How to resolve disputes before they get out of control

By Richard S. Victor, Esq.

Some people say that the greatest human tragedy that we sustain is the death of a close family member. Yes, it is certainly true that losing a loved one causes significant pain and grief. But, other then the death of a child, which can never have a logical explanation, divorce and custody battles may cause a greater and longer lasting loss then any other human tragedy.

Moms, dads, grandparents, and kids who find their family embroiled in divorce and legal separation cases are going through a living death. Theirs is the death of a relationship. Moms and dads often feel that they have been betrayed or disappointed by their soon to be former spouse. They act out or react to the hurts they experience. People going through this emotional roller costar will find that they act emotionally and not logically. This will often lead to actions that are designed to hurt rather then help the family unit which is usually already in dysfunction.

Kids and grandparents find that they are almost like victims of a "drive by shooting." They may not see it coming, but certainly feel the effect of the result of the behavior.

When we lose a close friend or family member we mourn and remember lessons they have taught us and the life experiences we have shared. We then go on, holding their memories with us wherever we go. But, adults who go through divorce find that they want to forget the memories of the past and move on to a new life. It is sometimes too painful to think about the past. But, when parents divorce and they have children, they have a greater responsibility, which does not allow them the luxury of completely moving

on. They must be able to talk and communicate with each other now and into the future. Parents will find that they are no longer marriage partners, but they will always be parent partners with their former spouse. Unfortunately, the desire to "move on" and forget the past often results in custodial parents wanting little or nothing to do with their former spouse or their former spouse's family. Some parents may not even get along with their own family. The result of these feelings is to attempt to ignore their children's extended family, including grandparents, aunts, uncles, and sometimes even step siblings. Just like the victim of the "drive by shooting" the children have nothing to do with the action, but suffer the loss of the result.

This reality has caused lawsuits and court cases to be filed to try and stop the amputation of close family members of children by their custodial parents. These types of cases include denial of visitation or parenting time for non-custodial moms or dads, or grandparents who have been told that they can no longer see their grandchildren. This litigation is very expensive, both financially and emotionally, for the family. So, how can we help to resolve some of these disputes before they get so out of hand that lawyers and the court system need to become involved?

First, attempt to diffuse problems between family members before consulting an attorney to file a legal action. This can be done through telephone or written communication between the family members involved. Face to face meetings are also very helpful. Confrontational and accusatory statements should be avoided by all of the adults.

Second, respect each other's right to think and feel in their own way. Do not think that you are going to change the other person's beliefs. Recognize that a person may have

feelings that you may not understand or agree with, but, acknowledge their feelings and let them know that you understand how they feel. You may even want to come to an understanding that you may never always agree, but that you can resolve your dispute by agreeing to disagree.

Third, try to find a common thread that you have with the other. Often time this recognition may be the reality that you both have the love for and of the child or grandchild. It is imperative to remember that the best interests of the child, not necessarily the interests of the adults, should control. This will require adults to sometimes put themselves second to the needs of their children/grandchildren.

Fourth, the use of behavioral science specialists (i.e. social workers, psychologists, and sometimes even psychiatrists) may be suggested as neutral moderators of meetings between the adults to attempt to talk-out and resolve family problems that brought about the break-up between family members. Resolution, possible through these efforts, may help reunite families in dysfunction or at least avoid battles that scare everyone.

Fifth, try and think what it must feel like to be the opposite party in your dispute. If you are a custodial parent, how do you think you former spouse must feel when they are separated from their child(ren)? Or if you are not allowing your children to see or visit with their grandparents, what pain do you think that loss must feel like to them? What if it all was reversed and you were the one denied?

How children come through divorce and separation of their parents is measured by how the important adults in their life handle this deeply difficult and emotional time. Remember, children learn from not only what we tell them, but also from what they see.

HOW SAFE AND SACRED IS YOUR E-MAIL AND TELEPHONE CONVERSATIONS?

I have had several cases where e-mail has been a hot issue during the divorce. In one case, my client believed that his wife was having an affair and that there might be some incriminating e-mail. I issued a subpoena to the e-mail server and was able to get the e-mail, despite the fact that the other side was claiming privilege. Other cases have involved situations where people were using e-mail to communicate back and forth during an affair, to track any financial information, to gamble on the internet or even to watch pornography. The question is whether there is a privacy right to such e-mail communications and if so, is it privileged?

Another situation involved a divorce where the husband and wife worked for the same corporation. The wife believed that her husband was involved in an affair and got into his corporate e-mail. She obtained his e-mail because she had knowledge of the password and was able to obtain proof of an affair along with proof of some possible corporate misdeeds on his part. The question is whether she had the right to go into his e-mail on a corporate level.

