

Does videotaping a supervised CPS visitation violate privacy rights?

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In an era where smartphones and home security cameras make recording everyday interactions commonplace, the question of whether parents can legally videotape Child Protective Services (CPS) workers or court appointed professionals during home visits that include interviews of children has become increasingly relevant. There are legal and ethical considerations to such attempts to record.

Texas

Texas is a one-party consent state for audio recordings, meaning that only one party to a conversation needs to consent to the recording. However, video recordings in private spaces present a more complex legal landscape. In 2021, Chapter 261 of the Texas Family Code was revised to add Section 261.3027, which mandates that prior to interviewing someone alleged to have committed child abuse, CPS must inform the individual both orally and in writing that the individual being interviewed may “create an audio or video recording of the interview, but may not record it in any other manner,” that such a recording may later be subpoenaed, and that the individual being recorded has the right to request and obtain a copy of CPS’ recording policy. The newly revised statute prohibits individuals from posting any recording of CPS’ interview with an alleged perpetrator on any internet website in a way that would allow the identification of a party to the interview. In other words, to post the interview might involve disguising the sound of a person’s voice and/or the blurring of the faces of the parties depicted in the recording. To assure compliance, Texas CPS workers are required by the statute to provide oral and written notices to parents regarding their right to record, with a copy of the written notice to be placed in the CPS file. By contrast, 2023 revisions to legislation in Texas mandate that court appointed child custody evaluators in Texas must create and maintain audiovisual recordings of any interviews of minor children.

[Texas Penal Code Section 21.15](#) addresses invasive visual recording, making it a crime to photograph or videotape someone without their consent with the intent to invade their privacy, particularly in private settings like bathrooms or changing rooms. This law reflects the state's emphasis on privacy, which could influence

decisions in family law cases involving videotaping. An offense under [Texas Penal Code Section 21.15](#) is a state jail felony. Unlawful disclosure of intimate visual material, pursuant to [Texas Penal Code Section 21.16](#) includes situations where:

1. The person recording the depicted person did so without that person's consent, and with intent to harm that individual, and then discloses visual material that includes the depicted person's intimate body parts or engaged in sexual activity;
2. The person recording has reason to believe that the depicted person anticipated that any recording would remain private;
3. The recording causes harm to the depicted person;
4. The depicted person can be identified as a result of the recording;
5. One cannot threaten to withhold production of such a recording for profit.

There is no defense to prosecution under the Texas statute that the depicted person may have consented to the recording or created the recording, nor is it a defense if the depicted person provided the recording to the person who shares the videorecording.

A recent decision by the [U.S. Court of Appeals](#) upheld Texas's drone privacy law, which includes restrictions on capturing images without consent, highlighting ongoing legal considerations around the right to record.

Texas courts have addressed the rights to record in various contexts, such as police activities, under First Amendment protections. These cases suggest a nuanced approach where the right to record is balanced against privacy concerns.

California

The recent case of *Malinowski v. Martin*, depicts a complicated history in which the appellate court considered the California Invasion of Privacy Act, Pen. Code, § 630 et seq., which prohibits individuals from recording private communications unless each party to the communication consents to being recorded. Pen. Code, § 632, subd. (a). The trial court denied the mother’s requested relief to include the parties’ “children as protected parties under an existing domestic violence restraining order (DVRO) under the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.). (Superior Court of San Mateo County, No. 21-FAM-01531, Rachel Holt, Judge.)”

In California, a "confidential communication" includes communicating in such a way that any individual involved in the communication wants to have the dialogue limited to the parties to the conversation, excluding conversations held “in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.” § 632, subd. (c). If evidence is procured in California in a way that violates this statute, that evidence is inadmissible in any type of “judicial, administrative, legislative, or other proceeding.” § 632, subd. (d). In *Malinowski*, the appellate court found that, pursuant to applicable criminal statutes:

In order for a parent to make a surreptitious recording of their child with another for the purpose of gathering evidence of abuse, the parent must have a good faith, objectively reasonable belief that the recording is in the best interest of the child. Pen. Code, § 633.5

The Malinowski case included reference to:

