

War of the Wiretaps: Serving the Best Interests of the Children?

ALLISON B. ADAMS*

I. Introduction

Technological advancements not only contribute greatly to society, but also enable the significant erosion of individuals' privacy. Both courts and lawmakers frequently wrestle with issues regarding what types of protections the legal system should provide in order to safeguard privacy.¹

The enactment of the Wiretap Act of 1968 represents a critical congressional response to the need to protect individuals' privacy in the face of rapidly advancing technology.² The Wiretap Act protects against "interceptions of oral and wire communications,"³ such as covertly recorded telephone conversations. Today, all states except for Vermont, have also enacted their own wiretap statutes, many of which are more restrictive than the federal statute.⁴

In order to effectuate their purpose of protecting privacy, the Wiretap Act and its state counterparts contain a harsh exclusionary rule, in addition to criminal and civil penalties, for their violation.⁵ The exclusionary rule bars recordings obtained in violation of the wiretap statutes from being admitted as substantive evidence in any legal proceeding.⁶

* Third-place winner, 2013 Schwab Essay Contest, and third-year student at Chicago-Kent College of Law. Currently is an associate at Schiller, DuCanto & Fleck LLP in Chicago.

1. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (stating that "the question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy").

2. See *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (citing the Senate committee report that accompanied Title III).

3. *United States v. Giordano*, 416 U.S. 505, 515 (1974).

4. *Electronic Surveillance Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2012), available at <http://www.ncsl.org/issues-research/telecom/electronic-surveillance-laws.aspx#VT>.

5. See S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2156.

6. 18 U.S.C. § 2515 (2012). Most state statutes also contain such an exclusionary rule.

Despite the importance of the exclusionary rule for enforcing state and federal wiretap statutes, parties to child custody cases have found a loophole that enables illegally obtained wiretap evidence to be considered in child custody determinations. Some judges have permitted guardians *ad litem* (GALs) to review and rely on illegally obtained wiretap evidence in making child custody recommendations to the court.⁷ GALs serve as the court's witness with an expertise in child custody.⁸ Permitting GALs to review and rely on illegally obtained wiretap evidence, however, effectively creates a loophole that allows the court to rely on otherwise inadmissible evidence through the recommendation of its expert witness.

In *In re Marriage of Karonis*,⁹ a highly contentious custody battle, the trial court appointed two GALs to help determine the custody arrangement for the parties' three children, which would serve their best interests.¹⁰ Prior to trial, the father sought to bar the use of recordings the mother made of telephone conversations between the father and the parties' children because they were obtained in violation of the Illinois eavesdropping statute.¹¹ The trial court barred all information on the tapes from being used as evidence at trial, but permitted the GALs to listen to the tapes.¹² Ultimately, the trial court awarded the mother sole custody of the parties' three children.¹³

On appeal, the father alleged that, while the recordings were barred from being used as evidence at trial, he suffered prejudice because the trial court improperly permitted the GALs to rely on the tapes in making their child custody recommendations.¹⁴ The appellate court affirmed the trial court's custody determination, reasoning that GALs must be permitted to consider even inadmissible evidence, including the recordings at issue, in order to determine the children's best interests.¹⁵

7. Compare *In re Marriage of Karonis*, 693 N.E.2d 1282 (Ill. App. Ct. 1998), with *Lewton v. Divingnzzo*, 772 F. Supp. 2d 1046, 1051 (D. Neb. 2011) (court excluding recordings from custody case where the mother covertly recorded the father by using a recording device in the child's teddy bear). The father then sued under state and federal wiretap statutes, and the court stated that the mother had no justifiable reason for distributing recordings to the GAL and other child experts in the child custody case before the judge ruled on the admissibility of such recordings. *Id.* at 1058. Accordingly, the court held the defendants liable for violating the Federal Wiretap Act. *Id.* at 1059.

8. See, e.g., *In re Marriage of Wycoff*, 639 N.E.2d 897, 904 (Ill. App. Ct. 1994) (holding that the "GAL is the 'eyes and ears' of the court"); *Clark v. Alexander*, 953 P.2d 145, 152 (Wyo. 1998); *Collins v. Tabet*, 806 P.2d 40, 44 (N.M. 1991).

9. 693 N.E.2d 1282 (Ill. App. Ct. 1998).

10. *Id.* at 1284.

11. *Id.* at 1285.

12. *Id.*

13. *Id.* at 1283–84.

14. *Id.* at 1285.

15. *Id.* at 1286.

The court noted that it is the GAL's duty to make child custody recommendations to the court based on what the GAL determines to be in the children's best interests.¹⁶ Permitting GALs to rely on illegally obtained wiretap evidence, however, creates a perverse incentive for parents in vicious custody battles to violate the statutes. New technology, such as smartphones, now enables a parent to easily obtain recordings of the other parent in order to gain an advantage in child custody litigation. Yet, this incentive to violate the statutes is precisely what the statutes' harsh exclusionary rules were designed to prevent. Permitting GALs to review and rely on such illegally obtained recordings essentially allows inadmissible evidence in through the back door. Ultimately, this practice raises the question of whether the final child custody determination truly serves the children's best interests.

This article argues that GALs should not be permitted to review and rely on recordings obtained in violation of either state or federal wiretap statutes. Part II provides an overview of federal and state wiretap statutes as a backdrop to this discussion. Part III discusses the role of GALs in child custody proceedings. Part IV advances the following three reasons why GALs should not be permitted to rely on evidence that violates state or federal wiretap statutes in making child custody recommendations to the court: (1) limits on expert witness's ability to rely on inadmissible evidence should bar GALs, as the court's expert witness, from relying on illegally obtained wiretap evidence; (2) permitting GALs to rely on inadmissible wiretap evidence exacerbates the concerns with conflicts in the GAL's role; and (3) permitting GALs to rely on inadmissible wiretap evidence frustrates the purpose of the wiretap statutes.

