

Privacy Violations During Divorce in the USA

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adultery, confidential, divorce, e-mail, keystroke logger, privacy, private, spouse, spouses, tort, torts, videocamera, wiretap, wiretapping

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Introduction

In 1998, I posted a short essay on privacy law at my website, <http://www.rbs2.com/privacy.htm> and also an essay about privacy of e-mail at <http://www.rbs2.com/email.htm>. In response to those essays, I received some e-mails from anguished people who alleged their spouse had read confidential e-mail or chat transcripts on their computer, and then used the information in divorce litigation. The attorneys for my correspondents did *not* hire me as a consultant for legal research, and so I could not help them.

This fascinating topic has stewed in the back of my mind for years, as I thought about privacy rights of a spouse during marriage, and how such rights might change when the parties live “separate and apart” during divorce proceedings. In addition to privacy law and divorce law, this topic involves evidence law and both federal and state criminal law (e.g., wiretaps, unauthorized access to a computer, stored communications, etc.).

Much of the evidence in divorce litigation is testimony by the spouses. Such testimony commonly includes exaggerations and sometimes false statements. Perhaps in an attempt to get more credible evidence than personal testimony, a litigant in a divorce sometimes records the other spouse's telephone calls, videotapes the other spouse in the bedroom of their home, or retrieves the other spouse's e-mail. While such evidence is probably more reliable than personal testimony, collecting the evidence may invade the other spouse's privacy. Such an invasion of privacy is a tort, which makes the invader liable for paying damages to the victim. And because these are

intentional torts, homeowners insurance will pay for neither the damages nor the attorney's fees for defending the tort litigation.

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at <http://www.rbs2.com/advice.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

I use longer quotations from judicial opinions that is common in law review articles, simply to give the reader the most authoritative statement without the need to go to a law library and read dozens of opinions. In this way, my essay functions like a law school case book, but on a very narrow topic.

Expectation of Privacy

When two spouses live together there is some loss of privacy, because of their shared lives and because of their trust of each other.¹ When one spouse alleges a violation of his/her privacy, the initial question arises whether the spouse had a reasonable expectation of privacy, given the particular facts of the case.

marriage is a confidential relationship

Two people who are married to each other are in a fiduciary relationship. As part of that relationship, there is a legal obligations not to disclose confidential information to a third party and not to use confidential information for personal advantage. This fiduciary relationship *might* justify allowing one spouse to read the other spouse's communications, *if* the communications can *not* be legally disclosed. In litigation involving a third-party (or government), there is a fundamental rule of evidence that a spouse can not give evidence about "private communications which took place during the marriage", even after death of one spouse or after divorce, and not

¹ For a rare judicial recognition of this fact, see, e.g., *Clayton v. Richards*, 47 S.W.3d 149, 155 (Tex.App.–Texarkana 2001) ("A spouse shares equal rights in the privacy of the bedroom, and the other spouse relinquishes some of his or her rights to seclusion, solitude, and privacy by entering into marriage, by sharing a bedroom with a spouse, and by entering into ownership of the home with a spouse. However, nothing in the Texas Constitution or our common law suggests that the right of privacy is limited to unmarried individuals.").

even with consent of the other spouse. See, e.g., *Morgan v. U. S.*, 363 A.2d 999, 1004, n.5 (D.C. 1976) (citing *Hopkins v. Grimshaw*, 165 U.S. 342 (1897)). Other noteworthy cases on this marital communication privilege include:

- *Bassett v. U.S.*, 137 U.S. 496, 505 (U.S. 1890) (“It was a well-known rule of the common law that neither husband nor wife was a competent witness in a criminal action against the other, except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule.”);
- *Trammel v. U.S.*, 445 U.S. 40, 53 (1980) (“... we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification — vesting the privilege in the witness-spouse — furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.”);
- *U.S. v. Byrd*, 750 F.2d 585, 589 (7th Cir. 1984) (“Privileges such as the attorney-client, doctor-patient, or marital communications privilege exist at common law or by statute to protect those interpersonal relationships which are highly valued by society and peculiarly vulnerable to deterioration should their necessary component of privacy be continually disregarded by courts of law.”);
- *U.S. v. Bahe*, 128 F.3d 1440, 1444-1445 (10th Cir. 1997) (“We believe the accepted norm in this country is that intimate sex acts between marriage partners are communication and an important expression of love. If we limit the marital communications privilege as narrowly as the government seeks in the instant case, a spouse could testify to every aspect of the marital sexual relationship. There is something inherently offensive in that idea.”);
- *Pennsylvania v. Weiss*, 776 A.2d 958, 967-968 (Pa. 2001) (“... disclosure of confidential communications made during a marriage is prohibited even following the dissolution of the marriage. *Cornell v. Vanartsdalen*, 4 Pa. 364 (1846).”);
- *Connecticut v. Christian*, 841 A.2d 1158, 1175 (Conn. 2004) (“For the marital communications privilege to apply, the communications must have been made in confidence during the marriage. Once the marital communications privilege has attached, moreover, it continues to survive even after the marriage has ended. See *Pereira v. United States*, 347 U.S. 1, 6, 74 S.Ct. 358, 98 L.Ed. 435 (1954) (“divorce ... does not terminate the privilege for confidential marital communications”)....”);
- *Pagan v. Florida*, 29 So.3d 938, 958 (Fla. 2009) (“... there is a marital privilege for confidential communications made between spouses while they are husband and wife. See § 90.504, Fla. Stat. (2007). The privilege continues after the marital relationship ends as long as the communications were made during the marital relationship. Either party can invoke the privilege and refuse to disclose or prevent another from disclosing those communications. This privilege does not apply where the spouses are involved in proceedings against each other or one spouse is charged with a crime committed against the other spouse's person or property or that of a child of either.”).

The details of the spousal testimonial privilege and marital communications privilege vary amongst jurisdictions, and also change with time. Before using spousal privilege in a case, an attorney should carefully research recent cases in that jurisdiction. Because the marital privilege does not apply in family law cases, the marital privilege is not useful to bar evidence collected by

surveillance (i.e., privacy violations) in family law cases. However, the existence of the marital privilege shows that — in general — the law does respect marriage as a confidential relationship.

However, in a case involving a Jehovah's Witness refusal to consent to blood transfusion, in which an estranged Husband (living separate and apart) consented for her when Wife was hemorrhaging following a Caesarean section, the Florida Supreme Court noted that spouses do not relinquish their individual right to personal autonomy:

We note that marriage does not destroy one's constitutional right to personal autonomy. In *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990), we held in relevant part that “when the patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made, and not one that the surrogate might make for himself or herself, or that the surrogate might think is in the patient's best interests.” *Id.* at 13 (emphasis supplied). The majority below said it looked to the husband's consent as “relevant only for the purpose of considering whether alternative care for the surviving children is available, in weighing the overriding interest of the state, and in determining whether or not the spouse's decision to refuse the transfusion constitutes an abandonment.” *Dubreuil*, 603 So.2d at 542. However, implicit in the decision of the trial court, and in its approval by the district court, is acceptance of the hospital's decision to allow Luc [the estranged Husband] to assert his own views over Patricia's [his Wife's] wishes. This is impermissible. See *Browning*.

Matter of Dubreuil, 629 So.2d 819, 827, n.13 (Fla. 1993).

So even in matters of saving a spouse's life, the law — and the other spouse — must obey the wishes of the spouse who is in peril. Because this case was decided on constitutional privacy grounds (i.e., preventing government from interfering with personal decisions), it is also relevant to invasions of privacy by one spouse on the other spouse.² *Dubreuil* stands for the proposition that married people in Florida have the same right of privacy as unmarried people.

relationship changes when “living separate and apart”

In some states, a legal condition for filing for no-fault divorce is that the parties have lived “separate and apart” for at least a specified time before filing for divorce.³ In Pennsylvania law, the important condition is that they maintain separate lives, even though they may continue to share one residence.

² Laura W. Morgan and Lewis B. Reich, “The Individuals's Right of Privacy in a Marriage,” 23 JOURNAL OF AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 111, 125 and n.68 (2010).

³ See, e.g., New York Domestic Relations Law § 170(6) (enacted 1966, current Dec 2011) (“The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years....”); Ohio Revised Code § 3105.01(J) (effective May 1974, amended, current Dec 2011) (“... may grant divorces ... when husband and wife have, without interruption for one year, lived separate and apart without cohabitation.”); 23 Pa.C.S.A. § 3301(d) (enacted 1980, still current Dec 2011) (“The court may grant a divorce where ... the parties have lived separate and apart for a period of at least two years and that the marriage is irretrievably broken.”).

Separate lives, and not separate roofs, appear to be the gravamen of [23 Penn. Statutes] section 201(d). ¶¶ The realities of matrimonial experience dictate that economic urgencies, as well as other reasons, may impel spouses to remain under the same roof long after marital relations may otherwise have ended. A wall of silence or detachment may be equally as effective a barrier between parties as any wall of brick or stone in establishing a cessation of cohabitation.

Amelio v. Amelio, 18 Pa. D. & C.3d 673, 674-675 (Pa.Com.Pl. 1981).

See also *Thomas v. Thomas*, 483 A.2d 945, 947 (Pa.Super. 1984) (citing *Amelio*); *Flynn v. Flynn*, 491 A.2d 156, 159 (Pa.Super. 1985) (citing *Amelio*, “This position follows the trend of Pennsylvania case law in which a common residence is not a bar to showing that the parties live separate and apart in order to establish entitlement to support [or to dissolve their marriage.]”); *Mackey v. Mackey*, 545 A.2d 362, 365 (Pa.Super. 1988) (quoting *Flynn*); *Teodorski v. Teodorski*, 857 A.2d 194, 197-198, 2004 PA Super 313, ¶6 (Pa.Super. 2004) (“... the gravamen of the phase ‘separate and apart’ becomes the existence of separate lives not separate roofs.” Quoting *Wellner*, 699 A.2d 1278, 1281 (Pa.Super. 1997), which quotes *Flynn*.)

I wonder if this living “separate and apart” ends the fiduciary relationship, and puts the spouses at “arm’s length” in terms of contractual bargaining and lack of trust of the other spouse. If the spouses share a residence while living separate and apart (i.e., before and during pendency of a divorce), I suggest that they *not* share a computer. Sharing a computer with one’s opponent in litigation is a very bad idea, which just invites privacy violations. Divorce attorneys should explicitly recommend against such sharing of computer(s) with one’s opponent in divorce litigation. Purchasing a new computer for private use is much less expensive than paying an attorney to litigate alleged invasions of privacy.

spouse may be justified in investigating possible adultery

In some states, adultery continues to be grounds for divorce. Concealment of adultery is a fraud on the innocent spouse. I expect that privacy does *not* allow a married person to legally conceal adultery from the other spouse. As a practical matter, the innocent spouse may be exposed to sexually transmitted diseases by continuing intercourse with an adulterous spouse,⁴ so the innocent spouse *may* have a self-defense argument for wanting to know about adultery.

⁴ Jennifer Mitchell, Note, “Sex, Lies, and Spyware: Balancing the Right to Privacy against the Right to Know in the Marital Relationship,” 9 JOURNAL OF LAW AND FAMILY STUDIES 171, 183 (2007).

adultery *not* protected by privacy?

It seems well established that adultery is *not* protected by privacy law. The Texas Supreme Court wrote:

Similarly, several federal district courts have concluded that adultery is not protected by the right to privacy. E.g., *Oliverson v. West Valley City*, 875 F.Supp. 1465, 1480 (D.Utah 1995) (“Extramartial sexual relationships are not within the penumbra of the various constitutional provisions or the articulated privacy interests protected by the Constitution”); *Suddarth v. Slane*, 539 F.Supp. 612, 617 (W.D.Va. 1982) (holding that federal privacy rights do not include protection for adultery); *Johnson v. San Jacinto Junior College*, 498 F.Supp. 555 (S.D.Tex. 1980) (stating that right to privacy does not protect adulterous conduct).

City of Sherman v. Henry, 928 S.W.2d 464, 471 (Tex. 1996).

See also *Marcum v. Catron*, 70 F.Supp.2d 728 (E.D.Ky. 1999), *aff’d sub nom. Marcum v. McWhorter*, 308 F.3d 635, 642-643 (6th Cir. 2002) (deputy sheriff fired because of adultery); *Cawood v. Haggard*, 327 F.Supp.2d 863, 877-879 (E.D.Tenn. 2004) (Attorney’s adulterous relationship with his client was *not* “within a right of privacy that is constitutionally protected from government intrusion”.); *United States v. Orellana*, 62 M.J. 595, 598 (N.M.Ct.Crim.App. 2005) (adultery not constitutionally protected conduct under *Lawrence* where criminal offense has “purpose is to maintain good order and discipline within the service, while secondarily fostering the fundamental social institution of marriage.”), *rev. denied*, 63 M.J. 295 (C.A.A.F. 2006).

However, note that none of these cases were in the context of one spouse searching for evidence of adultery by the other spouse. Instead, the contexts were a government employee (e.g., policeman, teacher, military) being disciplined or dismissed from employment because of adultery.

private places

There is a strong connection between the Fourth Amendment prohibition against “unreasonable searches and seizures” (which regulates conduct of government agents who do not have a search warrant) and torts for invasion of privacy. A landmark U.S. Supreme Court case tells us: “... the Fourth Amendment protects people, not places.” *Katz v. United States*, 389 U.S. 347, 351 (1967). Thirty-one years later, the U.S. Supreme Court clarified what it meant in *Katz*:

But the extent to which the Fourth Amendment protects people may depend upon where those people are. We have held that “capacity to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” *Rakas [v. Illinois]*, [439 U.S. 128] at 143 [(1978)], See also *Rawlings v. Kentucky*, 448 U.S. 98, 106 ... (1980).

Minnesota v. Carter, 525 U.S. 83, (U.S. 1998).

There is also no doubt that people have a greater expectation of privacy in some places than in other places. For example, one has no reasonable expectation of privacy for conduct on a sidewalk in the downtown district, where one is surrounded by strangers. On the other hand, one has a high

expectation of privacy for conduct inside a home, and especially in a bedroom. There is a high expectation of privacy in substitutes for a home, such as a hotel or motel room. A person also has a high expectation of privacy for activities inside a rest room of a public building, and a higher expectation of privacy inside a bathroom of their home. There are also high expectations of privacy inside a lawyer's office (or clergy's office) when only the attorney and client (or clergy and parishioner) are present, because of the confidential relationship. Similarly, there is a high expectation of privacy in a physician's office, in a room where only the physician/nurse and patient are present. Looking at these examples, we can deduce the general principle that a high expectation of privacy attaches to places where both (1) strangers are excluded, *and* (2) either sole occupancy or any second person present has a confidential relationship (e.g., husband-wife, attorney-client, clergy-parishioner, physician-patient, or any other fiduciary relationship).

Cases

I have made numerous searches of state and federal cases in the Westlaw database for many different queries to find alleged privacy violations in divorce proceedings, use of keystroke loggers in divorce litigation, searches of trash for evidence to use in divorce litigation, etc. I have found remarkably few cases. I suggest that divorce litigation is more expensive than most people can afford, and litigating additional claims for alleged privacy violations preceding or during divorce would add even more legal fees — so the privacy violations routinely continue without any case law to cite to discourage these violations. Furthermore, damage awards for privacy violations tend to be small, so plaintiff's legal fees can be larger than the damage award — making it a pyrrhic victory.

A. wiretapping of spouse's telephone

A law review article in 2004 cited a 1976 study that

indicated that 79% of the illegal wiretapping reported to the Federal Bureau of Investigation (FBI) [between 1967 and 1974] for which a motive could be identified involved surveillance by spouses, parents, or those in courtship.

Richard C. Turkington, "Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Store Communications Acts and the Common Law Privacy Intrusion Tort," 82 NEBRASKA LAW REVIEW 693, 695-696 (2004) (citing NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL & STATE LAWS RELATED TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, *Electronic Surveillance* 160 (1976)).

The federal wiretap act, 18 U.S.C. §§ 2510-2521, prohibits one spouse from recording the telephone calls of the other spouse in most of the USA:

- *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976) (private detective, who was hired by Wife, is liable for wiretapping of Husband and his girlfriend);

- *United States v. Jones*, 542 F.2d 661 (6thCir. 1976);
- *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4thCir. 1984)
- *Kempf v. Kempf*, 868 F.2d 970, 972–73 (8thCir. 1989)
- *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10thCir. 1991), *cert. denied*, 503 U.S. 951 (1992);
- *United States v. Murdock*, 63 F.3d 1391, 1400 (6thCir. 1995) (“This court concludes that the absence of an interspousal exemption from the restrictions of Title III as recognized by this circuit, together with the general proposition that spying on one’s spouse does not constitute use of an extension phone in the ordinary course of business,”), *cert. denied*, 517 U.S. 1187 (1996);
- *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11thCir. 2003) (en banc) (“The language of Title III [18 U.S.C. §§ 2510–2522] is clear and unambiguous. It makes no distinction between married and unmarried persons or between spouses and strangers. an overwhelming majority of the federal circuit and district courts, as well as state courts, addressing the issue have refused to imply an exception to Title III liability for interspousal wiretapping. [citing cases]”).

Fifth Circuit

However, in the Fifth Circuit (i.e., Texas, Louisiana, and Mississippi) spouses may wiretap each other, under the much criticized holding of *Simpson v. Simpson*, 490 F.2d 803, 805 (5thCir. 1974) (“However, we are of the opinion that Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts.”), *cert. den.*, 419 U.S. 897 (1974). *Simpson*, 490 F.2d at 806, n.7 also relied on interspousal tort immunity, a relic from the 1800s that is now rejected by most states in the USA.⁵ For more criticism of *Simpson*, see:

- *United States v. Jones*, 542 F.2d 661, 668-672 (6thCir. 1976);
- *Ransom v. Ransom*, 324 S.E.2d 437, 438 (Ga. 1985);
- *PV Intern. Corp. v. Turner*, 765 S.W.2d 455, 469-470 (Tex.App.-Dallas 1988) (“... we believe that the decision in *Simpson* is wrong. We, therefore, decline to follow it.”), *writ denied*, 778 S.W.2d 865, 866 (Tex. 1989) (per curiam) (“The [Texas state] court of appeals declined to follow *Simpson v. Simpson*, 490 F.2d 803 (5thCir.), *cert. denied*, 419 U.S. 897, [...], which is factually analogous to the instant case.”);

⁵ William L. Prosser and W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, § 122 (5th ed. 1984); Carl Tobias, “Interspousal Tort Immunity in America,” 23 GEORGIA LAW REVIEW 359 (Winter 1989); Carl Tobias, “The Imminent Demise of Interspousal Tort Immunity,” 60 MONTANA LAW REVIEW 101 (Winter 1999).

- *People v. Otto*, 831 P.2d 1178, 1185-1190 (Calif. 1992) (at 1188: “*Simpson’s* reasoning has been subjected to severe criticism, and its holding has been repudiated by the vast majority of legal commentators and state and federal courts.”);
- *Pollock v. Pollock*, 154 F.3d 601, 606, n.12 (6thCir. 1998) (“While the Fifth Circuit has not overruled that decision, it has been severely criticized by a number of other circuits,”).

See also:

- Savalle Davis, “Wiretapping and the Confines of the Marital Home: *What Part of ‘Any’ Don’t You Understand?*,” 20 JOURNAL OF LEGISLATION 75 (1994).

Second Circuit

The Second Circuit has an oddball interpretation of the federal wiretap act in a case involving Wife, whose conversations with her 8 y old daughter were wiretapped (by using a telephone answering machine to record her calls) by her Husband for two years preceding divorce, to secure evidence for use in a child custody case.