1. Mother's assertions that the children's father, Justin Martin:
 - a. Allegedly threatened to flush one of the children's fish down the toilet if the child did not attend a court-ordered visit;
 - b. Purportedly telling the same child that "he will call the police on her; she will go to jail; the jail is just next to them; and there are jails for six-year-olds."
2. The mother, Kamila Malinowski, recorded the children's father's supervised visits.
3. Supervised visitation coordinator Julie Espinoza, who had been court appointed to supervise visits, acknowledged when confronted with such allegations against the children's father that: "I do not know. . . the visits are recorded, and once Dad is with the kids, I may not necessarily be there because that's his parental time. So conversations may have happened with the kids that I was not privy to because I had stepped away".
4. Espinoza testified that the level of contentiousness between Martin and Malinowski was at such a level that she perceived her position to be "to observe, monitor, and document, as well as to keep the children safe." According to Espinoza, the children were often loud and unruly during the exchanges, which attracted the attention of bystanders. Once Martin arrived at the exchange location, Espinoza would sometimes drive to another part of the parking lot and supervise the interaction from a distance.
5. Malinowski hired a private investigator to engage in surveillance. The PI photographed and videotaped the children with their father on April 21, 2021, depicting one of the children "screaming and climbing on top of an

SUV. Espinoza testified she did not know a private investigator was watching.” Espinoza also testified that “she often had the feeling of being watched ‘in addition to the cameras inside Mom's car.’” Espinoza also noted that the children’s “[g]randfather sometimes hid in the bushes and watched the exchange through binoculars.”

6. The California appellate court declined to endorse an “ends justify the means” argument, holding that:

Though we reject Malinowski's argument that Penal Code sections 633.5 and 633.6, subdivision (b), permitted her to make the dash cam recordings of the supervised exchanges for the purpose of evidence-gathering, we reiterate our holding that the trial court erred in concluding the dash cam videos captured confidential communications in violation of Penal Code section 632 and in excluding the evidence on that basis.

Ethical Considerations

The ethical implications of recording CPS workers and court appointed professionals are significant:

1. Privacy concerns: Recording may infringe on the privacy rights of children or other family members present during the visit.
2. Interference with professional duties: Recordings by parents could potentially inhibit the ability of CPS workers and/or child custody evaluators to perform their duties effectively.
3. Authenticity of interactions: The presence of recording devices may alter the behavior of both the professionals and of the family members, potentially compromising the authenticity of the evaluation or investigation.

4. Confidentiality: There is a risk that recorded information could be shared inappropriately, violating confidentiality principles that must be maintained in child welfare and child custody cases.

Pro: Recordings

1. Accountability: Recordings can provide an objective record of interactions, potentially protecting both parents and professionals from false accusations.
2. Transparency: Video evidence may offer clarity in disputes about what occurred during a visit of evaluation.
3. Parental rights: Parents may argue that they have the right to document interactions that could result in significant restrictions regarding access to their children.
4. Consistency with “normal” behavior: Given how common recording devices are in homes, prohibiting their use during official visits may be increasingly difficult to justify.

Con: Recordings

1. Professional discretion: CPS workers and evaluators contend that their ability to make unbiased assessments is compromised when they are being recorded.
2. Child welfare concerns: The presence of recording devices may inhibit children from speaking to supervisors and other professionals freely, potentially encumbering child protection efforts.
3. Misuse of recordings: There is a risk that partial or edited recordings could be used to misrepresent interactions.
4. Interference with established protocols: Recording may disrupt standardized evaluation procedures, invalidating the results.

Recommendations

Given the complex nature of this issue, consider the following:

1. Clear guidelines: Courts and CPS should establish clear, uniform guidelines regarding recording of home visits and evaluations, taking into account pertinent right to privacy laws in each applicable jurisdiction.
2. Informed consent: If recordings are allowed, all parties should be informed and provide consent before any recording begins.
3. Controlled environment: When recordings are permitted, they should be conducted pursuant to protocols to ensure the integrity of the process.
4. Judicial discretion: In custody cases, judges should act as gatekeepers, using their authority to decide on a case-by-case basis whether a recording was appropriate, always being governed by the best interest of the child.
5. Professional training: CPS workers and court-appointed evaluators should receive training on how to conduct their duties effectively in an environment where they may be recorded.

Conclusion

The question of whether parents should be allowed to videotape CPS workers and court-appointed professionals during home visits is complex. Such a practice raises both legal and ethical concerns. As technology continues to evolve and recording devices become even more ubiquitous, it is crucial for lawmakers to address these issues directly. Clear guidelines that balance the rights of parents, the welfare of children, and the integrity of professional evaluations must be established. Courts must continue to approach the issue of recordings with caution, considering the unique circumstances of each case.

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Original link: <https://www.law.com/texaslawyer/2024/11/06/does-videotaping-a-supervised-cps-visitation-violate-privacy-rights/>