



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

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Volume 104  
Issue 3 *Dickinson Law Review - Volume 104,*  
*1999-2000*

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3-1-2000

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### Recommended Citation

Laura S. Killian, *Concerned or Just Plain Nosy? The Consequences of Parental Wiretapping Under the Federal Wiretap Act in Light of Pollock v. Pollock*, 104 DICK. L. REV. 561 (2000).

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## Note

# Concerned or Just Plain Nosy? The Consequences of Parental Wiretapping Under the Federal Wiretap Act in Light of *Pollock v. Pollock*

Title III Omnibus Crime Control and Safe Streets Act of 1968 (Title III), commonly referred to as the Federal Wiretapping Act, subjects “any person who—(a) intentionally intercepts . . . any wire, oral, or electronic communication” to criminal liability unless a specified exemption applies.<sup>1</sup> Two such commonly applied exemptions are the consent and extension exemptions.<sup>2</sup> The consent exemption excludes all recordings from Title III when one of the parties to the conversation has given prior consent.<sup>3</sup> The extension exemption, also known as the “ordinary course of

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1. 18 U.S.C. § 2511 (1994). Title III provides the following:

(4) “intercept” means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;

(12) “electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photooptical system that affects interstate or foreign commerce. . .

*Id.* at § 2510 (1994 & Supp. IV 1998).

2. *See id.* §§ 2511(2)(d), 2510(5)(a).

3. *See id.* § 2511(2)(d).

business exemption,”<sup>4</sup> exempts “any telephone or telegraph instrument, equipment or facility or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service . . . and being used by the subscriber or user in the ordinary course of its business. . . .”<sup>5</sup>

These exemptions are open to interpretation when applied to parents who record their minor children’s phone conversations. Generally, this issue arises during bitter custody disputes when a custodial parent uses an extension phone inside the home to record phone calls between the noncustodial parent and the child.<sup>6</sup>

The doctrine of vicarious consent was adopted under the consent exemption by the Sixth Circuit as a matter of first impression in *Pollock v. Pollock*.<sup>7</sup> The court held that parents may consent for their children when the recording of the calls is in the child’s best interest.<sup>8</sup> In reaching its decision, the Sixth Circuit refused to follow other circuit courts that have applied the extension exemption to parental wiretapping.<sup>9</sup> Although one cannot discuss the subject of parental wiretapping without a discussion of this exemption, this Note will not focus on whether it applies to domestic situations. Rather, this Note will focus on the *Pollock* decision and the circumstances and issues surrounding the application of a vicarious consent analysis. Part I will discuss the facts and holding of *Pollock*, Part II will summarize the extension exemption debate and the history of parental wiretapping, and Part III will examine the consent exemption as it applies to parental wiretapping.

## I. *Pollock v. Pollock*

### A. Facts

Samuel and Sandra Pollock were married in 1977 and had three children together, Courtney, born 1981, Robert, born 1984, and Ian, born 1987.<sup>10</sup> In 1993 they divorced and Samuel remarried

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4. See *Pollock v. Pollock*, 154 F.3d 601, 607 (6th Cir. 1998).

5. See U.S.C. § 2510(5)(a)(i).

6. See *Pollock*, 154 F.3d at 603 (“[T]he tape recordings . . . that form the basis of this lawsuit occurred in the context of a bitter and protracted child custody dispute.”); *Campbell v. Price*, 2 F. Supp.2d 1186, 1191 (E.D. Ark. 1998).

7. 154 F.3d at 610.

8. See *id.*

9. See *id.* at 607.

10. See *id.* at 603.

his current wife, Laura.<sup>11</sup> Sandra was granted custody of all three children.<sup>12</sup> Samuel appealed the final decree and a custody dispute ensued over Courtney, who was fourteen at the time.<sup>13</sup> During the dispute Sandra tape-recorded Courtney's phone conversations with Samuel and Laura on an extension phone in Sandra's bedroom over a period of a few weeks in 1995.<sup>14</sup>

During one phone call between Courtney and Laura, Courtney complained about a court order requiring her to live with her mother, after which she and Laura joked about killing Sandra's two attorneys and the judge that granted custody to Sandra.<sup>15</sup> Hearing this conversation, Sandra became alarmed and frightened, and claimed that it "gave [her] immediate concern for the safety and well-being of three other individuals and confirmed to [her] the abuse and emotional injury and harm she suspected Courtney was being subjected to."<sup>16</sup> According to Laura, however, it was clearly obvious from the tape that the two had made the remarks "in obvious jest and with no semblance of seriousness."<sup>17</sup> Sandra claimed she recorded the conversations in an attempt to prove that Samuel was psychologically and emotionally abusing Courtney.<sup>18</sup> She felt that "Samuel was trying to get Courtney to do whatever she could to convince [Sandra] to let Courtney primarily live with Samuel."<sup>19</sup> Sandra further believed that Courtney had an excessive and compulsive desire to live with her father which had caused the mother-daughter relationship to deteriorate<sup>20</sup> and that her only motivation for recording Courtney's conversations was "concern for her child's well being."<sup>21</sup>

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11. *See id.* Sandra and Samuel had separated in 1992 after she discovered he was having an affair. *See id.*

12. *See Pollock*, 154 F.3d at 603.