The facts in the instant case, by contrast, present a purely domestic conflict a dispute between a wife and her ex-husband over the custody of their children a matter clearly to be handled by the state courts. We do not condone the husband’s activity in this case, nor do we suggest that a plaintiff could never recover damages from his or her spouse under the federal wiretap statute. We merely hold that the facts of this case do not rise to the level of a violation of that statute.

Anonymous v. Anonymous, 558 F.2d 677, 679 (2dCir. 1977).

Followed in *Janecka v. Franklin*, 684 F.Supp. 24 (S.D.N.Y. 1987), *aff’d*, 843 F.2d 110 (2dCir. 1988). Note that *Anonymous* cites *Simpson v. Simpson*, 490 F.2d 803 (5thCir. 1974), which was later overruled in *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11thCir. 2003) (en banc), so the authority for *Anonymous* is now weak.

It is not clear how much of *Anonymous* depends on the fact that one party to the wiretapped calls was a child. Below, at page 12, I cite cases that permit a parent to wiretap conversations between their child and the other parent. These cases form a strange exception to spousal wiretapping cases.

A U.S. District Court judge in Pennsylvania nicely refuted *Anonymous* in the Second Circuit:

Finally, Title III is not, as the defendants suggest, an intrusion by the federal government into the law of domestic relations, a subject traditionally left to the states. Title III regulates electronic eavesdropping, not marital relations. It proscribes one method of gathering evidence for use in, inter alia, domestic relations cases, but in no manner deals with the merits of such cases. The statute is unconcerned with questions of divorce, support, custody, property, etc., and though two opposing parties to the instant case are married, this case requires no resolution of such issues.

The institution of marriage is not such a “sacred cow” [footnote to: Comment, Interspousal Electronic Surveillance Immunity, 7 U. of Tol.L.Rev. 185, 196 (1975)] that when Congress seeks to prohibit a “dirty business” [footnote to: *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)] such as wiretapping it must abstain (or be

deemed to have abstained) from proscribing this wrong when committed by one spouse against the other. The evils of electronic surveillance are not peculiar to the marital relationship, and there is no more reason to permit husbands and wives to perpetrate these evils upon each other with impunity than there is to permit them legally to commit any other crimes against each other.

Our case is a simple one; we deal here only with a fundamental and cherished human right, that of privacy. The enjoyment of that right has been seriously imperiled by modern technology, prompting Congress to enact Title III as a barrier to further encroachment upon such enjoyment. Since the right of privacy has been afforded federal statutory protection, there is no justification for a federal court, presented with an “interspousal” Title III suit, to dismiss that suit by stating that it involves only a “domestic conflict”. [FN29]

FN29. For these reasons we must reject the holding of the Second Circuit in *Anonymous v. Anonymous*, 558 F.2d 677 (2dCir. 1977).

Kratz v. Kratz, 477 F.Supp. 463, 475-476 (D.C.Pa. 1979).

Incidentally, another court summarized the context of *Kratz*:

Kratz was a civil action brought under the federal wiretap statute. Defendant believed that his wife was having an extra-marital affair and asked his attorney whether he could place a wiretap on the family telephone. Counsel researched the applicable law and found a case from another jurisdiction that recognized an spousal immunity exception under Title III. *Kratz*, 477 F.Supp. [463] at 466 [(E.D.Pa 1979)], citing *Simpson v. Simpson*, 490 F.2d 803 (5thCir.), cert. denied, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974). However, counsel did not discover a more recent case from his own jurisdiction that rejected such an exception. [*Kratz*] at 466, n.4, citing *Remington v. Remington*, 393 F.Supp. 898 (E.D.Pa. 1975). The court refused to adopt the spousal exception but recognized a defense of “reasonable reliance upon a judicial interpretation of Title III.” [*Kratz*] at 484.

Peavy v. Harman, 37 F.Supp.2d 495, 511, n.13 (N.D.Tex. 1999). This paragraph shows the peril of doing inadequate legal research: Wife sued both Husband and his counsel for the wiretap. Even in December 2011, the Third Circuit (which includes Pennsylvania, where *Kratz* was located) has not ruled on a spousal exception to wiretapping. If counsel had done a nationwide search, he would have discovered that *Simpson* expresses the minority rule. But this research was in 1976, before online databases like Westlaw and Lexis made it easy to search for cases outside of one’s jurisdiction, and before most of the criticism of *Simpson*. Even with online databases, a complicated topic like spousal wiretapping with a split amongst circuits could take more than \$1000 in attorney time to research and understand, and very few clients want to spend so much money on legal research.

wiretapping children

There is authority for permitting wiretapping by one spouse, or by an ex-spouse, of conversations between the other [ex-]spouse and their child, for use in child custody hearings or criminal prosecutions.

- *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10thCir. 1991) (extension phone exception);
- *Thompson v. Dulaney*, 838 F.Supp. 1535, 1544 (D.Utah 1993) (vicarious consent);
- *Scheib v. Grant*, 22 F.3d 149 (7thCir. 1994) (extension phone exception);
- *Pollock v. Pollock*, 975 F.Supp. 974, 978 (W.D.Ky. 1997), *aff'd*, 154 F.3d 601, 610 (6thCir. 1998) (vicarious consent, emphasizing when there is a good-faith basis in the best interests of the child);
- *Campbell v. Price*, 2 F.Supp.2d 1186, 1189 (E.D.Ark. 1998) (vicarious consent);
- *Wagner v. Wagner*, 64 F.Supp.2d 895, 899-901 (D.Minn. 1999) (vicarious consent).

Some of these courts used a vicarious consent argument, in that the parent who wiretaps has consented on behalf of the child. Federal wiretap statute requires at least one party to the conversation to consent. The recorded parent did *not* consent, and — as a matter of law — a child (i.e., the other recorded party) can *not* consent. In my view, the [vicarious] consent of the recording parent is irrelevant, because he/she is not a party to the conversation. The whole vicarious consent doctrine seems to me to be an example of “the end justifies the means” — judges want reliable evidence in child custody cases, so the judges twist the law to justify a violation of the wiretap statute. My concern with permitting *any* wiretaps of a telephone is that the wiretap may also record privileged conversations (e.g., spouse and their attorney, physician, psychotherapist, clergy, etc.) and may also record other private conversations having no relevance to child custody.

Markham (Fla. 1973)

Husband, Thomas H. Markham, wiretapped his Wife’s telephone during divorce litigation, and used a tape recorder to record her conversations at the marital home. Husband introduced the recordings as evidence during hearings on temporary custody of the children. The trial court erroneously held that such wiretap evidence was admissible. On interlocutory appeal, the intermediate appellate court and Florida Supreme Court both held that such a wiretap was a violation of Wife’s privacy and the evidence was not admissible. *Markham v. Markham*, 265 So.2d 59 (Fla.App. 1972), *aff'd*, 272 So.2d 813 (Fla. 1973).

The intermediate court of appeals analyzed the law and concluded:

The undisputed facts in this cause are that neither party to the conversations consented to the interception. The interception of the conversations resulted from the wiretapping activities by a third party. The subject statute [Florida Statute § 934.01(4)] does not provide that a subscriber-husband is permitted to wiretap. It states unequivocally that ‘when none of the Parties to the communication has consented’, such interception should be allowed only upon a

court's order. The cited Florida constitutional provision [Article I, Declaration of Rights, Section 12, Searches and Seizures, Constitution of the State of Florida (1968)] shores up the conclusion that a husband does not possess the right to invade his wife's right of privacy by utilizing electronic devices.

A married woman is no longer her husband's chattel. She is a citizen — she is an individual — and her rights are as paramount as his. The law properly protects married women in their right to independently acquire, encumber, accumulate and alienate property at will. They now occupy a position as equal partners in the family relationship resulting from marriage and more often than not contribute a full measure to the economic well-being of the family unit. [footnote omitted] A husband has no more right to tap a telephone located in the marital home than has a wife to tap a telephone situated in the husband's office. Spying and prying by one spouse into the private telephone conversations of the other does not contribute to domestic tranquillity or assist in preserving the marital estate.

The statutory and constitutional law of the State of Florida precludes the admissibility into evidence of a recording of a telephone conversation, if neither party thereto consents, and in the absence of authorization for such recording by a court of competent jurisdiction. The instant recording is not admissible in evidence.

Markham, 265 So.2d at 61-62 (Fla.App. 1972).

As an aside here, one judge of the three-judge panel at the intermediate court of appeals dissented. The dissenting judge noted that Husband had paid for the telephone service that he wiretapped, and then the dissent evoked the role of Husband as Lord and Master of the Household:

The law has traditionally recognized the husband of a marriage to be the head of his household, which carries with it the privilege and duty of protecting it against injury, harm, or the threat thereof. He therefore possesses every legal right to take all steps deemed reasonably necessary to prevent destruction of his family unit, regardless of whether the attempt to damage or destroy his home emanates from an unfaithful wife, an ungrateful child, or a deceitful employee or guest. The constitutional right of privacy was never intended to apply to family relationships and must not now be extended to the point of preventing a husband from placing under surveillance a telephone line subscribed to by him and installed in his marital home if such is reasonably necessary in order to prevent harm or injury to his connubial relationship and domestic tranquillity.

As I read and interpret the controlling decisions on facts similar to those in this case, I conclude that the trial court's judgment is amply supported by *People v. Appelbaum*, 277 App.Div. 43, 97 N.Y.S.2d 807 (1950); *Erlich v. Erlich*, 278 App.Div. 244, 104 N.Y.S.2d 531 (1951); *Commonwealth v. Goldberg*, 208 Pa.Super. 513, 224 A.2d 91 (1966).

Markham, 265 So.2d at 62-63 (Fla.App. 1972) (Wigginton, J., dissenting).

Rather than comment on this anachronistic image of Husband as Lord and Master of the Household, who may wiretap his wife to “prevent harm to his ... domestic tranquility”, let me say that the Wife — quite properly in my view — responded to the wiretap by suing Husband and prevailing. So much for wiretaps as an instrument of “domestic tranquility”!

Incidentally, of the three cases cited in Wigginton's dissent, *Appelbaum* and *Goldberg* were decided on the basis that only one party to a communication needs to consent to the recording, but modern Pennsylvania law is that *all* parties must consent before the wiretapping is lawful. *Pennsylvania v. Jung*, 531 A.2d 498, 503-504 (Pa.Super. 1987). *Goldberg* is no longer good law.

Pennsylvania v. Parrella, 610 A.2d 1006, 1011-1012, n.3 (Pa.Super. 1992). *Appelbaum* is likewise no longer good law. *Pica v. Pica*, 417 N.Y.S.2d 528, 530 (N.Y.A.D. 1979). *Erlich* cites *Appelbaum*, so when *Appelbaum* falls, so does *Erlich*. All this leaves Wigginton's dissent without any cases to support his anachronistic opinion.

The fact that spouses know intimate, confidential details about their spouse hints that, during an intact marriage, spouses may voluntarily suffer a reduction in privacy compared to unmarried individuals. However, after *Markham* in Florida, during divorce litigation (or during living "separate and apart" in anticipation of a divorce), spouses have full privacy rights of individual, unmarried people.

The Florida Supreme Court tersely wrote in a four-to-one decision:

The District Court has correctly answered the question presented and its decision is adopted as the decision of this Court. The Statute in question makes no exception allowing admission of wiretap evidence in domestic relations cases when neither party to the communication consented to the interception.

Accordingly, the decision of the District Court [of Appeal] in this cause is affirmed and the writ is discharged.

Markham, 272 So.2d at 814 (Fla. 1973).

The remainder of this divorce and child custody case is not in Westlaw.

B. videotaping in bedroom

The history of technology shows us that soon after the availability of new technology, some miscreant uses the new technology to harm people. For example, after ancient men discovered how to create fire, someone used fire to commit arson. And so it is no surprise that videocameras are sometimes installed in bathrooms⁶ or bedrooms, in violation of people's privacy.

Installing a videocamera in a bedroom without knowledge of both parties is litigated as the privacy tort of intrusion upon solitude or seclusion, RESTATEMENT SECOND OF TORTS § 652B. If the images are shown to the public, then the privacy tort of "publicity given to private life" has been committed. RESTATEMENT SECOND OF TORTS § 652D. Both of these torts require that the privacy invasion be "highly offensive to a reasonable person", which is easy to satisfy with a

⁶ *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9thCir. 2001) (trucking company installed videocameras behind two-way mirrors in bathroom "ostensibly to detect and prevent drug use by its drivers"); *Doe v. GTE Corp.*, 347 F.3d 655 (7thCir. 2003) (videocameras in locker rooms of college sports teams); *U.S. v. Helton*, 302 Fed.Appx. 842 (10thCir. 2008) (D concealed videocamera in bathroom, charged with sexual exploitation of a child, affirmed 300 months in prison.); *Montana v. Sage*, 841 P.2d 1142 (Mont. 1992) (father videotaped daughter in bathroom with hidden camera); *Matter of Holloway*, 469 S.E.2d 167 (Ga. 1996) (attorney installed videocamera in bathroom of his cabin, then recorded his secretary there, attorney suspended from practice of law for three years); *Dana v Oak Park Marina*, 660 N.Y.S.2d 906 (N.Y.A.D. 1997) (marina installed videocamera in women's bathroom "for the purpose of detecting and curbing vandalism"); *Sawicka v Catena*, 912 N.Y.S.2d 666 (N.Y.A.D. 2010) (employer hid videocamera in women's bathroom).

videocamera in a bedroom. In states that do not recognize privacy torts, this invasion of privacy can be litigated as intentional infliction of emotional distress.⁷ RESTATEMENT SECOND OF TORTS § 46.

Hamberger v. Eastman (N.H. 1965)

The Hambergers were Husband and Wife, who rented an apartment from Eastman. The Hambergers alleged that Eastman put “a listening and recording device” in the bedroom used by the Hambergers. The recording device was in Eastman's dwelling, which was adjacent to the Hambergers. Husband discovered the microphone in October 1962. *Hamberger v. Eastman*, 206 A.2d 239, 239 (N.H. 1965).

The New Hampshire Supreme Court wrote:

We have not searched for cases where the bedroom of husband and wife has been ‘bugged’ but it should not be necessary — by way of understatement — to observe that this is the type of intrusion that would be offensive to any person of ordinary sensibilities. What married ‘people do in the privacy of their bedroom is their own business so long as they are not hurting anyone else.’ Ernst and Loth, FOR BETTER OR WORSE, 79 (1952). The RESTATEMENT [FIRST] TORTS § 867 provides that ‘a person who unreasonably and seriously interferes with another's interest in not having his affairs known to others * * * is liable to the other.’

Hamberger v. Eastman, 206 A.2d 239, 241-242 (N.H. 1965). The New Hampshire Supreme Court unanimously recognized a privacy tort in this case.

If the peeping Tom, the big ear and the electronic eavesdropper (whether ingenious or ingenuous) have a place in the hierarchy of social values, it ought not to be at the expense of a married couple minding their own business in the seclusion of their bedroom who have never asked for or by their conduct deserved a potential projection of their private conversations and actions to their landlord or to others.

Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1965).

The defendant argued that there was no violation of privacy, because there was no allegation (and no evidence) that anyone listened to the tape recordings. Defendant’s argument was rejected by the court:

The defendant contends that the right of privacy should not be recognized on the facts of the present case as they appear in the pleadings because there are no allegations that anyone listened or overheard any sounds or voices originating from the plaintiffs' bedroom. The tort of intrusion on the plaintiffs' solitude or seclusion does not require publicity and communication to third persons although this would affect the amount of damages, as Prosser makes clear. Prosser, TORTS, 843 [(3d ed. 1964)]. The defendant also contends that the right of privacy is not violated unless something has been published, written or printed and that oral

⁷ *Dana v Oak Park Marina*, 660 N.Y.S.2d 906, 909-910 (N.Y.A.D. 1997) (“complaint states a cause of action for reckless infliction of emotional distress.”); *Sawicka v Catena*, 912 N.Y.S.2d 666 (N.Y.A.D. 2010) (videocamera in bathroom was “unquestionably outrageous and extreme”).

publicity is not sufficient. Recent cases make it clear that this is not a requirement. *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841; *Bennett v. Norba*, 396 Pa. 94, 151 A.2d 476, 71 A.L.R.2d 803; *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So.2d 321. *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1965).

In modern law, the act of installing surveillance equipment in a private place violates the privacy right of intrusion on solitude or seclusion. RESTATEMENT SECOND OF TORTS § 652B, comment *b*. Publicly distributing the fruits of the surveillance would violate the privacy right of publicity given to private life. RESTATEMENT SECOND OF TORTS § 652D. Note that *Hamberger* was prior to the availability of inexpensive videocameras and videotape recorders, but the issues are the same in audio recording and audio-video recording.

Miller v. Brooks (N.C.App. 1996)

Estranged wife, Annette K. Miller, and her private investigator, Gregory Brooks, installed a hidden videocamera in the ceiling of the bedroom of the husband's house⁸ in February 1993. A few days later, "plaintiff returned home and discovered a pile of dust or dirt on the floor indicating that someone had been in his house. He engaged a private detective who helped him locate and remove the camera and videotape. They watched the videotape which showed pictures of plaintiff in his bedroom, getting undressed, taking a shower, and going to bed."⁹

Husband sued his estranged wife, her private investigator and his two assistants for a declaratory judgment and compensatory and punitive damages for invasion of privacy, intentional infliction of emotional distress, trespass, and damage to real property. The trial judge granted summary judgment to all defendants, a three-judge panel of the appellate court unanimously reversed, and the state supreme court declined to hear the case. *Miller v. Brooks*, 472 S.E.2d 350, 353 (N.C.App. 1996), *review denied*, 483 S.E.2d 172 (N.C. 1997).

The intermediate appellate court held that North Carolina recognizes a tort for intrusion on seclusion, RESTATEMENT SECOND OF TORTS § 652B.

... plaintiff's forecast of the evidence shows that defendants invaded his home, indeed, his bedroom, and placed a hidden video camera in his room which recorded pictures of him undressing, showering, and going to bed. Plaintiff had every reasonable expectation of privacy ... in his home and bedroom. A jury could conclude that these invasions would be highly offensive to a reasonable person.

Miller, 472 S.E.2d at 354.

⁸ The January 1991 separation agreement gave husband sole possession of the house. The wife and private investigator used the services of a locksmith to gain entrance to husband's house to install the videocamera, because wife had given her key to husband. 472 S.E.2d at 352.

⁹ *Miller*, 472 S.E.2d at 352-353.

The intermediate appellate court rejected Defendants' arguments that the entry into the house was somehow authorized because wife was still technically married to husband, although the spouses lived in a separate residences.

We reject defendants' assertion that the marital relationship between plaintiff and defendant Annette Miller precludes plaintiff from asserting an intrusion claim. The couple agreed, in a written separation agreement, that plaintiff would have sole possession of the Buck Lane premises. Granted, the couple's attempted reconciliation may have voided this agreement. See N.C. Gen.Stat. § 52-102 (1991); *Schultz v. Schultz*, 107 N.C.App. 366, 368-73, 420 S.E.2d 186, 188-90 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). However, even if the separation agreement were nullified by the attempted reconciliation, there is evidence that, at the time of the intrusions, plaintiff and defendant Miller were living separately and had agreed that only plaintiff would live in the marital residence. The evidence raises a genuine issue of material fact as to whether plaintiff had authorized her to enter his house without his permission. Furthermore, there is no evidence that plaintiff authorized his wife or anyone else to install a video camera in his bedroom

Although a person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons, such is not the case here where the spouses were estranged and living separately. Further, the marital relationship has no bearing on the acts of defendants Brooks, Hite, Brooks Investigations, and Massaroni. Plaintiff's marriage to defendant Miller did nothing to reduce his expectations that his personal privacy would not be invaded by perfect strangers. The acts of installing the hidden video camera and the interception of plaintiff's mail as alleged and forecasted are sufficient to sustain plaintiff's claims for invasion of privacy by intrusion on his seclusion, solitude, or private affairs. Plaintiff has offered sufficient proof of these acts, many of which are admitted in defendants' depositions, to survive summary judgment.

