopts the statement of the facts as presented by the witness-appellant.

ARGUMENT

I. SECTION 135(b) OF G.L. c. 112 REQUIRES SOCIAL WORKERS TO DISCLOSE CLIENT COMMUNICATIONS WHICH REVEAL THE CONTEMPLATION OR COMMISSION OF A CRIME OR HARMFUL ACT.

A. Introduction

Massachusetts established a comprehensive system of licensure for social workers with the enactment of St. 1977, c. 818. This statute provided four levels of licensure governed by education and experience requirements. G.L. c. 112, § 131. In addition, section 1 of c. 818 established a Board of Registration of Social Workers to, inter alia, "promulgate rules and regulations that set professional standards for all licensed social workers. . ." G.L. c. 13, § 84.

Section 2 of c. 818, now codified in G.L. c. 112, § 135, contained a provision prohibiting certain disclosures by social workers. This section provided as follows:

> No social worker in any licensed category, including those in private practice, may disclose any information he may have acquired from persons consulting him in his professional capacity except:
>
> (a) with the written consent of the person or, in the case of death or disability of his own personal representative, other person authorized to sue, or the beneficiary of an insurance policy on his life, health, or physical condition;
>
> (b) that a licensed certified social worker, including those engaged in independent clinical practice, licensed social worker, or licensed social work associate shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or a harmful act;
>
> (c) when the person waives the privilege by bringing charges against the licensed certified social worker, including those engaged in independent clinical practice, the licensed social worker, or the licensed social work associate.

G.L. c. 112, § 135 has recently been amended by St. 1981

c. 91, which added the following additional exceptions to the privilege:

> (d) to initiate a proceeding under subsection C of section twenty-three of chapter one hundred and nineteen or section twenty-four of chapter one hundred and nineteen or section three of chapter two hundred and ten and give testimony in connection therewith;
>
> (e) in any other child custody case in which, upon a hearing in chambers, the judge, in the exercise of his discretion, determines that the social worker has evidence bearing significantly on the person's ability to provide suitable custody, and that it is more important to the welfare of the child that the information be disclosed than that the relationship between the person and social worker be protected.

In the instant case the District Attorney seeks to compel the testimony of Betsy John, a licensed certified social worker employed by Massachusetts General Hospital who was providing professional consultation to the defendant. Such testimony was and is sought pursuant to G.L. c. 112, § 135(b), under the theory that the defendant in the course of his consultations with Ms. John may have revealed the "contemplation or commission of a crime or a harmful act." Ms. John contends that the subsection (b) instruction that a social worker "shall not be required to treat [certain communications] as confidential" permits but does not require a social worker to testify about information she has acquired about the commission or contemplation of a crime or harmful act.

B. Other Jurisdiction Have Interpreted Provisions Similar To G.L. c. 112, § 135(b) To Require Disclosure.

G.L. c. 112, § 135 is a relatively new statute and there have as yet been no Massachusetts court decisions contstruing

its scope or meaning. It is therefore necessary to refer for guidance to decisions from other states having similar statutes. Kneeland v. Emerson, 280 Mass. 371 (1932).

New York has a statute similar to G.L. c. 112, § 135.[1/] A New York court was presented with a similar interpretive claim that social workers had discretion to testify to communications revealing "the contemplation of a crime or harmful act." The court ruled that, "Such a construction of the statute is unwarranted and is rejected." Community Service

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1/ The New York statute, Sec. 4508 of the Civil Practice Laws and Rules (CPLR), provides as follows:

> A person duly registered as a certified social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person working for the same employer as the certified social worker be allowed to disclose any such communication or advice given thereon; except
>
> 1. that a certified social worker may disclose such information as the client may authorize;
>
> 2. that a certified social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;
>
> 3. where the client is a child under the age of sixteen and the information acquired by the certified social worker indicates that the client has been the victim or subject of a crime, the certified social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;
>
> 4. where the client waives the privilege by bringing charges against the certified social worker pursuant to section seventy-seven hundred of the education law where such charges involve confidential communications between the client and the certified social worker.