13. *See id.*

14. *See id.* at 604.

15. *See id.*

16. *Id.* (quoting Joint Appendix at 103). Sandra discussed this conversation with her attorney who reported the situation to the Crimes Against Children Unit (CACU). *See id.* The CACU then revealed the contents of the tape to the presiding judge in Samuel and Sandra's divorce and custody cases who entered it as part of the official record. *See id.* at 605.

17. *Pollock*, 154 F.3d at 605.

18. *Id.* at 604.

19. *Id.*

20. *See id.* Courtney blames the deteriorating relationship on the fact that she does not get along well with her mother, was not happy living with her, and does get along with her father and step-mother. *See id.* at 605. She further stated that the relationship was strained by her mother's relationship with a convicted felon who was only a few years older than Courtney. *See id.*

21. *See id.* (quoting Joint Appendix at 102-103). Sandra's stated she believed

On the other hand, Samuel and Laura alleged that Sandra's motivation arose out of anger towards Courtney.<sup>22</sup> They claimed Sandra became angry when she learned that a phone call between herself and Courtney had been recorded and recorded the calls "to return the favor."<sup>23</sup> Laura further believed Sandra's anger was a result of discovering, upon reading Courtney's diary, that Samuel had hired an attorney to represent Courtney in the on-going custody dispute.<sup>24</sup> She was alleged to have recorded the calls to eavesdrop on the privileged conversations between Courtney and her attorney.<sup>25</sup>

*B. The District Court for the Western District of Kentucky*

Samuel and Laura brought action against Sandra under 18 U.S.C. § 2511(1)(a) for intentionally recording their phone conversations with Courtney without either party's consent.<sup>26</sup> The court qualified vicarious consent under the consent exemption and granted summary judgment to Sandra,<sup>27</sup> finding that no question of material fact existed as to whether she acted in Courtney's best interest.<sup>28</sup> In reaching its decision, the court relied on the Seventh Circuit's decision in *Scheib v. Grant*<sup>29</sup> and the Alabama Court of Civil Appeals' decision in *Silas v. Silas*<sup>30</sup> which granted summary judgement to the recording parent.<sup>31</sup> The court stated that Samuel and Laura failed to show more than the existence of "tension and bitterness" between the parties to prove that Sandra's motives were improper.<sup>32</sup>

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throughout the divorce and custody proceedings that Courtney was being emotionally abused. *See id.*

22. *See Pollock*, 154 F.3d at 605.

23. *Id.* It was disputed as to who Courtney said actually recorded this conversation; Sandra believed that Courtney accused Samuel and Laura, while Courtney and Laura claim that Courtney recorded the conversation. *See id.*

24. *See id.* Courtney also believed her mother began recording her calls after reading her diary. *See id.*

25. *See id.*

26. *See id.*

27. *See Pollock*, 154 F.3d at 605.

28. *See id.*

29. 22 F.3d 149 (7th Cir. 1994).

30. 680 So.2d 368 (Ala. Civ. App. 1996).

31. *See Pollock*, 154 F.3d at 612.

32. *See id.*

### C. *The Sixth Circuit*

The Sixth Circuit affirmed the district court's adoption of vicarious consent but found that a question of material fact existed as to Sandra's motives, reversed summary judgment and remanded the case for trial.<sup>33</sup> The Sixth Circuit criticized the district court for failing to consider Samuel, Laura, and Courtney's testimonies regarding Sandra's motives.<sup>34</sup> The *Pollock* court upheld its prior decision in *United States v. Murdock*<sup>35</sup> rejecting the applicability of the extension exemption to domestic situations.<sup>36</sup> The court chose instead to apply the best interests standard established by the District Court of Utah in *Thompson v. Dulaney*.<sup>37</sup> This standard emphasizes that the recording parent must demonstrate "a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child."<sup>38</sup>

## II. The Extension Exemption and the History of Parental Wiretapping

The issue of parental wiretapping initially came to light in *Anonymous v. Anonymous* under the extension exemption.<sup>39</sup> A custodial father had recorded his children's conversations with their mother by turning the record knob on the answering machine every time that she called.<sup>40</sup> The court held that the recording father was exempt under the extension exemption because the use of an extension phone in one's own home is "certainly . . . in the 'ordinary course of (the user's) business.'"<sup>41</sup> The court further stated that the wiretapping occurred in a purely domestic context and did not rise to the level of criminal conduct.<sup>42</sup>

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33. *See id.* As of the date of publication for this article, the case is pending in the Western District of Kentucky.

34. *See id.* at 611-612.

35. 63 F.3d 1391 (6th Cir. 1995).

36. *See Pollock*, 154 F.3d at 607.

37. *See id.* at 610; *Thompson v. Dulaney*, 838 F.Supp. 1535, 1544 (D. Utah 1993).

38. *Pollock*, 154 F.3d at 610.