Miller, 472 S.E.2d at 354-355.

In also accepting husband's claim that Defendants trespassed on his property, the intermediate appellate court said:

Defendants assert that, as plaintiff's wife, defendant Miller was authorized to enter the house and could give others the right. Defendants further dispute plaintiff's testimony that he directed defendant Miller not to enter the house in his absence and without his permission. We conclude that there is a genuine issue of material fact on this issue. Even if she had permission to enter the house and to authorize others to do so, there is also evidence to create a genuine issue of material fact as to whether defendants' entries exceeded the scope of any permission given.

....

.... If plaintiff had the right of possession at the time of the entries and if defendant Miller [wife] had no such right, any entries made by her without plaintiff's consent, or by the other defendants, constitute trespass. This is true even if defendants entered the premises with a bona fide belief that they were entitled to enter the property since such a belief is no defense to trespass. See *Industrial Center*, 271 N.C. at 163, 155 S.E.2d at 506 (citing, inter alia, RESTATEMENT OF TORTS (SECOND) § 164). Similarly, defendants cannot escape liability by asserting that they relied on the advice of counsel in mistakenly concluding that they were

entitled to enter plaintiff's property. See RESTATEMENT (SECOND) OF TORTS § 164, Comment a. (1965).

Miller, 472 S.E.2d at 355-356.

The intermediate appellate court also held that Husband's claim of intentional infliction of emotional distress was adequate to withstand Defendants' summary judgment motion. *Miller*, 472 S.E.2d at 356.

There is nothing in this judicial opinion about Wife's motive for putting a videocamera in Husband's bedroom. The final result of this case is not in Westlaw.

Plaxico v. Michael (Miss. 1999)

In a revolting case, Husband, Glenn Michael, stood outside his ex-Wife's bedroom window in June 1993 and made three photographs of his ex-Wife's lesbian lover. The photographs showed the lover "nude from the waist up." Husband used the photographs in family court to get custody of his 6 y old daughter awarded to him. The lover filed litigation against Husband for "intrusion upon the solitude or seclusion". The trial court dismissed the Complaint and, in a four-to-four decision, the Mississippi Supreme Court affirmed. *Plaxico v. Michael*, 735 So.2d 1036, 1037-38, ¶¶1-8 (Miss. 1999) (en banc).

The majority opinion said:

¶ 14. Plaxico was in a state of solitude or seclusion in the privacy of her bedroom where she had an expectation of privacy. However, we conclude that a reasonable person would not feel Michael's interference with Plaxico's seclusion was a substantial one that would rise to the level of gross offensiveness as required to prove the sub-tort of intentional intrusion upon seclusion or solitude.

¶ 15. No one would dispute that parents have a predominant and primary interest in the nurture and care of their children. *Ethredge v. Yawn*, 605 So.2d 761, 764 (Miss. 1992). In child custody matters the best interest of the child is the polestar consideration. *Mercier v. Mercier*, 717 So.2d 304, 306 (Miss. 1998). Here, Michael became concerned about the welfare of his daughter, who was in the custody of his former wife. Michael's former wife subleased a cabin from him, and invited Plaxico to be her roommate. His concern was based on numerous rumors of an illicit lesbian sexual relationship between Plaxico and his former wife. Michael decided that it was not in the best interests of his daughter to allow her to remain in the custody of her mother, and he wanted to obtain custody of the child. It is of no consequence that the mother was having an affair with another woman. She could have been carrying on an illicit affair with a man in the home where the child was, and any father would feel that this too was inappropriate behavior to be carried on in the presence of the child. A modification would still be desired by the parent.

¶ 16. In the present case, Michael did want to file for modification of child custody. However, he had no proof that there actually was lesbian sexual relationship which could be adversely affecting his minor child. In order to obtain such proof, he went to the cabin, peered through the window and took pictures of the two women engaged in sexual conduct. Three pictures were actually developed which were of Plaxico in a naked state from her waist up in her bed. Michael believed that he took these pictures for the sole purpose to protect his minor

child. Although these actions were done without Plaxico's consent, this conduct is not highly offensive to the ordinary person which would cause the reasonable person to object. In fact, most reasonable people would feel Michael's actions were justified in order to protect the welfare of his minor child. Therefore, the elements necessary to establish the tort of intentional intrusion upon solitude or seclusion are not present.

Michael, 735 So.2d at 1039-40, ¶¶14-16 (majority opinion).

Justice Fred L. Banks, joined by three other justices, wrote in dissent:

¶ 21. In my view, peeping into the bedroom window of another is a gross invasion of privacy which may subject one to liability for intentional intrusion upon the solitude or seclusion of that other. See *Candebat v. Flanagan*, 487 So.2d 207, 209-10 (Miss. 1986); RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 2 (1977) (invasion of privacy would occur if private investigator, seeking evidence for use in a lawsuit, looks into plaintiff's bedroom window with telescope for two weeks and takes intimate photographs).

¶ 22. The trial court found refuge in what it found to be a qualified privilege to see to the best interest of a child. Neither rumors concerning an ex-wife's lifestyle nor a parent's justifiable concern over the best of interests of his child, however, gave Michael license to spy on a person's bedroom, take photographs of her in a semi-nude state and have those photographs developed by third parties and delivered to his attorney thereby exposing them to others.

¶ 23. In another context, we have observed that “the end does not justify the means.... Our society is one of law, not expediency. This message must be repeated at every opportunity ...” *Mississippi Bar v. Robb*, 684 So.2d 615, 623 (Miss. 1996). I regret that today's majority here does not follow these worthy ideals.

Michael, 735 So.2d at 1040-41, ¶¶21-23 (Banks, J., dissenting).

Justice Chuck McRae, joined by Justice Banks, dissented:

¶ 24. Ms. Plaxico, the paramour of Michael's ex-wife, however, was not a party to the custody proceedings. As the majority points out, it matters not whether Michael's former wife was involved in a lesbian or a heterosexual relationship. Michael was not at liberty to peek in the women's bedroom window, an act that can only be characterized as voyeuristic. Nor was he at liberty to take photographs of Plaxico and share them with his attorney. At best, only pictures of his former wife could possibly be characterized as helpful to Michael's case. As to Plaxico, any privilege allowed Michael is misplaced. Accordingly, I dissent.

Michael, 735 So.2d at 1041, ¶24 (McRae, J., dissenting).

Note that voyeurism is a *crime* in Mississippi. *Warren v. State*, 709 So.2d 415 (Miss. 1998); *Gilmer v. State*, 955 So.2d 829, 832, ¶1 (Miss. 2007) (“ ‘video voyeur’ statute, Miss.Code Ann. § 97-29-63 (Rev. 2006).”); *Simoneaux v. State*, 29 So.3d 26, 32, ¶13 (Miss.App. 2009) (“... charged with voyeurism, in violation of Mississippi Code Annotated section 97-29-61 (Rev. 2006). This section makes clear that ‘[a]ny person who enters upon real property whether the original entry is legal or not, and thereafter pries or peeps through a window ... for the lewd, licentious and indecent purpose of spying upon the occupants thereof, shall be guilty of voyeurism.”). Regardless of any specific privacy tort, it is tortious to violate a statute enacted to protect someone. RESTATEMENT SECOND OF TORTS, §§ 285(b), 286.

Note also that Michael's ex-wife is *not* an adulterer. She was divorced at the time and free to have sex with whomever she wished. The judicial opinion in *Michael* mentions neither the word "adultery" nor "adulterer". The perversion of privacy when child custody is involved is also apparent in federal wiretapping cases, see page 12, above.

Clayton v. Richards (Tex.App. 2001)

In mid-1999, Wife and her private investigator, James Michael Richards, installed a videocamera in the bedroom of her home in Texas, because Wife "had been advised by a psychic that her husband had been committing adultery".¹⁰ Wife then departed for a vacation in Virginia.¹¹ Husband sued both Wife and her private investigator for invasion of privacy. The trial court granted summary judgment to the private investigator, but denied summary judgment to the Wife. Husband then appealed the erroneous grant of summary judgment to the private investigator, the appellate court reversed the trial court, and the Texas Supreme Court refused to review the case. *Clayton v. Richards*, 47 S.W.3d 149 (Tex.App.—Texarkana 2001), *review refused*, (Tex. 10 Jan 2002).

The Texas intermediate appellate court addressed Husband's reasonable expectation of privacy:

A spouse shares equal rights in the privacy of the bedroom, and the other spouse relinquishes some of his or her rights to seclusion, solitude, and privacy by entering into marriage, by sharing a bedroom with a spouse, and by entering into ownership of the home with a spouse. However, nothing in the Texas Constitution or our common law suggests that the right of privacy is limited to unmarried individuals. *Collins v. Collins*, 904 S.W.2d 792, 797 (Tex.App.—Houston [1st Dist.] 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996) (the *Collins* case involved a statutory violation of the prohibition against the use of illegally intercepted telephonic communications).

When a person goes into the privacy of the bedroom, he or she has a right to the expectation of privacy in his or her seclusion. A video recording surreptitiously made in that place of privacy at a time when the individual believes that he or she is in a state of complete privacy could be highly offensive to the ordinary reasonable person. The video recording of a person without consent in the privacy of his or her bedroom even when done by the other spouse could be found to violate his or her rights of privacy.

As a spouse with equal rights to the use and access of the bedroom, it would not be illegal or tortious as an invasion of privacy for a spouse to open the door of the bedroom and view a spouse in bed. It could be argued that a spouse did no more than that by setting up a video camera, but that the viewing was done by means of technology rather than by being physically present. It is not generally the role of the courts to supervise privacy between spouses in a mutually shared bedroom. However, the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters, which could later be exposed to the public eye.

¹⁰ *Clayton*, 47 S.W.3d at 152, 154.

¹¹ *Clayton*, 47 SW3d at 153.

The fact that no later exposure occurs does not negate that potential and permit willful intrusion by such technological means into one's personal life in one's bedroom. It has been held that the taking of the picture in the privacy of a home without consent may be considered an intrusion of privacy.^{FN4} See generally Phillip E. Hassman, Annotation, Taking Unauthorized Photographs as an Invasion of Privacy, 86 A.L.R.3d 374 (1978).

FN4. Cf. *Plaxico v. Michael*, 735 So.2d 1036 (Miss. 1999), a father's actions in taking nude pictures of a mother's lesbian paramour from a window of a cabin in which the mother, daughter, and paramour lived following the parents' divorce did not amount to an intentional intrusion on the solitude or seclusion of the paramour, where the father's actions were to prove an illicit lesbian relationship affecting the minor daughter. The father sought such proof in support of his motion for modification of custody.

Clayton, 47 S.W.3d at 155-156.

The intermediate appellate court reversed the summary judgment to the private investigator, and remanded the case for trial. The final result is in Westlaw. *Clayton v. Richards*, 2003 WL 25774578 (Tex. Dist. 25 Mar 2003) (NO. D-162111-A(MGS)).

Justice Ross of the Texas intermediate appellate court wrote the following concurring opinion that analogizes videotaping with wiretapping:

Since this case presents an issue of first impression, I believe it helpful to analyze the issue in relation to the established privacy rights developed under the laws, both federal and state, pertaining to wiretapping. For example, federal law prohibits interspousal wiretapping within the marital home. See 18 U.S.C.A. §§ 2510–2513, 2515–2520 (West 2000); *Collins v. Collins*, 904 S.W.2d 792 (Tex. App.—Houston [1st Dist.] 1995), writ denied per curiam, 923 S.W.2d 569 (Tex. 1996); *Turner v. PV Int'l Corp.*, 765 S.W.2d 455 (Tex. App.—Dallas 1988), writ denied per curiam, 778 S.W.2d 865 (Tex. 1989); accord *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976). [FN5] Texas law also prohibits interspousal wiretapping. See *Tex. Pen. Code Ann.* § 16.02 (Vernon Supp. 2001); *Duffy v. State*, 33 S.W.3d 17, 24 (Tex. App.—El Paso 2000, no pet.); *Collins*, 904 S.W.2d at 796–97. The act of videotaping a spouse does not meet the technical requirements to come under these prohibitions. See *Duffy*, 33 S.W.3d at 23; *United States v. Torres*, 751 F.2d 875, 880 (7th Cir. 1984). However, the underlying concern of both the federal and state wiretap statutes was to protect the right of privacy. See *Gelbard v. United States*, 408 U.S. 41, 48–50, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972); *Collins*, 904 S.W.2d at 797. An individual's right of privacy is compromised no less from being secretly videotaped than from being secretly recorded. A secret videotape of an individual who presumes to be in a private place is an even greater intrusion of privacy than secretly recording conversations. *Torres*, 751 F.2d at 878. Videotapes are a simultaneous audio and visual recording of events. *Ali v. State*, 742 S.W.2d 749, 754 (Tex. App.—Dallas 1987, writ ref'd).

FN5. Only two federal circuits have read an interspousal exemption from the federal wiretap statute. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974). These opinions have been widely criticized. See *Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. App.—Houston [1st Dist.] 1995), writ denied per curiam, 923 S.W.2d 569 (Tex. 1996); *People v. Otto*, 2 Cal.4th 1088,

9 Cal.Rptr.2d 596, 831 P.2d 1178, 1184–90 (1992); Scott J. Glick, *Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance*, 41 CATH. U.L.REV. 845 (1992).

Cases decided under the federal wiretap statute have found third-party invasions into the marital union to be egregious. “For purposes of federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse’s employ. The end result is the same — the privacy of the unconsenting parties to the intercepted conversation has been invaded.” *United States v. Jones*, 542 F.2d 661, 670 (6thCir. 1976). Even in the most noted case for an interspousal exception to the federal wiretap statute, the Fifth Circuit stated that “to our minds a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse’s privacy of much greater magnitude than is personal surveillance by the other spouse.” *Simpson v. Simpson*, 490 F.2d 803, 809 (5thCir. 1974); see *Remington v. Remington*, 393 F.Supp. 898 (E.D.Pa. 1975).

Based on these authorities, it is clear that married individuals retain rights of privacy, especially against third parties. The concern with these rights is evident from the federal and state wiretap statutes which have no exception for acts between spouses. By logical deduction, it can be reasoned that if unauthorized recording of a telephone conversation by one spouse against the other violates the unconsenting spouse’s right of privacy, then unauthorized videotaping of a spouse’s actions violates the same right of privacy. *Clayton*, 47 S.W.3d at 156-157 (Ross, J., concurring).

Lewis v. LeGrow (Mich.App. 2003)

Three ex-girlfriends sued their ex-boyfriend, James Frances LeGrow, for videotaping them during sexual intercourse with him. “... a jury found that defendant violated M.C.L. § 750.539d [the eavesdropping statute], invaded plaintiffs [names omitted] common-law right to privacy, and intentionally or recklessly inflicted emotional distress.” The jury awarded the plaintiffs a total of \$355,000. The boyfriend appealed and the appellate court affirmed. *Lewis v. LeGrow*, 670 N.W.2d 675, 680, 682 (Mich.App. 2003).

“This case involves the surreptitious, nonconsensual videotaping of intimate acts of sexual relations in defendant James F. LeGrow’s bedroom.” *Lewis*, 670 N.W.2d at 680. Each plaintiff testified that she did not consent to videotaping. *Lewis*, 670 N.W.2d at 681. The appellate court wrote:

Here, there is no question that defendant’s bedroom meets the required definition of a “private place” as one from which the general public is excluded. Likewise, plaintiffs did not claim, nor could they, that they were safe from defendant’s observation while engaging in consensual sex with him. Indeed, defendant’s observation of plaintiffs during their intimate sexual activities was neither casual nor hostile, nor was his observation secret within the meaning of “surveillance” as defined in subsection 359a(3). Nevertheless, a bedroom in a private home in which a couple engages in intimate relations fulfills the definition of a “private place” under subsection 539a(1) because reasonable people expect to be “to be safe from casual or hostile intrusion,” within a bedroom. *Abate*, supra at 278, 306 N.W.2d 476. Moreover, reasonable people engaged in sexual relations in a bedroom of a private home expect to be free from “surveillance,” § 539a(3), i.e., from being secretly spied on and having

their privacy invaded. The Legislature has not defined what constitutes an invasion of privacy, but when interpreted in light of the common-law right to privacy, *Riddle*, supra at 125-126, 649 N.W.2d 30, it is clear that it includes keeping sexual relations private. This Court, quoting from the Restatement of Torts, has opined concerning the common-law right to privacy:

“Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters.”

Doe, supra at 82, 536 N.W.2d 824, quoting 3 RESTATEMENT TORTS, 2d, § 652D, comment b, p 386.

Defendant argues that his bedroom is not a private place within the meaning of § 359d because he was present and only videotaped what he could also see. Defendant's argument fails because the statute patently protects a “person or persons entitled to privacy” in a private place. MCL 750.539d. The statute does not protect against defendant's unaided sight or hearing but, rather, prohibits defendant or “any person” from installing or using a device (video camera), “in any private place” (defendant's bedroom), “for ... photographing ... the ... events in such place” (sexual relations), “without the consent of the person or persons entitled to privacy there” (plaintiffs). *Id.* There is a vast difference between knowingly exposing oneself to one's partner during consensual sex and having that intimate event secretly photographed, and thus, “ ‘captured and preserved for all time.’ ” *Dickerson v. Raphael*, 222 Mich.App. 185, 188, 564 N.W.2d 85 (1997), *rev'd on other grounds* 461 Mich. 851, 601 N.W.2d 108 (1999), quoting *People v. Hall*, 88 Mich.App. 324, 330, 276 N.W.2d 897 (1979). The essence of 539d is to protect against the secret, nonconsensual photographing of an event in a place where the person secretly photographed would reasonably expect to be safe from such “surveillance.” MCL 750.539a(3). Just as “a participant [in a private conversation] may not unilaterally nullify other participants' expectations of privacy by secretly broadcasting the conversation,” *Dickerson*, supra, 461 Mich. at 851, 601 N.W.2d 108, defendant may not unilaterally nullify his sexual partners' expectations of privacy by clandestinely videotaping them.

Lewis, 670 N.W.2d at 685-686.

The Iowa Supreme Court in *Tigges* in 2008 decided that it was *irrelevant* whether Husband was living in the marital home, or living separate and apart, at the time Husband videotaped Wife. *Tigges*, 758 N.W.2d 824, n.1 and 827 (Iowa 2008). In *Lewis*, the invasion of privacy extended even to nonmarried people.

Tigges (Iowa 2008)

During early 2006, Husband, Jeffrey E. Tigges, surreptitiously videotaped his Wife's activities in the bedroom of their home. Husband filed for divorce on 7 Aug 2006. Wife sued Husband for “unreasonable intrusion upon her seclusion.” In May 2007, the divorce court granted Wife damages of \$22,500 for invasion of her privacy, the intermediate appellate court unanimously affirmed, and the Iowa Supreme Court unanimously affirmed. *In re Marriage of Tigges*, 2008 WL 2038246 (Iowa App. 2008), *aff'd*, 758 N.W.2d 824 (Iowa 2008).

Normally, torts are *not* adjudicated by divorce courts. However, in this case, neither Party nor Judge objected. *In re Marriage of Tigges*, 2008 WL 2038246 at *3, n.5 (Iowa App. 2008) (“The parties agree this issue was tried in equity and should be reviewed de novo.”), *aff’d*, 758 N.W.2d 824, 826, n.2 (Iowa 2008) (“... the parties tried the tort claim in the dissolution action without objection and Jeffrey has not raised the joinder question in this appeal.”).

