

*Submitted with permission and written by
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Acknowledgement

I wish to acknowledge the assistance of Judge Philip R. Martinez, Juvenile Court Referee Richard L. Ainsa, Steven Ortega, Summer Clerk at the El Paso County Attorney's Office and Second Year Law Student at George Washington University in Washington D.C., Administrative Assistant Susan McQueen of the El Paso County Juvenile Probation Department, in connection with the preparation of this article. Their ideas and comments were instrumental in its preparation.

I would also like to extend my gratitude to Professor Robert O. Dawson, whose recent publication Texas Juvenile Law (5th Edition) served as the basis for this paper.

INTRODUCTION:

Texas Family Code § 54.03(a)

A child may be found to have engaged in delinquent conduct or conduct indicating the need for

In re D.L.E., 531 S.W. 2d 196 (Tex. Civ. App.-Eastland 1979) Held: The procedural requirements of 54.03(b)(1) and (2) are mandatory and must be complied with before a child may be found to have engaged in delinquent conduct.

Texas Family Code § 54.03(b) provides:

At the beginning of the adjudication hearing, the juvenile judge shall explain to the child and his parents/ guardians or guardian ad litem:

1. The allegations made against the child.

a. Lesser Included Offenses:

A.E.M. v. State, 552 S.W. 2d 952 (Tex. Civ. App-San Antonio 1977)

The San Antonio Court of Appeals held the requirements of Texas Family Code §54.03 were not met as the trial court did not "explain" (to make something plain) that the juvenile could be found to have engaged in aggravated rape or the lesser included offenses of rape or aggravated assault.

A conflict in case law: In the Matter of D.L.K., 690 S.W. 2d 654 (Tex. App.-Eastland 1985)

Wherein the 11th Court of Appeals expressly refused to follow the language of A.E.M. requiring admonitions regarding lesser included offenses.

Until this conflict in case law is resolved, if it ever is, the only safe course of action is for the juvenile court to take care to admonish the respondent not only of the offense alleged, but of any lesser included offenses that may be implicated by the charge.

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b. Adequate Explanation:

In the Matter of B.J., 960 S.W. 2d 216 (Tex. App.-San Antonio 1997)

The 4th Court of Appeals held that the juvenile was not properly admonished regarding his right against self-incrimination, nor his right to confront and cross examine witnesses. The trial court also failed to properly admonish the juvenile regarding his right to a jury trial as the trial court had the juvenile's attorney do this.

2. The nature and possible consequences of the proceeding, including the law relating to the admissibility of the record of a juvenile court adjudication in a subsequent adult criminal proceeding. Texas Family Code § 54.03(b)(2).

a. In a standard delinquency case, the court must inform the juvenile of the possible dispositions available, which generally include probation in or outside of the home, until his/her 18th birthday.

If the offense is applicable to TYC commitment, then the court should admonish the juvenile about possible commitment to TYC until age 21. [Texas Family Code §54.04(d)(i)]

If it is a Determinate Sentence Case, then the court should admonish the juvenile that disposition may include probation for up to 10 years [Texas Family Code §54.04(q)], or Determinate Period not to exceed 40 years for Capital, Aggravated Controlled Substance Felony, or First Degree Felony (or)

Up to 20 years for a Second Degree Felony (or)

Up to 10 years for a Third Degree Felony.

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If it is a Felony Conduct adjudication, the court must admonish the juvenile that Texas Family Code § 51.031 Habitual Felony Conduct may be applicable and a Felony Adjudication, when combined with another separate Felony Adjudication may allow for a Third Felony charge to be adjudicated pursuant to Determinate Sentencing.

b. Admissibility of Juvenile Record

Texas Family Code § 54.03(b)(2)

The court must admonish the juvenile regarding ". . .the law relating to the admissibility of the record of a juvenile court adjudication in criminal proceeding;"

P.L.W. v. State, 851 S.W. 2d 383 (Tex. App.-San Antonio 1993)

Held that the failure to admonish the juvenile that his juvenile record may be admissible against him in a criminal proceeding, was reversible error.

- i. Authority to use juvenile record in adult criminal proceedings. Texas Code of Criminal Procedures Article 37.07 Sec. 3(a) provides that during the penalty phase of an adult criminal trial evidence of an adjudication of delinquency for a felony or misdemeanor possible by confinement in jail, may be admitted.

Section 3(a) also allow the judge or jury to consider "any matter the court deems relevant to sentencing".

Possible enhancement pursuant to:

Texas Penal Code § 12.42(a)-(c) and (e) pursuant to Texas Family Code §51.13(d).