39. *See* 558 F.2d 677 (2d Cir. 1977).

40. *See id.* at 678.

41. *Id.* at 678-79 (citation omitted).

42. *See id.* at 679. While the court noted that Congress was aware of the occurrence of domestic wiretapping, Congress's primary concern was organized crime, and the facts in *Anonymous* did not rise to that level. *See id.* at 677.

The extension exemption is included as an exception to the definition of "electronic, mechanical, or other device."<sup>43</sup> The exemption is as follows:

- (5) "electronic, mechanical, or other device" means . . . other than –
- (a) any telephone or telegraph instrument, equipment or facility . . .
- (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business . . .

Courts have looked to the plain language, and most debatably, the legislative intent of Title III to determine its scope.<sup>45</sup>

The Tenth Circuit in *Newcomb v. Ingle*<sup>46</sup> found Title III to indicate clearly Congress's intent "to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other."<sup>47</sup> In that case a mother recorded the conversations of her son with her ex-husband.<sup>48</sup> One of the conversations revealed the father instructing the son and his brother as they set fire to their house.<sup>49</sup> The court reasoned that a broad reading of Title III indicates that Congress would not create an exemption for only businesses, and not one for homes.<sup>50</sup>

Similarly, the Seventh Circuit in *Scheib v. Grant* stated that Congress could not have meant for parents to be criminally liable for taping their children's conversations when the parents act out of concern for their children's welfare.<sup>51</sup> In *Scheib*, a father used an answering machine to record two phone calls between his son, who

43. 18 U.S.C. § 2510(5)(a) (i)(1994).

44. *See id.*

45. *See Scheib v. Grant*, 22 F.3d 149 (7th Cir. 1994); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991); *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir.); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *U.S. v. Jones*, 542 F.2d 661 (6th Cir. 1976).

46. *See Newcomb*, 944 F.2d at 1534.

47. *Id.* (quoting *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir. 1974)).

48. *See id.* at 1535.

49. *See id.* Criminal charges were brought against the father and the son after the mother sent the tapes to an assistant county attorney. *See id.* The charges against the son were dismissed and he subsequently brought suit under 18 U.S.C. § 2511 against his mother. *See id.*

50. *See id.* at 1536.

51. *See* 22 F.3d 149, 154 (7th Cir. 1994) ("We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for that child's well-being").

was visiting for the summer, and the mother.<sup>52</sup> The court examined Title III's language to conclude that the words "subscriber" and "user" are not "exclusively market-oriented connotations," and thus apply to the home.<sup>53</sup> The phrase "in the ordinary course of business," when read with the words "subscriber" and "user," then indicates that the exemption is not exclusive to commercial situations but applies to domestic situations as well.<sup>54</sup>

The *Pollock* court refused to apply the extension exemption to parental wiretapping based on its decision in *Murdock*.<sup>55</sup> In *Murdock*, Mrs. Murdock, the defendant's wife, became suspicious of her husband's personal and business conduct.<sup>56</sup> She recorded all calls at the funeral home business the couple owned together from two business extensions inside their home.<sup>57</sup> The Sixth Circuit did not exempt Mrs. Murdock under the extension exemption because her conduct, "spying on one's spouse," was not in the ordinary course of the funeral home's business.<sup>58</sup> The court further held that the recording device placed on the extension phone intercepted the calls, not the extension phone.<sup>59</sup> The recording device was not provided by "a provider of wire or electronic communication service",<sup>60</sup> and therefore, was not covered by the extension exemption.<sup>61</sup>

Other circuits faced with facts similar to those of *Murdock* have criticized the application of the extension exemption in domestic contexts and look to the purpose of Title III - to "effectively prohibit . . . all interceptions of oral and wire

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52. See *id.* at 151.

53. See *id.* at 154.

54. See *id.*

55. See *Pollock v. Pollock*, 154 F.3d 601, 607 (6th Cir. 1998).

56. See *United States v. Murdock*, 63 F.3d 1391, 1392 (6th Cir. 1995).

57. See *id.* Mrs. Murdock attached on/off switches to the tape recorders to allow her to control the recording equipment. See *id.* She recorded the calls for three months until her son from a previous marriage told her that it was illegal. See *id.*

58. See *id.* at 1400. Although *Murdock* analyzed both Mrs. Murdock's business and personal concerns under this standard, *Pollock* focused on the personal aspect of the analysis. See *Pollock*, 154 F.3d at 607. *Murdock* stated that recording phone calls in an employment context is in the ordinary course of business when done "to the extent necessary to guard against unauthorized use" and for only "as long as the call involves the type of information the supervisor fears is being disclosed." *Murdock*, 63 F.3d at 1396. Mrs. Murdock indiscriminately recorded all calls at the funeral home and thus was not acting in the ordinary course of business. See *id.* at 1397.

59. See *Murdock*, 63 F.3d at 1395.

60. 18 U.S.C. § 2510(5)(a)(i)(1994). Mrs. Murdock had purchased the tape recorders from Radio Shack. See *Murdock*, 63 F.3d at 1392.