The intermediate appellate court wrote:

Cathy [i.e., Wife] testified that in 2006, she came home from work early one day and saw Jeffrey retrieving a videotape from the drop-down ceiling in the basement. He broke the videotape case, but she was able to have someone fix the videotape. Cathy stated she watched the tape with her sister. The videotape was not submitted as an exhibit, but Cathy testified to the contents she viewed. She stated the videotape showed her in the parties' bedroom cleaning out the closet. After a while Jeffrey came into the bedroom to change clothes. She stated she had another videotape which showed “comings and goings out of our bedroom.”

Cathy also testified that Jeffrey had drilled a hole in the headboard of the parties' bed and installed a motion-sensitive camera. Furthermore, she testified she was dusting in the bedroom one day and in picking up an alarm clock felt it was hot. In examining the alarm clock she discovered there was a camera in it. Cathy stated that when Jeffrey came home he was upset because the alarm clock was gone. These incidents occurred when the parties were still living in the same house, prior to their separation. After the separation Cathy and her nephews searched the house, but did not find any additional recording equipment.

Jeffrey admitted installing motion-sensitive cameras in the home. He stated these cameras would only tape during the daytime and did not have the capability to tape at night. He testified he installed the equipment because he believed Cathy was taping his telephone calls. He stated he believed he had the right to install this equipment into his own home. Jeffrey denied taping after the parties' separation, stating he no longer had access to the house.

The district court awarded Cathy \$22,500 on the claim of invasion of privacy. In its ruling the district court specifically found the invasion occurred “after and during the parties' separation.” The court found Jeffrey engaged in stealthy intrusion into Cathy's privacy, and this was highly offensive to her. The court determined Jeffrey's actions caused her mental anguish and suffering.

On our review of the record, we find the incidents testified to by Cathy clearly occurred while the parties were still residing in the same house together as husband and wife.¹² Although Cathy testified she believed Jeffrey might still be taping her actions, there was no evidence to support this supposition. Cathy admitted that she and her nephews were not able to find any additional recording equipment when they searched the house.

Our research revealed very few cases addressing a claim for invasion of privacy between married spouses living in the same home. In *White v. White*, 344 N.J.Super. 211, 781 A.2d 85, 92 (N.J.Super.Ct. Ch. Div. 2001), a husband was living in the sun room of the parties' home. The wife and children came in and out of the room on a regular basis. *White*, 781 A.2d at 92. The New Jersey Superior Court found the husband could not have an expectation of privacy in a computer that was in the sun room, and denied his claim for invasion of privacy based on the wife's examination of his e-mails. *Id.*; see also *Miller v. Brooks*, 123 N.C.App. 20, 472 S.E.2d 350, 355 (N.C.Ct.App. 1996) (“[A] person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons.”).

¹² The Iowa Supreme Court later noted that the trial court disputed this factual conclusion reached by the intermediate appellate court. See the text quoted at page 25, later in this essay.

In *Clayton v. Richards*, 47 S.W.3d 149, 153 (Tex.App. 2001), a wife hired a private investigator to install a video camera in the bedroom of the marital home. She then left on an extended visit with relatives. *Clayton*, 47 S.W.3d at 153. The husband filed a claim for invasion of privacy against the private investigator. *Id.* at 154. In addressing the private investigator's motion for summary judgment, the court addressed the actions of the wife. *Id.* at 155. The court concluded:

A spouse shares equal rights in the privacy of the bedroom, and the other spouse relinquishes some of his or her rights to seclusion, solitude, and privacy by entering into marriage, by sharing a bedroom with a spouse, and by entering into ownership of the home with a spouse. [...]

...

.... It is not generally the role of the courts to supervise privacy between spouses in a mutually shared bedroom. However, the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters which could later be exposed to the public eye. The fact that no later exposure occurs does not negate that potential and permit willful intrusion by such technological means into one's personal life in one's bedroom. [*Clayton*, 47 S.W.3d] at 155-56. The court determined the private investigator was not entitled to summary judgment. *Id.* at 156.

We conclude Cathy presented evidence that Jeffrey videotaped “private matters which could later be exposed to the public eye.” Jeffrey installed motion-sensitive cameras in the parties' bedroom. Cathy was unaware her actions were being recorded. The fact that potentially “private matters” were videotaped means they could possibly be viewed by others. We determine Cathy has shown Jeffrey intentionally intruded upon “the private seclusion that [she] had thrown about [her] person or affairs” and the intrusion was one that would be highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c, d; *Stressman*, 416 N.W.2d at 687. We affirm the district court's award of damages to Cathy based on the tort of invasion of privacy.

In re Marriage of Tigges, 2008 WL 2038246 at *4-*5 (Iowa App. 2008).

The Iowa Supreme Court began its opinion by reviewing the facts. The Iowa Supreme Court noted one discrepancy between the trial court and intermediate appellate court:

The district court found the videotaping occurred when “the parties were separated and residing in separate residences.” The court of appeals concluded “the incidents testified to by Cathy clearly occurred while the parties were still residing in the same house together as husband and wife.” We find the record lacks sufficient clarity to determine by a preponderance of the evidence whether Jeffrey was residing in the marital home or in a separate residence when he installed the cameras and when the recording was accomplished. A resolution of this factual issue is not essential to our decision, however, as we conclude Jeffrey's activities intruded on Cathy's right to privacy whether or not he was residing in the marital home when the surreptitious videotaping occurred.

In re Marriage of Tigges, 758 N.W.2d 824, 825, n.1 (Iowa 2008).

This paragraph by the Iowa Supreme Court is a rare judicial remark on the status of the relationship (i.e. married or living “separate and apart”) as related to the acceptability of the alleged invasion of privacy. Whether Husband was living in the marital home or living in another residence might be relevant to a claim for trespass, but no trespass claim was raised in *Tigges*.

The Iowa Supreme Court discussed the reasonable expectation of privacy in a bedroom:

Although this court has never been called upon to decide whether a claim may be brought by one spouse against the other for an invasion of privacy resulting from surreptitious videotaping, the question has been confronted by courts in other jurisdictions. In *Miller v. Brooks*, 123 N.C.App. 20, 472 S.E.2d 350 (1996), a wife hired private investigators to install a hidden camera in the bedroom of her estranged husband's separate residence. 472 S.E.2d at 352-53. The husband discovered the hidden equipment and sued both his wife and her agents who assisted her in its installation. *Id.* The trial court granted summary judgment in favor of the defendants. *Id.* at 353. On appeal from that ruling, the North Carolina Court of Appeals noted the expectation of privacy “might, in some cases, be less for married persons than for single persons,” but that “such is not the case ... where the spouses were estranged and living separately.” *Id.* at 355. Finding no “evidence [the husband] authorized his wife or anyone else to install a video camera in his bedroom,” the appellate court reversed the summary judgment, concluding issues of fact remained for trial in the husband's claims against his wife and her agents. *Id.*

As we have already noted, in the case before this court the record is unclear whether Jeffrey installed the equipment and accomplished the recording of Cathy's activities before or after the parties separated. We conclude, however, the question of whether Jeffrey and Cathy were residing in the same dwelling at the time of Jeffrey's actions is not dispositive on this issue. Whether or not Jeffrey and Cathy were residing together in the dwelling at the time, we conclude Cathy had a reasonable expectation that her activities in the bedroom of the home were private when she was alone in that room. Cathy's expectation of privacy at such times is not rendered unreasonable by the fact Jeffrey was her spouse at the time in question, or by the fact that Jeffrey may have been living in the dwelling at that time.

Our conclusion is consistent with the decision reached by the Texas Court of Appeals in *Clayton v. Richards*, 47 S.W.3d 149 (Tex.App.2001). In that case, Mrs. Clayton hired Richards to install video equipment in the bedroom shared by Mrs. Clayton and her husband. Clayton, 47 S.W.3d at 153-54. After discovering the scheme, Mr. Clayton sued his wife and Richards, alleging invasion of his privacy. The trial court denied Mrs. Clayton's motion for summary judgment, but granted the one filed by Richards. *Id.* at 151. On appeal, the Texas Court of Appeals concluded Richards' liability turned on whether Mrs. Clayton's acts were tortious under Texas law. *Id.* at 154 (“If [Mrs. Clayton's] acts were tortious, and if [Richards] knowingly aided her in the commission of the acts, then his acts were tortious also.”). In its analysis of whether Mr. Clayton had a reasonable expectation of privacy in the bedroom he shared with his spouse, the court observed:

A spouse shares equal rights in the privacy of the bedroom, and the other spouse relinquishes some of his or her rights to seclusion, solitude, and privacy by entering into marriage, by sharing a bedroom with a spouse, and by entering into ownership of the home with a spouse. However, nothing in the ... common law suggests that the right to privacy is limited to unmarried individuals. [...]

When a person goes into the privacy of the bedroom, he or she has a right to the expectation of privacy in his or her seclusion. A video recording surreptitiously made in that place of privacy at a time when the individual believes that he or she is in a state of complete privacy could be highly offensive to the ordinary reasonable person. The video recording of a person without consent in the privacy of his or her bedroom even when done by the other spouse could be found to violate his or her rights of privacy.

As a spouse with equal rights to the use and access of the bedroom, it would not be illegal or tortious as an invasion of privacy for a spouse to open the door of the bedroom

and view a spouse in bed. It could be argued that a spouse did no more than that by setting up a video camera, but that the viewing was done by means of technology rather than by being physically present. It is not generally the role of the courts to supervise privacy between spouses in a mutually shared bedroom. However, the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters, which could later be exposed to the public eye. The fact that no later exposure occurs does not negate that potential and permit willful intrusion by such technological means into one's personal life in one's bedroom. [...]

[*Clayton*, 47 S.W.3d] at 155-56 (citations omitted) (emphasis added).

Prior to catching Jeffrey in the act of removing the cassette from the concealed recorder, Cathy was unaware of his video surveillance scheme. Citing our decision in *Stessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685 (Iowa 1987), Jeffrey nonetheless contends his conduct is not actionable because Cathy was in “public view” in the home he owned jointly with her. 416 N.W.2d at 687. In *Stessman*, the plaintiff sued a broadcasting company for invasion of privacy for videotaping her, despite her objection, while she was eating in a public restaurant, and publishing the tape. *Id.* The district court dismissed *Stessman*'s petition for failure to state a claim, concluding she was, as a matter of law, in “public view” at the time the recording was made. *Id.* at 686. On appeal, this court rejected the notion that *Stessman* was in “public view” as a matter of law. *Id.* at 687 (noting it was not inconceivable the plaintiff was seated in a private dining room within the restaurant at the time the recording was made). “[T]he mere fact a person can be seen by others does not mean that person cannot legally be ‘secluded.’ ” *Id.* (quoting *Huskey v. NBC, Inc.*, 632 F.Supp. 1282, 1287-88 (N.D.Ill. 1986)). Furthermore, “visibility to some people does not strip [the plaintiff] of the right to remain secluded from others.” *Id.* (quoting *Huskey*, 632 F.Supp. at 1287-88).

Even if we assume for purposes of our analysis that Cathy was observed by other family members including Jeffrey, who, from time to time, entered the bedroom with her knowledge and consent, she was not in “public view” and did not forfeit her right to seclusion at other times when she was alone in that room. As we observed in *Stessman*, “[p]ersons are exposed to family members and invited guests in their own homes, but that does not mean they have opened the door to television cameras.” *Id.* (quoting *Huskey*, 632 F.Supp. at 1287-88). Any right of access to the bedroom held by Jeffrey did not include the right to videotape Cathy's activities without her knowledge and consent.

We find persuasive the courts' characterizations of a spouse's right of privacy in *Miller* and *Clayton*. Cathy did not forfeit through marriage her expectation of privacy as to her activities when she was alone in the bedroom. Accordingly, we conclude Cathy had a reasonable expectation of privacy under the circumstances presented in this case.

In re Marriage of Tigges, 758 N.W.2d at 826-828 (Iowa 2008).

The Iowa Supreme Court wrote about the elements of the tort of intrusion on seclusion and then concluded:

1. *Intentional intrusion.* Cathy had a reasonable expectation of privacy in the bedroom when she was alone in that room. Jeffrey admitted videotaping her activities in the bedroom and various other rooms in the home. It is undisputed that he covertly installed the video recorder, recorded Cathy's bedroom activities, and attempted to retrieve a cassette from the recorder. We find this conduct clearly constituted an intentional intrusion upon Cathy's privacy.

2. *Highly offensive to a reasonable person.* Jeffrey contends the judgment in favor of Cathy must be reversed because the videotaping captured nothing that would be viewed as highly offensive to a reasonable person. He emphasizes the videotape captured nothing of a “private” or “sexual” nature in the bedroom. This contention is without merit, however, because the content of the videotape is not determinative of the question of whether Jeffrey tortiously invaded Cathy's privacy. See generally *Stessman*, 416 N.W.2d at 687 (concluding plaintiff stated a claim for intrusion upon her seclusion where defendant videotaped her eating in a restaurant). The intentional, intrusive, and wrongful nature of Jeffrey's conduct is not excused by the fact that the surreptitious taping recorded no scurrilous or compromising behavior. The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that Cathy's activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a reasonable expectation of privacy.

.... We conclude Cathy met her burden to prove Jeffrey's intrusive videotaping would be highly offensive to a reasonable person.

....

Cathy had a reasonable expectation of privacy when she was alone in her bedroom. Jeffrey's covert video surveillance intentionally intruded upon Cathy's expectation of privacy. The intrusion was highly offensive to a reasonable person. We therefore affirm the decision of the court of appeals.

In re Marriage of Tigges, 758 N.W.2d at 829-830 (Iowa 2008).

Note that there was no evidence presented in *Tigges* that any private images of Wife were ever recorded by Husband. The mere possibility of such private images was enough to give Wife a viable tort claim for intrusion on solitude. In other words, surreptitious recording of activities in a bedroom of a home is enough to invade privacy, regardless of the actual content of recordings, and regardless whether the recordings were shown to any third person(s). If there were evidence of private images (e.g., nudity, sexual intercourse with Husband), presumably those private images would support greater damages. Display of private images to third person(s) is an additional tort, publicity given to private life. RESTATEMENT SECOND OF TORTS § 652D.

It is a novel question of law what would happen if there were images of adulterous sexual activity that were shown only in a divorce case — on one hand, sexual activity (indeed any activity in a bedroom, according to *Tigges*) is a private matter, on the other hand, there is case law saying there is no right of privacy for adultery.¹³ If the images of adulterous sexual activity were shown *only* in the context of divorce litigation, there *might* be some kind of litigation privilege for collecting and using such evidence, especially if a statute made adultery relevant to some issue in divorce (e.g., adultery was a ground for divorce). One hopes that the adulterer would admit in a notarized writing to adultery (and also agree not to sue anyone in tort for making the videotapes), in exchange for destroying the videotapes showing his/her adulterous activity.

¹³ See cases cited at page 7, above.

Perez (Minn.App. 2010)

Husband, Richard Allen Perez, was convicted in criminal court for videotaping his nude Wife in the bathroom of the marital residence. Apparently, the nude images were never shown to any third party. Husband appealed his conviction, the intermediate appellate court affirmed, and the state supreme court declined to hear the case. *Minnesota v. Perez*, 779 N.W.2d 105 (Minn.App. 2010), *review denied* (Minn. 15 June 2010). The intermediate appellate court summarized the facts:

The facts of this case are undisputed. In July 2006, appellant's estranged wife, K.P., contacted law enforcement personnel, indicating to them that she and appellant were in the process of divorce and that during that proceeding K.P. discovered that appellant had altered a picture of K.P. K.P. became suspicious of what else might be on their home computer. She was able to access the computer and in doing so she found video clips that appeared to be taken by appellant. Those clips included a video of K.P., naked, getting into the bathtub in the bathroom shared by the parties. She stated to the police that she had not given permission to have the videos taken, and that she had discovered a hole in the parties' bathroom wall capable of being used for videotaping. Pursuant to a search warrant issued on the basis of K.P.'s complaint, the parties' home computer tower was seized; the police found four video clips of K.P., undressed in the bathroom, and several other clips taken by Perez in public places attempting to film under women's skirts and shorts. Police also documented the existence of a hole between the closet and the bathroom of the parties' home.

Police sought to arrange a time to speak with appellant at the police department about K.P.'s complaint. On the morning of the scheduled appointment, appellant arrived at the parking lot of the police department and stated that he was not going to speak with an officer and would be contacting a lawyer. The officer stated that he could arrange a time to speak with appellant and his lawyer, at which point appellant said "Sorry, you [know], I was taking [m]eth and I don't remember much[.] We weren't having sex anymore and[] I did that for me, nobody else." The charges upon which appellant was subsequently convicted followed.

Appellant waived his right to a jury trial and agreed to have the matter tried on stipulated facts. Among the stipulated facts presented to the court was the acknowledgment that although the parties' bathroom was undergoing some reconstruction and did not have sheetrock on the bathroom side of the walls or have a door at the time of the videotaping, there was sheetrock on the opposite side of the walls and K.P. had hung a shower curtain in place of the door to close off the bathroom. This action of K.P. had afforded her enough seclusion that appellant was required to create a hole in the wall of the adjoining closet to film her.

Appellant argued to the district court that he could not be found guilty of interference with privacy under the statute because, as a matter of law, K.P. did not have a reasonable expectation of privacy when occupying their shared, residential bathroom, due to the fact that they were married at the time of the videotaping. Alternatively, appellant argued that K.P. did not have a reasonable expectation to keep her "intimate parts" private from her husband. The district court convicted appellant on all four counts of interference with privacy, concluding that K.P. did have a reasonable expectation of privacy when alone in the couple's bathroom and that absent implied or express consent, the parties' marital relationship did not eliminate her reasonable expectation of privacy. Appellant renews these two arguments on appeal.

Perez, 779 N.W.2d at 107.

The sole issue in this appellate case was “Does a spouse have a reasonable expectation of privacy from being videotaped surreptitiously by the other spouse while alone in a shared, residential bathroom?” *Perez*, 779 N.W.2d at 108.

The statute said:

A person is guilty of a gross misdemeanor who:

(1) surreptitiously installs or uses any device for observing, photographing, recording, amplifying, or broadcasting sounds or events through the window or other aperture of a ... place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts ... or the clothing covering the immediate area of the intimate parts; and (2) does so with intent to intrude upon or interfere with the privacy of the occupant.

Minn.Stat. § 609.746 (1)(d) [enacted 1979, current 2006].

Appellant does not challenge that there was a surreptitious installation or use of a device for photographing events through an aperture. Instead, he first argues that his conviction must be reversed as a matter of law because his wife did not have a reasonable expectation of privacy that included an expectation of not being videotaped by him in their bathroom without her knowledge and consent, and therefore the statute is inapplicable to the facts of this case.

....

In assessing whether a defendant is guilty of interference with the privacy of another under section 609.746, Minnesota law concerning the reasonable expectation of privacy in the search and seizure context is instructive. See *State v. Ulmer*, 719 N.W.2d 213, 216 (Minn.App. 2006) (affirming conviction of interference with privacy based on the reasoning of *State v. Bryant*, 287 Minn. 205, 177 N.W.2d 800 (1970)), which addressed the reasonable expectation of privacy from police surveillance in public restroom. To have a protected privacy interest, an individual must have a subjective expectation of privacy and the subjective expectation must be reasonable, i.e., one that is recognized by society. See *State v. Jordan*, 742 N.W.2d 149, 156 (Minn. 2007) (citing *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003)); see also *Rakas v. Illinois*, 439 U.S. 128, 143–44 n. 12, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978) (stating that to be legitimate, expectation of privacy must be one that society is prepared to recognize as “reasonable”).

