

Taping a Minor Child's Phone Conversations

By Maury Klein, Esq.

After your divorce, you are granted physical custody of your minor child. Your spouse is granted visitation and telephone contact. Your spouse phones several times a week. After a while, you notice that after these telephone conversations, your child becomes visibly upset and withdrawn. You suspect something is seriously amiss.

As an attorney, you are capable of examining the legalities, but you decide that emotionally you are too close to the situation. The needs of your child demand to be protected, so you retain counsel.

You explain the situation and stress that you have an objective, good faith belief that your child's well being is at stake, and you are alarmed by what you observe after your child hangs up with your ex.

Your counsel advises you that because you have the best interests of your child at heart and you are the custodial parent, you have the authority to consent to taping your child's phone conversation. Your counsel suggests you tape conversations and move to severely restrict visitation based on the child's best interests.

Your former spouse finds out about this and ...

Scenario 1 sues you in the state courts for violation of the Omnibus Crime Control and Safe Street Act of 1968, 18 USC § 2510 *et seq.* (the federal wiretapping act), the Michigan eavesdropping statute, MCL § 750.539 *et seq.*; MSA § 28.807 *et seq.* and the common-law tort of invasion of privacy.

That scenario was the underlying fact pattern in *Williams v Williams*, 581 NW2d 777 (1998) with the Michigan Court of Appeals reasoning as follows:

The sole issue presented by the plaintiff on appeal is an issue of first impression for this Court: whether a custodial parent of a minor child may consent on behalf of the child to the interception of conversations between the child and another party and thereby avoid liability under the Michigan eavesdropping statute and the federal wiretapping act. Although there may be distinguishing factors not at issue in this case, these two statutes generally prohibit a person from similar conduct, the intentional interception or use of any wire, oral, or electronic communication under threat of criminal penalty or civil damages.¹ (Footnote Omitted.) Defendants argue that the recording

activity in this case does not come within the purview of either statute because of an implicit reference to consent in the state statute and an explicit reference in the federal act. Therefore, we must decide whether these references to consent may be construed so broadly as to include the type of vicarious consent exception advocated by defendants. We conclude that they cannot.

(1) First, regarding the Michigan eavesdropping statute, defendants argue that the tape recordings in this case do not come within the intended purview of the state statute because defendant Brent Williams stood in the place of his minor child by granting consent on the child's behalf. For a vicarious consent exception in the state statute, dependants rely on this Court's holding in *Sullivan v Gray*, 117 Mich App 476, 481; 324 NW2d 58 (1982), that the Michigan Legislature ambiguously excluded participant recording from the definition of eavesdropping by defining the subject conversation as "the private discourse of others?" MCL § 750.539a(2); MSA § 28.807(1) (2). Thus, defendants' argument is apparently that the subject conversations should not be considered "the private discourse of others" because defendant Brent Williams was a vicariously participant in the conversation by virtue of his role as custodial parent.

The goal of statutory construction is to ascertain and facilitate legislative intent. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994). The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). In the provisions of the Michigan eavesdropping statute, we find no indication that the Michigan Legislature intended to create an exception for a custodial parent of a minor child to consent on the child's behalf to interceptions of conversations between the child and a third party. If the Legislature had intended the result argued by defendants, then it could have included such an exception MCL § 750.539g;

MSA §28.807(7), the provision in the Michigan eavesdropping statute in which the Legislature delineated exceptions to the prohibition against eavesdropping. Because the Legislature did not include such an exception, we must presume it intended only the meaning that it plainly expressed. *Institute in Basic Life Principles, Inc v Watersmeet Twp* (After Remand), 217 Mich App 7, 12; 551 NW2d 199 (1996).

(2) Additionally, we do not believe that this Court's interpretation of the phrase "private discourse of others" in *Sullivan, supra* at 481, 324 NW2d 58, supports an enlargement of those statutory exceptions to include vicarious consent by a custodial parent. Indeed, this Court has previously interpreted the relevant provision of the Michigan eavesdropping statute to mean that even if an eavesdropper acts as an agent of a participant in the conversation, that third party nonetheless used a device to eavesdrop "upon the conversation without the consent of all parties thereto" contrary to MCL § 750.539c; MSA § 28.807(3), *Dickerson v Raphael*, 222 Mich App 185, 200; 564 NW2d 85 (1997). In any event, this Court has no authority to judicially create an

exception for tape recording made by a custodial parent with a child's vicarious consent because we may not speculate with regard to the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell* 214 Mich App 304, 310; 543 NW2d 11 (1995).

* * *

Because the activity in this case is encompassed by both the Michigan eavesdropping statute and the federal wiretapping act as written, we hold that the lower court erred in finding that defendants were entitled to judgment as a matter of law on this basis.² (Footnote omitted.) Having stated our holding in this case, we nonetheless recognize that several courts in other jurisdictions have analyzed this precise issue of vicarious consent within the context of a custody dispute. In general, these courts have been willing to extend the consent exception in the federal wiretapping act to include vicarious consent by a parent on behalf of a minor child to intercepting and using communications with a third party where such action is in this child's best interests.³ (Footnote omitted.)

To be concluded in the next issue.

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