A felony delinquency adjudication (can be regular petition or determinate sentencing or habitual felony conduct or a modification disposition of either of these) resulting in a TYC commitment, constitutes a prior felony conviction pursuant to Texas Penal Code § 12.42(a)-(c) and (e) for purposes of punishment enhancement only and NOT habitual offender pursuant to Texas Penal Code §12.42(d).

3. Privilege Against Self Incrimination: Texas Family Code § 54.03(b)(3)

". . .nor shall any person . . .be compelled in any criminal case to be a witness against himself."

(United States Constitution Amendment V)

Texas Family Code § 54.03(b)(3)

Requires admonishments regarding a juvenile's "privilege against self incrimination."

Simply put, the court should ensure that the juvenile is admonished and that he/she won't be punished for not testifying and that if the juvenile does elect to testify, anything can be used against him/her. ROBERT O. DAWSON, TEXAS JUVENILE LAW, 158 (5TH ED. 2000)

4. Right to Trial and Confrontation of Witnesses: Texas Family Code § 54.03(b)(4)

Texas Family Code § 54.03(b)

The court shall also admonish as to child's right to trial and confrontation of witnesses. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . to be confronted with the witnesses against him;"
(United States Constitution Amendment VI)

5. Right to Attorney

". . .and to have the Assistance of Counsel for his defence."
(United States Constitution Amendment VI)

Texas Family Code § 54.03(b)(5)

The court shall also admonish regarding "the child's right to an attorney if he is not already represented."

6. Right to a Trial By Jury: Texas Family Code § 54.03(b)(6)

CAVEAT-OBJECTIONS AND ADMONISHMENTS

(Texas Family Code § 54.03(i))

Basically: In order to preserve error for appellate or collateral review for failure to provide §54.03(b) admonishments, the child's attorney must object to any failure either:

- i) prior to the beginning of testimony in a contested adjudication, or
- ii) prior to the child's plea to a petition or agreement to a stipulation.

Clarification Regarding Texas Family Code § 54.03(i) and Texas Rules of Appellate Procedure. Due to revision of the Appellate Rules effective September 1, 1997, Rule 52 became a reference to Rule 33.1 that is substantively the same as Rule 52.

Thus, if an offense occurred on or after September 1, 1997, a timely trial objection pursuant to §54.03(i) is required. Offenses prior to September 1, 1997 do not require a trial objection.

In the Matter of C.O.S., 988 S.W. 2d 760 (Tex.-1999)

7. Areas Where Admonishments are NOT REQUIRED:

a. Sex Offender Registration

In the Matter of B.G.M., 929 S.W. 2d 604 (Tex. App.-Texarkana 1996)

The 6th Court of Appeals held that the Sex Offender Registration Act did not call for registration and considered the Act to be a remedial measure and not a punitive measure with the possible consequences of failing to register as a collateral consequence.

b. Immigration Consequences:

In the Matter of E.J.G.P., 5 S.W. 3d 868 (Tex. App.-El Paso 1999)

The 8th Court of Appeals concluded that immigration consequences to a juvenile adjudication are a collateral consequence because they involve civil proceedings administered by an independent agency over which the trial judge has no control.

CONTRAST: Texas Code of Criminal Procedure Article 26.13(a)(4)

Requiring court admonishment, for a non-U.S. citizen adult prior to a guilty plea, of

possible deportation, exclusion from admission, or denial of naturalization consequences of a conviction.

c. An Area Where Admonishments are NOT REQUIRED but RECOMMENDED

Determinate Sentence:

No reported cases on point, however, general admonishments regarding possible transfer to the Texas Department of Criminal Justice Institutional Division to serve the balance of the Determinate Sentence. The eligibility of TYC parole following the statutory minimum length of stays:

- i. 10 years minimum for Capital Murder
- ii. 3 years for Aggravated Controlled Substance Felony, First Degree Felony
- iii. 2 years for Second Degree Felony
- iv. 1 year for Third Degree Felony

Texas Human Resources Code § 61.081(f).

D. Plea Agreement Admonishments: The Second Type of Admonishments

1. Along with general admonishments, the court shall also admonish the child of Texas Family Code §54.03(j). If a plea agreement is reached, the prosecutor shall inform the court of such and the court shall then admonish "the child that the court is not required to accept the agreement".

This allows the juvenile the right to withdraw a plea if the court does not accept the agreement.

2. Texas Family Code § 54.034
Requires the court to admonish the child that if the court accepts the plea or stipulation and the court makes the disposition in accordance with the agreement (regarding pleas entered pursuant to Texas Family Code § 54.03, 54.04, 54.05) the child may not appeal unless
 - 1) the court grants permission or
 - 2) the child is appealing the denial of a written pre-trial motion.

Texas Family Code § 56.01(n) is the provision that Texas Family Code § 54.034 is designed, to admonish the child regarding this limited right to appeal.