In *Bryant*, the Minnesota Supreme Court reasoned that an occupant of a public restroom could reasonably expect the degree of privacy that the design of the restroom assures through partitioned toilet stalls with doors. *Bryant*, 287 Minn. at 210–11, 177 N.W.2d at 803. The Court held that evidence obtained through police surveillance using a vent above the closed-off toilet stall violated the defendants' constitutional rights. *Id.* at 205–06, 212, 177 N.W.2d at 801, 804. In *Ulmer*, we held that an individual had a reasonable expectation of privacy when using a partitioned urinal based on the restroom's design and that the defendant was guilty of interference of privacy when he leaned over the partition to watch someone use the urinal. *Ulmer*, 719 N.W.2d at 215–16.

We recognize that none of the Minnesota cases addressing a reasonable expectation of privacy involved that expectation in the context of a marital relationship. The Iowa Supreme Court, however, recently considered a case that has facts similar to those here. While arising in the context of a civil action, the Iowa case is nonetheless instructive. In *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008), the wife sued the husband in the course of their

divorce proceeding for installing video cameras in their bedroom. *Id.* at 825–26. The court held that the wife had a reasonable expectation of privacy when she was alone in the parties' bedroom, and stated that she “did not forfeit through marriage her expectation of privacy.” *Id.* at 828. The *Tigges* court cited with approval the analysis of the Texas Court of Appeals in *Clayton v. Richards*, 47 S.W.3d 149, 155–56 (Tex.App. 2001). *Tigges*, 758 N.W.2d at 827–28. After recognizing that a “spouse shares equal rights in the privacy of the bedroom, and the other spouse relinquishes some of his or her rights to seclusion, solitude, and privacy by entering into marriage [] [and] by sharing a bedroom with a spouse,” the *Clayton* court went on to conclude,

[N]othing in ... common law suggests that the right to privacy is limited to unmarried individuals. [¶] When a person goes into the privacy of the bedroom, he or she has a right to the expectation of privacy in his or her seclusion. [¶] As a spouse with equal rights to the use and access of the bedroom, it would not be illegal or tortious as an invasion of privacy for a spouse to open the door of the bedroom and view a spouse in bed. However, the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse [....]

Clayton, 47 S.W.3d at 155–56 (citations omitted).

We find the rationale expressed in the Iowa and Texas cases sound, their reasoning persuasive, and their factual scenarios strikingly similar to those in this case. Although here reconstruction involving the bathroom had caused the door of that room to be removed, K.P. demonstrated a subjective, reasonable, expectation of privacy when she hung the shower curtain. While the condition of the bathroom may not have assured privacy from being overheard or from having appellant enter the room, it did assure privacy from being videotaped by him when she was alone in the room and unaware of any intrusion.

The basic question we must answer here is not whether appellant had a right to enter the bathroom while K.P. was there. If he had entered, K.P. would have been aware of that entry, and she might have acquiesced in appellant's presence or she might have asked him to leave. Her expectation of privacy might have been intruded upon, but she would have been aware of that intrusion and been able to address it. While knowledge of appellant's presence in the bathroom might have temporarily lessened or frustrated K.P.'s reasonable expectation of privacy, his surreptitious videotaping of her violated both her reasonable expectation and the provisions of the statute.

Perez, 779 N.W.2d at 108-110.

The appellate court then addressed Husband's second argument:

Appellant next argues that even if the fact that he and K.P. shared the bathroom in their home is not enough to preclude his convictions, the fact that he has often consensually seen his wife in a state of undress in the past means that his continued observation and videotaping without her knowledge cannot be an invasion of her privacy, and cannot, therefore, constitute a violation of the statute. Under the facts of this case, we find no merit to this argument.[FN2] Indeed, for this court to do so would be tantamount to stating that a spouse indefinitely and irrevocably consents to intrusion such as occurred here — knowingly and unknowingly — by the other spouse without limitation. Even in marriage, consent can be bounded. The courts in *Tigges* and *Clayton* concluded that a spouse does not have an absolute right to videotape the other spouse without his or her knowledge of and consent to that activity. *Tigges*, 758 N.W.2d at 828; *Clayton*, 47 S.W.3d at 156. Similarly, the *Bryant* court rejected the state's argument that the defendants consented to surveillance by virtue of using the public restroom, stating, “[c]onsent can hardly be given in the absence of some knowledge

that an act is in progress or is to be performed.” *Bryant*, 287 Minn. at 211, 177 N.W.2d at 804. We find the rationale of *Bryant* to be applicable to K.P. and appellant.

FN2. We recognize that in the context of a marriage relationship, the reasonable expectation of privacy a spouse has turns on the facts of each case. There is nothing in the record before us to indicate that appellant and K.P. had a practice of surreptitious installation of videotape devices, undisclosed or non-consensual videotaping in an area where reasonable expectation of privacy was apparent, and subsequent acceptance of and agreement with such practice. We decline to engage in conjecture here concerning the effect evidence of such practice would have on subsequent cases.

K.P. did not know she was being videotaped in the bathroom and did not consent to being recorded surreptitiously. As already noted, appellant's argument that his past consensual observation of K.P. forfeited her reasonable expectation of privacy from him in the future is fatally flawed. A spouse does not lose all claims to privacy through previously sharing some intimate information, activity, or viewing with the other spouse. Federal law recognizes the reasonable expectation of privacy spouses have in their phone conversations and creates a civil action for unauthorized wiretapping by one spouse of the other. *Kempf v. Kempf*, 868 F.2d 970, 972 (8th Cir. 1989). If marriage does not erase a spouse's reasonable expectation of privacy in his or her phone calls, it surely cannot erase his or her reasonable expectation of privacy from being videotaped while undressed without his or her knowledge or consent.

Perez, 779 N.W.2d at 110.

Husband's bogus argument that marriage implied Wife's consent to videotaping of her nude body reminds one of the ancient — and now obsolete — legal rule that a husband could not rape his wife, because a wife was incapable of denying consent to intercourse with her husband. *Kansas v. Cahill*, 845 P.2d 624, 628 (Kan. 1993) (“The rape statute's requirement that it does not apply to nonconsensual sexual intercourse between husband and wife was removed by a 1983 amendment (L.1983, ch. 109, § 2, effective July 1, 1983).”); *Lane v. Maryland*, 703 A.2d 180, 184-186 (Md. 1997) (good discussion of history); *Louisiana v. Amos*, 849 So.2d 498, 501, n.3 (La. 2003) (Louisiana abolished spousal exception to rape in 1990).

In summary, notice that *Clayton v. Richards*, 47 S.W.3d 149, 155–156 (Tex.App. 2001) and *In re Marriage of Tigges*, 758 N.W.2d 824, 828 (Iowa 2008) (“... [Wife] did not forfeit through marriage her expectation of privacy as to her activities when she was alone in the bedroom.”) both agreed that spouses have a reasonable expectation of privacy in the bedroom. *Tigges* at n.1 and at 827 also holds that people living separate and apart have a reasonable expectation of privacy in the bedroom. *Perez*, 779 N.W.2d 105, 109 holds that unmarried people have a reasonable expectation of privacy in the bedroom, by analogy with *Clayton v. Richards* and *Tigges*. Because sexual activities are inherently private, and there is no possible privilege between unmarried people, the conclusion in *Perez* logically comes first, and is not derived from cases involving spouses.

C. privacy of computer files (e.g., e-mail)

An unmarried adult who is the sole user of one computer owned by that adult generally has a reasonable expectation of privacy in e-mail or other forms of communication by computer (e.g., Yahoo Instant Messenger).

The federal wiretap act, 18 U.S.C. §§ 2510-2521 (amended by Electronic Communications Privacy Act), only applies to communications that are in transit, not past communications that are stored on a computer. See, e.g., *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457, 460-463 (5thCir. 1994).

Stored Communications Act (SCA) 18 U.S.C. § 2701 et. seq. protects e-mail messages that are stored by a service provider, such as Yahoo, Hotmail, Gmail, or a local Internet Service Provider. The SCA does *not* protect messages that are stored on a user's computer, such as in a home. *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072-73, 1075 (9thCir. 2004); *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F.Supp.2d 311, 337 (D.D.C. 2011) ("It is entirely non-controversial that 'e-mail messages downloaded and stored on, and subsequently accessed solely from, a user's personal computer do[] not fall within the SCA's definition of electronic storage.' *Thompson v. Ross*, 2010 WL 3896533, at *5 (W.D.Pa. Sept. 30, 2010); accord *Bailey v. Bailey*, 2008 WL 324156, at *6 (E.D.Mich. Feb. 6, 2008).").

Hazard (Tenn.App. 1991)

During a divorce proceeding, Wife found a letter from Husband to his attorney on a computer in the marital residence. The appellate court tersely said:

The letter in question was stored in the Husband's computer located in the marital home, to which Wife had complete access when she retrieved the letter from the computer. In *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328 (Tenn. 1984), the Court said:

The attorney-client evidentiary privilege only extends to communications from the client to the attorney. D. Paine, TENNESSEE LAW OF EVIDENCE, § 96, p. 111-112 (1974), and confidentiality is destroyed when those communications take place in the presence of a third party. *Hazlett v. Bryant*, 192 Tenn. 251, 257, 241 S.W.2d 121, 123 (1951). The privilege is designed to protect the client and because it belongs to the client, may be waived by him....

Smith County v. Anderson, 676 S.W.2d at 333.

Husband voluntarily placed this communication in the computer to which Wife had access. This effectively allowed the contents of the letter to be communicated to Wife the same as if Wife had overheard a conversation of Husband with his attorney or had received a copy of a letter from Husband to his attorney. There is not a situation concerning testimony from the attorney to whom the letter was addressed and the communication as introduced was not privileged.

Hazard v. Hazard, 833 S.W.2d 911, 914 (Tenn.App. 1991).

Hazard contains no details about how Wife found the letter. Apparently, Husband's attorney only objected to the admission of the letter into evidence, without asserting a privacy violation by Wife. The appellate court opinion does *not* mention the word "privacy".

Stafford (Vt. 1993)

Despite four pre-trial status conferences, Plaintiff-Wife in a divorce action never mentioned alleged adultery by Husband. At trial, Wife testified about his adultery and produced a document that she found on a computer used by Husband that contained a list of his sexual encounters. On appeal to the Vermont Supreme Court, Husband objected to the admission of the list in evidence by the trial court.

Defendant's [Husband's] principal arguments relate to the court's treatment of evidence about his infidelity. Plaintiff's testimony raised the issue of defendant's sexual misconduct during the marriage, which had not been specifically identified as an issue prior to trial, either during pretrial status conferences or otherwise. Defendant objected to that testimony and to plaintiff's exhibit, headed "My List," which appeared to be an inventory and description of sexual encounters with numerous women. Plaintiff testified that she found the document in the directory of the family's computer and that it was similar to a notebook that she had discovered in defendant's handwriting giving similar accounts. The notebook had disappeared or been lost.

Defendant relies here on V.R.F.P. 4(c)(4), which provides for pretrial status conferences and, in contested cases, requires the court to inquire "whether issues relating to infidelity ... will be raised at the hearing." Although four status conferences were held, the court never inquired about infidelity, and plaintiff did not disclose it as an issue. Defendant never raised the family rule below, and, in any event, it is not an exclusionary rule. Failure to comply with the rule can lead to discovery sanctions, see Reporter's Notes, V.R.F.P. 4, which are in the discretion of the court. See *In re R.M.*, 150 Vt. 59, 64, 549 A.2d 1050, 1053 (1988). Here, the court gave defendant an opportunity to respond to the infidelity allegation, but he failed to avail himself of it. There was no abuse of discretion.

Defendant also contends that the exhibit known as "My List" was not properly authenticated and should not have been admitted into evidence. V.R.E. 901(a) states that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Testimony of a witness with knowledge" can serve as that evidence. V.R.E. 901(b)(1). Plaintiff's testimony of the source of the document as a file in the family computer was sufficient to identify what it was. See *Veilleux v. Veilleux*, 565 A.2d 95, 96 (Me. 1989) (wife's identification of envelope as coming from mother-in-law sufficient authentication even in light of latter's denial). The presence in the family computer, along with the presence of the information in the notebook, provided prima facie authenticity as defendant's document. See *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir.) (proponent need only make a prima facie showing of authenticity), cert denied, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985). It was up to the court to decide whether the document was, in fact, generated by defendant. There was no error in admitting the exhibit or in finding from it that defendant had been unfaithful.

There was also no error in refusing to exclude the exhibit under V.R.E. 403. Surprise is not a ground for exclusion under the rule. See Reporter's Notes, V.R.E. 403. The exhibit was probative of defendant's infidelity. The court's ruling is highly discretionary, see *State v. Percy*, 158 Vt. 410, 415, 612 A.2d 1119, 1123 (1992), and there was no abuse of that discretion.

Stafford v. Stafford, 641 A.2d 348, 349-350 (Vt. 1993).

The Vermont Supreme Court ignored any privacy issues about files on the computer used by Husband.

Byrne (N.Y.Sup. 1996)

Husband's employer, Citibank, issued a laptop computer to Husband. During divorce proceedings, Plaintiff-Wife took (stole?) the computer and gave it to her attorney. The computer was in the custody of the judge when the following opinion was written. A trial court in New York State wrote:

In this matrimonial action, the parties are hotly contesting the issue of who should be permitted access to information contained in a notebook computer. It is undisputed that the computer was used by defendant as part of his employment but it is disputed as to whether the computer was also used for his own personal purposes. Plaintiff removed the computer from the marital residence and gave it to her attorney. Plaintiff believes important information concerning the finances of the parties or at least the finances of defendant is stored in the computer memory. Defendant asserts that there is nothing of use to plaintiff in the computer and that it was improper for plaintiff to take the machine to her attorney's office. The only way to determine if plaintiff is correct is for the contents of the computer memory to be opened up or "dumped" and analyzed. Defendant's employer, Citibank, has also entered the matter by asserting that the notebook computer belongs to the corporation and not defendant and thus should be turned over to it.

The Court is presently in control of the laptop computer removed from the marital residence by plaintiff. Defendant contends that the computer is personal property (allegedly not owned by him) and thus not subject to discovery.

The facts are undisputed that the laptop computer was used and controlled by defendant and was not limited in use by his employer. In fact, defendant permitted his children to use the computer for their homework. Thus, it cannot be said that plaintiff acted illegally by removing the "family" computer from the marital residence and presenting it to her attorney.

The real issue is not who possesses the computer but rather who has access to the computer's memory. The computer memory is akin to a file cabinet. Clearly, plaintiff could have access to the contents of a file cabinet left in the marital residence. In the same fashion she should have access to the contents of the computer. Plaintiff seeks access to the computer memory on the grounds that defendant stored information concerning his finances and personal business records in it. Such material is obviously subject to discovery. Therefore, it is determined that plaintiff did nothing wrong by obtaining the physical custody of the notebook computer.

Byrne v. Byrne, 650 N.Y.S.2d 499, 499-500 (N.Y.Sup. 1996). The trial judge ruled that all files on the computer, except those protected by attorney-client privilege, were discoverable by Wife. There was no appeal. The trial court opinion does *not* mention the word "privacy".

The lesson from *Byrne* is not to use an employer's computer for personal use and children's homework. The analogy of a computer to a filing cabinet appears to be a good analogy. However, computer-illiterate people may incorrectly believe that a computer is somehow more secure than an unlocked file cabinet, because they do not know how to access data files (except through the program that created the data file, such as a wordprocessor, e-mail program, or chat room software).

White (N.J.Super.Ch. 2001)

Husband filed for divorce in Oct 1999, but he continued to live in the family home, sleeping in the sun room. The sun room also contained the family's computer, the family's television receiver and stereo. Wife, Mary White, hired a private investigator to copy Husband's computer files from the hard drive of the family's computer. These files included Husband's e-mail. Husband then filed a motion in trial court to suppress his computer files from use in child custody proceedings before the divorce court. *White v. White*, 781 A.2d 85, 87 (N.J.Super.Ch. 2001). There is no appellate opinion in Westlaw for this case.

Neither the federal nor New Jersey state wiretap acts applied, because the e-mails were *not* intercepted during transmission. Instead, the files were copied long after the e-mail had been received by Husband. *White*, 781 A.2d at 89-91.

Husband also alleged that Wife's access to his e-mails constituted the tort of intrusion on seclusion. The trial court wrote:

A "reasonable person" cannot conclude that an intrusion is "highly offensive" when the actor intrudes into an area in which the victim has either a limited or no expectation of privacy.

"[E]xpectations of privacy are established by general social norms." *State v. Hempele*, 120 N.J. 182, 200, 576 A.2d 793 (1990). And, using a Fourth Amendment analysis for purposes of analogy, one's expectation of privacy must be reasonable-objectively reasonable. *State v. Brown*, 282 N.J.Super. 538, 547, 660 A.2d 1221 (App.Div.) *certif. denied*, 143 N.J. 322, 670 A.2d 1064 (1995). A person's expectation of privacy to a room used for storage and to which others have keys and access is not reasonable. Defendant's subjective belief that the room was private is "irrelevant". *Ibid*.

The same is true here. Plaintiff lived in the sun room of the marital residence; the children and defendant were in and out of this room on a regular basis. The computer was in this room and the entire family had access to it and used it. Whatever plaintiff's subjective beliefs were as to his privacy, objectively, any expectation of privacy under these conditions is not reasonable. Indeed even subjectively, plaintiff knew his living accommodations were not private; he avers that he did not leave the letter to his girlfriend in plain view.

In *Del Presto v. Del Presto*, 97 N.J.Super. 446, 235 A.2d 240 (App.Div. 1967), a case similar to the case at bar, defendant husband sought to suppress evidence of his extramarital affair that his wife found "in one of the office file cabinets in a room to which plaintiff [wife] had complete access." *Id.* at 454, 235 A.2d 240. The papers, consisting of love letters sent to the defendant by his paramour and a jewelry receipt for jewelry not given to his wife, had been left "in files to which she [wife] had a full freedom of entry." *Id.*

The Appellate Division overruled the trial court's suppression of this evidence, saying:
Having a legitimate reason for being in the files, plaintiff had a right to seize evidence she believed indicated her husband was being unfaithful.

[*Del Presto*, 235 A.2d at 246.]

Can it be said that defendant's activities here are “highly intrusive?” *Hennessey*, supra. She was searching for indicia that her husband was involved in an extramarital liaison — not an uncommon occurrence in the realm of human experience. Is rummaging through files in a computer hard drive any different than rummaging through files in an unlocked file cabinet, as in *Del Presto*, supra?

Not really.

White, 781 A.2d at 92.

I find this analysis of reasonable expectation of privacy to be superficial. Granted, wife and children had access to the family computer. As the trial court says in its discussion of lawful access to the computer:

Although she did not often use the family computer, defendant [i.e., Wife] had authority to do so. Additionally, defendant did not use plaintiff's password or code without authorization.

Rather, she accessed the information in question by roaming in and out of different directories on the hard drive.

White, 781 A.2d at 90. But earlier in the same judicial opinion, it was said that Wife's private investigator — not Wife herself — did the search of Husband's files and sent a report to Wife and to Wife's attorney. *White*, 781 A.2d at 87. The distinction between Wife and her private investigator may be legally insignificant, because the private investigator was the agent of Wife and, according to the holding in *White*, neither Wife nor her agent exceeded her lawful authority to read files on the family computer. *White* involves a motion to suppress evidence, and is *not* a tort case seeking damages for intrusion on solitude. Furthermore, Husband did not sue Wife's private investigator. Nonetheless, the trial court in *White* ignores the distinction between (1) access to the computer and (2) reading files created by another user.