61. See *Murdock*, 63 F.3d at 1395.



communications, except those specifically provided for in the Act . . ." - to stress that the unambiguous language does not include an express or implied exemption for domestic situations.<sup>62</sup> The comments of Senator Long, Chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, and Senator Hruska, a co-sponsor of the bill, were relied on to show the congressional awareness of wiretapping within the home.<sup>63</sup> Senator Long noted "the three major areas in which private electronic surveillance was widespread were (1) industrial, (2) divorce cases, and (3) politics."<sup>64</sup> Senator Hruska stated that "[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations."<sup>65</sup> Similarly, much weight was given to the testimony of Professor Robert Blakey, who is recognized as the author of Title III.<sup>66</sup> He stated that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation."<sup>67</sup>

With the exception of the Tenth Circuit, the above reasoning was used to prohibit all wiretapping under the extension exemption.<sup>68</sup> Only the Tenth Circuit in *Newcomb* broadened its interpretation of Title III to exclude parents from its prohibition, finding interspousal wiretapping to be "qualitatively different from a custodial parent tapping a minor child's conversations within the family home."<sup>69</sup> Similarly, by exempting parents from Title III in certain circumstances under the doctrine of vicarious consent, the

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62. See *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372, 373(4th Cir. 1984); *U.S. v. Jones*, 542 F.2d 661, 666 (6th Cir. 1976).

63. See *Kempf*, 868 F.2d at 973; *Heggy*, 944 F.2d at 1540.

64. *Hearings on Invasions of Privacy Before the Subcomm. On Admin. Practice & Procedure of the Sen. Comm. On the Judiciary*, 89th Cong., pt. 5 at 2261 (1965-66).

65. S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2274.

66. See *Jones*, 542 F.2d at 668-69; *Pritchard*, 732 F.2d at 374; *Heggy*, 944 F.2d at 1541.

67. *Hearings on the Right to Privacy Act of 1967 Before the Subcomm. on Admin. Practice & Procedure of the Sen. Comm. on the Judiciary*, 90th Cong., pt. 2 at 413 (1967).

68. See *Pritchard*, 732 F.2d at 374 (Title III prohibits all wiretapping activities unless specifically excepted"); *Pollock v. Pollock*, 154 F.3d 601, 607 (6th Cir. 1998) (refusing to apply the extension exemption to wiretapping in the home); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989) (agreeing with *Pritchard*).

69. See *Newcomb v. Ingle*, 944 F.2d 1534, 1535-36 (10th Cir. 1991).

Sixth Circuit in *Pollock* held that not all domestic wiretapping should be prohibited.<sup>70</sup>

Vicarious consent was first introduced in *Thompson v. Dulaney*.<sup>71</sup> The District Court in *Thompson* held that a parent could vicariously consent on behalf of a child if the parent has a "good faith basis that is objectively reasonable for believing that it is necessary . . . and in the best interest of the child."<sup>72</sup> Subsequent to the *Thompson* decision, both state and federal district courts have adopted this line of reasoning.<sup>73</sup> At the circuit court level, whether vicarious consent qualifies under the consent exemption to absolve recording parents of criminal liability became a question of first impression in *Pollock*.<sup>74</sup>

### III. The Consent Exemption

It shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.<sup>75</sup>

While Congress does not specifically provide for vicarious consent within this language,<sup>76</sup> all but one court considering parental wiretapping under the consent exemption have interpreted Title III to include vicarious consent.<sup>77</sup> The Michigan Court of Appeals' first hearing of *Williams v. Williams* refused to follow this interpretation.<sup>78</sup> In that case, the custodial father recorded two phone conversations between his five-year old son and the noncustodial mother.<sup>79</sup> The trial court adopted vicarious consent

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70. See *Pollock*, 154 F.3d at 610.

71. 838 F. Supp. 1535 (D. Utah, 1993).

72. *Id.* at 1544.

73. See *Silas v. Silas*, 680 So.2d 368 (Ala. Civ. App. 1996); *Pollock v. Pollock*, 975 F. Supp. 974 (W.D. Ky. 1997); *Campbell v. Price*, 2 F. Supp.2d 1186 (E.D. Ark. 1998); *Williams v. Williams*, 603 N.W.2d 114 (Mich. Ct. App. 1999); *Wagner v. Wagner*, 64 F. Supp.2d 895 (D. Minn. 1999).

74. See *Pollock*, 154 F.3d 606-07 (discussing that the courts to have ruled on this issue were a few district courts).

75. 18 U.S.C. § 2511(2)(d)(1994).

76. See *id.*

77. See *Silas*, 680 So.2d 368; *Pollock*, 975 F. Supp. 974; *Campbell*, 2 F.Supp.2d 1186; *Williams*, 603 N.W.2d 114; *Wagner*, 64 F. Supp.2d 895.