II. No United States Constitutional Right to a jury trial in juvenile proceedings.

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647, (1971)

Held: A trial by jury is not constitutionally required in the adjudicative phase of a state juvenile court delinquency proceeding.

Additionally, the Court held "the States . . . may install a jury system." Id. at p. 547.

III. TEXAS CONSTITUTIONAL RIGHT TO A JURY TRIAL

Tex. Const. Art. I, § 15. "The Right of Trial by jury shall remain inviolate."

Jury Trials in Texas Juvenile Cases are authorized.

Adjudication Hearing:

Texas Family Code § 54.03(c) "Trial shall be by jury unless jury is waived in accordance with Section 51.09 of this code."

IV. SIZE OF JURY

- A. Texas Family Code § 51.04(b) Juvenile Board designates the Juvenile Court. Thus, the number of jurors (6 or 12) depends upon the designation. Texas Constitution: Vernon's Ann. Tex. Const. Art. 5 § 13, "Grand and petit juries in the District Courts shall be composed of twelve men, . . ."
- B. Texas Family Code § 54.03(c) A Determinate Sentence trial (Texas Family Code § 53.045) must consist of 12 persons. This is also true of Determinate Sentence cases in County Court (Texas Family Code § 51.045) "If a provision of this title requires a jury of 12 persons, that provision prevails over. . .law that limits the number. . .in a particular court at law."

77th Legislative Regular Session (2001) H.B. 1118, Sect. 22, amends Texas Family Code, Section 54.03(c) to read as follows: (c) Trial shall be by jury unless jury is waived in accordance with Section 51.09 ~~[of this code]~~. If the hearing is a petition that has been approved by the grand jury under Section 53.045 ~~[of this code]~~, the jury must consist of 12 persons and be selected in accordance with the requirements in criminal cases. Jury verdicts under this title must be unanimous.

Effective date, September 1, 2001 and applies only to a referral based upon conduct occurring on or after this date.

Interpretation: Jury selection in Determinate Sentencing cases must comply with Texas Code of Criminal Procedure, Chapter 35 and specifically Texas Code of Criminal Procedure § 35.15, et. seq.

- C. County Court: Non-Determinate Cases heard in County Courts consist of 6 jurors. In the Matter of A.N.M., 542 S.W. 2d 916 (Tex. Civ.-App.-Dallas 1996)

V. Jury Strikes

A. PEREMPTORY CHALLENGES

Texas Rules of Civil Procedure, Rule 233:
Each party is entitled to 6 peremptory challenges (strikes) in District Court cases and 3 peremptory challenges (strikes) in County Court cases.

1. PEREMPTORY CHALLENGES-DETERMINATE SENTENCING

Both Texas Family Code § 51.045 Juries in County Courts at Law and Texas Family Code § 53.045 Referral to Grand Jury (Determinate Sentence Act) were enacted September 1, 1987 (Acts 1987, 70th Legislature, Ch. 385) as a means of ensuring a jury of 12 even if the designated Juvenile Court is a County Court level. A basic principle of the Determinate Sentence Act was to provide a juvenile with the procedural rights enjoyed if this juvenile were transferred to Criminal Court and prosecuted for the same offenses as an adult.

Consequently, the reference to peremptory challenges must be read to refer to criminal cases in District Court (Texas Code of Criminal Procedure, Art. 33.01 and 33.15) Title 3, giving both the state and the juvenile 10 strikes. Delinquent Children and Children In Need of Supervision, Robert O. Dawson 21 Tex. Tech. L. Rev. 1762, 1806 (1990).

2. PEREMPTORY CHALLENGES:

a. BATSON STRIKES

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986)
The United States Supreme Court held that the Equal Protection Clause of the 14th Amendment forbids the prosecutor in a criminal prosecution from using peremptory challenges to exclude members of the defendant's race from the jury venire. If a defendant objects to the state's use of the peremptory challenge in a timely fashion, then the defendant may establish a Prima Facie Case of discrimination, by showing:

- (1) that he is a member of a cognizable racial group;
- (2) that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire; and
- (3) these facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the venire members on account of their race.

Once a Prima Facie Case is made, the burden shifts to the State to provide a racially neutral explanation for the challenge. Id. at 96-98.

3. Application to Texas Delinquency Trials

a. C.E.J. v. State, 788 S.W. 2d 849 (Tex. App.-Dallas 1990, writ denied)
The Dallas Court of Appeals held that Batson does apply to a juvenile delinquency proceeding and that in the absence of legislation implementing the Batson decision in delinquency trials, the Dallas Court of Appeals adopted relevant provisions of Article 35.261 of the Code of Criminal Procedure as the standard of review in determining timeliness of a Batson motion in juvenile delinquency proceedings, as follows:

- (1) After the parties have delivered their lists to the clerk. . .and before the court has impaneled the jury, the appellant may request the court to dismiss the array and call a new array in the case. . .
- (2) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

Id. at 852-53

4. EXPANSION OF BATSON:

(1) Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)
The Supreme Court held that under the Equal Protection Clause of the 14th Amendment, a criminal defendant may object to race based exclusion of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

(2) Edmonson v. Lessville Concrete Co. Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)
The Supreme Court held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race.