Husband relied on his misunderstanding that anyone would need his AOL password in order to access his e-mail sent/received via AOL. Husband did not understand that his e-mail was stored on the hard drive, readable by anyone with access to the computer:

[Husband] had thought — incorrectly as it turns out — that his e-mail and attachments could not be read without his AOL password.

White, 781 A.2d at 87. One way to interpret the holding of no privacy in *White* is to say that the Husband was the victim of his own ignorance about computer security.

In some computer operating systems (e.g., Unix), each user has his own identity and password, and a user can read and modify his/her files, but not read/modify files belonging to other users. In such a computer, Husband arguably could have a reasonable expectation of privacy for his files, despite having multiple users for one computer. The judicial opinion does not mention the operating system, but it was probably some version of Windows 95 or 98, given the date of this case. These old Windows operating systems do not have permissions attached to each file, to determine who can read and who can modify each file.

Let me return to the distinction between (1) access to the computer and (2) reading files created by another user — a distinction which the court in *White* ignored. I believe it is arguable that sharing a computer does *not* give an authorized user permission to read files created by another authorized user. By analogy, people who live in the same house may share a bathroom, but that does *not* give one person the right to surreptitiously peek at another person who is alone in the bathroom. The fact that reading a spouse's e-mail (or installing a keystroke logger, see page 44) is done surreptitiously always indicates that the surveilling spouse *knows* he/she does not have permission to access this information, and that the other spouse will object to the invasion of her/his privacy. Even though the family computer may be shared, and even though one spouse is able to read files created by the other spouse, it should be possible to maintain a privacy tort for intrusion on seclusion for the surreptitious reading of private e-mails.

Evans (N.C.App. 2005)

Husband filed for divorce. Divorce was granted. Primary physical custody of children was given to Husband. Wife was denied alimony because of her subjecting Husband to indignities during marriage. Wife appealed. The appellate court affirmed the trial court. The appellate court wrote about the indignities:

Testimony at trial tended to show that defendant [Wife] had condoms in her purse, even though she and plaintiff had not used a condom for about twelve years and the parties were no longer engaging in sexual relations. Defendant [Wife] engaged in sexually explicit e-mails with a physician in Chapel Hill.

Evans v. Evans, 610 S.E.2d 264, 269 (N.C.App. 2005).

In defendant's last argument, she contends the trial court committed reversible error in overruling timely and continuing objections to the admission into evidence of intercepted sexually explicit e-mails between defendant and Dr. Mark Johnson, a Chapel Hill physician. Defendant claims the e-mails, private communications received from Dr. Johnson, were illegally intercepted pursuant to 18 U.S.C. § 2511(1)(c) and (d) (2000), which prohibits the disclosure or use of any electronic communication that was intercepted in violation of the Electronic Communications Privacy Act (ECPA). However, most courts examining this issue have determined that interception "under the ECPA must occur contemporaneously with transmission." *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 (3d Cir., 2003). Here, the e-mails were stored on, and recovered from, the hard drive of the family computer. The e-mails were not intercepted at the time of transmission. Therefore, we hold the trial court did not admit the evidence in violation of the ECPA.

Evans v. Evans, 610 S.E.2d 264, 270-271 (N.C.App. 2005).

That is the only mention of the e-mail acquisition in this case. Wife's attorney should have argued a different violation, such as the Stored Communications Act or the privacy tort of intrusion on solitude. However, any argument would probably fail to protect e-mail that was stored on a family computer to which both spouses had access.

Poling (Ohio Mun. 2010)

Poling is a criminal case not involving divorce, but it is relevant here because it involves similar statutes. A mother, whose name I have omitted, had obtained a civil protection order prohibiting an adult male, Poling, from contacting her 16 y old daughter. The mother found that Poling had violated the order by sending MySpace messages to her daughter. The state of Ohio filed criminal charges against Poling. Poling's attorney filed a motion to suppress the messages in violation of the protection order, because the mother had allegedly violated federal statute in obtaining the messages from her daughter.

Ohio v. Poling, 938 N.E.2d 1118, 1120, and 2010-Ohio-5429 at ¶¶3-6 (Ohio Mun. 2010).

The details of the acquisition of Poling's communications were described by the trial court:

On May 22, 2009, [Daughter] was on the computer in the [family] home. The computer was centrally located in the family's living room. The computer was used by the whole family. [Mother] paid the bill for the home's computer service. [Mother] also made it a habit to police [Daughter's] Internet use, and [Daughter] knew it. On the evening in question, [Mother] saw that [Daughter] was on MySpace. Two of [Daughter's] young cousins were visiting the [family] home that evening.

[Mother] asked [Daughter] to walk the children down the block to their home. [Daughter] left to escort the two young children home. When she left, she did not log off the computer or shut anything down. While [Daughter] was gone, [Mother] checked on her daughter's activities on the Internet. [Mother] copied several recent messages that had come to [Daughter's] MySpace account. She then placed the copies into a file that [Mother] maintained on the computer. Later, [Mother] reviewed the items that she had copied. The items were messages between [Daughter] and the defendant. [Mother] then went to the Hocking County Sheriff's Office to make a report. Deputy Trent Woodgeard took a report and filed a charge against Poling.

Poling, 938 N.E.2d at 1120 and ¶¶4-5.

The trial court held that the Wiretap Act did not apply, because the communications were not intercepted during transit. The trial court held the Stored Communications Act, Title II of the Electronic Communications Privacy Act, 18 U.S.C. § 2701, et seq. was the relevant statute.

Poling, 938 N.E.2d at 1120-23 and ¶¶8-14.

The Ohio trial court wrote two paragraphs that are relevant to family-law situations:

Moreover, although no on-point authority was located, it appears that [the mother's] conduct did not violate the SCA, as her conduct would seem to be authorized, at least implicitly, given her status as parent and how she observed the e-mails on the family computer without the use of her daughter's password. For example, in *Sherman & Co. v. Salton Maxim Housewares* (E.D.Mich. 2000), 94 F.Supp.2d 817, 821, the court stated that "for 'intentional' access in excess of authorization to be a crime and actionable civilly, the offender must have obtained access to private files without authorization (e.g., using a computer he was not to use, or obtaining and using someone else's password or code without authorization)." See also *Pietrylo v. Hillstone Restaurant Group* (Sept. 25, 2009), D.N.J. No. 06-5754, 2009 WL 3128420 (employee's managers violated SCA by knowingly

accessing a chat group on a social networking website without authorization; even though employee provided her login information to manager, she did not authorize access by managers to the chat group); *Sporer v. UAL Corp.* (Aug. 27, 2009), N.D.Cal. No. C 08-02835JSW, 2009 WL 2761329 (employer did not violate Wiretap Act when he viewed a pornographic video employee sent from his work account to his personal account; employer had a policy to monitoring employees' computer use and warned employees of policy; thus, employee gave implied consent to his employer to monitor work e-mail account).

In addition, case law under the Wiretap Act holds that a parent may vicariously consent for the child to the intentional interception of communications as long as the parent has a good-faith basis that is objectively reasonable for believing that such consent is necessary for the welfare of the minor child. See, e.g., *Pollock v. Pollock* (C.A.6, 1998), 154 F.3d 601, 610; *Babb v. Eagleton* (N.D.Okla. 2007), 616 F.Supp.2d 1195; *People v. Clark* (2008), 19 Misc.3d 6, 855 N.Y.S.2d 809. Similarly, it is reasonable and within the parent's authority for the parent to monitor her child's use of the computer in the home for the welfare of the child, particularly under the circumstances presented here. If so, then [the Mother's] conduct would have been "authorized" and thus not in violation of the SCA. In any case, as discussed above, the SCA does not provide for exclusion of the evidence as a remedy for its violation. *Poling*, 938 N.E.2d at 1123-24 and ¶¶15-16.

The trial court permitted the admission of the messages in the criminal case against Poling. Note that this is a state trial court opinion and is not precedential, although the opinion is well written.

Jennings (S.C.App. 2010)

The South Carolina intermediate appellate court summarized the facts:

On June 21, 2006, Husband's wife, Gail Jennings (Wife), discovered a card for flowers in her car. Suspecting the flowers were not for her, Wife questioned Husband, who had recently borrowed her car, about the card. To Wife's dismay, Husband informed Wife that he had bought the flowers for another woman, with whom he had fallen in love. Although Husband refused to tell Wife the woman's full name, he mentioned that he had been corresponding with her via email at his office. That same day, the couple separated.

A few days later, Wife's daughter-in-law, Holly Broome (Broome), visited Wife at her home. Wife, who was extremely upset, told Broome about the separation and the conversation she had had with Husband. The next day, Broome, who had previously worked for Husband, logged onto Husband's Yahoo account from her personal computer by changing Husband's password. Broome proceeded to read emails that had been sent between Husband and his girlfriend. After reading a few of the emails, Broome called Wife, who came over to Broome's home. Broome printed the emails, and she and Wife made copies of them. They then gave one set of the emails to Neal, Wife's divorce attorney, and another set to Brenda Cooke (Cooke), a private investigator from the BJR International Detective Agency, Inc. (BJR) whom Wife had hired.

Broome subsequently logged onto Husband's Yahoo account on five or six additional occasions. Information she obtained about Husband's girlfriend as a result was communicated to Neal and Cooke. According to Broome, she never accessed any of Husband's unopened emails.

On June 29, 2006, Wife initiated an action in family court for divorce and separate support and maintenance. During the course of that litigation, which is still pending, Husband learned that Broome had accessed emails from his Yahoo account and that copies of those emails had been disseminated to Cooke and BJR.

Jennings v. Jennings, 697 S.E.2d 671, 672-673 (S.C.App. 2010).

In 2007, Husband sued Wife, Broome, Cooke (Wife's private investigator), BJR (private investigator's employer), and Wife's divorce attorney. The causes of action (after amendments) included:

- "invasion of privacy (publicizing of private affairs and wrongful intrusion)," and
- "Title II of the ECPA, 18 U.S.C. §§ 2701-2712 (2006), which is separately known as the Stored Communications Act (SCA)."

Jennings, 697 S.E.2d at 673.

The trial court granted Defendants' Motion for Summary Judgment and Husband appealed. The appellate court held that the trial court erred by considering the summary judgment as a motion to dismiss for failure to state a cause of action, under Rule of Civil Procedure 12(b)(6), in which the judge only considers the Complaint. "In contrast, in ruling on a summary judgment motion, 'a court must consider everything in the record-pleadings, depositions, interrogatories, admissions on file, affidavits, etc.' [citation omitted]" *Jennings*, 697 S.E.2d at 674.

The appellate court wrote:

In the present case, Husband introduced evidence showing that Broome logged onto Husband's Yahoo email account without authorization by changing Husband's password. He also presented evidence that Broome, without Husband's consent, read and printed emails that were stored in Husband's Yahoo email account. Importantly, at least one court has held that comparable proof was sufficient to withstand a summary judgment motion in a section 2701 action. See *Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F.Supp.2d 914, 924-26 (W.D.Wis. 2002) (denying summary judgment to defendants in a cause of action for a violation of section 2701 where evidence was presented to show that defendants logged onto plaintiff's Hotmail account without authorization and printed plaintiff's emails). Because the circuit court was ruling on motions for summary judgment, it was required to consider the evidence presented by Husband. Accordingly, we conclude that the circuit court erred by granting summary judgment to Respondents based merely upon the fact that Husband failed to expressly allege in his complaint that Respondents "obtain[ed], alter[ed], or prevent[ed] authorized access to a wire or electronic communication while it [was] in electronic storage." See 18 U.S.C. § 2701(a) (2006).

Jennings, 697 S.E.2d at 675.

There is a difficult issue of whether the e-mails accessed by Broome were "in storage" as that phrase is used in 18 U.S.C. § 2701(a). The definition of "in storage" in 18 U.S.C. § 2510(17) is not as precise as it should have been:

- (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
- (B) any storage of such communication by an *electronic communication service* for purposes of *backup protection* of such communication.

18 U.S.C. § 2510(17) (2006) (emphasis added by South Carolina court).

Subsection (A) does not apply to *Jennings* because:

Several courts have held that the application of subsection (A) of section 2510(17) is limited to communications that have not yet been accessed by their intended recipient. See, e.g., *In re DoubleClick, Inc. Privacy Litig.*, 154 F.Supp.2d 497, 512 (S.D.N.Y. 2001) (“[I]t appears that [section 2510(17)(A)] is specifically targeted at communications temporarily stored by electronic communications services incidental to their transmission—for example, when an email service stores a message until the addressee downloads it.”); *United States v. Weaver*, 636 F.Supp.2d 769, 771 (C.D.Ill. 2009) (“Because the emails here have been opened, they are not in temporary, intermediate storage incidental to electronic transmission.”). Here, as noted above, Broome testified that she never accessed any of Husband’s unopened emails.

Jennings, 697 S.E.2d at 675, n.3

Husband argued that his e-mails that Broome read were covered by subsection (B), and the South Carolina appellate court agreed. One possible reading of §2510(17)(B) is the “backup” is a copy made in case the primary storage medium (e.g., hard disk drive) at the service provider (i.e., Yahoo in this case) fails, so the service provider can restore the files from the backup copy.

An obvious purpose for storing a message on an ISP’s server after delivery is to provide a second copy of the message in the event that the user needs to download it again — if, for example, the message is accidentally erased from the user’s own computer. The ISP copy of the message functions as a “backup” for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition.

Theofel v. Farey-Jones, 359 F.3d 1066, 1075 (9thCir. 2004), quoted in *Jennings*, 697 S.E.2d at 677.

The South Carolina appellate court wrote:

Respondents nonetheless contend that, because Husband has not claimed that he saved the emails anywhere else, the storage of his emails could not have been for the purposes of backup protection. However, courts interpreting section 2701 have issued rulings that would seem to allow Husband’s cause of action in this case. See *Cardinal Health 414, Inc. v. Adams*, 582 F.Supp.2d 967, 976 (M.D.Tenn. 2008) (“[W]here the facts indisputably present a case of an individual logging onto another’s e-mail account without permission and reviewing the material therein, a summary judgment finding of an SCA violation is appropriate.”); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548, 555 (S.D.N.Y. 2008) (“The majority of courts which have addressed the issue have determined that e-mail stored on an electronic communication service provider’s systems after it has been delivered, as opposed to e-mail stored on a personal computer, is a stored communication subject to the SCA.”); *Fischer*, 207 F.Supp.2d at 925-26 (rejecting argument that emails stored on Hotmail’s system were not in “electronic storage”).

Furthermore, we do not find Respondents' argument to be convincing. Under Respondents' construction of the SCA, the unauthorized access of a person's emails from an ECS would be unlawful if the person had previously saved his emails somewhere else, but would be perfectly lawful if the person had not done so. However, such an interpretation would lead to strange results. For instance, a person whose emails were stored solely with an ECS would generally suffer greater harm if someone "alter[ed]" or "prevent[ed] authorized access" to his ECS-stored emails than a person who had saved his emails in additional locations. Yet, under Respondents' construction of the SCA, only the person in the latter position would be protected. We do not believe that this was what Congress intended.

Indeed, the legislative history of the SCA supports the conclusion that Congress intended for the SCA to apply to the conduct Broome engaged in here. For instance, both the House and Senate Reports state that section 2701 "addresses the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that are not intended to be available to the public." H.R.Rep. No. 99-647, at 62 (1986); S.Rep. No. 99-541, at 35 (1986). Additionally, the Senate Report provides the following illustration of what conduct would constitute a violation of section 2701:

For example, a computer mail facility authorizes a subscriber to access information in their portion of the facilities storage. Accessing the storage of other subscribers without specific authorization to do so would be a violation of [section 2701].

S.Rep. No. 99-541, at 36. Here, Broome has admitted that she accessed and read, without authorization, Husband's emails that were stored on Yahoo's system. The legislative history of the SCA indicates that Congress intended that such conduct would constitute a violation of section 2701.

Jennings, 697 S.E.2d at 678.

The appellate court affirmed the grant of summary judgment to Wife, Cooke and BJR, because they did not engage in unlawful retrieval of Husband's e-mails, in violation of 18 USC § 2701.

Jennings, 697 S.E.2d at 680. The appellate court remanded for trial of Husband's claims against Broome.

password-protected files

In the context of criminal law, there are a few court cases holding that password-protected computer files are private, even if others have access to the computer. Even stronger privacy protection could be obtained by encrypting the files, with a password required for access to the decrypted file.

- *Trulock v. Freeh*, 275 F.3d 391, 403 (4thCir. 2001);
- *United States v. Buckner*, 473 F.3d 551, 554, n. 2 (4thCir. 2007), *cert. denied*, 550 U.S. 913 (2007);
- *U.S. v. Stabile*, 633 F.3d 219, 233 (3dCir. 2011) ("First, the computer was not password-protected. The failure to use password protection indicates that Stabile relinquished his privacy in the contents of the [shared] computer. Cf. *Trulock*, 275 F.3d at 403");

- *U.S. v. Stanley*, 653 F.3d 946 (9thCir. 2011) (Files containing child pornography were password-protected at one time, but defendant removed the password-protection when he was using the computer alone. Held no privacy for non-password-protected files on shared computer.).

D. keystroke logger on family's computer

A keystroke logger is software that can be installed on a computer, which software will surreptitiously record everything that a user types, including usernames and passwords. Keystroke logging software may be legitimately used by parents to monitor their children's use of the Internet, or possibly by employers to monitor their employee's use of company-owned computers. However, in many other applications, use of keystroke logging software is a tort or crime. Installing a keystroke logger on an adult's personally owned computer is a violation of privacy, except when done by law enforcement agents authorized by a search warrant. Keystroke loggers are particularly useful to acquire confidential information (e.g., usernames, passwords, financial account numbers, etc.) for use in crimes or frauds. When I did the legal research for this essay in December 2011, there were few reported cases involving keystroke loggers.¹⁴

Zapeda (S.Dak. 2001)

Jorge and Leslie Zepeda married in 1987 in Louisiana, where they were college students. Their only child, Jorgito, was born in 1996. In November 1998, they moved to South Dakota. Husband sued for divorce in September 1999. The divorce court granted Wife primary physical custody of son, denied alimony to Wife, and denied Wife's request for attorney's fees. Both Parties appealed, and the South Dakota Supreme Court affirmed. *Zepeda v. Zepeda*, 632 N.W.2d 48, 51-52, 2001 SD 101 at ¶¶1-4 (S.Dak. 2001).

This case is relevant to this essay, because Husband installed a keystroke logger on a computer used by Wife. The appellate court wrote:

After their move to South Dakota, marital difficulties began to emerge. According to Renee, Jorge was either "controlling" or he ignored her, choosing to "talk to his computer or the TV rather than [her]." For his part, Jorge became suspicious of Renee's activities on the Internet while he was at work. He installed software on their home computer to covertly monitor her keystrokes. What he discovered would become a focal point in the divorce proceedings. In trial, Renee admitted that from late July 1999 until sometime in October of that year she engaged in "highly erotic" discourse on Internet "chatrooms" with two different adult men.[footnote omitted] These communications occurred, in her estimate, perhaps "once a week." [footnote omitted] She explained that "it was kind of enjoyable that someone was

¹⁴ See, e.g., *U.S. v. Scarfo*, 263 F.3d 80, 83-84 (3dCir. 2001) (comments to journalist about keystroke logger in criminal case not violative of gag order); *U.S. v. Barrington*, 648 F.3d 1178, 1184 (11thCir. 2011) (keystroke logger used by criminal to obtain information to change grades on college's computer); *Hayes v. SpectorSoft Corp.*, Not Reported in F.Supp.2d, 2009 WL 3713284 (E.D.Tenn. 2009) (Husband sued keystroke logger manufacturer, all claims dismissed.)

finding interest in me.” But her infidelity was not confined to the Internet. Renee had sexual relations several times with another man in July 1999.[footnote omitted] On one occasion, after sharing a bottle of wine, the two engaged in sexual intercourse in Renee and Jorge's apartment while Jorgito was sleeping.

