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# FAMILY LAW FOCUS

# Dad Punishes Teenager by Belting

For those folks with teenagers, this case may provoke an informed nod. You *know* firsthand the 13-to-19 set can not only push your buttons but you . . . right to the edge.

At the end of his rope was exactly where the Dad herein found himself with his 14-year-old.

For some 18 months, his daughter had exhibited worsening behavioral problems that included lying, sneaking out of the house and displaying "a severely bad attitude."

### Bad Behavior at School Increased

She also started having trouble at school. Her grades of As and Bs had dropped to Ds and Fs. She had been "kicked out" of a before-and-after-school tutorial program as well as off her cross-country team.

In efforts to curtail these problems, Dad had tried progressive forms of discipline, including grounding as well as taking away her television and phone privileges.

***Dad belts his teenager after she forged permission to go on school outing.***

Even so, in spring of 2010, she forged his permission for a school trip — after he refused to grant it.

After retrieving the teen from the principal's office, Dad took her home where he called her into the living room. He again questioned her, but she refused to answer.

### Father Belted Her Repeatedly

Then he told her to undress, but for her undergarments, and hit her back, arms and legs with a belt more than twenty times. She fled to a neighbor who called police.

A trial court found him guilty of Class A misdemeanor battery.

On appeal, Dad argued there was insufficient evidence to rebut his defense that the battery qualified as "privileged parental discipline."

The Court of Appeals, though, was not convinced.

The defense of parental privilege is "a complete defense" in that a valid claim of such privilege is a legal justification for an otherwise criminal act. Ind.Code §35-41-3-1.

Thus, to sustain a conviction for battery where a claim of parental privilege has been asserted, the Court noted, the State must prove the force used was unreasonable.

A number of factors may be considered in determining whether a parent used reasonable force.

### Daughter in Undergarments

Here, the record shows it was unusual for Dad and teen to talk while she was in undergarments.

Given that her step-mother and brothers were home, such punishment was especially "unnecessarily embarrassing and degrading."

Dad repeatedly struck her with enough force that, three months later, a scab on her leg still hurt and a finger was still swollen.

Despite his claim, the Court explained, the "arguably degrading and long-lasting physical effects" lead us to conclude that the force employed was unreasonable.

Affirmed.

See *Hunter v. State*, 950 N.E.2d 317 (Ind.App. 2011).♦

## SPOTLIGHT ON:


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## REALITY CHECKS:

You can be your own worst enemy when you engage in conduct that sabotages your chances of being seriously considered for custody of your child.

√ Even if you're in a custody battle, don't make derogatory remarks about the other parent.

√ As tempting as it might be, don't belittle the family of the other parent.

√ Avoid putting your child in the position of being a messenger between the two of you.

√ Leaving your child with a babysitter during visitation can send a message to the court that seeing your child isn't important.

√ Don't refuse to talk, text or e-mail with the other parent.

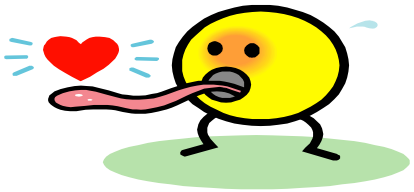
√ Make sure you are in touch with your child's teachers and health care providers. (You may need them to testify as to your involvement with your child.)

√ Avoid giving a negatively exaggerated profile of the other parent to a custody evaluator. Let the professionals do their jobs.

√ Don't make the mistake of dragging your "significant other" into this dispute. Keep it between you and the other parent.

SOURCE: "Don't Be Your Own Worst Enemy," *Family Matters*, Indiana State Bar Association, September 2007.♦

# Classroom Discipline Calls Parental Privilege into Play



***Special education teacher used prompt to remind pupil about her tongue.***

Mixed messages are flying in today's classrooms as some teachers are allowed to physically discipline their pupils, while others are forbidden to touch them.

Such was the case here where a female Teacher had been in special education for eleven years.

In February of 2009, she had eight students in her class, and one was a ten-year-old girl named A.R.

Because A.R. was a child with Down Syndrome, she often left her tongue hanging out of her mouth.

### Teacher Used Prompt on Lip

As a prompt for her to pull her tongue back into her mouth, the Teacher "used two of her fingers to tap A.R. on the bottom lip."

One day, she reminded the girl twice. Then she "flicked" A.R.'s tongue with her middle finger and thumb, causing the child to cry.

Charges were filed, and the Teacher was convicted of Class B misdemeanor battery.

On appeal, she argued her conduct was protected by the same privilege afforded to parents. Thus, she had "immunity (for) a disciplinary action taken to promote student conduct . . . if the action [was] taken in good faith and [was] reasonable." Ind.Code §20-33-8-8(b).

### State Must Disprove Defense

To negate a parental privilege claim, the Court noted, "the State must disprove beyond a reasonable doubt at least one element of the defense, either by direct rebuttal or by relying on the sufficiency of the evidence in its case-in-chief."

Thus, to sustain a conviction of battery where this privilege has been asserted, it continued, "the State must prove either: (1) the force the (teacher) used was unreasonable, or (2) the (teacher's) belief that such force was necessary to control (the) child and prevent misconduct was unreasonable."

This the State failed to do.