Also answered in this case, Batson applies not only to Determinate Sentencing cases, but all juvenile proceedings, as well as the restriction on a juvenile from making race based challenges to remove venire members.

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B. CHALLENGE FOR CAUSE:

Texas Government Code § 62.105 Disqualification for Particular Jury
A person can be challenged for cause who could not remain an impartial juror in the case they were called to serve as a juror.

W.D.A. v. State, 835 S.W. 2d 227 (Tex. App.-Waco 1992)

The Waco Court of Appeals held a juror should have been struck for cause when the juror related that the juvenile would not have been in court had he not done something wrong as a showing of his prejudice pursuant to §62.105(4).

VI. BURDEN OF PROOF IN DELINQUENCY OR CONDUCT INDICATING A NEED FOR SUPERVISION

UNITED STATES CONSTITUTION

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).

The United States Supreme Court held that the Constitutional safeguard of proof beyond a reasonable doubt is applicable in a juvenile delinquency proceeding.

Texas Authority:

Texas Family Code § 54.03(f) . . . The child shall be presumed innocent of the charges against the child and no finding that a child has engaged in delinquent conduct or CINS may be returned unless the State has proved such beyond a reasonable doubt.

Geesa v. State, 820 S.W. 2d 154 (Tex. Crim. App. 1991)

The Texas Court of Criminal Appeals expressly adopted the instruction "reasonable doubt" (820 S.W. 2d 162) and held that this instruction shall be submitted to the jury in all criminal cases, even in the absence of an objection or request by the State or the defendant, whether the evidence be circumstantial or direct. Id. at 162.

Given § 54.03(f) requires proof beyond a reasonable doubt, as is required in criminal cases (Texas Penal Code § 2.01), it appears reasonable to use the Geesa instruction in juvenile adjudications.

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Geesa Overruled: Paulson v. State, 28 S.W. 3d 570 (Tex. Crim. App. 2000)

Held: We specifically overrule that portion of Geesa which requires trial courts to instruct juries on the definition of "beyond a reasonable doubt. We also overrule Reyes [938 S.W. 2d 718 (Tex. Crim. App. 1996)] in its entirety."

"We find the better practice is to give no definition of reasonable doubt at all to the jury."

"On the other hand, if both the state and the defense were to agree to give the Geesa instruction to the jury, it would not constitute reversible error for the trial court to acquiesce to their agreement."

VI. VARIANCE: Texas Family Code § 53.04(d)

The petition must state:

- A. With reasonable particularity: the time, place and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts.
- B. A significant difference (variance) between what was charged and what is proved will result in an acquittal of the juvenile.

L.G.R. v. State, 724 S.W. 2d 775 (Tex 1987)

The Texas Supreme Court held that the State failed to prove its charges and set aside the delinquency adjudication.

VII. LAW OF PARTIES

This theory need not be pled in a petition and a finding that a juvenile is delinquent as a party is not a variance. ROBERT O. DAWSON, TEXAS JUVENILE LAW, 166 (5TH ED. 2000)

Texas Authority:

Texas Penal Code § 7.01(c) All traditional distinctions between accomplices and principals are abolished by this section and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.

VIII. LESSER INCLUDED OFFENSES

- A. Generally, these are implicitly charged offenses because every element of these offenses is included in elements of the greater charge. Code of Criminal Procedure, Article 37.09(1).

Texas Authority:

Texas Family Code § 54.03(f) . . .A child may be adjudicated as having engaged in conduct constituting a lesser included offense as provided by Articles 37.08 and 37.09, Code of Criminal Procedure.

- B. If during a Determinate Sentence case, the judge or jury found the juvenile delinquent of a lesser included offense, not within the Determinate Statute, then the proceedings continue as if an ordinary delinquent case. If the lesser included offense is still within the act, then the proceedings continue under Determinate Sentencing. ROBERT O. DAWSON, TEXAS JUVENILE LAW, 167 (5TH ED. 2000)

United States Constitution, 5th Amendment

Lesser Included Offense and Double Jeopardy

Both the greater and lesser offenses are one in the same offense for Double Jeopardy purposes. Consequently, the Double Jeopardy clause would be violated if the juvenile was adjudicated of both.

Remedy: Vacate the lesser offense and allow the greater offense to stand.

