Legal Matters®

Family Law
summer 2018

Digital spying on your spouse is a bad idea

There's a lot of cutting-edge technology available today that makes it easy to spy on someone — or for someone to spy on you.

Some programs enable people to "jailbreak" your phone and get past your anti-spyware protection. Once that protection is gone, other programs can give someone access to emails, text messages and call history. Then other programs can be used to encrypt your data and send it to an account where it can be accessed.

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Unfortunately, the existence of such technology may tempt someone in a bad marriage to use it to spy on his or her spouse. That could lead to evidence of infidelity, help dig up dirt for a custody case, or provide evidence that an ex is cohabiting with a new significant other, which the spying spouse could use to get out from under his or her alimony obligations.

But as tempting as it seems, it's a very bad idea. For one thing, illegally obtained data could easily backfire in family court. Worse, you could end up facing criminal sanctions. That's because of laws like the Federal Wiretap Act, which makes it a crime to use a machine to capture someone else's communications without court approval.

In addition, a lot of states have "anti-stalking" laws, and digitally spying on your spouse might break these laws. In some places, this could even get you jail time.

Assuming that you can go ahead and spy and then simply delete everything if your spouse finds out won't work. First of all, deleted data can usually be recovered with the aid of a good computer forensics expert. Additionally, you're engaging in "spoliation" of evidence, which will certainly hurt your custody or divorce case. Theoretically, if your spouse reports being hacked and the police investigate, you might even be considered as having obstructed justice, which can a crime in and of itself.

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‘No contest’ clauses not bulletproof

A “no contest” clause is a provision in a lot of estate documents that automatically disinherits anyone who challenges its terms. The purpose is to scare people out of bringing lawsuits claiming that the will or trust doesn’t reflect the creator’s real wishes.

But a recent Massachusetts case shows that these provisions won’t necessarily bar all challenges. In that case, the mother of two adult siblings created an estate plan that distributed what one sibling thought was an unreasonable share of the family assets, which included significant wealth from a multimillion-dollar family ice cream business and valuable real-estate holdings, to her brother and his kids.

The sister challenged the plan in court, claiming that as their mother began to decline mentally and physically, her brother took advantage of the situation, manipulating their mother into gifting him 50 percent of the real estate interests and making him and his children the beneficiaries of her retirement and bank accounts. She also claimed that the brother convinced their mother to leave him the family home and a vacation home in a posh Cape Cod beach town, assets the mother had allegedly promised to the daughter.

The brother argued that under the “no contest” clause in their mother’s estate documents, the very act of challenging the estate automatically disinherited his sister, making her a non-beneficiary with no legal standing to pursue the case.

But a Massachusetts trial judge disagreed. He concluded that if the sister pursued the challenge in court *and lost*, she’d be disinherited. But she could decide whether to take that risk, leaving her free to pursue the case. After all, said the judge, the no-contest clause itself could have been a result of the brother’s undue influence on the mother, in which case it would be void in the first place. Now the sister has the opportunity to try and prove exactly that and more.

The law, of course, may differ from state to state, so talk to a lawyer where you live.

Football participation for kids source of conflict in family court

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Divorcing parents fight over a range of issues, from big questions like who the children will live with and how to handle major educational and medical decisions to some relatively minor issues.

Now another source of contentiousness has emerged: whether the kids should play football.

As more and more evidence links football to long-term brain damage, a lot of parents are having second thoughts about whether their children should play the sport. This has resulted in disagreements that led to some parents going to court over whether their custody orders should bar their kids from taking the field.

One such dispute is happening in Pittsburgh. John Orsini is seeking to stop his youngest son from playing high-school football because the boy has had concussions in the past and Orsini is worried about him having more in the future. The boy’s mom, however, says their son understands the risks, wants to keep playing and should be able to decide for himself.

Orsini hasn’t been able to get the judge to block his son from playing and the issue is headed for trial. For now, the boy is still playing and apparently hopes to play in college, like his older brother.

It’s hard to say how judges will ultimately resolve these types of disputes. There’s plenty of research that football poses serious health risks in the long run, but coaches and trainers are now better equipped to detect and address signs of concussions. Plus, judges in many states are elected, and may be concerned about re-election if they start routinely issuing orders blocking kids from hitting the gridiron. These are also very fact-specific cases that can depend heavily on the individuals involved.

But if you’re concerned about your own child playing football and your ex-spouse disagrees, talk to a family law attorney to determine how best to approach the issue.

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One recent case from New York illustrates how a suspicious spouse got himself in hot water. The husband, known in court documents as "Crocker C.," installed spyware on his wife's phone three weeks before filing for divorce. He wanted to gain an edge in divorce proceedings by intercepting communications between his wife, known as "Anne R.," and Raoul Felder, her celebrity divorce lawyer.