Society v. Welfare Inspector General, 91 Misc. 2d 383, 387 398 N.Y.S. 2d 92 (Sup. Ct. N.Y. Co. 1977) aff'd 65 A.D. 2d 734, 411 N.Y.S. 2d 188 (1st Dept. 1978). The court added,

> it must be held that the meaning of the statute is that communications by a client which reveal the contemplation of a crime or harmful act are not privileged and are subject to compulsory disclosure.

Id. at 387

See also People v. Lipsky, 102 Misc. 2d 19, 24, 423 N.Y.S. 2d 599 (1979) ("The reason for the establishment of the privilege did not contemplate that it would be a shield behind which the commission of a homicide would be sheltered")

C. The Clear Language Of G.L. c. 112, § 135(b) Shows Compulsory Disclosure Is Required.

It is well established that a statute's language is the primary source of its meaning and that this court's function is to interpret the statute on the basis of what the Legislature has written. E.g., Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. (1980) 485, 489; New England Medical Center Hospital, Inc. v. Commissioner of Revenue, Mass. Adv. Sh. (1980) 2339, 2340; Massachusetts Financial Services, Inc. v. Securities Investor Protection, Corp., 545 F.2d 754, 756 (1st Cir.), cert. denied, 431 U.S. 901 (1976). Subsection (b) of § 135 when read alone, is ambiguous as to its intent. However, its meaning is clear when read in context with all of § 135. G.L. c. 112, § 135 establishes a general prohibition to disclose information: "No social worker. . .may disclose any information. . ." In other words, a social worker is required to treat such information as confidential.

The social worker has no discretion to disclose information covered by the general prohibition. Therefore, when the general prohibition against disclosure is removed by subsection (b) ("the social worker ". . .shall not be required to treat [information] as confidential") (emphasis added) the general prohibition merely ceases to exist. Without statutory authority, social workers and their clients have no common law or other basis for claiming a privileged communication. Yaron v. Yaron, 83 Misc. 2d 276, 280, 372 N.Y.S. 2d 578 (Sup. Ct. N.Y. County, 1975).

The Legislature evidenced no intent to give social workers the discretion sought here by the witness-appellant. Compare with subsection (e) of § 135,[2/] added by St. 1981, c. 91, which explicitly granted discretion (to courts) to breach the privilege in child custody cases. Further evidence that the Legislature intended no discretion by social workers in §135(b) can be found in St. 1981, c. 91. Section 2 of St. 1981, c. 91, amended G.L. c. 119, § 51A, the so-called "child abuse mandated reporter statute," to allow social workers to report child abuse or neglect notwithstanding the privilege created in § 135. The amendment provided:

> Any privilege established by section one hundred and thirty-five of chapter one hundred and twelve. . .relating to confidential communications shall not prohibit the filing of a [child abuse or death] report pursuant to this section.

Section 1 of St. 1981, c. 91 additionally added exception

2/ See p. 4 supra, for text of subsection (e).

(d) to § 135 in order to allow a social worker to testify in, inter alia, care and protection proceedings under G.L. c. 119, § 24. It would be anomalous indeed for a social worker to be required to report child abuse (G.L. c. 119, § 51A), required to testify in a care and protection proceeding arising from such report (G.L. c. 112, § 135 (d)), yet not required to testify in a criminal proceeding arising from such incident. It is well established that where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose. Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds, Mass. Adv. Sh. (1981) at 420.

The Legislature has evidenced no demonstrable intent to give social workers unboundaried discretion to choose whether or not to testify to communications which reveal the contemplation or commission of a crime or harmful act. The absence of discretion from § 135(b) will not impair the social work-client relationship since, unlike with the attorney-client privilege, clients have no historical basis for believing such communications would be privileged.

II. A SOCIAL WORKER MAY NOT BE COMPELLED TO REVEAL INFORMATION RECEIVED FROM PERSONS CONSULTING HER IN HER PROFESSIONAL CAPACITY EXCEPT AS PROVIDED BY THE EXCEPTIONS IN G.L. c. 112 § 135.