In the Matter of L.M., 993 S.W. 2d 276 (Tex. App.-Austin 1999)

IX. AFFIRMATIVE DEFENSES ARE APPLICABLE IN JUVENILE CASES

In the Matter of P.A.S., 566 S.W. 2d 14 (Tex. Civ. App.-Amarillo 1978)

Held that the juvenile has the burden of proving an affirmative defense by a preponderance of the evidence, as per Texas Penal Code § 2.04 and that the juvenile was unsuccessful in her affirmative action defense of duress (Texas Penal Code § 8.05) when there is ample evidence to support the court's finding that she could have used this gun as a means of freeing herself from any demands or threats. An admission by appellant that she received a share of the money taken supported the State's contention that she was not just an unwilling participant in the crime.

X. VENUE

- A. Texas Family Code § 51.06(a) Venue in a juvenile proceeding is in the County in which the alleged delinquent conduct or prohibited conduct occurred (or) the County where the juvenile resides if:

1. The child was on probation at the time of the alleged conduct (or)
2. It is not known in which County the alleged conduct occurred (or)

XIII. EVIDENCE

- A. Texas Family Code § 54.03(d) . . ."Except in a detention or discretionary transfer hearing, a social history report or social service file shall not be viewed by the court before the adjudication decision and shall not be viewed by the jury at any time.
- Rationale: Re: judge-avoid providing additional information about the juvenile to the court.
- B. United States Constitution, 6th Amendment: Right to Confront Witness
- In re Gault, 387 U.S. 1, 18 L.Ed 2d 527, 87 S. Ct. 1428 (1967)
Held 6th Amendment right of confrontation of witnesses applies in juvenile cases.
- In the Matter of M.R.R., 2 S.W. 3d 319 (Tex. App.-San Antonio 1999)
An out-of-court statement of co-conspirator admitted into evidence by redacting a reference to juvenile may be considered by the jury unless the jury understands the redacted statement refers to the juvenile on trial.
- C. Rules of Evidence Applicable to Adjudication Hearing:
1. Texas Family Code § 54.03(d) . . ."only material, relevant, and competent evidence in accordance with the Texas Rules of Evidence applicable to criminal cases and Chapter 38, Code of Criminal Procedure, may be considered in the adjudication hearing."
 2. Impeaching testimony of a party-witness with juvenile adjudication in a juvenile proceeding, pursuant to Rule 609(d) of the Texas Rules of Evidence is authorized. "Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party" {as defined by Texas Family Code § 51.02(10)} "under this rule unless required to be admitted by the Constitution of the United States."
- D. Pretrial Photographic Identification Procedures
- These are the same for juveniles and adults (i.e., no right to counsel, the array of the photographs must be fair as not to suggest who the juvenile is, to the identifying witness.)
- E. Texas Family Code § 51.17(c) Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Chapter 38, Code of Criminal Procedure apply in judicial proceedings under this title.
- F. Essentially, Texas Family Code § 54.03(e) provides 3 special evidentiary rules that supersede the Texas Rules of Evidence or Chapter 38 of the Code of Criminal Procedure, in the event of a conflict:
1. 5th Amendment to the United States Constitution:
Privilege Against Self-Incrimination held to be applicable in juvenile proceedings.
In Re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967)
Texas Family Code § 54.03(e) "a child alleged to have engaged in delinquent conduct or CINS need not be a witness against nor otherwise incriminate himself."
 2. Illegal Confession
Texas Family Code § 54.03(e) . . .An extrajudicial statement that was obtained without fulfilling the requirements of this title (Texas Family Code § 51.095 and § 52.02) or of the constitution of this state or the United States, may not be used in an adjudication hearing.
 3. Illegally Seized Evidence
Texas Family Code § 54.03(e) Evidence illegally seized or obtained is inadmissible in an adjudication hearing.

Dispositional Powers and Procedures

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- I. A. Texas Family Code § 54.04(a)

"The disposition hearing shall be separate, distinct and subsequent to the adjudication hearing."

The juvenile court in its discretion may schedule the disposition hearing for immediately after the adjudication hearing or on a different day.
 - B. Disposition-Adjudication-2 Distinct Issues
 - 1. Issue regarding disposition is what to do with the juvenile who has been adjudicated.
 - 2. Issue regarding adjudication is whether the juvenile engaged in delinquent conduct.

