

Discipline of Stepchildren

By Stepparents in Cases Involving Joint Custody

By Hon. John C. Ruck

Fast Facts:

Of all the problems that divorced parents with children must deal with, the issue of a stepparent's involvement with discipline can be among the most vexatious.

Caselaw provides two main theories under which a stepparent may exercise parental discipline over a stepchild: delegation by a parent to a stepparent and being *in loco parentis*.

People v Green is still the law in Michigan concerning the question of how far a parent or other person *in loco parentis* may go in inflicting corporal punishment on a child legally in his or her control without becoming liable for an assault and battery.



The quintessential evil stepfather of English literature might well be the infamous Edward Murdstone, created by Charles Dickens in his classic novel of childhood development, *David Copperfield*. The reader will recall that immediately upon marrying David's sainted mother, Clara, the stone-hearted Mr. Murdstone moved into her home and took over running the household, including educating and disciplining young David with a very firm and harsh hand. David's words, "He beat me then, as if he would have beat me to death,"¹ are words that many a divorced parent has nightmares about while a child is spending an alternate weekend with the other parent and his or her new spouse.

Of all the problems that divorced parents with children must deal with, certainly the issue of a stepparent's involvement with disciplining the parties' children—and in particular, corporal discipline—can be among the most vexatious.² It is frequently a reason for further turmoil and acrimony between the parents, often resulting in exposing the children to the stress of more litigation between the parents.

Legal Basis for Corporal Discipline of a Child by a Parent

The fundamental rights in the parent-child relationship are protected by the due process clauses of the United States and Michigan constitutions.³ This fundamental interest includes the right of parents "to direct the upbringing and education of children."⁴

The case of *People v Green*⁵ is still the law in Michigan on the question of how far a parent or other person *in loco parentis* may go in inflicting corporal punishment on a child legally in his or her control without becoming liable for an assault and battery. In *Green*, the Court held:

It is not the intention of the court to in any wise weaken parental authority. On the contrary, we hold that it is the unquestionable right of parents and those *in loco parentis* to administer such reasonable and timely punishment as may be necessary to correct growing faults in young children; but this right can never be used as a cloak for the exercise of malevolence or the exhibition of unbridled passion on the part of a parent.⁶

The Michigan Penal Code provides that the criminal penalties for child abuse do not apply when the parent or a person authorized by the parent takes steps to reasonably discipline a child, including the use of reasonable force.⁷

The definition of “child abuse” in the Michigan Child Protection Law makes no exception for a parent disciplining a child. By the same token, however, the definition does not include all forms of corporal punishment. The statute defines “child abuse” as

harm or threatened harm to a child’s health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child’s health or welfare or by a teacher, a teacher’s aide, or a member of the clergy.⁸

The Department of Human Services defines the term “physical abuse” in greater detail. Under that definition, physical abuse runs a full gamut of injuries from bruises and welts to death:

Physical abuse (injury) means a nonaccidental occurrence of any of the following: death, deprivation or impairment of any bodily function or part of the anatomy, permanent disfigurement, a temporary disfigurement, brain damage, skull or bone fracture, subdural hemorrhage or hematoma, dislocations, sprains, internal injuries, poisoning, drug or alcohol exposed infants, . . . burns, scalds, bruises, welts, open wounds, loss of consciousness, adult human bites and provoked animal attacks.⁹

In the unpublished case of *In re Eckles*,¹⁰ the Court of Appeals noted that, under the Michigan administrative rules for foster care, it is acceptable for parents to use reasonable physical discipline for their children.

The Indiana Supreme Court, in *Willis v State*,¹¹ recently adopted the view of the second Restatement of Torts,¹² which provides that a parent may apply to his or her child reasonable force or impose reasonable confinement that is necessary to control, train, or educate the child. The Restatement outlines the factors to be considered.¹³

Basis of a Stepparent’s Authority to Discipline a Stepchild

Caselaw has sanctioned two main theories under which a stepparent may exercise parental discipline over a stepchild. The first is a theory of delegation of authority by a parent to a stepparent, and the second is the theory of being *in loco parentis*. To some extent, the former theory is generally implied in the latter, but not necessarily so.