78. See *Williams v. Williams*, 581 N.W.2d 777, 780 (Mich. Ct. App. 1998).

79. See *id.* at 778.

and granted the father summary judgment, finding no genuine issue of material fact that he acted in the best interests of his son.<sup>80</sup> On appeal, the Michigan Court of Appeals reversed the decision and refused to create a judicial vicarious consent exemption, because Title III does not specifically provide for one in its language.<sup>81</sup> It further concluded that Congress could have created this exemption had it intended for parents to consent on behalf of their minor children.<sup>82</sup> It reasoned that the legislature is in a better position to determine if such an exemption should be added to Title III, because they can weigh the policy and privacy issues regarding the extent of privacy expected from family members in the home.<sup>83</sup>

The Michigan Supreme Court remanded *Williams* on appeal for consideration in light of *Pollock*.<sup>84</sup> On remand, the Court of Appeals was compelled by the Sixth Circuit's decision to adopt vicarious consent but nevertheless clearly stated its opposing view on the issue.<sup>85</sup> *Williams* was brought under both the Federal Wiretapping Act and the Michigan Eavesdropping statute<sup>86</sup> which contains a similar consent provision.<sup>87</sup> While the court followed the Sixth Circuit's interpretation of the Federal Act, it refused to find such an exemption in the Michigan statute for lack of legislative intent.<sup>88</sup> The court's statement, "[w]e remain convinced that the delicate question posed in this case and the effect that its resolution may have both on how family law is practiced and the relationship between the child and each of the parents, is more appropriately commended to the legislative branch," implies that in the absence

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80. *See id.*

81. *See id.* at 780.

82. *See id.*

83. *See Williams*, 581 N.W.2d at 781.

84. *See Williams v. Williams*, 593 N.W.2d 559 (Mich. 1991).

85. *See Williams v. Williams*, 603 N.W.2d 114, 116 (Mich. Ct. App. 1999).

86. *See* 24A MICH. COMP. LAWS ANN. § 28.807(3) (West 1990). The Michigan statute provides the following:

Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both.

*Id.*

87. *See Williams*, 581 N.W.2d at 778.

88. *See Williams*, 603 N.W.2d at 116.

of *Pollock* it would have refused the adoption of vicarious consent under the Federal Act as well.<sup>89</sup>

The perspective that developed from *Williams* is quite narrow. The consent exemption is meant to be interpreted broadly.<sup>90</sup> Congress found it unnecessary to specifically enumerate each way consent may be given. The word "consent" is a general term that can be given by actual or implied consent.<sup>91</sup> When an individual lacks the capacity to consent,<sup>92</sup> their guardian is empowered to consent on their behalf. Parents, as the natural guardians of their children, hold the legal right to act on their behalf to make decisions for their protection.<sup>93</sup> Parents must consent for their minor children to marry, receive medical treatment, and sometimes to practice contraception.<sup>94</sup> There are certain situations where a parent's authority is overridden, and minors do not need the consent of their parents, such as the decision to obtain an abortion.<sup>95</sup> Wiretapping does not rise to the level of privacy debated over abortion laws.<sup>96</sup> However, it can be argued that the conflict over the privacy issue of minors, most likely teenagers, can create "profound effects on the family relationship and on parental control."<sup>97</sup> Nonetheless, taping a child's phone conversations is no different than listening in on an extension phone.<sup>98</sup> It is also no greater of an intrusion than a parent snooping through a child's bedroom or reading a diary - all common parental acts.<sup>99</sup> Expanding a child's privacy rights beyond the fundamental rights of abortion treads too far into parental autonomy.

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89. *Id.*

90. See *Campbell v. Price*, 2 F. Supp.2d 1186, 1091 (E.D. Ark. 1998); *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993).

91. See *Thompson*, 838 F. Supp. at 1543.

92. See *infra* notes 121-25 and accompanying text.

93. See *Thompson*, 838 F. Supp. at 1544.

94. See *id.*

95. See David J. Anderman, *Title III at a Crossroads: The Ordinary Course of Business in the Home, the Consent of Children, and Parental Wiretapping*, 141 U. PA. L. REV. 2261, 2292 n.135 (June 1993).

96. See *id.*

97. See *id.*

98. See *Anonymous v. Anonymous*, 558 F.2d at 679; *Newcomb v. Ingle*, 644 F.2d 1534, 1536 (10th Cir. 1991) ("The fact that appellee here taped the conversation which he permissibly overheard, we find... to be a distinction without a difference"); *Silas v. Silas*, 680 So.2d 368, 370 (Ala. Civ. App. 1996) ("...the courts found that a parent's recording of a telephone conversation from an extension telephone is a distinction without a difference from the parent's listening to a telephone conversation on an extension telephone").

99. Thirty-three percent of surveyed teenagers were concerned that their parents eavesdropped on their phone calls. See Anderman, *supra* note 95, at 2263.