II. Overview of Federal and State Wiretap Statutes

In order to understand the implications involved when courts allow GALs to rely on covertly recorded communications, it is important to first understand the structure of the federal and state wiretap statutes which regulate such communications. While there is a circuit split as to whether the federal Wiretap Act applies in domestic cases, such as child custody cases,¹⁷ "nearly 80% of reported wiretapping matters involve wiretaps within the family context."¹⁸

16. *Id.* at 1284.

17. Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 964 n. 55 (2005).

18. Allan H. Zerman & Cary J. Mogerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating to Electronic Eavesdropping and Their*

A. *The Federal Wiretap Act*

The federal statute regulating electronic surveillance of communications, commonly referred to as the “Wiretap Act,” is found in Title I of the Electronic Communications Privacy Act (ECPA) of 1986.¹⁹ The ECPA of 1986 amended the original Wiretap Act found in Title III of the Omnibus Crime Control and Safe Street Acts of 1968.

1. THE HISTORY OF THE WIRETAP ACT

The Wiretap Act of 1968 was Congress’s response to changing conceptions of privacy in the face of advancing technology.²⁰ In 1934, Congress enacted the Federal Communications Act (FCA) as a response to the United States Supreme Court’s decision in *Olmstead v. United States*.²¹ In *Olmstead*, the Court upheld the constitutionality of a government wiretap under the Fourth Amendment to the United States Constitution.²² The FCA protected individuals’ privacy by prohibiting interceptions of communications, such as the government wiretap in *Olmstead*.²³ In 1967, with its seminal decision in *Katz v. United States*,²⁴ the Court expanded its notion of privacy under the Fourth Amendment to protect individuals’ reasonable privacy expectations where new technology in the form of an eavesdropping device threatened to erode that privacy interest.²⁵

The expansive notion of privacy, together with the limitations of the FCA, led Congress to enact the Wiretap Act of 1968.²⁶ The purpose of the Wiretap Act was “to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act.”²⁷ Congress amended the Wiretap Act in 1986 to account for the rapid technological advancements that had occurred since passage of the original Wiretap Act in 1968.²⁸

Application in Matrimonial Cases, 12 J. AM. ACAD. MATRIMONIAL LAW. 227, 228 (1994) (citing NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 160 (1976)).

19. 18 U.S.C. §§ 2510–2522 (2012).

20. *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (citing the Senate committee report that accompanied Title III).

21. 277 U.S. 438 (1928); 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 Stored Communications Acts and the Common Law Privacy Intrusion Tort*, 82 NEB. L. REV. 693, 701 (2004).

22. 277 U.S. at 469.

23. Turkington, *supra* note 21, at 701.

24. *Katz v. United States*, 389 U.S. 347 (1967).

25. *Id.*

26. Turkington, *supra* note 21, at 701–02.

27. *United States v. Giordano*, 416 U.S. 505, 515 (1974).

28. Turkington, *supra* note 21, at 703.

2. COMMUNICATIONS REGULATED BY THE WIRETAP ACT

The Wiretap Act regulates interceptions of “wire, oral, or electronic communication.”²⁹ Primarily, the Wiretap Act only regulates “interceptions” of communications, defined as “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.”³⁰ Accordingly, the Wiretap Act only applies to audio recordings captured while the communication is being transmitted. For example, the Wiretap Act applies when a person records a telephone conversation.³¹ It likewise applies when a person captures a conversation on video that includes audio, as opposed to video recordings that solely record images without audio, such as closed-circuit video cameras.³²

Additionally, the Wiretap Act only applies when the audio recording is captured while the communication is being transmitted. Once the transmission is complete, the recording is governed by the Stored Communications Act.³³ Hence, covertly obtaining copies of e-mails, once stored, is regulated by the Stored Communications Act, not the Wiretap Act.³⁴

The Wiretap Act only regulates interceptions of “wire, oral, or electronic communication.”³⁵ The Wiretap Act defines “oral communication” as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”³⁶

Finally, the Wiretap Act’s reach is limited to the regulation of “intentional” interceptions.³⁷ A person who acts negligently does not violate the Wiretap Act. Courts have found that the requirement that the act be “intentional” is satisfied when a person intercepts a communication “without justifiable excuse[,] stubbornly, obstinately, perversely . . . without ground for believing it was lawful . . . [or with] careless disregard whether or not one [had] the right to act.”³⁸

29. 18 U.S.C. § 2511(1)(a) (2012).

30. *Id.* § 2510(4).

31. Turkington, *supra* note 21, at 705.

32. *See, e.g.*, United States v. Falls, 34 F.3d 674, 679–80 (8th Cir. 1994); United States v. Torres, 751 F.2d 875, 885–86 (7th Cir. 1984); State v. O’Brien, 774 A.2d 89, 96–97 (R.I. 2001).

33. 18 U.S.C. §§ 2701–11.

34. *See* Konop v. Hawaiian Airlines, Inc., 236 F.3d 1035 (9th Cir. 2001), *withdrawn by* 262 F.3d 972 (9th Cir. 2001); Steve Jackson Games, Inc. v. U. S. Secret Serv., 36 F.3d 457 (5th Cir. 1994).

35. 18 U.S.C. § 2511(1)(a).

36. *Id.* § 2510(2).

37. *Id.* § 2511(1).

38. Citron v. Citron, 722 F.2d 14, 16 (2d Cir. 1983) (internal citations omitted); *see* Heggy v. Heggy, 944 F.2d 1537, 1542 (10th Cir. 1991); Kratz v. Kratz, 477 F. Supp. 463, 478–79 (E.D. Pa. 1979).