Delegation of Parental Authority

A parent has the right to delegate to a third party the authority to discipline the parent’s child. The Michigan criminal child abuse statute specifically authorizes that delegation with this language:

This section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.¹⁴

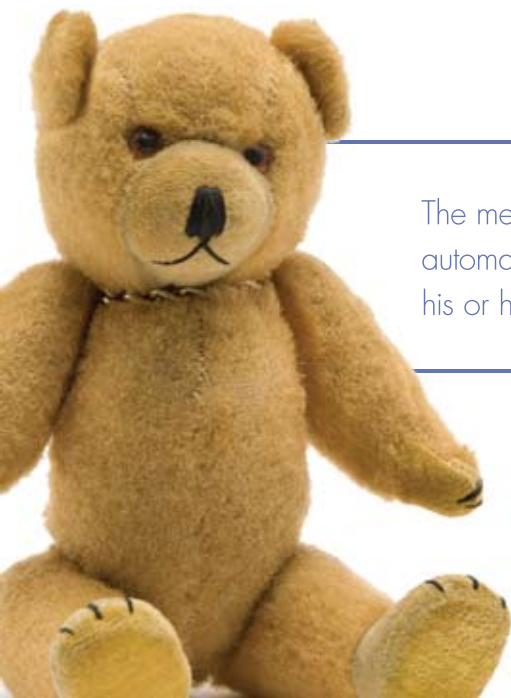
The delegation may be oral or in writing. MCL 700.5103 provides for delegating parental powers over a minor for not more than six months by means of a power of attorney relating to the care, custody, and property of the minor.

The state has the right to limit the parent’s authority to delegate. In *Johnson v Dep’t of Social Services*,¹⁵ the California Court of Appeal held that the state had the right to forbid by regulation corporal discipline in state-licensed foster homes, despite a parent’s objection. That court stated:

We have been cited to no case which holds a state may not by regulation prohibit parents from either allowing or requiring others to administer corporal punishment to their children. Parenting as a fundamental right is personal in nature. When parents delegate to third parties those decisions regarding child rearing, care, discipline and education, such delegation does not carry with it the constitutional protections inherent in the right of the parents. Moreover, this parental duty and right is tempered by and subject to limitations. When parental decisions may jeopardize the health or safety of a child, the state may assert important interests in safeguarding that health and safety.¹⁶

The mere fact of becoming a stepparent does not automatically give a person the authority to discipline his or her spouse’s minor child.

The mere fact of becoming a stepparent does not automatically give a person the authority to discipline his or her spouse’s minor child. In *Tipkin v Municipality of Anchorage*,¹⁷ the court found that the stepparent’s spouse had not delegated the authority to discipline the child to the stepparent and went on to say that, even when proper delegation exists, if the corporal punishment is inflicted out of anger and not for the purpose of benefitting the child, the defense of delegated authority is abrogated.



In Loco Parentis

The term “*in loco parentis*” has been defined as follows:

[I]n the place of a parent, and a “person in loco parentis” is one who has assumed the status and obligations of a parent without formal adoption. Whether or not one assumes this status depends on whether that person *intends* to assume that obligation.¹⁸

Becoming a stepparent does not automatically confer on the stepparent the status of being *in loco parentis* to his or her spouse’s child. The existence of that status is a question of fact to be determined by the appropriate fact-finder. The intent of the parties and their outward actions are critical in determining whether the relationship exists. Michigan courts have defined the relationship as follows:

Legally, the assumption of *in loco parentis* status is a question of intent. Intent to assume parental status can be inferred from the acts and declarations of the parties. *Rutkowski v Wasko, supra*. Some factors to consider are the age of the child; the degree to which the child is dependent on the person claiming to be standing *in loco parentis*; the amount of support, if any, provided; the extent to which duties commonly associated with parenthood are exercised. *McManus v Hinney*, 35 Wis 2d 433, 151 NW2d 44 (1967).¹⁹

The relationship is considered temporary and can be terminated at the will of the surrogate parent.²⁰ This differs from the relationship of an equitable parent, which is permanent in nature.²¹

The Michigan Supreme Court, when discussing the question of parental discipline of minor children, included persons *in loco parentis* in the same category as parents.²²

Physical Discipline by a Stepparent

For the sake of clarity and to narrow the issues, let us first consider the issue of stepparent discipline in a factual situation with the following parameters:

- The physical discipline the stepparent used on the child would be considered legal within the law of the jurisdiction involved if the parent had imposed it.
- The stepparent’s spouse has sole or joint legal custody of the child.
- The stepparent’s spouse consented to discipline by the stepparent.
- The noncustodial parent or the parent without primary physical custody has a parenting-time order.
- There are no provisions in a divorce judgment or a subsequent order, a personal protection order, an order in a Child Protective Services proceeding, or a probation or parole order restricting the stepparent from disciplining the child.

