



PROFESSOR LEX

BY HARVEY I. HAUER

Dear Professor Lex,

Can you assist me? I need to know if my client did anything wrong when she taped a telephone conversation between her former spouse and their young child. Both she and the child's father have joint legal custody.

Dear Practitioner:

The facts in *Williams v Williams*, 229 Mich App 318, 581 NW2d 777 (1998) are similar to those you describe. The parent who did the taping in *Williams* had sole legal and sole physical custody. He believed this entitled him to tape their conversations between the child and the mother.

The issue in *Williams* was, may a custodial parent of a minor child consent, on behalf of his/her child, to the interception of conversations between the child and the other parent and thereby avoid liability under Michigan's eavesdropping statute and the federal wiretapping act. The court stated that this was a case of first impression in Michigan.

In their opinion, the court stated, in part:

The applicable provision of Michigan's eavesdropping statute provides the following: Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more

than \$2,000.00, or both. M.C.L. § 750.539c; M.S.A. § 28.807(3).

In part, 18 U.S.C. § 2511 states the following:(1) Except as otherwise specifically provided in this chapter any person who (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when-(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).



The Williams Court held:

*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 *324 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 in M.C.L. § 750.539g; M.S.A. § 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 N.W.2d 199 (1996).*

Additionally, we do not believe that this Court's interpretation of the phrase "private discourse of others" in Sullivan, supra at 481, 324 N.W.2d 58, supports an enlargement of those statutory exceptions to include vicarious consent by a custodial parent...

The Court in discussing the federal wiretapping act stated, in part:

...the federal wiretapping act is silent with regard to the types of consent that Congress contemplated. The exception to the federal statute simply provides for consent by "one of the parties to the communication." This language

*gives us no indication that Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf and tape record telephone conversations between the child and a third party. Were it the intent of Congress to create a safe harbor from liability for custodial parents recording the conversations of their children, it, too, could have easily done so. Instead, the federal wiretapping act states that any exceptions to its prohibitions are "specifically provided in this chapter." 18 U.S.C. § 2511(1). This Court will *326 not speculate with regard to the probable intent of Congress beyond the words expressed in the statute. Schnell, supra at 310, 543 N.W.2d 11.*

I suggest that you carefully review the holding in *Williams* with your client, who apparently, has violated the aforementioned statutes.

**Answer respectfully submitted by
Harvey I. Hauer, Hauer & Snover.**

Please send questions for Professor Lex to Hhauer@hauersnover.com. Include "Professor Lex" in the e-mail's subject line.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