As technology continues to advance, the application of the Wiretap Act to new forms of communication will need to be examined. For example, new technology relevant to child custody litigation includes real-time video chats, such as the FaceTime³⁹ application for iPads and iPhones, Skype video calls,⁴⁰ and Google Voice.⁴¹ Visitation between children and their parents more frequently includes virtual visitation, which “refers to the use of e-mail, instant messaging, webcams, and other Internet tools to provide regular contact between a noncustodial parent and his or her child.”⁴² By increasing access to and use of communication tools within the family context, this new technology increases the likelihood that parties to a vicious custody battle will covertly record such conversations to use as ammunition against the other party in court. Real-time recordings of the audio portions of video chats while they are in progress, as opposed to a copy of the video stored on a computer, are regulated under the Wiretap Act. Consequently, courts are likely to deal with issues regarding the admissibility of such recordings on an increasingly frequent basis.

3. PENALTIES FOR VIOLATING THE WIRETAP ACT

A person, whether or not a government actor, may violate the Wiretap Act through a number of different actions. This section discusses only those actions pertinent to the present subject and does not represent an exclusive list of actions that violate the Wiretap Act.

Primarily, a person violates the Wiretap Act by intercepting communications governed by the Act.⁴³ Even if individuals do not intercept communications themselves, they still violate the Wiretap Act by intentionally disclosing such interceptions to others or using the contents of an interception when they “kn[ew] or ha[d] reason to know” that such interception violated the Wiretap Act.⁴⁴ Accordingly, individuals who attempt to submit recordings into evidence in court that were obtained in violation of the Wiretap Act still violate the Act regardless of whether they intercepted the communications themselves or engaged others to act on their behalf. A party cannot evade the reach of the Wiretap Act by engaging another person, such as a private investigator, to covertly intercept communications on that party’s behalf.

A person escapes liability under the Wiretap Act, however, where one

39. APPLE, IPHONE, <http://www.apple.com/iphone/features/> (last visited Apr. 6, 2013).

40. SKYPE, <http://www.skype.com/en/features/video-chat/> (last visited Apr. 6, 2013).

41. GOOGLE VOICE, <http://www.google.com/googlevoice/about.html> (last visited Apr. 6, 2013).

42. Elisabeth Bach-Van Horn, *Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?*, 21 J. AM. ACAD. MATRIMONIAL LAW. 171, 172 (2008).

43. 18 U.S.C. § 2511(1)(a) (2012).

44. *Id.* § 2511(1)(c), (d).

party to the communication consented to the interception.⁴⁵ The federal Wiretap Act is a one-party consent statute. As long as the person intercepting the communication is a party to the communication, the consent requirement is met and the person is not liable under the Wiretap Act.⁴⁶

The Wiretap Act imposes criminal, civil, and evidentiary penalties. Subject to exceptions, “whoever violates subsection (1) . . . shall be fined under this title or imprisoned not more than five years, or both.”⁴⁷ Specifically, the Wiretap Act provides for civil remedies, which include compensatory damages, punitive damages, equitable or declaratory relief, and reasonable attorney’s fees and litigation costs.⁴⁸

Critically, the Wiretap Act also includes an expansive exclusionary rule. The rule prohibits the introduction into evidence of interceptions obtained in violation of the Wiretap Act in any proceeding, whether criminal or civil.⁴⁹ The Act’s exclusionary rule states as follows:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.⁵⁰

The vast penalties imposed for the violation of the Wiretap Act reflect the importance Congress placed on protecting individuals’ privacy in the face of rapidly advancing technology.⁵¹ Accordingly, the many penalties, including the exclusionary rule, are intended to be strictly enforced to give effect to the purpose of the Wiretap Act.

B. State Wiretap Statutes

In addition to the federal Wiretap Act, all states, except for Vermont, have enacted their own wiretap statutes.⁵² While some state statutes mirror the federal Wiretap Act, other states’ statutes are more restrictive. No state statute is less restrictive than the federal Wiretap Act.⁵³

45. *Id.* § 2511(2)(d).

46. *Id.*

47. *Id.* § 2511(4)(a).

48. 18 U.S.C. § 2520(b).

49. 18 U.S.C. § 2515.

50. *Id.*

51. See S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2156 (stating that “[c]riminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for dangers. The perpetrator must be denied the fruits of his unlawful action in civil and criminal proceedings”).

52. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 4.

53. “Generally speaking . . . states are free to superimpose more rigorous requirements upon

Two-party consent statutes represent the most impactful way in which many state wiretap statutes are more restrictive than the federal Wiretap Act. Eleven states' statutes include a two-party consent requirement.⁵⁴ Additionally, the Nevada Supreme Court held that its statute requires two-party consent.⁵⁵

Two-party consent statutes require the consent of all parties to a communication to avoid liability under the statute. Therefore, while a person who intercepts a communication does not violate the federal Wiretap Act, if that person is a party to the communication, that person still violates a state statute in a two-party consent state if the other parties to the communication do not consent. Alternatively, where a person's actions run afoul of the federal Wiretap Act, they will violate a state statute as well.

C. Evidentiary Issues Implicated by Federal and State Wiretap Statutes

The above is an overview of the reach of the federal and state wiretap statutes and the exclusionary rules imposed as a penalty for their violation. Given the above, there are a number of evidentiary issues that arise in the context of child custody litigation.

1. TWO-PARTY CONSENT STATUTES

In two-party consent states, covert interceptions of communications violate the state statute. The majority of statutes in two-party consent states contain exclusionary rules like that in the federal Wiretap Act.⁵⁶ Therefore, if a party to child custody litigation in a two-party consent state covertly records the telephone conversation of his or her spouse, such a recording is not admissible as substantive evidence in the child custody proceeding. Video recordings with audio would likewise be inadmissible.

Recent advancements in technology make covert video recording easier to obtain. Smartphones, such as iPhones, are now owned by 45% of adults in the United States⁵⁷ and contain the ability to record video with

those mandated by the Congress, but not to water down federally-devised safeguards." *United States v. Mora*, 821 F.2d 860, 863 n. 3 (1st Cir. 1987) (internal citations omitted).