Zepeda v. Zepeda, 632 N.W.2d 48, 51-52, 2001 SD 101 at ¶4 (S.Dak. 2001).

I emphasize that this is the only mention of the keystroke logging software in *Zepeda*.

Apparently, Wife's attorney did not move to exclude evidence gathered by the keystroke logging software. The appellate court opinion does *not* mention the word “privacy”. In connection with the child custody issue, the appellate court wrote:

In discussing the instance of sexual intercourse in the home while Jorgito was sleeping, the court again emphasized that Renee's conduct was reprehensible. The court concluded, however, that the child was not in Renee's direct presence, that he was monitored with a baby monitor, and that the incident was an isolated one. Consequently, the court found no harmful effect on the child. The court discounted allegations of excessive drinking based on the lack of evidence. All Renee's misconduct occurred in a three month time span from July to October 1999.

.... Like the circuit court, we do not condone Renee's misconduct, but we cannot hold that the court was clearly erroneous when it ruled that the misconduct had no harmful effect on Jorgito.

Zepeda v. Zepeda, 632 N.W.2d at 55, 2001 SD 101 at ¶¶18-19 (S.Dak. 2001).

Husband was an electrical engineer employed by a computer manufacturer, and with that education and experience, Husband was much more knowledgeable about computers than his Wife (who had a business administration degree), attorneys, or judges in this case.

At trial, Wife requested \$ 12,000 for her attorney's fees,¹⁵ which is a small amount for a case involving divorce and child custody. On such a small litigation budget, it would have been difficult for Wife to argue a privacy violation.

O'Brien (Fla.App. 2005)

Wife, Beverly Ann O'Brien, installed the Spector spyware program on a computer used by her Husband. The appellate court summarized the facts:

When marital discord erupted between the Husband and the Wife, the Wife secretly installed a spyware program called Spector on the Husband's computer. It is undisputed that the Husband engaged in private on-line chats with another woman while playing Yahoo Dominoes on his computer. The Spector spyware secretly took snapshots of what appeared on the computer screen, and the frequency of these snapshots allowed Spector to capture and record all chat conversations, instant messages, e-mails sent and received, and the websites visited by the user of the computer. When the Husband discovered the Wife's clandestine attempt to monitor and record his conversations with his Dominoes partner, the Husband uninstalled the Spector software and filed a Motion for Temporary Injunction, which was

¹⁵ *Zepeda*, 632 N.W.2d at 557.

subsequently granted, to prevent the Wife from disclosing the communications. Thereafter, the Husband requested and received a permanent injunction to prevent the Wife's disclosure of the communications and to prevent her from engaging in this activity in the future. The latter motion also requested that the trial court preclude introduction of the communications into evidence in the divorce proceeding. This request was also granted.

O'Brien v. O'Brien, 899 So.2d 1133, 1134 (Fla.App. 2005).

After the parties were divorced, the Wife appealed the permanent injunction and also appealed the exclusion of Husband's communications from evidence in the divorce. The relevant statute in this case was the Florida Security of Communications Act, § 934.03(1) Florida Statutes (2003). The statute applies to everyone, with no exception for spouses. The appellate court found "the particular facts and circumstances of the instant case reveal that the electronic communications were intercepted contemporaneously with transmission." *O'Brien*, 899 So.2d at 1136.

The appellate court wrote:

The Wife argues that the communications were in fact stored before acquisition because once the text image became visible on the screen, the communication was no longer in transit and, therefore, not subject to intercept. We disagree. We do not believe that this evanescent time period is sufficient to transform acquisition of the communications from a contemporaneous interception to retrieval from electronic storage. We conclude that because the spyware installed by the Wife intercepted the electronic communication contemporaneously with transmission, copied it, and routed the copy to a file in the computer's hard drive, the electronic communications were intercepted in violation of the Florida Act.

O'Brien, 899 So.2d at 1137.

The appellate court affirmed the permanent injunction against Wife and also affirmed the exclusion of the evidence from the divorce trial.

Rich (Mass.Super 2007, 2011)

Husband, Lesley S. Rich, installed a keystroke logger on a computer used by his ex-wife, with whom he continued to live, for convenience in rearing their children. He learned that she was corresponding with another man about sadomasochistic¹⁶ activities. This case has two judicial opinions: (1) in Nov 2007, the court granted an injunction prohibiting disclosure of private messages, and (2) the result of a trial in 2011 denying tort damages to Wife for several technical reasons. In the 2007 opinion, a trial court in Massachusetts summarized the facts:

After the divorce [in 1987], the plaintiff [Wife] returned to the marital home to reside with the defendant [Husband] and their children in Somerset, Massachusetts, which living arrangement continued from 1989 through June 1993. There were at least two computers situated at the Somerset home which were networked and used by the plaintiff, the defendant and their children. The server for the computer was AOL and the primary account holder was the defendant. The plaintiff maintained a password-protected AOL account. The court finds that the plaintiff did not share her password with any family members. In approximately

¹⁶ *Rich*, 2011 WL 3672059 at *1.

2001, the defendant decided to purchase and install a Keylogger software program on the family computers which monitored key strokes of the user of the computer. This permitted the defendant to retrieve the password of the plaintiff as well as any outgoing instant messages but did not permit retrieval of incoming instant messages. The court finds it is likely that shortly after installation of the subject program, the defendant started to monitor communications from the plaintiff on her password-protected email account. At some time prior to June 2003, he concluded that plaintiff was engaged in online communications with an individual, ultimately identified as Andrew Fisher. These communications were of a personal nature and were thought by the plaintiff to be protected from inspection by any third parties, including the defendant.

In June of 2003, the defendant became aware that the plaintiff intended to travel to the Cayman Islands to meet an individual, whom he believed to be Andrew Fisher. This resulted in at least two discussions between the parties in which it was disclosed to the plaintiff by the defendant that he had been monitoring her email communications. During one of these discussions, he exhibited to her, on the computer in his study, portions of the intercepted email communications. The plaintiff was in shock in that what she thought were private communications had been intercepted and reviewed by her former husband. The plaintiff implored him to delete all of the subject communications. The defendant purported to delete such materials but did not advise the plaintiff that he had made a copy of them. The disclosure of the defendant's conduct contributed to a final separation of the parties. This resulted in the defendant [Husband] communicating with Robin Fisher, the wife of Mr. Fisher and ultimately providing copies of various emails retrieved from his computer purportedly between Andrew and the plaintiff. The defendant appeared at a deposition in Georgia in which certain emails were marked as exhibits. Also pursuant to a subpoena which had been served upon him, he produced his computer and hard drive for the purpose of permitting retrieval of any incriminating materials which might exist thereon. At the time of the hearing, such computer continued to remain in the possession and control of Robin Fisher's counsel. *Rich v. Rich*, Not Reported in N.E.2d, 2007 WL 4711508 at *1 (Mass.Super. 2007).

Wife then sued Husband in Massachusetts, "for a preliminary injunction seeking an order requiring Lesley Rich to return certain electronic communications and to refrain from any further dissemination of unlawfully obtained electronic communications or their contents, by any means to any third party." *Ibid.* at *1.

There are two categories of messages in this case: (1) those found by the keystroke logging program and (2) those contained in AOL e-mail files on the hard drive of the family computer.

With respect to the first category, the Massachusetts trial court wrote:

The court finds that the secret use of the Keylogger software program in order to record instant messages of the plaintiff and/or to gain access to her emails is violative of the aforesaid statute [Mass. General Law chapt. 272, § 99]. In that the plain language of the statute was designed to prohibit the use of electronic surveillance devices by private individual due to the serious threat that they pose to the privacy of citizens, the plain language fails to exhibit any intent to protect the action of the defendant in the case at bar. [citing case] *Rich*, 2007 WL 4711508 at *3 (Mass.Super. 2007).

With respect to the second category, the Massachusetts trial court wrote:

The second category includes emails sent and received by the plaintiff which were retrieved by the defendant purportedly pursuant to a unique feature with AOL accounts which stores emails of all users of the computer in a “personal filing cabinet.” The court finds that this was a feature that neither the plaintiff nor the defendant were aware of and that the first time that the defendant became aware of the same was on or around June of 2003. Thus the court finds that both parties had an expectation of privacy with respect to items which became inadvertently stored in the “personal filing cabinet” of the subject computer.

Rich, 2007 WL 4711508 at *2 (Mass.Super. 2007).

Note that this is the opposite result held in *White*, 781 A.2d at 87, where there was no expectation of privacy in AOL e-mail files on a shared computer, regardless of the belief of the person who wrote the messages in the files. Also, there was no discussion by the Massachusetts trial court of any effect of the relationship between the parties on ex-Wife’s reasonable expectation of privacy. *Rich* cites no cases from outside of Massachusetts, despite relevant cases elsewhere.

The Massachusetts trial court concluded:

For the foregoing reasons, it is ORDERED:

1. That the defendant, Lesley S. Rich, his agents, servants, employees and attorneys, are hereby RESTRAINED and ENJOINED pending further order of the court from disseminating any electronic communications falling within the scope of this decision, either verbally, in writing, electronically or by any other means to any third party.
2. That pending further order of the court, the defendant, Lesley S. Rich, the defendant shall turn over to his counsel for safekeeping all hard copies, computer hard drives and other storage media which contain any of the aforesaid communications.
3. The Motion for Impoundment is ALLOWED.

Rich, 2007 WL 4711508 at *4 (Mass.Super. 2007).

(2011)

Four years later, the case was back in court, this time before a different judge, for trial without a jury on civil claims under the Massachusetts Wiretap Act, G.L.c. 272, § 99(Q), and the Massachusetts Privacy Act, G.L.c. 214, § 1B. *Rich v. Rich*, Not Reported in N.E.2d, 2011 WL 3672059 (Mass.Super. 2011). The trial court made the following findings of fact:

Debra Rich and Lesley Rich were married to one another until they divorced in June 1987. After living apart for two years, the parties again resided together in Somerset from 1989 until 2003. Although they remained divorced, they resided together with their sons Jeremy and Justin in a home they both owned.

As of 2000, there were two computers in the home. A desktop computer was kept in a home office. A laptop computer was kept in the family room. All members of the family had access to the laptop. Lesley Rich established an account with America On Line for email and instant messaging services. Debra Rich had her own password to use the account. She did not provide the password to anyone. Unknown to her, the account retained all emails sent or received on the computer in a “personal file cabinet.” No password was needed to access the “personal file cabinet.”

In 2002, Lesley Rich purchased a computer program called, “key logger.” That program records all keystrokes typed into a computer. As a result, a person using the program can view all messages sent on the computer on which the program is installed. Lesley Rich wanted to use the program to determine whether employees at work were stealing from the company he managed. However, he also installed the key logger program on the parties' home computers.

Both Lesley Rich and the parties' son, Jeremy, testified at trial that Lesley Rich told all members of the family, including Debra, that he was installing the key logger program on the home computers in order to test it. The court credits that testimony but finds that the information was conveyed in a manner that was not sufficiently clear to alert a reasonable person, not well versed in the operation of computer programs, that every message sent on the computer would be recorded. The court finds that Debra Rich did not understand that every message she sent was saved and available to Lesley Rich and her children.

By 2003, Debra Rich had become secretly involved in an intimate relationship with an individual named Andrew Fisher. She used the laptop computer to exchange emails and instant messages with him. These messages included communications of a sexual nature.

In June of 2003, Lesley Rich discovered these communications through the key logger program and Debra Rich's “personal file cabinet,” which retained her emails. When he read the messages he was shocked and asked Debra Rich what was going on. He specifically asked about the sadomasochistic content of the messages. Debra Rich told him that she was involved with dangerous people and that he should not become involved. At that point, Lesley did not know Andrew Fisher's identity.

That same month, Debra Rich told Lesley Rich that she was going on a trip with a female friend. Lesley Rich begged her not to go. Debra Rich went on the trip. By viewing messages sent by Debra, Lesley was able to determine that Debra actually went to the Cayman Islands with Andrew Fisher.

On her way back from the trip, Debra and Lesley spoke by telephone. Lesley asked Debra if she had fun with Andrew Fisher. Debra became hysterical and asked whether Lesley had arranged to have them followed.

The next morning, Debra asked Lesley how he knew about Andrew Fisher. Lesley informed her that, through use of the key logger program and her “personal file cabinet” he had read her emails, as well as her side of conversations sent by instant messaging. Debra became very upset. She began screaming and demanded that Lesley delete her messages. Lesley deleted the messages from the laptop screen, although they remained stored in the computer. Debra expressed concern for Andrew Fisher. Lesley told her that if she broke off the relationship, he would not tell Andrew's wife, Robin Fisher, about the affair. Debra Rich moved out of the parties' home later that month.

On September 10, 2003, the parties executed a document entitled, “Release and Amended Settlement Agreement.” The agreement amended the marital settlement agreement the parties entered into at the time of their divorce in 1987. Among other provisions, the agreement included the following general release:

Waiver and Release of the Parties. Les and Deb, on behalf of themselves and their partners, officers, directors, shareholders, trustees, beneficiaries, agents, attorneys, employees, parents, subsidiaries, affiliates, divisions, heirs and legal representatives, and the respective successors and assigns of any of the foregoing (collectively, the “Releasers”), hereby irrevocably and unconditionally release and forever discharge each other and their partners, officers, directors, shareholders, trustees, beneficiaries, agents, attorneys, employees, parents, subsidiaries, affiliates, divisions, heirs and legal representatives, and the respective successors and assigns of any of the foregoing (collectively, the “Released Parties”), from any and all claims, demands, debts, liabilities, contracts, obligations, accounts, torts, causes of action or claims for relief of whatever kind or nature, whether

known or unknown, whether suspected or unsuspected, which the Releasors, or any of them, may have or which may hereafter be asserted or accrue against Released Parties, or any of them, resulting from or in any way relating to any act or omission done or committed by Released Parties, or any of them, prior to the date hereof (each, a "Claim"), including without limitation any right, claim, demand, action or cause of action under or related to the Divorce Agreement.

Exhibit 15, par. K.

On February 17, 2004, Lesley Rich wrote a letter to Robin Fisher, using the fictitious name "Helen Dwarfman." [9] In 2006, Robin Fisher commenced divorce proceedings against Andrew Fisher in the Georgia Superior Court.

....

.... The court infers that either Lesley Rich told Robin Fisher directly, or Lesley Rich's attorney told Robin Fisher's attorney, that Lesley Rich possessed evidence of electronic communications with Andrew Fisher that would prove his infidelity. Otherwise, there would have been no reason for Robin Fisher to depose Lesley Rich in her divorce case.

In December 2007, Debra Rich testified at a deposition in connection with the Fishers' divorce case. Robin Fisher's attorney asked her numerous questions about her activities and communications with Andrew Fisher, including matters she and Andrew Fisher had discussed in private emails and instant messages. One question pertained to her use of a dog collar as a sexual accoutrement. That was something she had discussed with Andrew Fisher in an instant message sent from the laptop computer. She had not discussed that subject with anyone else.

After 2007, Debra Rich found several anonymous "blog" postings on the internet regarding her relationship with Andrew Fisher. These postings included information discussed in her electronic communications with Andrew Fisher. They caused her severe emotional distress and damaged her reputation.

Rich, 2011 WL 3672059 at *1-*4 (Mass.Super. 2011) (findings of fact).

The Massachusetts trial court found a violation of the Massachusetts wiretap statute. Husband argued that the keystroke logger intercepted the information between the keyboard and computer, which was *not* in transit between computers or between buildings. The Massachusetts state trial court rejected this argument:

Lesley [Husband] relies on federal cases that have construed the term "intercept" in the federal act narrowly to include only electronic messages while they are in transit and to exclude those messages while they are in "storage." See, *In Re Pharmatrak, Inc.*, 329 F.3d 9, 21–22 (1st Cir. 2003) (describing debate about whether interception requires acquisition of message contemporaneously with transmission). As in *Pharmatrak*, however, Lesley's acquisition of Debra's messages would constitute an interception even under the narrower definition. The key logger program Lesley installed recorded the messages as Debra typed them. Compare, *Bailey v. Bailey*,¹⁷ No. 07–11672, p. 8 (E.D.Mich. Feb. 6, 2008), relied on by Lesley, in which a key logger program was used only "to learn passwords, which were used to access and copy Plaintiff's email and messages." Debra's composition of the message was the first step in her communication. Thus, Lesley "intercept[ed]" her messages within the meaning of the state wiretap statute.[FN3]

¹⁷ *Bailey* is discussed here, at page 51.

FN3. Lesley's accessing Debra's emails in her "personal file cabinet" was not contemporaneous with transmission and therefore would not constitute interception if the state act were construed to include a "real time" requirement. However, it does not appear that Lesley gained any additional information from the stored emails that he did not obtain through use of the key logger.

Rich, 2011 WL 3672059 at *5 (Mass.Super. 2011).

However, the trial judge held that there was a three-year statute of limitations for both the state Wiretap Act and the state Privacy Act. *Ibid.* at *6.

Debra Rich knew that Lesley Rich had obtained the contents of her emails and instant messages in June of 2003. She did not file this action until October 26, 2007, which was well over four years later. Thus, any claim under either the Privacy Act or the Wiretap Act for the acquisition of those messages is time-barred.

Even if those claims were not barred by the statute of limitations, they would be barred by the release of liability Debra signed in September 1993. In that document, Debra "irrevocably and unconditionally release[d] and forever discharge[d]" all claims against Lesley "resulting from or in any way relating to any act or omission done or committed" by Lesley prior to September 10, 1993.

Rich, 2011 WL 3672059 at *7 (Mass.Super. 2011).

Husband's disclosure to Robin Fisher of his ex-Wife's private messages began on 17 Feb 2004. Claims for disclosure of these private messages after 26 Oct 2004 would presumably (the judge does not say) *not* be barred by the statute of limitations. However, such claims were held to be barred by the litigation privilege. *Ibid.* at *8.

Thus, Husband won the litigation, despite having violated his ex-Wife's privacy, because she released him from liability *and* because she filed her claims too late. As for disclosure of ex-Wife's private messages in the Fisher divorce case in Georgia, any privacy claims were barred by the litigation privilege. In December 2011, I searched Westlaw for the Fisher divorce case in Georgia, but found nothing.

Bailey (E.D.Mich. 2008)

In the Fall of 2005, Husband, Jeffery Allan Bailey, installed a keystroke logger on both family computers that were also used by his Wife. He discovered various sexual e-mails between Wife and various men. On 9 Jan 2006, Husband left the marital home in Michigan and temporarily resided in Ohio. While in Ohio, he used Wife's passwords (which he knew from use of the keystroke logger while he was in Michigan) to access her e-mail directly, without using the keystroke logger. Husband "filed for divorce on January 11, 2006. He alleged [Wife] was an alcoholic with a history of depression and sought full physical custody of the children." In the divorce and child custody litigation in Michigan state court, Husband's attorney used e-mails from Wife that "indicated that [Wife] had recently gone to a party where she consumed alcohol and

illegal drugs.” “The parties settled the divorce case prior to the July 21, 2006 trial date. [Wife] agreed to give full physical custody of the children to [Husband].” On 2 Mar 2007, after Wife was arrested three times for driving while intoxicated, “the judge awarded sole legal and physical custody to [Husband].” *Bailey v. Bailey*, Not Reported in F.Supp.2d, 2008 WL 324156 at *1-*2 (E.D.Mich. 2008).