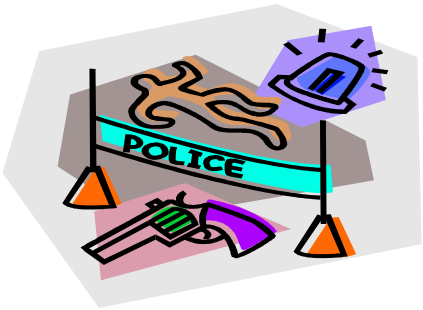
### No "Flicking" Evidence Offered

No explanation or legal authority was offered to show "flicking" was unreasonable under professional standards, and no evidence was presented to show the Teacher "was unreasonable to believe a physical prompt was necessary."

The conviction was reversed.

See *Barocas v. State*, 949 N.E.2d 1256 (Ind.App. 2011).♦

# Case Preserves Victim's Privilege




***"Victim's advocate privilege" wins over defendant's "fair trial" claim.***

With this decision, the Indiana Supreme Court waded into a case pitting the defendant's constitutional right to a fair trial against the "victim's advocate privilege."

One party was Crisis Connection, a nonprofit group for victims "of domestic or family violence, sexual assault, or dating violence."

The other was a man charged with two counts of child molesting.

### Defendant Wanted All Records

While gathering evidence, the Defendant asked the trial court to force Crisis Connection to give him its records as to the victims.

But the group refused, arguing Indiana's "victim advocate privilege" authorized it to deny such requests. Ind.Code §35-37-6-9.

The court split the difference, deciding the records would not go to the Defendant but rather to the judge to determine relevancy.

Crisis Connection appealed, and the Court of Appeals affirmed that this *in camera* review of the records was permissible.

The nonprofit again appealed, and the Defendant again claimed a violation of his constitutional rights.

### Was Man's Defense at Risk?

If he were denied access to records necessary to prepare his defense, he urged, the court would be interfering with constitutional rights that guarantee him a fair trial.

But the Supreme Court was unimpressed with such arguments.

The victim's advocate privilege protects victims, their advocates and victim service providers from being "compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative proceeding." See Ind.Code §35-37-6-9(a).

Such information is thereby off-limits, the Court continued, unless it violates the Constitution.

### Fair Trial & Victim's Privilege

In looking at whether the constitutional rights of the Defendant would be violated without turning over the records, the Court weighed the interest advanced by the advocate privilege "against the inroads of such a privilege on the fair administration of criminal justice."

According to Ind.Code §35-37-6-5, this privilege applies to victim service providers that "provide services for emotional and psychological conditions" to victims of domestic violence and sexual assault.

Effective psychotherapy is dependent upon "an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears."

Therefore, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment, " explained the Court.

Maintaining the confidentiality of these records in this case does not imperil the Defendant's right to a fair trial, it continued.

### Other Evidence Was Available

This Defendant's right to present a complete defense is "well-protected by his extensive access to other sources of evidence."

Given the primary function of groups protected by the victim advocate privilege is not to investigate crimes but to provide counseling for emotional and psychological needs, the Court suggested, "we think it unlikely that the (Defendant) would find evidence in Crisis Connection's records that is not available to him by way of other discovery sources."

Reversed and remanded to trial court for further proceedings.

See *In Re Crisis Connection, Inc.*, 949 N.E.2d 789 (Ind. 2011).♦

# Parties Hit by Low Housing Prices

For those who might think the Court of Appeals deals in ivory-tower law, take a look at this case. Underlying its decision is a recognition of the impact the economic downturn is having on legal parties.

Married in 1971, the Husband and Wife purchased two pieces of real estate during their marriage.

### 2005 Appraisal Was $389,000

In 2005, she filed for divorce. One piece of property was sold, and the proceeds were distributed. The other was appraised at $389,000.

A final hearing was held in April 2010. The parties offered evidence as to the value of their property, including a 2009 appraisal of their real estate at $229,000.

In May, the trial court entered a divorce decree that included a division of their marital property using the 2005 appraisal amount.

The Husband appealed, arguing the court abused its discretion "in using the date of filing as the valuation date of (the) real estate awarded to (him) that significantly decreased in value due only to the economic/market forces during the provisional period."


*Parties forced to sell real estate during process of divorce.*

The Court of Appeals agreed.

### Equal Division Is Presumed

A court is required to divide a marital estate in a just and reasonable manner, it said, with an equal division being presumed just and reasonable. Ind.Code §31-15-7-5.

Not only does the court have broad discretion in picking the date upon which to value the marital assets, the Court stated, but there is no requirement that the valuation date be the same for every asset.

In light of the total value of the marital estate, the Court noted, the $160,000 decline in real estate value "is substantial and represents a significant departure from an equal division of the marital estate."

### Court's Intent Did Not Happen

"[U]ltimately, (this) rendered an unequal division of marital property, which was contrary to the court's stated intent."

There appears to be no legitimate reason, the Court continued, "why both parties should not share in the change or risk of change in the value of the property."

As such, the case was reversed and remanded with instructions to modify the decree so as to reflect an equal division of the marital estate "considering the change in value."

See *McGrath v. McGrath*, 948 N.E.2d 1185 (Ind.App. 2011).♦

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