54. CAL. PENAL CODE § 632 (West 2013); CONN. GEN. STAT. § 53a-189 (West 2013); FLA. STAT. ANN. 934.03 (West 2013); 720 ILL. COMP. STAT. 5/14-2 (West 2013); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2013); MASS. GEN. LAWS ch. 272, § 99(c)(1) (West 2013); MICH. COMP. LAWS § 750.539c (West 2013); MONT. CODE ANN. § 45-8-213 (West 2013); N.H. REV. STAT. ANN. § 570-A:2 (West 2013); 18 PA. CONS. STAT. ANN. § 5703 (West 2013); WASH. REV. CODE § 9.73.030 (West 2013).

55. See generally *Lane v. Allstate Ins. Co.*, 969 P.2d 938 (Nev. 1998).

56. CAL. PENAL CODE § 632(D) (West 2013); FLA. STAT. ANN. § 934.06 (West 2013); 720 ILL. COMP. STAT. § 5/14-5 (West 2013); MD. CODE ANN., CTS. & JUD. PROC. § 10-405 (West 2013); MASS. GEN. LAWS ch. 272, § 99 (West 2013); N.H. REV. STAT. ANN. § 570-A:6 (West 2013); 18 PA. CONS. STAT. ANN. § 5721.1 (West 2013); WASH. REV. CODE § 9.73.050 (West 2013).

57. Lee Rainie, *Two-Thirds of Young Adults and Those with Higher Income Are*

one touch of the screen.⁵⁸ Hence, parents seeking an advantage in child custody proceedings may use their smartphones to record video that captures the other party in a negative light. While such covert recordings may seem like a tempting way to gain an advantage in court, parties in two-party consent states cannot use such recordings to bolster their cases even where they are a party to the communication. Where the recording contains audio, it violates the state wiretap statute. As a result, the recording is subject to the exclusionary rule, rendering it inadmissible in court. Further, the party who covertly recorded the communication could be held criminally or civilly liable under the state wiretap statute.

2. ONE-PARTY CONSENT STATUTES AND THE VICARIOUS CONSENT DOCTRINE

Even under one-party consent statutes, including the federal Wiretap Act and the majority of state wiretap statutes, a party's covert recording of a telephone conversation between his or her spouse and a third party would be inadmissible in the child custody proceeding where no party to the conversation consented to its recording. By contrast, if the person recording the communication is a party to the telephone conversation, this recording does not violate one-party consent statutes. Therefore, the applicable state or federal wiretap statute would not serve to exclude such a recording from being admitted into evidence at trial.

In one-party consent states, however, the vicarious consent doctrine may enable a person to admit a recording into evidence even where the person intercepting the communication is not a party to the communication. In the context of wiretap statutes, vicarious consent refers to the ability of parents to consent on behalf of their children to interceptions of communications.⁵⁹ The requirement to obtain the consent of one party to the communication is satisfied since the parent can consent on behalf of the child. Consequently, as one legal scholar summarized, “[t]he basic premise of the doctrine of vicarious consent is that a parent can avoid liability for violations of the federal wiretap statute or its state law counterparts that might otherwise attach when he or she surreptitiously records a minor child's telephone conversations with a third party without gaining prior consent from the child or the third party.”⁶⁰

For example, in a one-party consent state, the vicarious consent doctrine allows a parent to record a telephone conversation between his or her

Smartphone Owners, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT 2 (2012), available at http://pewinternet.org/~media/Files/Reports/2012/PIP_Smartphones_Sept12%209%2010%2012.pdf.

58. IPHONE, BUILT-IN APPS, <http://www.apple.com/iphone/built-in-apps/> (last visited Apr. 6, 2013).

59. See *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

60. Dinger, *supra* note 17, at 968.

child and the child's other parent without violating the state or federal wiretap statutes. Likewise, the vicarious consent doctrine would allow a parent to use current technology to video tape a video chat between the other parent and their child in real time without violating the wiretap statutes. Because the recordings would not violate the wiretap statutes, the applicable exclusionary rule would not operate to exclude such a recording at trial. Hence, a parent could covertly record the telephone conversation between his or her child and spouse and then use it against the spouse in a child custody proceeding.

The doctrine of vicarious consent developed primarily through case law for the purpose of protecting the welfare of children. As such, the doctrine is only available in certain jurisdictions and as applied to specific fact scenarios that effectuate this purpose. In *Thompson v. Dulaney*, the United States District Court for the District of Utah held that “[a]s long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.”⁶¹ The court stressed that the parent's purpose in intercepting the communications was critical to the application of the vicarious consent doctrine and denied the mother's motion for summary judgment as there existed factual issues about her motivation.⁶²

Additional courts have adopted the vicarious consent doctrine, in limited contexts, in order to protect the welfare of children.⁶³ Georgia codified the vicarious consent doctrine in its wiretap statute.⁶⁴ By contrast, some courts have rejected the doctrine of vicarious consent.⁶⁵ Other jurisdictions have yet to reach the issue. Consequently, the applicability of the vicarious consent doctrine to allow a parent to intercept communications between his or her child and a third party without violating the applicable federal or state wiretap statutes varies greatly by both the jurisdiction and the specific facts involved in each case.

Overall, there are many contexts in both two-party and one-party con-

61. 838 F. Supp. 1535, 1544 (D. Utah 1993).

62. *Id.*, at 1545, 1548.

63. *See, e.g.*, *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998) (adopting the vicarious consent doctrine determined in *Thompson* as applied to older children); *Silas v. Silas*, 680 So. 2d 368, 371–72 (Ala. Civ. App. 1996) (upholding a father's vicarious consent on behalf of his child to recording telephone conversations with the child's mother where he “had a good faith basis that was objectively reasonable for believing that the minor child was being abused, threatened, or intimidated by the mother”).

64. GA. CODE ANN. § 16-11-66(d) (2012).

65. *See Williams v. Williams*, 581 N.W.2d 777 (Mich. Ct. App. 1998); *W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L.*, 453 S.E.2d 646 (W. Va. 1994).

sent states in which evidentiary issues arise regarding the admissibility of evidence obtained in violation of state or federal wiretap statutes.