On 13 April 2007, Wife filed litigation in federal court, alleging:

- (1) violation of 18 U.S.C. § 2511 (Wiretap Act) against ex-Husband and his attorney in the divorce case;
- (2) violation of 18 U.S.C. § 2701 (Stored Communications Act) against ex-Husband;
- (3) violation of 18 U.S.C. § 2512 (Wiretap Act prohibition against devices) against ex-Husband and his attorney in the divorce case, and against a John Doe Defendant who supplied the key logger software;
- (4) violations of MCL § 750.539a, et seq., and MCL § 750.540 (Eavesdropping) against ex-Husband and his attorney in the divorce case, and John Doe;
- (5) two counts of invasion of privacy against ex-Husband and his attorney in the divorce case;
- (6) intentional infliction of emotional distress against all Defendants; and
- (7) professional malpractice against her attorney in the divorce case.

Wife filed this shotgun blast of litigation, but her real feeling was apparently:

Plaintiff argues that she would not have lost custody of her children if her emails and internet messages had not been disclosed. She also attributes emotional problems and distress she claims to suffer to the loss of custody of her children.

Bailey v. Bailey, 2008 WL 324156 at *2-*3.

The trial judge methodically worked through this scatterbrained set of eight counts, which Wife’s attorney should¹⁸ have pruned by doing some legal research prior to filing her Complaint, as only two of eight counts survived summary judgment, and three of the four Defendants were dismissed on summary judgment.

The Wiretap Act did not apply, because no messages were intercepted while in transit. The trial judge wrote:

Although the issue has not been addressed by the Sixth Circuit, the Circuits that have addressed the issue have agreed that the definition of “intercept” “encompasses only acquisitions contemporaneous with transmission.” *United States v. Steiger*, 318 F.3d 1039, 1047 (11thCir. 2003). See *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5thCir. 1994); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9thCir. 2001); *In re Pharmatruk, Inc.*, 329 F.3d 9 (1stCir. 2003); and *Fraser v. Nationwide Mutual Ins. Co.*, 352 F.3d 107 (3rdCir. 2003). The general reasoning behind these decisions is that based on the statutory definition and distinction between “wire communication” and “electronic communication,” the latter of which conspicuously does not include electronic storage, Congress intended for electronic communication in storage to be handled solely by the Stored

¹⁸ Standler, Why do Legal Research?, <http://www.rbs2.com/legres.pdf> , 71 pp., 6 Mar 2005.

Communications Act. This interpretation is reasonable and consistent with the language of the statute.

Bailey v. Bailey, 2008 WL 324156 at *4.

[Husband] did not obtain the emails or messages contemporaneously with their transmission, and thus, the Wiretap Act does not apply. [¶] Defendants are entitled to summary judgment on Plaintiff's claim for violation of 18 U.S.C. § 2511.

Bailey v. Bailey, 2008 WL 324156 at *5.

The Stored Communications Act did apply, because Husband accessed Wife's e-mails on a computer owned by her ISP or by e-mail provider, *not* from the family computer in the marital residence. Husband was denied summary judgment on this claim. *Bailey v. Bailey*, 2008 WL 324156 at *5-*6. The trial judge wrote:

However, as a point of clarification, Stored Communications Act protection does not extend to emails and messages stored only on Plaintiff's personal computer. *In re Doubleclick Inc.*, 154 F.Supp.2d 497, 511 (S.D.N.Y. 2001) ("the cookies' residence on plaintiffs' computers does not fall into § 2510(17)(B) because plaintiffs are not 'electronic communication service' providers.").

Bailey v. Bailey, 2008 WL 324156 at *6

18 U.S.C. § 2512 applies to manufacture of devices for wiretapping. But neither Husband nor his attorney were manufacturers, and — more importantly — this is only a criminal statute, with no private right of action. Defendants were granted summary judgment on this claim. *Bailey v. Bailey*, 2008 WL 324156 at *7.

Defendants were granted summary judgment on Michigan's eavesdropping statutes, because those statutes did not apply to conduct in this case, and because of a lack of civil cause of action in those statutes. *Bailey v. Bailey*, 2008 WL 324156 at *7-*9.

Wife made a common-law privacy claim for intrusion on seclusion. The trial court noted:

[Husband] ... argues that Plaintiff [i.e., Wife] cannot establish a claim because his actions are not objectionable to a reasonable man. Defendant Bailey contends that his actions were done after inadvertently discovering his wife was having sexual discussions on the internet, and were done to protect himself and his family. Plaintiff responds by stating there is a question of fact, but does not identify any authority or evidence to support his conclusion.

The facts are largely undisputed in this case. The method used by Defendant Bailey was a key logger that recorded Plaintiff's keystrokes, which Defendant used to learn Plaintiff's passwords. With the passwords, Defendant was able to access Plaintiff's email and private message forums. In addition, once Defendant learned that Plaintiff used family names as passwords, he claims he was able to guess her new passwords even after she repeatedly changed them. Plaintiff avers that Defendant continued to access her email even after divorce proceedings were complete. [Plaintiff's Exhibit A]. She provides an affidavit that claims she planted a false story of an affair with a neighbor in an email on January 2007, well after the divorce was final. She claims that on February 16, 2007, her daughter Chloe sent an email referencing the planted story, which Plaintiff takes to mean Defendant Bailey was continuing to access her accounts and passing the information to their teenage daughter.

Defendant cites *Lewis v. Dayton-Hudson*, 128 Mich.App. 165, 339 N.W.2d 857 (Mich.App. 1983), to support his contention that he is entitled to summary judgment. Defendant appears to rely on *Lewis* for the proposition that Plaintiff did not have a right of privacy. In *Lewis*, the court held that use of a two-way mirror in a dressing room was not an invasion of privacy because customers do not have a legitimate expectation of privacy in light of signs posted in the dressing room indicating there was surveillance. It is not clear how this case is applicable to the instant facts, it is undisputed that Plaintiff was unaware of Defendant's use of the key logger.

Defendant also cites *Saldana v. Kelsey-Hayes Company*, 178 Mich.App. 230, 443 N.W.2d 382 (Mich.App. 1989), where the court found an employer's use of a high powered lens to look into an employee's home for purposes of determining whether he was disabled was not an invasion of privacy. The court found the plaintiff did not have a right to privacy because the surveillance "involved matters which defendants had a legitimate right to investigate." Id. at 234, 443 N.W.2d 382. The court found that an employer has a legitimate right to investigate suspicions that an employee's work-related disability is a pretext. Id. at 235, 443 N.W.2d 382. This case is not dispositive of Plaintiff's claim.

Defendant asserts that he had a right to monitor Plaintiff's computer activities in the interests of himself, Plaintiff, and their children. [Motion, p. 26]. However, Plaintiff presents evidence that Defendant continued to access her private email after the divorce, and regarding matters that were no longer of Defendant's concern. [Plaintiff's Exhibit A]. In general, Plaintiff had a right to privacy in her private email account.

Plaintiff raises an issue of fact regarding whether Defendant Bailey's use of a key logger to learn her email and messaging passwords so that he could access her private correspondence was objectionable to a reasonable man. See *Saldana*, 178 Mich.App. at 234, 443 N.W.2d 382 ("[w]hether the intrusion is objectionable to a reasonable person is a factual question best determined by a jury."). Defendant Bailey is not entitled to summary judgment on this claim.

Bailey v. Bailey, 2008 WL 324156 at *9-*10.

Because Husband's lawyer was not involved in the intrusion, he was granted summary judgment. *Ibid.* at *9.

Wife also made a common-law privacy claim for public disclosure of private facts.

The alleged "public" disclosure of the information contained in Plaintiff's emails consists of Defendant Pope's use of the emails to impeach Plaintiff's testimony during a custody hearing, although he did not admit them into evidence; copies were sent as exhibits to Plaintiff's attorney, Defendant Kozyra; and the emails were summarized in response to a motion by Plaintiff. None of these is sufficient to support Plaintiff's claim for invasion of privacy based on public disclosure of private facts.

The information disclosed, regarding Plaintiff's sexual relations, were private facts. "Sexual relations, for example, are normally entirely private matters." *Doe*, 212 Mich.App. at 82, 536 N.W.2d 824 (citation omitted). However, the information must be of no legitimate concern to the public. All of the disclosures were in the context of a court case to determine the custody of the parties three children. Where the state is required to determine the custody of children during a divorce, the fitness of a person to parent is of legitimate concern to the public. Thus, this was not "unreasonable publicity." See *Doe*, 212 Mich.App. at 81, 536 N.W.2d 824.

Accordingly, Defendants are entitled to summary judgment on this claim.

Bailey v. Bailey, 2008 WL 324156 at *11.

There might also be a litigation privilege for introduction of this evidence in the child custody case, provided there was no disclosure outside the court's proceedings.

Wife made an intentional infliction of emotional distress claim.

In this case, Defendants' conduct of using a key logger to obtain Plaintiff's passwords in order to gain access to her email and messaging accounts, and then using copies of those documents in divorce and custody proceedings is not extreme and outrageous conduct. A husband snooping in his wife's email, after learning that she was engaging in sexual discussions over the internet while the children may have been present, and using damaging emails in divorce and custody proceedings can hardly be considered "atrocious and utterly intolerable in a civilized society." Consistent with the discussion above regarding Plaintiff's invasion of privacy claim, Defendant Bailey's method of garnering the information may be objectionable to a reasonable man, that is for the jury to decide, but his conduct does not "go beyond all possible bounds of decency."

Defendants are entitled to summary judgment on Plaintiff's claim for intentional infliction of emotional distress.

Bailey v. Bailey, 2008 WL 324156 at *11-*12.

Finally, Wife's attorney during the divorce litigation was dismissed as a defendant in federal court, because of lack of subject matter jurisdiction over his alleged malpractice. The only claims remaining after summary judgment were: "(1) violation of 18 U.S.C. § 2701 against [Husband]; and (2) invasion of privacy against [Husband] based on intrusion upon seclusion." *Bailey v. Bailey*, 2008 WL 324156 at *12.

The summary judgment decision was on 6 Feb 2008. The parties settled their litigation and, on 25 March 2008, the judge dismissed the case.¹⁹

Miller v. Meyers (W.D.Ark. 2011)

Husband, Darin Meyers, installed a keystroke logger on a computer "onto the computer primarily used by Plaintiff [Wife]". Husband used information from that logger in the divorce litigation in state court:

Defendant [Husband] admittedly obtained such information and monitored his then-wife's activity prior to the commencement of divorce proceedings. Defendant was able to access password-protected information by installing a key-logger program onto the computer primarily used by Plaintiff. During the divorce proceedings and again during a later custody proceeding, Defendant used certain information he obtained from Plaintiff's accounts.

Miller v. Meyers, 766 F.Supp.2d 919, 921 (W.D.Ark. 2011).

¹⁹ *Bailey*, Document 46, Case Nr. 2:07-cv-11672-SFC-MKM (E.D.Mich. 25 Mar 2008).

When Wife learned of the surveillance, she filed litigation in federal court, alleging three federal and five state law claims:

- 18 U.S.C. § 1030, et seq. for Fraud in Connection with Computers;
- 18 U.S.C. § 2701, et seq. for Unlawful Access to Stored Communications;
- 18 U.S.C. § 2511, et seq. for Interception and Disclosure of Electronic Communications.

Five claims under Arkansas state law for:

1. Unlawful Use or Access to Computers, Ark.Code Ann. § 5-41-203,
2. Computer Trespass, Ark.Code Ann. § 5-41-104,
3. Unlawful Act Regarding a Computer, Ark.Code Ann. § 5-41-202,
4. Breach of Contract (disputed facts about “valid, enforceable agreement between the parties as to non-disclosure of materials used in the divorce proceeding”), and
5. Intentional Infliction of Emotional Distress.

Miller v. Meyers, 766 F.Supp.2d at 921, 924-925 (W.D.Ark. 2011).

In a preliminary skirmish about jurisdiction of the federal court, "Defendant [Husband] contends Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure". The trial court held:

The domestic relations exception divests the federal courts of jurisdiction over any action for which the subject is a divorce, allowance of alimony, or child custody. *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). Additionally, when a cause of action closely relates to but does not precisely fit into the contours of an action for divorce, alimony or child custody, federal courts generally will abstain from exercising jurisdiction. See *Lannan v. Maul*, 979 F.2d 627, 631 (8thCir. 1992).

Plaintiff's Complaint states an independent basis for federal jurisdiction, i.e., the alleged violations of certain federal statutes. While the alleged conduct may have taken place during the pendency of the divorce proceedings, the Court does not find Plaintiff's claims to be so inextricably intertwined with the prior property settlement and divorce decree to divest this court of jurisdiction. Further, as previously stated, Plaintiff's Complaint alleges federal question jurisdiction pursuant to 28 U.S.C. § 1331, as opposed to diversity jurisdiction pursuant to 28 U.S.C. § 1332. Accordingly, Defendant's Motion to Dismiss is DENIED. *Miller*, 2010 WL 797153 at *1-*2 (W.D.Ark. 2010).

The trial court held that the Stored Communications Act, *not* the Wiretap Act, was the applicable statute in this case. *Miller v. Meyers*, 766 F.Supp.2d at 923-924 (W.D.Ark. 2011).

The trial court granted Wife's summary judgment motion on the violation of the Federal Stored Communications Act:

The relevant section of the SCA provides that whoever “intentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility; and thereby obtains ... access to a wire or electronic communication while it is in electronic storage in such system shall be punished ...” 18 U.S.C. § 2701(a). The statute allows for private causes of action where “any person” injured by a violation of the SCA can show that the person violating the Act acted with a “knowing or intentional state of mind[.]” 18 U.S.C. § 2707(a). “[W]here the facts

indisputably present a case of an individual logging onto another's e-mail account without permission and reviewing the material therein, a summary judgment finding of an SCA violation is appropriate.” *Cardinal Health 414, Inc. v. Adams*, 582 F.Supp.2d 967, 976 (M.D.Tenn. 2008) (citing *Wyatt Tech. Corp. v. Smithson*, No. 05–1309, 2006 WL 5668246, *9–10 (C.D.Cal. 2006)). The Court finds no genuine issue of any material fact regarding Defendant's unlawful access to Plaintiff's stored communications. Defendant has admitted to using a keylogger program to obtain Plaintiff's passwords. Defendant then used those passwords to access Plaintiff's email account without authorization. Summary judgment for Plaintiff on this count as to liability is, therefore, appropriate. The amount of damages, if any, may be determined at trial.

Miller v. Meyers, 766 F.Supp.2d at 923 (W.D.Ark. 2011).

The trial court granted summary judgment for Wife on violation of the Arkansas Computer Trespass Statute:

Plaintiff contends that Defendant should be found liable for computer trespass under Ark.Code Ann. § 5–41–104. While there is little case law interpreting this particular statute, it is clear to the court that Defendant intentionally accessed the MySpace and Yahoo computer networks without authorization and should now be held liable for computer trespass. While the extent of Plaintiff's actual injury, under this statute is not entirely clear, the Court finds that she has at least sustained some minor damages in changing her passwords and assessing the consequences of her husband's snooping. See *Cardinal Health 414, Inc. v. Adams*, 582 F.Supp.2d 967, 982 (M.D.Tenn. 2008) (finding minor damages to a plaintiff under a similar state statute). The Court therefore finds that summary judgment should be granted in favor of Plaintiff on this count as to liability, and any damages may be determined at trial.

Miller v. Meyers, 766 F.Supp.2d at 924 (W.D.Ark. 2011).

The other two Arkansas statutory claims — unlawful use or access to a computer, and unlawful act regarding a computer — have only criminal liability, with no civil penalties, hence the trial court dismissed those two counts. *Miller v. Meyers*, 766 F.Supp.2d at 924-925 (W.D.Ark. 2011).

The trial court granted Husband summary judgment on the intentional infliction of emotional distress claim:

Arkansas courts have taken a very narrow view of claims of intentional infliction of emotional distress, or outrage. See *Faulkner v. Arkansas Children's Hospital*, 347 Ark. 941, 69 S.W.3d 393, 404 (2002). Merely describing conduct as outrageous does not make it so. *Id.* at 404. Defendant's [Husband's] conduct of monitoring the internet traffic on his home network and using a keylogger to access his then wife's e-mails, and then using copies of those documents in divorce and custody proceedings is not extreme and outrageous conduct. A husband prying into his wife's email, after learning that she was engaging in conversations and photo sharing, and then using damaging emails in a divorce and custody proceedings can hardly be considered “extreme and outrageous,” “beyond all possible bounds of decency,” or “utterly intolerable in a civilized society.” *Crockett v. Essex*, 341 Ark. 558, 19 S.W.3d 585 (2000) (listing elements of the tort of outrage). Defendant [Husband] is entitled to summary judgment on this claim.

Miller v. Meyers, 766 F.Supp.2d at 925 (W.D.Ark. 2011).

Note that a videocamera in a bedroom or bathroom is infliction of emotional distress, but apparently reading private e-mail is *not* infliction of emotional distress.

The summary judgment motions were decided on 21 Jan 2011 and trial was scheduled for 2 Feb 2011. When I did legal research in December 2011, there was nothing further in Westlaw for this case. My inspection of the online federal court docket showed that the case settled before trial, and the settlement was *not* made part of the court's record.²⁰

Conclusion

In most of the USA, one spouse can *not* legally wiretap the other spouse's telephone conversations, with one exception. A spouse with a good-faith belief that the other spouse is abusing their child may record the other spouse's telephone calls.

Videotaping a spouse in a bedroom or bathroom is a privacy tort, and can also be intentional infliction of emotional distress.

Courts generally hold there is no reasonable expectation of privacy for files stored on a shared computer in the marital residence. However, it is a violation of the Stored Communications Act for anyone other than the intended recipient to read e-mail messages on a server belonging to an e-mail service.

If the spouses share a residence while living separate and apart (i.e., before and during pendency of a divorce), I suggest that they *not* share a computer. Sharing a computer with one's opponent in litigation is a very bad idea, which just invites privacy violations. Divorce attorneys should explicitly recommend against such sharing of computer(s) with one's opponent in divorce litigation. Purchasing a new computer for private use is much less expensive than paying an attorney to litigate alleged invasions of privacy.

I strongly suggest that divorce attorneys discourage their clients from installing a keystroke logger on a computer used by the other spouse.²¹

²⁰ *Miller v. Meyers*, Document 44, Case Nr. 06:09-CV-6103 (W.D.Ark. 2 Feb 2011).

²¹ Accord, Laura W. Morgan, "Marital Cybertorts: The Limits of Privacy in the Family Computer," 20 JOURNAL OF AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 231, 249 (2007).

Bibliography

The authority for this essay is the cases cited above, beginning at page 8. However, the following articles in legal journals may be helpful to the reader. Note that there are *many* other articles on wiretapping, keystroke loggers, privacy of e-mail, and electronic surveillance in general.

Camille Calman, Note, "Spy vs. Spouse: Regulating Surveillance Software on Shared Marital Computers," 105 COLUMBIA LAW REVIEW 2097 (Nov 2005).

Scott J. Glick, "Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance," 41 CATHOLIC UNIVERSITY LAW REVIEW 845 (Summer 1992).

Laura W. Morgan, "Marital Cybertorts: The Limits of Privacy in the Family Computer," 20 JOURNAL OF AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 231 (2007).

Laura W. Morgan and Lewis B. Reich, "The Individuals' Right of Privacy in a Marriage," 23 JOURNAL OF AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 111 (2010).

Richard C. Turkington, "Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Store Communications Acts and the Common Law Privacy Intrusion Tort," 82 NEBRASKA LAW REVIEW 693 (2004).

This document is at **www.rbs2.com/dprivacy.pdf**

My most recent search for court cases on this topic was in December 2011.

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