

Dial 'W' for Wiretap  
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## Dial 'W' for Wiretap

The legality of taping telephone conversations between your child and the other parent

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A recent Delaware case highlighting the importance of wiretapping laws in custody disputes may be instructive to Pennsylvania family lawyers, as well as parents who may want to monitor their child's interactions with "the other" parent.

The decision, *G.J.G. v. L.K.A.*, 2006 Del. Fam. Ct. LEXIS 92 (Apr. 11, 2006), came in a case involving a custody dispute. In an effort to gather evidence, the mother recorded a telephone conversation between her son, 12, and his father without their knowledge. In the conversation, the father encouraged the child to lie about the mother. The mother and child had engaged in a physical altercation. The father questioned the child about the incident. Although the child repeatedly admitted that he had pushed his mother first, the father instructed the child to lie to the Division of Family Services and to tell them that his mother had started the fight.

The court noted that both the Federal Wiretapping Act, 18 U.S.C.S. Section 2510 et seq. and the Delaware Wiretapping Act, Del. Code. Ann. Tit. 11, Section 2401, permitted wiretapping provided that one party to the conversation gives consent. At issue was whether the mother could vicariously consent to the wiretapping on behalf of the child, which would make the recording admissible in the custody proceedings.

The Delaware court noted that federal courts generally accept vicarious consent as an exception to the prohibitions of the Wiretapping Act. The federal district court for Utah first adopted vicarious consent in *Thompson v. Dulaney*, 838 F.Supp. 1535 (D. Utah 1993) which has set a widely adopted standard. In that case, the mother recorded numerous telephone conversations between her two children (ages 3 and 5) and their father. The mother alleged that she had recorded the conversations because the father was interfering with her relationship to the children. The federal court held that "as long as the [parent] has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible for the [parent] to ... act in the best interests of the children."

The 6th U.S. Circuit Court of Appeals adopted the *Thompson* standard for reviewing vicarious consent in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998). In that case, the child was 14 years old. Noting the age of the child, the *Pollock* court nonetheless followed the *Thompson* standard, finding that the child's own ability to consent was not mutually exclusive with her mother's ability to vicariously consent on her behalf. The *Pollock* court declined to adopt a specific age cutoff, but warned that the doctrine "should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest ....'"

## Vicarious Consent

Although not unanimously, state courts have also adopted vicarious consent as an exception to state wiretapping statutes. In *Silas v. Silas*, 680 So.2d 368 (Ala. Civ. App. 1996), an Alabama appeals court found that the standard had been met when a parent "has a good faith basis that is objectively reasonable for believing that the minor child is being abused, threatened or intimidated by the other parent." In *Silas*, the father taped calls between his son, 8, and the mother, where the mother would call the child while at the father's home, and the child would become extremely upset and cry during the conversations.

In summarizing its survey of federal and state case law regarding vicarious consent, the Delaware court noted that the parent making the recording did not necessarily have to be the primary custodial parent. The court also observed that the child's age, the scope of the recording, and the alleged harm the recording parent believes to exist are all factors to consider in determining whether the parent had a good faith and objectively reasonable belief of harm to the child. It is important to note that there are some state courts that have declined to adopt vicarious consent as an exception to the

federal and state wiretapping statutes, the reasoning of which the Delaware court did not find to be compelling.

The Delaware court adopted the *Thompson* standard. The court held that the mother had vicariously consented to the recording of the telephone conversation between her son and his father, and thus the conversations were admissible. With regard to the child's age, the court noted that there are a number of circumstances, including health care, where a preteen child is not legally capable of giving consent. The court found that the mother did have a good faith basis that was objectively reasonable to believe it was necessary to consent on her son's behalf to a conversation between him and his father to prevent abuse, threats or intimidation by him. The mother recorded the conversation in her own home, following a physical altercation with her son. Based on the parties' history, the mother believed that the father would file an emergency application with the court or a complaint with DFS, and thus the encounter with her son was a sufficient basis on which to record the conversation.

The *G.J.G.* court recognized the concerns of other jurisdictions that the doctrine can be abused by parents who see vicarious consent "as a license to indiscriminately 'spy' on their child, their child's other parent, or other third parties." The court stated that the *Thompson* standard is intended to narrow the recordings which may be considered authorized by vicarious consent, as the test is not based upon the subjective intent of the recording parent, but rather requires that the recording parent's good faith belief be objectively reasonable.

### **Pennsylvania in the Minority**

Pennsylvania is in the minority of states that do not have a one-party consent statute. Thirty-seven states and the District of Columbia permit one party to intercept a wire, oral or electronic communication where one of the parties to a communication gives consent, while only thirteen states do not. In Pennsylvania, unless both parties consent to the communication being intercepted, the interception is illegal.

Nonetheless, this case is instructive for parents in Pennsylvania where the other parent lives out-of-state, because other states' laws may be applied under a conflict of laws analysis. Further, the federal wiretap statute may also be invoked. Interestingly, most of the states surrounding Pennsylvania are one-party consent states, including New York, New Jersey, Delaware, and Ohio.

In *Larrison v. Larrison*, 750 A.2d 895 (Pa. Super. 2000), the Superior Court affirmed that a recording made with only one party's consent in another state was admissible evidence in a Pennsylvania custody proceeding. In *Larrison*, the mother made a call to her ex-husband and his sister. The mother lived in Pennsylvania, and the father and his sister lived in New York. The father's sister recorded the conversation, which included a string of hostile and obscene comments by the mother to the father and his sister. Under New York law, a person can record his or her own conversations without the other party's consent. At a subsequent custody hearing, the mother argued that the recording was inadmissible under Pennsylvania law. The *Larrison* court found that there was a conflict of law. In its analysis, the court concluded that New York possessed a greater interest in allowing its citizens to record telephone conversations lawfully with only the consent of one party, and that it had no power to control the activities that occur within a sister state. Thus, the court held that the recording was admissible evidence. While not relying on the federal wiretap statute, the court did note that the conversation would have been admissible under that law as well. Other Pennsylvania courts have similarly found recordings made in one-party consent jurisdictions to be admissible in non-family law contexts.

Parents should also keep this doctrine in mind with respect to videotaped interactions. Where there is hostility between the parents, some choose to videotape custodial pick-ups and drop-offs. While the audio track would be subject to wiretapping statutes, the video track is not. Therefore, any gestures or other non-verbal communications would likely be admissible, presuming the videotape meets the applicable evidentiary requirements.

In sum, it is important for family law attorneys to understand not only Pennsylvania's wiretap law, but also differences and nuances in the federal wiretap act and other states' wiretap statutes. Parents who have a good faith, objective belief that recording a conversation is necessary to prevent abuse, threats or harm may be able to collect "evidence" of the other parent's actions, depending upon the location where the calls are being made or received. Alternatively, attorneys must also caution clients who present a "smoking gun" tape that under Pennsylvania law, no matter how relevant, the recording may not only be inadmissible, but also the client's conduct in making the recording is likely illegal. •