In the Matter of C.L., 930 S.W. 2d 935 (Tex. App.-Houston [14th Dist.] 1996)
Held reversible error for trial court to allow prosecutor to argue to the jury at the adjudication that they should adjudicate juvenile for her own good and to remove her from an abusive home.
 - C. Rules of Judicial Administration adopted by the Texas Supreme Court, Rule 6. Time Standards for the Disposition of Cases.
 - Section 3. Disposition Hearing: No later than 15 days following the adjudication hearing, complex cases may necessitate more time.
 - Section 4. These rules are guidelines and the juvenile judge is free to recess a hearing at any stage where the parties are agreeable or when in the opinion of the judge the best interest of the child or society shall be served without incurring any penalties.
 - D. Transfer to Another County for Disposition
 - 1. Texas Family Code § 51.07(a)

Following an adjudication pursuant to Texas Family Code § 54.03, permits the transfer of a juvenile case and transcripts of records and documents with consent of the child pursuant to Texas Family Code § 51.09 to a county where a child will reside.
 - 2. Opinion Texas Attorney General Letter No. 95-030 (1995)

Consent by the receiving court is not required.
- II. Evidence at the Disposition
 - A. Social History Report
 - 1. Who contributes to the Social History Report?
 - a. Texas Family Code § 54.04(b)

"At the disposition hearing, the juvenile court may consider written reports from probation officers, professional court employees or professional consultants in addition to the testimony of witnesses."

- b. When is the Social History Report admissible?

Texas Family Code § 54.03(d)

"A social history report or social service file shall not be viewed by the court before the adjudication decision and shall not be viewed by the jury at any time."

Once an adjudication decision has been made, the court may consider the information in the Social History Report.

2. a. Violation of Due Process?

Tyler v. State, 512 S.W. 2d 46 (Tex. Civ. App.-Beaumont 1974)

A Social History Report was introduced at disposition which contained a psychological report wherein the psychologist never testified. The court held that in the disposition hearing, there is good reason to give the judge the latitude afforded by Texas Family Code § 54.04(b) to consider all factors in deciding what disposition to make. Any possible danger to the child is removed by the requirement that the court provide the attorney for the child with all written matter to be considered by the court in disposition. We conclude that Texas Family Code § 54.04 is not unconstitutional as denying due process.

- b. The Social History Report is hearsay and yes, it is admissible.

In the Matter of A.A.A., 528 S.W.2d 337 (Tex.Civ.App-Corpus Christi 1975)

Held all of the information in a Social History Report is hearsay, but it is admissible in evidence because the legislature has authorized its use in order to provide a broad informational basis for dispositional decisions.

- c. No, the Social History Report is not subject to Texas Rules of Evidence; Rules 402, 404 or 405, and yes it is admissible.

In the Matter of A.F., 895 S.W. 2d 481 (Tex. App.-Austin 1995)

Held the Social History Report in Texas Family Code § 54.04(b) is not subject to the rules of civil evidence. Thus, there was no abuse of discretion when the trial court refused to exclude portions of the report based upon the rules of evidence.

B. Texas Family Code § 54.04(b)

This section draws from a large pool of information.

1. Adjudication Hearing:

Evidence from the adjudication hearing is admissible as a court must consider a broad pool of information when making its decision. To hold otherwise would, to an extent, become redundant as witnesses would be forced to reappear and repeat any evidence from the adjudication hearing which would have a bearing on the disposition.

In the Matter of A.N.M., 542 S.W. 2d 916 (Tex. Civ. App.-Dallas 1976).

2. Detention Center Documents:

Texas Family Code § 54.04(b)

Allows a court to consider all written reports from probation officers, professional court employees, or professional consultants in addition to witness testimony. Consequently, the court is at liberty to review the information not specifically prepared for disposition.

In the Matter of J.A.W., 976 S.W. 2d 260 (Tex. App.-San Antonio 1998)

The court reviewed the child's detention center records leading up to trial. The court did permit defense counsel a recess to review the documents. Interestingly, neither the state nor the defense counsel offered this information into evidence, but the San Antonio Court of Appeals reasoned that the trial court was entitled to consider the detention reports to assess the juvenile's behavior while in detention. The court further reasoned that juvenile detention officers came under Texas Family Code § 54.04(b) list of individuals contributing to the court's decision.

C. Safeguard:

Texas Family Code § 54.04(b)

Also provides "Prior to the disposition hearing, the court shall provide the attorney for the child with access to all written matter to be considered in disposition."

As pointed out in J.A.W. above, the court afforded the defense counsel an opportunity to review the information they relied upon. A request to review any such documents should be made on the record with a ruling to preserve any possible appellate issues.

In the Matter of L.T.F., 656 S.W. 2d 179 (Tex. App.-San Antonio 1983)

Defense attorney provided with a case history report containing within it, reference to a psychiatric report. Defense counsel was not provided with a copy of the psychiatric report and the court used this report in making its decision. The San Antonio Court of Appeals held that Texas Family Code § 54.04(b) does not require a court to force counsel to examine a particular document. To "provide access" to records is to have the records necessary for an attorney to review. Thus counsel was deemed to have been placed on notice of the psychiatric report and counsel's statement that he had previously only examined part of it does not amount to a denial of access.