III. The GAL's Role in Child Custody Proceedings

Given the contexts in which the exclusionary rule applies to evidence obtained in violation of state or federal wiretap statutes, issues arise in child custody proceedings regarding whether GALs should be allowed to review and rely on such evidence in making child custody recommendations to the court. It is first important to understand the role that GALs play in child custody proceedings.

A. The Development of the GAL's Role in Child Custody Proceedings

GALs represent the best interests of children in court proceedings, including child custody litigation. In the seminal case of *In re Gault*, the United States Supreme Court in 1967 first recognized the need for an attorney to represent children in court proceedings, independent from the representation of their parents' interests.⁶⁶ Shortly thereafter, Wisconsin became the first state to require GALs to represent children in child custody litigation.⁶⁷ This initiated a movement across the United States, which urged the appointment of attorneys, such as GALs, to represent children in all child custody proceedings.⁶⁸

A significant number of attorneys, many in the capacity of GALs, are appointed to represent children each year in proceedings that deal with child custody issues.⁶⁹ While family law statutes differ from state to state, there are generally three types of attorneys who represent children in child custody proceedings: (1) an Attorney for the Child; (2) a GAL; and (3) a Child's Representative. Each type of attorney serves a different role with regard to the child's representation. Generally, the role of an Attorney for the Child is to advocate for the child's interests, just as any attorney advocates for a client's interests.⁷⁰ In contrast, the role of both the Child's

66. 387 U.S. 1 (1967); Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109–10 (2002).

67. *Id.* at 110.

68. This movement is evidenced by the fact that in 1972 the American Bar Association Family Law Section proposed an amendment to the Uniform Marriage and Divorce Act, which required that all children in custody proceedings have an attorney. ABA, *Proposed Revision of the Uniform Marriage and Divorce Act*, 7 FAM. L.Q. 135 (1972).

69. Approximately 3.6% of the population gets divorced each year, representing more than one million people. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS SYSTEM: NATIONAL MARRIAGE AND DIVORCE RATE TRENDS, available at http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm. As many of these divorces include children, a significant number of child custody determinations are made each year in divorce cases.

70. See, e.g., 750 ILL. COMP. STAT. 5/506 (2013).

Representative and the GAL is to advocate for the best interests of the child, independent of the child's wishes.⁷¹ One legal scholar described this network of differing roles as "falling on a continuum, with the lay guardian *ad litem* committed to protecting the children's interests at one end of the spectrum, the zealous attorney committed to advocating the children's wishes at the opposite end, and various hybrid models falling at different points in between."⁷²

GALs are distinguished from both Attorneys for the Child and Child's Representatives because GALs serve as the court's witness, whereas Attorneys for the Child and Child's Representatives represent children independent of the court. The GAL is often referred to as "the arm of the court"⁷³ and "the eyes and ears of the court."⁷⁴ In this capacity, the GAL's role includes conducting an investigation to determine the children's best interests, serving as an expert witness, and advising the court.⁷⁵ GALs often conduct "interviews with parties and others knowledgeable about the child, review . . . relevant records, participat[e] in court proceedings and settlement discussions, and repor[t] findings and recommendations to the court."⁷⁶

Furthermore, in Illinois, as in many states, the GAL "serves as a court-appointed quasi-expert."⁷⁷ Of the three types of attorneys who may represent children in custody proceedings, only the GAL can be called as a witness.⁷⁸ As such, GALs are generally also subject to cross-examination at trial regarding their recommendations to the court.⁷⁹

B. Scholarly Criticisms of the GAL's Role in Child Custody Proceedings

The GAL's role as the court's witness has elicited significant criticism from legal scholars. First, "critics argue that courts give too much weight to recommendations by guardians *ad litem* and that reliance on the rec-

71. *Id.*

72. Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL LAW. 183, 193 (2005) (citing Raven C. Lindman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998)).

73. *See, e.g.*, Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998); Collins v. Tabet, 806 P.2d 40, 44 (N.M. 1991).

74. *See In re Marriage of Wycoff*, 639 N.E.2d 897, 904 (Ill. App. Ct. 1994).

75. *In re Marriage of Karonis*, 693 N.E.2d 1282, 1286 (Ill. App. Ct. 1998); Atwood, *supra* note 72, at 196 (citing Lindman & Hollingsworth, *supra* note 72).

76. Atwood, *supra* note 72, at 196 (internal citations omitted).

77. Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 460 (2001).

78. 750 ILL. COMP. STAT. 5/506(a) (2013).

79. Gilmore, *supra* note 77, at 460; *see* 750 ILL. COMP. STAT. 5/506(a) (2013).

ommendations amounts to an abdication of judicial responsibility.”⁸⁰ Where judges simply defer to the GAL’s recommendation, this deference means that, practically speaking, the GAL is making child custody determinations instead of the judge.

Second, “serious due process concerns are present when guardians’ reports and recommendations have been considered by courts without an opportunity for cross-examination by the parties.”⁸¹ As such, many due process challenges have proven successful when a trial court judge relied on the GAL’s recommendations without providing the adverse party the opportunity to cross-examine the GAL.⁸²

Finally, given the vast disparity in roles for GALs and other types of attorneys who represent children, “commentators worry that the absence of clear standards for guardians *ad litem* permits them to act on the basis of subjective, unconstrained bias.”⁸³ As the court’s witness, GALs, like judges, are generally immune from civil liability.⁸⁴ Consequently, GALs lack accountability for their recommendations. This lack of accountability raises concerns that courts may rely on biased recommendations by GALs in making child custody determinations without any requirement for consistency or accountability.

IV. Why GALs Should Not Be Permitted to Rely on Evidence Obtained in Violation of State or Federal Wiretap Statutes

Based on the GAL’s role in child custody litigation, there are three reasons why GALs should not be permitted to rely on evidence that violates state or federal wiretap statutes. First, limits on expert witnesses’ abilities to rely on inadmissible evidence should bar GALs, as the court’s expert witness, from relying on illegally obtained wiretap evidence. Second, permitting GALs to rely on inadmissible recordings exacerbates concerns with consistency and accountability surrounding the GAL’s role in child custody proceedings. Third, relying on such evidence frustrates the purpose and policy of state and federal wiretap statutes.