Crocker may have gained access to as many as 200 emails before a computer expert that Felder and Anne hired for a different issue discovered the spyware.

The police have since seized all of Crocker's computers and devices and they're now being scoured for evidence that he intercepted his wife's confidential communications. He's also been found in contempt of court for trying to wipe all of his hardware.

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In another case out of Texas, a man actually got four years in prison for using software called "SpyRecon" (which parents can use to monitor their kids' smartphone use) on his wife's phone.

Situations may exist where digital spying is OK. But if you're feeling tempted, it's critical to talk to an attorney first. If you suspect your spouse may be spying on *you*, give your lawyer a call to discuss your options.

Wife who abandoned husband forfeited spouse's share of his estate

Living separate lives may be the key to some long-lasting marriages. But doing so could result in the forfeit of important interests, as a Missouri case shows.

The couple in that case, Marilyn and John David Heill, married in 1968. In the 1990s, John started spending most of his time at his parents' farm in another county.

He returned to the marital home to recover from a heart attack, but went back to the farm in 1999 when he inherited it upon his mother's death.

Marilyn stayed at the marital home with John's consent, visiting him on occasion to discuss business or bring the grandchildren for a visit. After 2000, the two provided no domestic, financial or emotional support to one another, and Marilyn didn't provide John with care through his bouts with prostate cancer, a heart attack, a broken hip and eventually Alzheimer's disease. He moved to a nursing home before passing away in 2014. Neither spouse ever began proceedings to divorce or even to separate legally.

John's will left his entire estate to his son. But as in most states, Missouri law allows a spouse to take an "elective share," which is usually between 1/3 to 1/2 of the estate, in place of whatever he or she was left in the will.

John's son argued that Marilyn "abandoned" the marriage in 2000 without reasonable cause by living separately from John. Accordingly, even though the son alleged no marital misconduct such as abuse or infidelity, the marriage was, for all meaningful purposes, over at the time of John's death.

A trial judge agreed and an appeals court affirmed. So if you're living separately from your spouse, it might also be a good idea to check with an attorney to find out what options you have to hold onto important rights and decide whether it might be best to end the marriage and divide the property accordingly.

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Deceased worker's retirement benefits go to sister, not wife

If you're getting married and want your retirement and other similar benefits to go to your new spouse if you pass away first, it's very important to update all your policies and plans to name your spouse as the beneficiary. Otherwise your property might not get distributed in the way you want.

This happened recently in Texas. A man got married in 2003 but never changed the beneficiary designation for his retirement benefits. He died eight years later. His wife was also the executor of his estate and went to probate court seeking a ruling that the benefits were rightfully hers as "community property." The judge, however, said they belonged to her late husband's sister, who was named as the beneficiary.

The wife appealed. But the Texas Court of Appeals upheld the decision, pointing out that benefits associated with the husband's employment during their marriage might be considered community property, but that wasn't the case here.

If you're not sure that the beneficiaries on your own retirement plans and life insurance policies are completely up-to-date, talk to a family lawyer about the potential implications.

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Father wins custody battle with grandmother

A recent case from Virginia demonstrates that a parent typically has the edge in a custody battle with a non-parent and that it takes extraordinary circumstances for a non-parent to overcome that advantage.

The case involved a dispute between the father of a 9-year-old girl and the maternal grandmother she'd lived with her entire life.


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The father was in jail while the girl was a baby. During that time she lived with her grandmother in what the court described as a "spacious" home. Her mother lived there too before relocating to Georgia in 2015.

At some point after the father was released, he sought custody of his daughter. By this point, he was living in a two-bedroom home with his new wife and two sons.

The grandmother objected and filed for custody herself, arguing that the girl had always lived with her and that remaining with her would be in the best interests of the child. A "guardian ad litem" (an individual, often a lawyer or a counselor, appointed by the court to protect a child's interests) agreed.

But a family court judge gave physical custody to the father, and after a trial gave him legal custody as well, over the objections of the grandmother, the mother and the guardian.

In ruling this way, the judge said there is a legal presumption favoring the parent in any custody case and to rebut that presumption the non-parent has to do more than show it is in the child's best interests. Instead, the non-parent has to give an "extraordinary" reason. In other words, the judge said, the grandmother would have had to show "actual harm" to the child if the father got custody.

Since there was no such showing in this case — in fact, the grandmother admitted that the father was a fit parent despite having been in jail — the court awarded physical custody to the father while granting joint legal custody to him, the mother and the grandmother.

Courts in other states may look at a situation like this differently, so check with a lawyer in your state.