Qualifying vicarious consent under the consent exemption is supported by other circuit court decisions.<sup>100</sup> The Second, Seventh, and Tenth Circuits did not expressly reject vicarious consent when they exempted parents under the extension exemption.<sup>101</sup> In light of their holdings, the Second and Seventh Circuits found it unnecessary to address vicarious consent.<sup>102</sup> These circuits acknowledged the applicability of vicarious consent, but found the extension exemption more favorable in such situations.<sup>103</sup>

### A. Objectively Reasonable Parents and Best Interests

Vicarious consent is always necessary to protect children in cases of verbal, emotional, or sexual abuse by a parent.<sup>104</sup> In *Silas v. Silas*, the Alabama court interpreted its state version of Title III to conclude that vicarious consent qualifies for the consent exemption under some circumstances other than abuse.<sup>105</sup> While the *Silas* court did not adopt the best interest language of *Thompson*, it set forth that a parent must have a “good faith basis . . . to believe that the minor child is being abused, threatened, or intimidated by the other parent.”<sup>106</sup> Nevertheless, the purpose of the *Silas* test is to protect the child from harm. While it is agreeable that vicarious consent should apply to situations of abuse as clearly being in the child’s best interests, what qualifies as an objectively reasonable basis for believing that the child is being threatened, intimidated or otherwise subjected to a future harm, is not always clear.

What the parent believes often conflicts with the testimony of the child, and most commonly the other parent.<sup>107</sup> In *Pollock*, Sandra believed that Courtney was subjected to psychological and emotional pressure.<sup>108</sup> However, Courtney and her father declared that her mother recorded her phone calls because she became angry

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100. See *Anonymous*, 558 F.2d at 679–680; *Scheib v. Grant*, 22 F.3d 149, 155 n.6 (7th Cir. 1994); *Newcomb*, 944 F.2d at 1534.

101. See cases cited *supra* note 100.

102. See *Anonymous*, 558 F.2d at 679–680; *Scheib*, 22 F.3d at 155 n.6.

103. See cases cited *supra* note 102.

104. See *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).

105. 680 So.2d 368, 371 (Ala. Civ. App. 1996).

106. See *id.* The child, on visitation with his father, would cry and become extremely upset during phone conversations with his mother. See *id.* Psychologists confirmed from the tapes that the mother was verbally abusing the child. See *id.* at 371-72; see also *Anonymous*, 558 F.2d at 678 (stating that the mother used foul and abusive language with her children over the phone).

107. See *Pollock*, 154 F.3d at 603-05; *Scheib*, 22 F.3d at 155 n.5.

108. See *Pollock*, 154 F.3d at 604.

when she learned that Courtney's father had hired an attorney.<sup>109</sup> In *Scheib*, the father believed that conversations between his son and his son's mother caused his son to become extremely upset and refuse to talk to anyone in the family.<sup>110</sup> Yet, his son stated that while he was angry and upset after speaking to his mother, it was not the phone conversations that upset him.<sup>111</sup> When determining if a parent acted in the child's best interest, courts should look at the situation as it appears to the parent, not the reality of the situation, nor what is perceived by the child.<sup>112</sup>

However, can a parent who is in the middle of a custody dispute be completely objective? Isn't it likely that parents will claim that they acted in their child's best interest just to spy on their ex-spouse? Parents often are motivated by other concerns, such as revenge or control, and may not only record in their child's best interests, but also may do so to obtain negative information about their ex-spouse. It can be difficult to separate these other concerns from a best interests claim.<sup>113</sup>

*Pollock* implies that a direct correlation must exist between the child's behavior and the recorded conversation.<sup>114</sup> The court made a factual distinction between Sandra's observations and Courtney's behavior patterns in *Pollock* from the circumstances of *Silas* and *Scheib* in support of its decision to deny summary judgment to Sandra.<sup>115</sup> In *Silas*, the father noticed that his seven-year old son became extremely upset and began to cry during phone conversations with his mother.<sup>116</sup> Similarly, in *Scheib*, the father noticed several times that his eleven-year old child became upset immediately after speaking to his mother.<sup>117</sup> Unlike the situation in *Silas* and *Scheib*, Sandra noticed only a gradual change in Courtney's behavior, which she thought included an excessive or compulsive desire to be with her father.<sup>118</sup> From this distinction, one can conclude that the observations upon which parents should

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109. See *id.* at 605.

110. See *Scheib*, 22 F.3d at 155 n.5.

111. See *id.*

112. See *id.* at 155.

113. See *Pollock*, 154 F.3d at 612. Although Sandra claimed that she acted in Courtney's best interest, Courtney's father and stepmother claimed that Sandra recorded Courtney's conversations out of anger towards Courtney. See *id.* at 605.