In his January 14, 1982 Ruling and Order (reserved pending his report), Judge Brogna set forth an in camera hearing during which the social worker would reveal "all of

the alleged communications" (emphasis added) sought by the Commonwealth. The communications sought include,

> . . .communications made to [the social worker] by the defendant[,] Mark Collette [sic], from various members of the family of Stacey Whittaker (in whose custody the child was following hospital treatment), and from professionals working with other agencies.

The Commonwealth also sought

> Other communications of the social worker from other persons which. . .concern the child's appearance and behavior prior to her hospitalization and the feelings, observations, suspicions and hopes about the child and one another.

It is readily apparant that the Commonwealth desires the disclosure of communications far beyond the scope of "a communication that reveals the contemplation or commission of a crime or harmful act." It is equally apparant that Judge Brogna's Ruling and Order abets those desires and in effect makes § 135 a nullity. The Superior Court has cited no authority to justify its disregard of the social work-client privilege. While Judge Brogna does mention "the rights of the public," it appears that this reference is in support of his finding that social workers have no discretion to withold testimony pursuant to § 135(b), discussed supra. Even assuming, arguendo. that a "rights of the public" argument is raised to justify a breach of § 135, such an argument should be rejected. There is no mention in § 135 of any discretion by the court to breach the privilege on public interest or policy grounds. The Legislature did however, give the court discretion to breach the privilege in child custody matters. (G.L. c. 112, § 135(e)). It would, therefore,

appear that if the Legislature intended to give courts additional discretion to breach the privilege created by § 135 it would have done so. It should be noted that § 135(e) was added by St. 1981, c. 91, four years after the initial enactment of § 135. The Legislature thus had two opportunities to provide courts with additional discretion to breach the privilege. Similarly, the psychotherapist-patient privilege, G.L. c. 233, § 20B, gives explicit discretion to courts through an in camera hearing to breach the privilege in child custody matters.[3/] G.L. c. 112, § 135 should be inerpreted on the basis of what the Legislature has written. Globe Newspaper Co. v. Superior Court, supra. "[The court is] not free to water down the legislative policy embodied in the statute by loose construction or by giving [its] approval to informal procedures different from those prescribed." Usen v. Usen, 359 Mass. 453, 457 (1971).

A New York court commenting on several New York cases which breached the social work-client privilege on non-statutory "public policy" grounds, concluded this:

> When a court says it is balancing the privilege with some other interest, whether denominated a community interest or anything else, and then goes on

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3/ § (e) provides: In any child custody case in which, upon a hearing in chambers, the Judge, in the exercise of his discretion, determines that the psychotherapist has evidence bearing significantly on the patient's ability to provide suitable custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

to say that the danger to the relationship of the social worker to the client is outweighed by such other interest, it misses the real point. It is not the individual relationship between a client and a social worker that is injured. It is the general relationship between all clients and their social workers that is injured. It is the chilling effect on such a general relationship that is overlooked by courts when they apply the balancing act test.

If parties who are in need of help face the danger that some court will at some later date balance the privilege, which the clients believe they have every right to rely on, with some other so-called interest, what happens to the necessary "baring of the souls", the necessary "self-revelation", the necessary honesty required to provide the basis for such aid?

Who would wish to be subjected to such self-revelation faced with the possibility that at some later time a court will do a balancing act and declare that the privilege relied upon was a myth?

When the courts begin to destroy this privilege on the grounds, amongst others, that when custody or paternity, or some other so-called community interest is involved, then privilege is not the right it should be but a feeble pretense of privilege at the mercy of some balancing act by some court.

Privilege granted by the Legislature was not meant to be a myth. It was meant to cure the evil which had resulted from social workers either voluntarily or by court direction being forced to disclose communications given to them of the most intimate nature by people desperately in need of help. People were, and are, told that in order to be helped they must reveal the innermost parts of their emotional being - their most dreadful fantasies, their fears, their angers and desires. How can such persons have faith in this process if they become aware that some court can subsequently find that the confidence in

> which such feelings were revealed can be betrayed? Yaron v. Yaron, 83 Misc. 2d 276, 283-284, 372 N.Y.S. 2d 518 (Sup. Ct. N.Y. County, 1975).