In a child custody case, a mother tape recorded her daughter's conversations with her father from an extension phone. She wanted to know why her daughter did not want to visit with her father any more. The question is whether or not there were any violations of the law in these situations.

This article will examine the legality of reading your spouse's e-mail and/or recording your spouse's telephone conversations in the context of a divorce or custody proceeding. The potential civil or criminal liability that can stem from such conduct will be discussed. To begin, a review of the applicable statutes that govern the interception of electronic and oral communications is necessary.

Generally, there are three claims related to these issues: federal and state wiretapping statutes; the Electronic Communications Privacy Act ("ECPA"); and tort claims in privacy. First, the Federal Wiretapping Act in Title III[1] and the Michigan eavesdropping statute[2] prohibit the unauthorized interception, disclosure or use of communications, as well as eavesdropping on third party conversations. Violations of either statutes brings criminal sanctions and the federal statute also can expose an individual to a wide range of civil remedies.[3]

Next, is the Electronic Communications Privacy Act ("EPCA")[4] which amended the Federal Wiretap Act in 1986 to encompass the technology of computer communication. The EPCA prohibits the disclosure of the contents of electronic communications to any person. In *Jessup-Morgan v. America Online*,[5] the Court clarified the term "contents" as set forth in the statute. In *Jessup*, the Sixth Circuit held that AOL did not violate the EPCA when it revealed the name of one of its subscribers, pursuant to a civil subpoena. The Court held that this disclosure did not reveal the "contents"of the e-mail. Similarly, in *Hill v. MCI World Communications*[6], an Iowa Court held that revealing the phone number and duration of phone calls to one of its subscribers was not a violation of the EPCA. Therefore, although the EPCA prevents the communications companies from revealing the contents of e-mails, under subpoena, these companies will be able to reveal information related to the subscriber without revealing the actual e-mail contents.

Finally, there are several torts that stem from one's expectation of privacy, such as intrusion upon seclusion, false light, public disclosure of private facts. Civil damages related to such claims can flow from these. Courts look at an individual's objective and subjective expectation of privacy in their analysis of liability for these torts.[7] Further, without a violation of

the wiretapping or EPCA statutes, one's objective claim of privacy is diminished.

E-Mail

Generally speaking retrieving your spouse's e-mail from a home or work computer is not prohibited because you are accessing stored e-mail. Certainly, if your spouse knows the password to your computer, you have given your spouse authorization to access your computer. An understanding of how e-mail is transmitted is necessary to grasp the basis of the court's rulings related to e-mail retrieval.

Sent e-mail is temporarily stored on the service provider's server until the recipient retrieves it. E-mail is retrieved from the server after the subscriber enters his password, accesses his/her e-mail and opens the e-mail on his/her computer. Once the e-mail is opened, it is stored on the computer's hard drive. In the case of AOL, the e-mail is automatically stored on the computer's hard drive in the AOL Personal File Cabinet or PFC. E-mail will remain on the PFC until manually deleted. Usually, there is no automatic password protection provided for the PFC. The result is that anyone (your spouse or otherwise) can open the service provider's software on your computer's hard drive and read the PFC e-mails that are stored there.

Courts have consistently held that the retrieval of e-mail stored on a computer that is subsequently accessed, is not a violation of EPCA or the wiretapping statutes because the "transmission" of the e-mail is complete and reading stored e-mail is not an intercepted transmission. In *White v. White*[8], Mr. White exchanged e-mails with his girlfriend and these e-mails were stored on the family computer. Mrs. White hired an investigative service to obtain her husband's e-mails from their computer. The Court held that retrieval of such stored e-mail was not a violation of the law because it in its "post-transmission" storage.[9] Similarly, in *Fraser*

v. Nationwide Mutual Ins. Co[10]*.,* the Court held that the wife's reading of her husband's e-mail stored on his computer at work was not a violation of the EPCA or the state and federal wiretapping laws. The Court held that an individual's expectation of privacy with respect to such e-mail communications diminishes significantly after transmission is complete.[11] Further, the *Fraser* Court analogized stored e-mail to saved voice mail, and held that retrieval of such a communication is not a violation of the law because the transmission is complete at the point of retrieval and therefore no interception of the communication occurred.

Accordingly, once an e-mail has been read by the subscriber, it is no longer a protected communication that is afforded an expectation of privacy. Just as reading a letter left on a desk is permissible conduct, so is reading an opened e-mail.