114. See *Pollock*, 154 F.3d 601, 612.

115. See *id.*

116. See *Silas v. Silas*, 680 So.2d 368, 371 (Ala. Civ. App. 1996).

117. See *Scheib*, 22 F.3d at 151; see also *Campbell v. Price*, 2 F. Supp.2d 1186, 1187 (E.D. Ark. 1998).

118. See *Pollock*, 154 F.3d at 612.

base their best interest defense must occur during or shortly after the phone conversations take place. This direct correlation would deter parents from claiming any excuse as being in their child's best interest.<sup>119</sup> Without it, the consent exemption could have "widespread implications and may encompass surreptitious actions by parents with less than laudable motives."<sup>120</sup>

### B. *Consenting Children*

The *Pollock* court refused to limit the application of vicarious consent to children of certain ages because children develop both emotionally and intellectually at different stages.<sup>121</sup> The word "consent" means a "voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another."<sup>122</sup> At very young ages, children do not have the ability to understand the nature of consent and to make "a truly voluntary decision . . ."<sup>123</sup> Children not only lack the legal capacity to consent, but also lack the ability to give actual consent, either express or implied.<sup>124</sup> The *Pollock* court thought that it would be problematic for courts to attempt to determine at what age a child would be able to consent on his own.<sup>125</sup>

*Pollock* could be interpreted to support the contention that a minor's age should be considered when determining the applicability of the exemption. Although *Pollock* did not address Courtney's ability to consent, the court's "obvious distinction" between the children's ages in *Thompson* and *Pollock* implies that Courtney, age 14, may have had the ability to understand the nature of consent.<sup>126</sup> *Thompson* also furthers the notion that age may be considered as a factor in a best interest analysis.<sup>127</sup> *Thompson*, like *Pollock*, does not address whether the children

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119. See *id.* at 610 ("We stress that . . . this doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest.'").

120. *Williams v. Williams*, 581 N.W.2d 777, 781 (Mich. Ct. App. 1998).

121. See *Pollock*, 154 F.3d at 610.

122. BLACK'S LAW DICTIONARY 305 (6th ed. 1990).

123. See *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993). *Thompson* did not address whether the children could voluntarily consent because they were only three and five years old and lacked the ability to understand the nature of consent and could not "in any meaningful sense." *Id.*

124. See *id.*

125. See *Pollock*, 154 F.3d at 610.

126. See *id.* at 608.

127. See *Thompson*, 838 F. Supp. at 1543.

could voluntarily consent because they were only three and five years old,<sup>128</sup> but does cite and agree with *Luna v. State of Oklahoma*<sup>129</sup> where the court found that a seventeen year old who lacked the legal capacity to consent to wear a wiretap was able to “freely and voluntarily” consent.<sup>130</sup> Despite these implications, *Pollock* makes clear that the focus of a vicarious analysis should be on the recording parent’s obligation to satisfy the best interest standard.<sup>131</sup> This concentration will also avoid many quandaries in allowing such a determination.

In an attempt to protect an older child, parents will risk imprisonment up to five years and/or a fine<sup>132</sup> in hopes that a court will agree with their determination of their own child’s maturity. Since it is nearly impossible to establish legal guidelines for this type of evaluation, should parents be burdened with having their child professionally evaluated to protect themselves and their own judgment from prosecution? Other areas of the law do not allow a case-by-case determination of a child’s psychological ability to consent, or more accurately their maturity level. The law sets age limits for things such as driving, voting, serving in the military, consuming alcohol, and especially the capacity to contract. When a suit ensues based on a minors incapacity to contract, should courts be allowed to consider the minor’s ability to understand the nature of contractual obligations? Undoubtedly so. This defense is deeply rooted in our common law tradition, as is the right to raise one’s children as one sees best.

Another drawback to allowing an age consideration is that cases will become complicated with expert testimony and character evidence from both parties regarding the child’s mental capacity. Moreover, children involved in the situations that underlie parental wiretapping cases are often caught in the middle of a bitter custody dispute. They are vulnerable and heavily influenced by their feuding parents. They have feelings of guilt, anger, depression, and

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128. *See id.*

129. 815 P.2d 1197 (Okla. Crim. App. 1991).

130. *See Thompson*, 838 F. Supp. at 1543.

131. *See Pollock*, 154 F.3d at 610. The court stated that

We conclude that although the child in this case is older than the children in the cases discussed above in which the doctrine of vicarious consent has been adopted, we agree with the district court’s adoption of the doctrine, *provided that a clear emphasis is put on the need for the ‘consenting’ parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child.*

*Id.* (emphasis added).

132. 18 U.S.C. § 2511(4)(a) (1994).



confusion, and are often torn when obligated to choose one parent over the other. When you add the pressure from parents to this mixed bag of emotions, children in such situations are not likely to be able to think objectively for their own best interest.

The exemption debate should be abandoned and the vicarious consent doctrine adopted for several reasons. First, the argument that legislative intent is indicative of Congress's desire to include *all* domestic wiretapping within the purviews of Title III is not well supported. The very comments by Senator Long and Professor Blakey relied on to reach this conclusion focused only on wiretapping *between spouses*.<sup>133</sup> The exclusion of parental wiretapping from these comments indicate Congress's desire to avoid deciding the amount of privacy between a parent and child. Further, the purpose of the act is to prevent organized crime, not family disputes.<sup>134</sup>

Second, parental wiretapping is qualitatively different from interspousal wiretapping.<sup>135</sup> Unlike spouses who can sever their relationship by a divorce, a parent-child relationship is permanent.