In this situation, it appears that a stepparent may use corporal discipline on a stepchild if the stepparent acts with the consent of his or her spouse or if he or she is *in loco parentis* to the child.²³

But what if the other parent having joint legal custody objects?

Effect of the Lack of the Other Parent’s Consent to Physically Disciplining a Stepchild

A court may award joint custody to the parents if they agree to it or if the court finds it to be in the best interests of the child. The court must find that the parents will “cooperate and generally agree concerning important decisions affecting the welfare of the child.”²⁴ Furthermore, MCL 722.26a(7) provides:

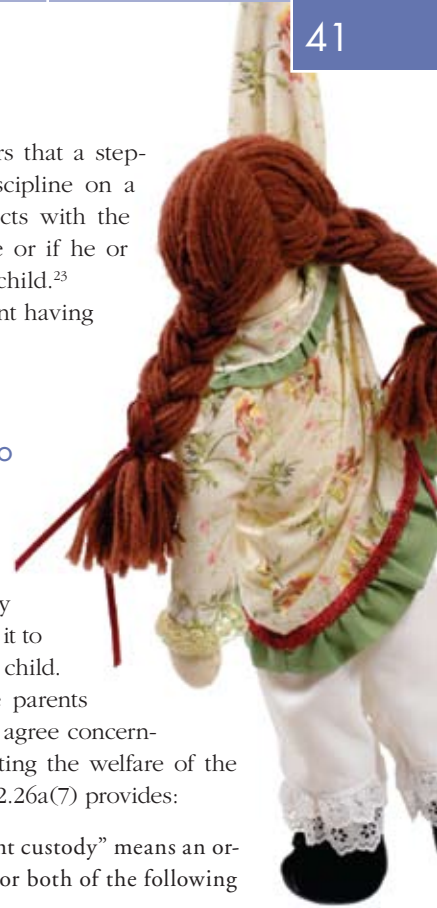
As used in this section, “joint custody” means an order of the court in which 1 or both of the following is specified:

- (a) That the child shall reside alternately for specific periods with each of the parents.
- (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

The court may bifurcate the joint custody. It is not uncommon for one spouse to enjoy primary physical custody, while both parents share joint legal custody.²⁵ In those situations, the child lives primarily with one parent, but both parents share the decision-making authority with respect to the “important decisions affecting the welfare of the child.”²⁶ The parents need not agree on everything to continue to qualify for joint legal custody provided that they “generally” do so.

In *Lombardo v Lombardo*,²⁷ the parents failed to agree on whether their son should be enrolled in a program for gifted children at his elementary school. They had joint custody over the child’s care, control, and education. The trial court ruled that, since the father had primary physical custody, his opinion should control when the parents could not agree on an educational issue. The Court of Appeals reversed, holding that, when “the parents as joint custodians cannot agree on important matters such as education, it is the court’s duty to determine the issue in the best interests of the child.”²⁸

MCL 722.27a(4) provides that, when a child resides with a parent in a joint-custody situation, that parent will decide all “routine matters concerning the child.” While the use of reasonable corporal punishment by a parent may be a routine matter, the right to delegate that authority to a third party when the parents share joint legal custody probably is not. The court may need to



make that determination if the parents disagree. In making its determination, the court would have to evaluate the situation within the context of the best-interest factors of MCL 722.23. When an issue of whether a stepparent is *in loco parentis* to a child exists, the court must apply the factors to the stepparent as well as the parents.

For example, the court would examine whether there is a bond of love, affection, and emotional ties between the stepparent and the child. How long have they been together in a home as a household unit? Does it appear to be a permanent family relationship? Does the stepparent help provide for the child economically? What are the child's feelings about the stepparent's role in his or her life? Has domestic violence been a factor in this or a previous relationship of the stepparent?

Because it can be so easily susceptible to misuse and abuse, "sharing the rod" with a stepparent should be subject to judicial oversight and restraint.