The in camera hearing suggested by Judge Brogna in the instant case would require the social worker to disclose all of her communications in the presence of the district attorney and the defendant's attorney.[4/] It is obvious that once the social worker reveals her confidences, regardless of whether any one of them is subsequently testified to, the privilege has been forever breached.

The only communications properly available at the trial are those coming within the exceptions to § 135. The only in camera hearing, if indeed any is required, should be to determine the relevancy and materiality of communications which reveal the contemplation or commission of a crime or harmful act.

III. IT IS FOR THE SOCIAL WORKER TO DETERMINE WHICH COMMUNICATIONS, IF ANY, REVEAL THE CONTEMPLATION OR COMMISSION OF A CRIME OR HARMFUL ACT.

Judge Brogna's ruling implies that the court should determine which communications come within § 135(b). The in camera hearing is the instrument to enable the court to make that determination. NASW believes it is the social worker - not the court- who should make the decision. This conclusion

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4/ On January 26, 1982, Judge Brogna issued a Supplemental Ruling and Order Re Claim of Social Worker Privilege permitting the attorney for the defendant to be present at the in camera hearing and then to argue for disclosure of exculpatory evidence.

is supported by the following:

First - The phrase a "communication that reveals the contemplation on commission of a crime or harmful act" (§ 135(b)) is straightforward and unambiguous. Its meaning is not beyond the comprehension of a social worker. Social workers are already required to make similar conclusions under G.L. c. 119, § 51A, the child abuse reporting statute, which requires under threat of penalty up to $1000 that a social worker,

> who in his professional capacity shall have reasonable cause to believe that a child under the age of eighteen years is suffering serious physical or emotional injury resulting from abuse inflicted upon him including sexual abuse, or from neglect, including malnutrition or who is determined to be physically dependant upon an addictive drug at birth, shall immediately report such condition to the department [of social services]. . .

Second - The social worker is in the best position through training and experience to distinguish a client's expressions of rage, anger or hostility toward others from serious threats or admissions meeting the threshold of § 135(b). It would be inherently violative of the privilege in § 135 and of the therapeutic process itself if every client's articulated hostilities were subject to judicial and prosecutorial scrutiny.

Third - The court itself recognizes "that a judge will [not] necessarily have all the [ ] a decision whether or not to compel the social worker to disclose the communications [sought by the Commonwealth] or

any of them." Brogna, J., Ruling and Order, January 14, 1982, p. 3. The Superior Court's solution is to have the Assistant District Attorney "inform the judge as to the necessity for the disclosure of any or all of the communications in the case to be tried." Id., p. 3. Permitting the Assistant District Attorney to select from the menu of all communications eradicates the privilege. It is certainly more in keeping with the intent of the Legislature in creating the privilege to allow the social worker to determine which communications fit the statutory exceptions. This could be accomplished either in open court or in an in camera hearing, at which the examiner asks the social worker the following questions: "During the course of the defendant's consultations with you in your professional capacity, did the defendant make any communication to you which, in your judgment, revealed,

A. The contemplation of a crime?

B. The contemplation of a harmful act?

C. The commission of crime?

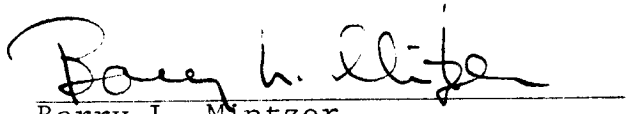
D. The commission of a harmful act?

Even assuming, arguendo, that the court should determine which communications come within § 135(b), such authority is not an open-ended invitation to inquire into all communications made to the social worker by the defendant and non-parties. It is difficult to imagine the court not being able to frame reasonable boundaries to guide both the District Attorney in his questions and the social worker in her answers.

CONCLUSION

For the foregoing reasons the Ruling and Order of the Superior Court should be reversed with directions to enter an order granting appropriate relief to the witness-appellant.

Respectfully submitted,
NATIONAL ASSOCIATION OF SOCIAL WORKERS (MASSACHUSETTS CHAPTER)
By its attorney,



Barry L. Mintzer
27 State Street
Boston, MA 02109
(617) 720-1000

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