80. Atwood, *supra* note 72, at 198.

81. *Id.*

82. See, e.g., *Ex parte R.D.N.*, 918 So. 2d 100 (Ala. 2005); *In re Marriage of Bates*, 819 N.E.2d 714 (Ill. 2004); *Pirayesh v. Pirayesh*, 596 S.E.2d 505 (S.C. Ct. App. 2004).

83. Atwood, *supra* note 72, at 198.

84. Ducote, *supra* note 66, at 148 (internal citations omitted); see, e.g., *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994) (holding that the guardian *ad litem* had absolute immunity from liability pursuant to Illinois’s eavesdropping statute); *Paige H.B. by Peterson v. Molepske*, 580 N.W.2d 289, 296 (Wis. 1998) (holding that guardians *ad litem* are entitled to absolute quasi-judicial immunity).

A. GALs Should Not Be Permitted to Rely on Inadmissible Evidence

GALs should not be permitted to rely on evidence that would otherwise be inadmissible because it was obtained in violation of state or federal wiretap statutes. Both federal and state rules of evidence contain limitations on an expert witness's ability to rely on inadmissible evidence in forming an opinion and presenting it to the court. Such limitations should bar GALs, as expert witnesses, from relying on illegally obtained wiretap evidence. Even where such evidence is admissible, GALs, as the court's expert witness, should not be permitted to rely on such evidence in the same manner as a normal expert witness who is not controlled by the court.

Federal Rule of Evidence 703 permits experts to rely on inadmissible evidence in forming an opinion. However, the rule does not "function as an exception through which otherwise inadmissible evidence could be admitted."⁸⁵ Rule 703 states as follows:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.⁸⁶

Rule 703 contains the following two limitations: first, in order for an expert to rely on inadmissible evidence, it must be of the type of evidence reasonably relied upon by experts in that particular field.⁸⁷ Second, it is impermissible for an expert to testify regarding an opinion that is based on inadmissible evidence if such evidence is unfairly prejudicial.⁸⁸ While Rule 703 makes specific reference to the jury, not the judge, as fact finder, Federal Rule of Evidence 403 provides for the exclusion of evidence in all circumstances where it is unfairly prejudicial.⁸⁹ As such, this exclusion for unfair prejudice also applies to the issue at hand where it has the potential to prejudice the GAL and the judge against one party to the child custody proceeding. The majority of states have rules of evidence similar to the federal rules of evidence with regard to the limitations on the ability of expert witnesses to rely on inadmissible evidence.⁹⁰

85. Ian Volek, Note, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 *FORDHAM L. REV.* 959, 963 (2011) (citing *FED. R. EVID.* 703 advisory committee's note on 2000 amendment).

86. *FED. R. EVID.* 703.

87. *Id.*; see Volek, *supra* note 85, at 982–83.

88. *FED. R. EVID.* 703; see Volek, *supra* note 85, at 982–83.

89. *FED. R. EVID.* 403, 703.

90. *ALASKA R. EVID.* 703; *ARK. R. EVID.* 703; *ARIZ. R. EVID.* 703; *CAL. EVID. CODE* §

1. AN EXPERT CAN RELY ON INADMISSIBLE EVIDENCE IF IT IS THE TYPE OF EVIDENCE REASONABLY RELIED UPON BY EXPERTS IN THE FIELD

First, an expert witness may only rely on inadmissible evidence to the extent that it is of the type of information reasonably relied upon by experts in the particular field at issue. The justification for this rule is that allowing experts to rely on such evidence promotes judicial efficiency and mirrors the expert's practice in his or her profession.⁹¹ Furthermore, the expert's own testimony validates the evidence the expert relies on.⁹² Where these justifications are not served, the court should bar the expert from relying on the inadmissible evidence.

Reasonable reliance by the expert's field requires that the reliance is "both customary in [the expert's] field and reasonable."⁹³ The requirement that inadmissible evidence pass this test prevents any party from circumventing the exclusion of evidence by finding an expert to rely on that evidence in presenting an opinion to the court.⁹⁴ In determining what is reasonable, the Illinois Supreme Court noted that it is important to examine the reason the evidence relied upon is inadmissible for its substantive value.⁹⁵ The court held that "if another rule of law applicable to the case excludes the information sought to be relied upon by the expert, the information may not be permitted to come before the jury under the guise of a basis for the opinion of the expert."⁹⁶

In the context of wiretap evidence, such evidence is not merely inadmissible evidence, it was also obtained illegally. Regardless of whether a GAL or other child expert would customarily rely on such evidence, its illegal nature should render it unreasonable.

Furthermore, illegally obtained wiretap evidence is unreasonable for an expert to rely on because such reliance frustrates the purpose of the rules

801(b) (West 2013); COLO. R. EVID. 703; CONN. CODE EVID. § 7-4; DEL. R. EVID. 703; FLA. STAT. § 90.704 (West 2013); HAW. REV. STAT. § 626-1 (West 2013); IDAHO R. EVID. 703; ILL. R. EVID. 703; IND. R. EVID. 703; IOWA R. 5.703; KY. R. EVID. 703; LA. CODE EVID. ART. 703; ME. R. EVID. 703; MD. RULE 5-703; MISS. R. EVID. 703; MO. ANN. STAT. 490.065 (West 2013); MONT. R. EVID. 703; NEB. REV. STAT. § 27-703; NEV. REV. STAT. 50.285 (West 2012); N.H. R. EVID., 703; N.J. R. EVID. 703; N.M. R. EVID. 11-703; N.Y.C.P.L.R. 4515 (McKinney 2013); N.C. R. EVID., G.S. § 8C-1, RULE 703; N.D. R. EVID. 703; 12 OKLA. STAT. ANN. tit. 12 § 2703 (West 2013); OR. REV. STAT. ANN. § 40.415 (West 2013) (RULE 703); PA. R. EVID. 703; R.I. R. EVID. 703; S.C. R. EVID. 703; S.D. CODIFIED LAWS § 19-5-3 (West 2013); TENN. R. EVID. 703; TEX. R. EVID. 703; UTAH R. EVID. 703; VT. R. EVID. 703; VA. CODE ANN. § 8.01-401.1 (West 2013); WASH. R. EVID. 703; W.VA. R. EVID. 703; WIS. STAT. ANN. § 907.03 (West 2013); WYO. R. EVID. 703.