D. How much time to review these reports?

Texas Family Code § 54.04(b)

Does not state a mandatory time in which an attorney has to review a document prior to the disposition hearing. Consequently, this could be the same day of the hearing.

III. The Requirement of a Need for Disposition

A. This is the first finding that must be made in every case:

Texas Family Code § 54.04(c)

No disposition may be made under this section unless the child is in need of rehabilitation or the protection of the public or the child requires that the disposition be made. If the court or a jury do not so find, the court shall dismiss the child and enter a final judgement without any disposition.

1. Violation of Due Process? (U.S. Const. amends V, XIV; Tex. Const. Ann. art.1, § 19,29)

In the Matter of J.T.H., 779 S.W. 2d 954 (Tex. App.-Austin 1989)

Juvenile argued that Texas Family Code § 54.04(c) violated due process of law because it does not state whether burden of proof in the need for disposition is beyond a reasonable doubt, by clear and convincing evidence, or preponderance of the evidence.

The court held that due process is satisfied in the disposition hearing when the juvenile is represented by counsel, has full opportunity to cross-examine and present witnesses and is fully aware of the nature of the proceedings. None of these elements is denied by Texas Family Code § 54.04(c). Additionally, the findings made under Texas Family Code §54.04(c) are subject to review for sufficient evidence to support them.

2. Violation of Equal Protection Clause? (U.S. Const. amend XIV; Tex. Const. art.1, § 3, 29)

Juvenile also argued that the finding of a need for disposition violates the Equal Protection Clause because no such finding is required in adult criminal trials.

The court held that rather than placing the juveniles at a disadvantage compared to the adult criminal defendants, the statute places an extra burden on the state when seeking disposition of juveniles. In the criminal justice system, a finding of guilt automatically leads to sentencing. However, in the juvenile justice system, an adjudication of delinquency does not lead to disposition unless the court or a jury first makes the necessary findings. In the Matter of J.T.H., 779 S.W. 2d at 957

B. The second finding that must be made when applicable:

The finding regarding home conditions.

Texas Family Code § 54.04(c)

No disposition placing the child on probation outside of the child's home may be made under this section, unless the court or jury find that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

This finding becomes applicable whenever a disposition requires placement of the child on probation outside of his/her home.

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C. The third finding that must be made when applicable:

1. Texas Family Code § 54.04(i)

If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court shall include in its order its determination that:

- a. It is in the child's best interest to be placed outside of the child's home;

- b. reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
- c. the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

These 3 findings become applicable whenever the child is removed from his/her home by probation placement or TYC commitment. It is the court alone that makes these findings.

- 2. Notice Texas Family Code § 54.04(c) and § 54.04(i)(3) appear and are identical with the major exception being that only the court can make the § 54.04(i)(3) findings, whereas § 54.04(c) findings can be made by either the judge or a jury.

Also, in a Determinate Sentence case, Texas Family Code § 54.04(i)(3) can again only be made by the court, even if the juvenile opts for a jury to sentence him/her.

77th Legislature Regular Session (2001) H.B. 1118, Section 23

This section amends what is currently § 54.04(i)(1), (2) and (3) to § 54.04(i)

If the court places the child on probation outside of the child's home or commits the child to the Texas Youth Commission, the court:

(1) shall include in its order its determination that:

- (A) ~~it~~ it is in the child's best interests to be placed outside the child's home;
- (B) ~~reasonable~~ reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
- (C) ~~the~~ the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation; and

(2) may approve an administrative body to conduct permanency hearings pursuant to 42 U.S.C. Section 675, if required during the placement or commitment of the child.

Effective September 1, 2001

This now allows the juvenile court to appoint an administrative body to conduct annual permanency hearings that may be required by Title IV-E federal funds that are used to pay for foster care placement of children. Previously, the court was required to conduct these hearings.

- 3. Appellate review of the three Texas Family Code § 54.04(i) Required Findings

When a dispositional order under challenge is one that removes a child from his/her home, the special findings of fact required by § 54.04 to authorize that action will be the focus of attack.

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The following cases demonstrate a fact specific sufficiency or lack thereof in removal.