Telephone Conversations

Eavesdropping on another individual's conversations, unlike opening another's e-mail, can be a civil, and even a criminal, violation of the law. The Michigan and federal statute wiretapping statutes prohibit such conduct. However, under both statutes, if the individual recording the conversation is a participant in the conversation, then there is no violation of the wiretapping statutes because such conversations were not "intercepted."[12] One exception to this rule focuses on the purpose of taping the conversations.[13] If the taped conversation is used to commit a crime (such as blackmail), although the person making the tape is a participant to the conversation, such recordings are illegal.[14] In the much publicized recorded tapes of Judge Ferrara of Wayne County Circuit Court, the Court held that although the Judge's husband (a participate in the taped conversation) had a right to record his conversations with her, because he sought to use the tapes to blackmail her, he was liable for damages.[15]

Spouses have attempted to escape the liability of the wiretapping statutes by invoking interspousal immunity to the wiretapping statutes. Most states do not recognize an interspousal immunity regarding the state and federal wiretapping statutes. Federal Courts[16] and Michigan Courts[17] have consistently held that the federal wiretapping statute in Title III does not recognize an interspousal exception. In *Young v. Young*, the Michigan Court of Appeals held that the husband's placement of a tape recorder under the bed to record his wife's telephone conversations was not entitled to immunity, despite the fact that the recordings were done within the marital home.[18]

There are other exceptions to the wiretapping statutes. One such exception to eavesdropping on the conversation of third parties without consequence, is if consent is obtained from one of the participants in the conversations. Obviously, in the context of an extramarital affair, it should be impossible to obtain such consent. However, in the case of a parent recording the conversations on behalf of her child, the Courts have recognized the exception in which the child gives a parent vicarious consent to eavesdrop on her conversation. In *Williams v. Williams*[19], the Court held that a five year old son gave his father vicarious consent to record his conversations with his mother. In *Pollack v. Pollack*[20], Mrs. Pollack taped conversations between her daughter and ex-husband. Here, the Sixth Circuit held that Mrs. Pollack had an objective basis for believing that taping the conversations was in the best interest of her child and therefore, her conduct fell into the exception and did not violate the Federal Wiretapping Act.

Others who have recorded their spouse's conversations have attempted to invoke other exceptions to the Federal Wiretapping Act, such as the business exception.[21] There are two elements to this exception, first, that there is recording equipment used on the phone line; and

second, that the tape recording is done in the ordinary course of business. In *United States v. Murdock*,[22] Mr. Murdock was being prosecuted for tax evasion. He attempted to suppress the use of his taped conversations because the tapes were made by his wife without authorization. The government argued that Mrs. Murdock's conduct fell within the business exception because she recorded conversations from an extension phone related to the family business. The Court ruled, however, that the wife's tape recording was not done in the ordinary course of her business and that she was wrong to do so. Despite the fact that the Court held that the taped conversations were recorded illegally, it still permitted the government to admit those tapes into evidence in its prosecution of Mr. Murdock, under the clean hands exception.[23]

In conclusion, it appears that reading e-mail is acceptable to anyone and everyone who has access to the computer upon which the e-mail is stored. An expectation of privacy to opened e-mail would be misplaced. Taping the conversations of others, however, is much more dangerous territory. Any attempt to do this could render the nonparticipant eavesdropper exposed to significant civil and possible criminal liability.

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1. 18 U.S.C. § 2510 *et seq.*

2. MCL 750.539c

3. 18 U.S.C. § 2520.

4.18 U.S.C. § *2701 et seq.*

5. 20 F. Supp. 2d 1105, 1108 (6th Cir. 1998).

6. 120 F.Supp. 2d 1194, 1196 (D. Iowa 2000).

7. *Dorris v. Absher, et al.*, 179 F.3d 420 (6th Cir. 1999).

8. 334 N.J. Super. 211, 781 A. D. 85 (2001).

9. *Id.* at 220.

10.115 F. Supp. 2d 623 (E.D.Pa 2001)

11. *Id.* at 637.

12. *Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W.2d 58 (1982).

13. 189 U.S.C. 2511(2)(d).

14. *Stocker v. Garrett,* 893 F.2d 856 (6th Cir. 1990).

15. *Ferrara v. Detroit Free Press, et al.*, 1998 U.S. Dist. LEXIS 8635.

16. *United States v. Murdock*, 63 F.3d 1391 (6th Cir. 1995); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976).

17. *Young v. Young,* 211 Mich. App. 446, 452, 536, N.W.2d 254, 257 (1995).

18. *Id.*

19. 237 Mich. App. 426, 603 N.W.2d 114 (1999).

20.154 F.3d 601 (6th Cir. 1998)

21. 18 U.S.C. § 2510(5)(a)(I).

22. *United States v. Murdock*, 63 F.3d 1391 (6th Cir. 1995).

23. *Id.* at 1396; 18 U.S.C. § 2515.

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