91. Volek, *supra* note 85, at 968.

92. *Id.*

93. Connelly v. Gen. Motors Corp., 540 N.E.2d 370, 378 (Ill. App. Ct. 1989).

94. *Id.*

95. City of Chicago v. Anthony, 554 N.E.2d 1381, 1389 (Ill. 1990).

96. *Id.*

of evidence. The purpose of the Federal Rules of Evidence, like those of the states, is “to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”⁹⁷ Yet, permitting GALs to rely on illegally obtained wiretap evidence encourages illegal activity, thus undermining the fairness of child custody proceedings. Also, by relying on a communication obtained in violation of a wiretap statute, the GAL, save for a provision imposing immunity from liability, could also be held criminally or civilly liable under such statute.⁹⁸ Because of its illegal nature, wiretap evidence should not be deemed to be the type of evidence reasonably relied upon by experts in the field of child custody. Consequently, GALs, as experts, should not be permitted to rely on otherwise inadmissible wiretap evidence.

2. IT IS IMPERMISSIBLE FOR AN EXPERT TO TESTIFY REGARDING AN OPINION
BASED ON INADMISSIBLE EVIDENCE THAT IS UNFAIRLY PREJUDICIAL

Where an expert witness’s opinion relies on inadmissible evidence, the expert may only testify regarding that opinion if the inadmissible evidence relied on is not unfairly prejudicial.⁹⁹ Federal Rule of Evidence 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁰⁰ “Rule 703 thus reverses the default presumption of disclosure under Rule 403 to create a presumption against disclosure even for the limited purpose of explaining the expert’s opinion.”¹⁰¹

In order to test the validity of a GAL’s custody recommendation, it is important for the GAL to testify and be cross-examined regarding the basis for the recommendation. Where a GAL relies on illegally obtained wiretap evidence in making a custody recommendation, the GAL will necessarily need to testify regarding this otherwise inadmissible evidence, at least on cross-examination. The potential for this testimony to be unfairly prejudicial to the adverse party is high when GALs rely on illegally obtained wiretap evidence. This risk of unfair prejudice due to a GAL’s inevitable testimony regarding the illegally obtained wiretap

97. FED. R. EVID. 102.

98. 18 U.S.C.A. § 2511(1)(d) (West 2012) (stating that a person is liable under the Wiretap Act who “intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection”).

99. FED. R. EVID. 403, 703.

100. FED. R. EVID. 403.

101. Volek, *supra* note 85, at 963.

evidence should serve to bar GALs from relying on such evidence in making custody recommendations.

On balance, the risk of prejudice outweighs the probative value of the evidence. It is important for GALs to have broad investigatory powers to carry out their duty of making child custody recommendations to the court.¹⁰² Recordings obtained in violation of state and federal wiretap statutes have the potential to prejudice the GAL against one parent from the outset in a way that could bias the GAL's recommendations. The recording could have been the result of any number of circumstances that do not accurately reflect the recorded party's normal temperament or relationship with the child. For example, one spouse may purposely incite the other spouse to obtain an advantage in a child custody proceeding by recording a communication that is severely out of character for the recorded spouse. Yet, it is well-established that listening to a recording or watching a video can have an immensely persuasive impact on an audience, the GAL in this case.¹⁰³ Hence, the adverse party will face an uphill battle trying to reverse the impact the illegally obtained wiretap evidence had on a GAL.

For this same reason, this risk of prejudice is not remedied by affording the adverse party the opportunity to cross-examine the GAL with regard to the GAL's reliance on the recording. In order to cross-examine the GAL in this regard, it would be critical to play the recording. While the recording would be reviewed solely to determine the credibility of the GAL's recommendation, it would likely be difficult for the judge, as the fact finder, to separate the substantive value of the recording from its purpose in determining the credibility of the GAL's recommendation. Inevitably, judges will rely on the evidence for its substantive value because "[i]n evaluating the expert's opinion, 'one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion.'"¹⁰⁴ Again, because of the great impact that audio and video recordings have on an audience, in this case the judge, the adverse party's ability to cross-examine the GAL is just as likely to harm that party as it is to correct the risk of prejudice.

Further, the probative value of the recording is minimal in comparison

102. *In re Marriage of Karonis*, 693 N.E.2d 1282, 1286 (Ill. App. Ct. 1998).

103. See Sonja R. West, *The Monster in the Courtroom*, 2012 B.Y.U. L. REV. 1953, 1966 (2012) (analyzing how video has a greater impact on an audience than "any other form of presentation"); see also Bradley Parker, et al., *The Paperless Deposition*, UTAH BAR J. 36, 37 (Jan.-Feb. 2007) (stating that "[t]he impact of the video testimony in settlement discussions, hearings and trials is much greater than printed testimony").

104. Volek, *supra* note 85, at 974 (citing Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 585 (1987)).

to its prejudicial effect. For example, if one party to a child custody battle contends that the other party is harmful to the child, there will likely be other evidence and testimony to support this contention. This evidence could be introduced in court or relied on by the GAL in making a recommendation to the court without the need to also rely on an illegally obtained recording that could prejudice the GAL against one party. Since illegally obtained recordings are likely to be unfairly prejudicial, GALs, as expert witnesses, should not be permitted to rely on such inadmissible evidence.