Finally, vicarious consent focuses the analysis on why the wiretapping occurred under the best interest standard instead of how. Based on the extension exemption's plain language, parents should be exempt in every situation, because it looks to the way the recording occurred – in the ordinary course of raising one's children.<sup>136</sup> Vicarious consent on the other hand establishes a narrower test that is less likely to be abused. Defendant parents are placed with the burden of demonstrating that they acted in the child's best interests in order to avoid liability.<sup>137</sup> They may not invoke the exemption simply by claiming "I was doing it in his/her best interest."<sup>138</sup>

## V. Conclusion

In the past, the United States Courts of Appeals have analyzed a recording parent's actions under only the extension exemption.<sup>139</sup>

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133. See *Hearings (1965-66)*, *supra* note 64, at pt. 5, 2261 ("the three major areas in which private electronic surveillance was widespread were (1) industrial, (2) divorce cases, and (3) politics"); *Hearings (1967)*, *supra* note 67, at pt. 2, 413 ("private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation.").

134. See *Anonymous v. Anonymous*, 558 F.2d 677 (2d 1977).

135. See *Newcomb v. Ingle*, 944 F.2d 1534, 1535-36 (10th Cir. 1991).

136. See *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994).

137. See *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).

138. *Id.*

139. See *Anonymous*, 558 F.2d 677; *Newcomb*, 944 F.2d 1534; *Scheib*, 22 F.3d

As a matter of first impression, the Sixth Circuit in *Pollock* adopted vicarious consent under the consent exemption to exempt recording parents so long as it was done in the child's best interest.<sup>140</sup> Since *Pollock*, both state and federal courts have adopted its line of reasoning.<sup>141</sup>

Although a parent cannot claim any excuse for the exemption to apply,<sup>142</sup> *Pollock* is clear in stating that the exemption should always apply in cases of abuse.<sup>143</sup> While the basis for the parent's objective is not always clear, courts should focus on the parent's perception of the situation.<sup>144</sup>

*Pollock* refused to establish an age limit when a child has the capacity to consent on their own,<sup>145</sup> but implied that the age of the minor may be a factor in its decision.<sup>146</sup> Regardless of the child's age, the emphasis of any vicarious consent analysis should be the best interest standard.<sup>147</sup>

A few questions remain to be explored. Can individuals who are not a child's legal guardian record the minor's phone calls while the child is visiting their home if they believe a parent is abusing the child?<sup>148</sup> The courts imply that a parent must vicariously consent,<sup>149</sup> but a case has not been brought involving a non-parent, such as a grandparent. Second, could fear that a child is using drugs, or is about to commit a crime, be considered "best interest"? In *State of North Carolina v. Shaw*, a mother who recorded a phone conversation of her son, who was planning on "getting together about 'shrooms' " with the other party to the conversation, was not

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149.

140. See *Pollock*, 154 F.3d at 610.

141. See *Wagner v. Wagner*, 64 F. Supp.2d 895 (D. Minn. 1999); *Williams v. Williams*, 603 N.W.2d 114 (Mich. App. Ct. 1999).

142. See *Pollock*, 154 F.3d at 610.

143. See *id.*; see also *Silas v. Silas*, 680 S.2d 368, 371 (Ala. Civ. App. 1996) (holding that vicarious consent is necessary when a parent makes "abusive or obscene phone calls threatening or intimidating minor children").

144. See *Scheib*, 22 F.3d at 155.

145. See *Pollock*, 154 F.3d at 610.

146. See *supra* notes 126-31 and accompanying text.

147. See *Pollock*, 154 F.3d at 610.

148. See Richard I. Zuber, *Domestic Eavesdropping and Wiretapping: Admissibility of Intercepted Communications*, 21 COLO. LAWYER 455, 456 (March 1992).

149. See *Pollock*, 154 F.3d at 610. The court's language says that "the 'consenting' parent" must demonstrate the good faith basis. *Id.* (emphasis added).

exempt under the extension exemption.<sup>150</sup> The mother may have been exempt had the court applied a best interest analysis.<sup>151</sup>

Until Congress clarifies its intent or the Supreme Court rules on the applicability of Title III to domestic wiretapping, the consent exemption is favorable to the extension exemption in parental wiretapping cases. The legislative intent does not support the inclusion of parents in Title III's prohibition, parental wiretapping is qualitatively different from interspousal wiretapping, and the vicarious consent doctrine creates a narrow test which focuses the analysis on why a parent felt compelled to record the child's conversations.<sup>152</sup> A parent must "demonstrate a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child . . . ."<sup>153</sup>

*Laura S. Killian\**

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150. 404 S.E.2d 887, 887-89 (N.C. Ct. App. 1991). After listening to her son's call, the mother informed the police and played the recorded conversation, which ultimately resulted in the arrest of the other individual. *See id.* at 269.

151. In this particular jurisdiction the mother probably would not have been exempt under a vicarious consent analysis because North Carolina sits in the Fourth Circuit which prohibits "all wiretapping activities unless specifically excepted." *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984). Courts that have accepted vicarious consent may find that this mother acted in her son's best interest.

152. *See supra* notes 133-38 and accompanying text.

153. *See Pollock*, 154 F.3d at 610.

\* This piece is dedicated to my mother for her tremendous faith in God, strength, and courage.