If it is comfortable with its findings based on the best-interest factors, the court should not hesitate to determine that the stepparent is *in loco parentis* to the child and should be allowed to exercise the rights of a parent with regard to disciplining the child. On the other hand, the court might well determine that granting the stepparent such authority is not in the best interests of the child. An example of this is the application of best-interest factor (j),²⁹ which concerns the willingness and ability of each party to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. The court could find that granting disciplinary authority to the stepparent would so infuriate the other parent and seriously harm his or her ability to co-parent with the stepparent's spouse that it would override any other benefit to the child. In that situation, and certainly in many others, the court must withhold disciplinary authority from the stepparent, even over the objection of the stepparent's spouse.

Conclusion

The decision about how a child is to be disciplined remains within the domain of the family, subject to the right of the state to protect the child. The disciplinary power is obviously not unlimited and is subject to multiple restrictions.

The child, through no fault of his or her own, now belongs to two families, each of which may have different rules and methods of obtaining compliance with them. When a parent has remarried and created a strong relationship with a new partner of which the child has become an integral part, public policy should encourage and support the familial aspects of that relationship, including questions of discipline. Ideally, the legal parents should agree on whether to extend the authority to discipline to a step-

parent. In a joint-custody situation, the decision should not be made unilaterally. The other parent is legally entitled to input on this sensitive question.

Parentally administered corporal punishment is so ingrained in our society as to be considered sacrosanct by many parents and cultures. Because it can be so easily susceptible to misuse and abuse, "sharing the rod" with a stepparent should be subject to judicial oversight and restraint. The use of the statutory best-interest factors is a ready tool for the court to apply to determine whether, in a particular extended family context, the rod should be spared and not shared. ■

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FOOTNOTES

1. Dickens, *David Copperfield* (New York: Penguin Group, 1962), ch 5, p 67.
2. It is the purpose of this article to examine the law as it exists in Michigan today rather than to discuss the merits or demerits of corporal punishment. For an analysis of the arguments against the practice, see Bitensky, *Spare the rod, embrace our humanity: Toward a new legal regime prohibiting corporal punishment of children*, 31 U Mich J L Reform 353 (1998).
3. US Const, Am XIV, § 1; Const 1963, art 1, § 17; see also *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978); *People v Hicks*, 149 Mich App 737, 743; 386 NW2d 657 (1986).
4. *Pierce v Society of Sisters of the Holy Names of Jesus and Mary*, 268 US 510, 534-535; 45 S Ct 571; 69 L Ed 1970 (1925).
5. *People v Green*, 155 Mich 524; 119 NW 1087 (1909).
6. *Id.* at 533.
7. MCL 750.136b(7).
8. MCL 722.622(f).
9. State of Michigan Department of Human Services, *Childrens Protective Services Manual*, available at <<http://www.mfia.state.mi.us/olmweb/ex/cfp/711-5.pdf>> (accessed September 23, 2008). See *In re Herronen*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2000 (Docket No. 226698), for a discussion of parental discipline and the right of the family division of the circuit court to take jurisdiction of a child under MCL 712A.2b.
10. *In re Eckles*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2004 (Docket No. 252709). The Court, however, did not cite the administrative rule it relied on.
11. *Willis v State*, 888 NE2d 177 (Ind, 2008).
12. 1 Restatement Torts, 2d, § 147(1), p 265.
13. *Id.* at § 150.
14. MCL 750.136b(7).
15. *Johnson v Dept of Social Services*, 123 Cal App 3d 878; 177 Cal Rptr 49 (1981).
16. *Id.* at 886.
17. *Tipkin v Municipality of Anchorage*, 65 P3d 899 (Alas, 2003).
18. *Gribble v Gribble*, 583 P2d 64, 66 (Utah, 1978) (emphasis added).
19. *Hush v Devilbiss Co*, 77 Mich App 639, 649; 259 NW2d 170 (1977).
20. *Cooly v Washington*, 136 A2d 583, 585 (DC, 1957).
21. *York v Morofsky*, 225 Mich App 333, 336-337; 571 NW2d 524 (1997).
22. *Green*, 155 Mich at 533.
23. *Id.* at 529, 533.
24. MCL 722.26a(1)(b).
25. *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994).
26. *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 295; 750 NW2d 597 (2008).
27. *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993).
28. *Id.* at 159.
29. MCL 722.23(j).