3. BECAUSE OF THEIR DISTINCT ROLE AS THE COURT'S WITNESS, GALs SHOULD BE PROHIBITED FROM BASING THEIR OPINIONS ON INADMISSIBLE WIRETAP EVIDENCE EVEN IF A NORMAL INDEPENDENT EXPERT WITNESS IS NOT

The GAL, unlike a normal expert witness, serves as the court's witness. Even if evidence obtained in violation of state or federal wiretap statutes could be relied on by a normal expert witness in forming an opinion, GALs, as the court's expert witness, should nevertheless be barred from reviewing and relying on such evidence in making a child custody recommendation.

GALs are not expert witnesses independently hired by one party to testify regarding an expert opinion. Rather, GALs are appointed by the court to investigate and make a recommendation to the court regarding the custody arrangement that would serve the children's best interests. Since GALs are meant to serve as neutral parties, unlike normal expert witnesses retained by one party, the court heavily relies on the GAL's recommendation. By allowing GALs to rely on inadmissible and illegally obtained recordings, the court is essentially circumventing the wiretap statutes' exclusionary rules. Consequently, GALs, as the court's expert, should be treated differently than normal experts with regard to their reliance on inadmissible evidence. GALs should not be permitted to circumvent an exclusionary rule by relying on illegally obtained wiretap evidence.

B. Permitting GALs to Rely on Inadmissible Wiretap Evidence Exacerbates the Concerns with Consistency and Accountability Regarding the GAL's Role

The concerns raised by many legal scholars regarding conflicts with the GAL's role are exacerbated by allowing GALs to review and rely on recordings obtained in violation of state or federal wiretap statutes. The role of the GAL enables the court to rely on the GAL's recommendation without a clear mechanism in place to ensure consistency or accountability for child custody determinations. Yet, critics repeatedly express con-

cern that lack of regulation of GALs “permits them to act on the basis of subjective, unconstrained bias.”¹⁰⁵

Given the great persuasive impact of audio and video recordings,¹⁰⁶ permitting GALs to rely on illegally obtained recordings increases the risk that a GAL’s subjective bias will enter into the GAL’s child custody recommendation. Because judges many times defer to the GAL’s recommendation for what is in the best interests of the children, this bias is also more likely to enter into the final custody determination. Permitting GALs to review inflammatory recordings potentially has the effect of enabling the court to rely on the GALs’ biases in making child custody determinations.

*C. Permitting GALs to Rely on Inadmissible Wiretap Evidence
Frustrates the Purpose of the Wiretap Acts*

Permitting GALs to review and rely on illegally obtained wiretap evidence in making child custody recommendations to the court also frustrates the purpose of the wiretap statutes. The purpose of the Wiretap Act of 1968 was to protect individuals’ privacy in the face of advancing technology.¹⁰⁷ This protection was critical to encourage society’s interest in “the uninhibited exchange of ideas and information among private parties.”¹⁰⁸ Congress was concerned about the ability of new technology to jeopardize “privacy of communication” among all individuals.¹⁰⁹ This same purpose also generally applies to state wiretap statutes.¹¹⁰

Significantly, “nearly 80 percent of reported wiretapping matters involve wiretaps within the family context.”¹¹¹ The Wiretap Act protects against these violations of communication privacy by imposing harsh civil, criminal, and evidentiary penalties for its violation.¹¹²

105. Atwood, *supra* note 72, at 198.

106. See West, *supra* note 103, at 1966; see also Parker et al., *supra* note 103, at 37.

107. Gelbard v. United States, 408 U.S. 41, 48 (1972) (citing the Senate committee report that accompanied Title III).

108. Dorothy Higdon Murphy, *United States v. Councilman and the Scope of the Wiretap Act: Do Old Laws Cover New Technologies?*, 6 N.C. J. L. & TECH. 437, 441 (2005) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) (quoting the Brief for the United States)).

109. S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2154 (noting that “widespread use and abuse of electronic surveillance techniques” can jeopardize “privacy of communication”); see 18 U.S.C.A. § 2511 (West 2012) (prohibiting interceptions of communications by “any person”).

110. See Travis S. Triano, *Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 416 (2012) (noting that the majority of states “tailor their statutes after the Federal Wiretap Act” and the other states’ statutes are more rigorous).

111. Zerman & Mogerman, *supra* note 18, at 228 (citing NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 160 (1976)).

112. 18 U.S.C. §§ 2511(4)(a), 2515, 2520(b).

Yet, allowing GALs to review and rely on recordings obtained in violation of state or federal wiretap statutes creates an incentive to violate these statutes. It creates an incentive for parties to a vicious custody battle to covertly record the other party in a negative light in order to gain a favorable custody recommendation from the GAL. Even where a parent has the best of intentions, permitting GALs to review such recordings eviscerates the communication privacy the Wiretap Act was enacted to protect. While parties could still be held criminally or civilly liable for violating a state or federal wiretap statute, this potential liability may not outweigh the incentive to obtain a recording to gain an advantage in a child custody proceeding. Therefore, GALs should not be permitted to review or rely on illegally obtained wiretap evidence because such a practice contravenes the purpose of safeguarding communication privacy that the state and federal wiretap statutes were enacted to protect.

V. Conclusion

As technology continues to advance, courts will increasingly be faced with issues in child custody cases regarding the use of illegally obtained wiretap evidence. Such evidence should be excluded from being used not only as substantive evidence at trial, but also from use by GALs in making child custody recommendations to the court. Permitting GALs to review and rely on illegally obtained wiretap evidence violates the rules of evidence regarding the limitations on an expert witness's ability to rely on inadmissible evidence, exacerbates concerns regarding the GAL's role, and frustrates the purpose and policy behind state and federal wiretap statutes.

The ultimate goal in child custody cases is to enter a custody judgment that serves the best interests of the children. Yet, in many cases, permitting GALs to rely on inadmissible wiretap evidence better serves the interests of embattled parents than those of their children.