- a. In the Matter of A.S., 954 S.W. 2d 855 (Tex. App.-El Paso 1997)
TYC commitment was set aside as an abuse of discretion, evidence showed that the juvenile's family had moved from El Paso to Midland, where the crime was committed, because the juvenile was involved in an El Paso street gang. The court went on to state "Other than A.S.'s commission of this state jail felony offense and the violation of his mother's curfew on this occasion, there is no evidence to establish the M.M. cannot provide the quality of care and level of support and supervision that A.S. needs to meet the conditions of probation".
- b. In the Matter of K.L.C., 972 S.W. 2d 203 (Tex. App.-Beaumont 1998)
Court held that factual insufficiency to support efforts to keep the child at home. The Court of Appeals also interpreted "reasonable doubt" as a mandate that evidence in the record shows what the dispositional alternatives were to removal and why they were not considered or were unsuitable. Id. at 206.
- c. In the Matter of J.S., 993 S.W. 2d 370 (Tex. App.-San Antonio 1999)
Court held abuse of discretion in TYC commitment. After the offense was committed, the child had been sent to live with the father in New Mexico and was undergoing therapy for a year prior to adjudication and disposition proceedings.
- d. In the Matter of T.K.E., 5 S.W. 3d 782 (Tex. App.-San Antonio 1999)
Court held that juvenile court did not abuse discretion in committing juvenile to TYC for 6 years for aggravated assault, given the serious and repeated nature of the juvenile's conduct as well as a highly rated sex offender program at TYC.
- e. In the Matter of M.A.C., 999 S.W. 2d 442 (Tex. App.-El Paso 1999)
Court held no equal protection violation to commit Mexican National to TYC due to probation limitations. There was no control in the home and the child did not qualify for placement in the Mexican National Childrens Program.
- f. In the Matter of B.M., 1 S.W. 3d 204 (Tex. App.-Tyler 1999)
Court held that the juvenile could not be provided quality of care and level of supervision necessary to meet the conditions of home probation and thus ordered the child placed in a boot camp.

Any dispositional order removing a child from his/her home must be supported by the 3 required findings which must be based upon evidence.

ROBERT O. DAWSON, TEXAS JUVENILE LAW 182 (5TH ED. 2000)

- g. In re J.S.S., 20 S.W. 3d 837 (Tex. App.-El Paso 2000)
Court held 5th Amendment privilege against self-incrimination applied to disposition phase, even though the state statute did not specifically provide that the juvenile had the right and the juvenile was not available in determining disposition. Extension of privilege to disposition hearing would not substantially impact quantity and quality of information available.

IV. Dispositional Powers of the Court

A. Probation

A child may be placed on probation if he/she was adjudicated for delinquent conduct or CINS.

Texas Family Code § 54.04(d)(1)

Specifies 3 types of probation placements:

1. in his own home or in the custody of a relative or other fit person;
2. subject to the finding under Subsection (c) of this section on the placement of the child outside of the child's home, in:
 - a. a suitable foster home; or
 - b. a suitable public or private institution or agency, except for the Texas Youth Commission.

Basically, the child can be placed at home or any place else, except TYC.

Recall, the court must make findings pursuant to Texas Family Code §54.04(i) in order to remove a child and place him/her on probation outside of the child's home.

B. Loss of Jurisdiction

The primary legal difference between placement of a child on probation in a public institution and commitment to TYC is that the court retains jurisdiction and can modify the placement just as any other probation condition.

Commitment to TYC relinquishes jurisdiction of the case exclusively to TYC.

ROBERT O. DAWSON, TEXAS JUVENILE LAW 182 (5TH ED. 2000)

C. Terms of Probation

Texas Family Code § 54.04(1)

A court or jury may place a child on probation under Subsection (d)(1) of this Section for any period of time, except that probation may not continue on or after the child's 18th birthday. The court may, before the period of probation ends, extend the probation for any period of time, except that the probation may not extend to or after the child's 18th birthday.

D. Sex Offender Registration

1. Texas Family Code § 54.04(p)

Requires a minimum 2 year probationary term for a child placed on probation for a felony level sex offense committed against a victim who is under 17 years of age, enumerated in §54.0405(b).

2. Texas Penal Code § 21.11 Indecency with a child; Texas Penal Code 22.011 Aggravated Sexual Assault; Texas Penal Code § 22.021 Prohibited Sexual Conduct; Texas Penal Code § 25.02 Aggravated Kidnapping with Intent to Violate or Abuse the Victim Sexually; Texas Penal Code § 20.04(a)(4) or Burglary of Habitation Committed with Intent to Commit any other Felony covered by § 54.0405(b), Texas Penal Code §30.02(d).
3. Texas Family Code § 54.04(l)
The two year requirement is subject to the limitation that the juvenile's probation will automatically expire upon the probationer's 18th birthday.

E. Determinate Sentence Probation

1. In 1999 the state legislature created Section 54.04(q), 54.05(j) and 54.051 to create a new type of juvenile probation.

In Determinate Sentencing cases, if the judge or a jury assess a sentence of 10 years or less, it may place the respondent on probation. The court may then impose a probation term that may be as long as 10 years.

ROBERT O. DAWSON, TEXAS JUVENILE LAW, 183 (5TH ED. 2000)

2. Texas Family Code § 54.051
Unless the juvenile court orders a transfer to a criminal court for adult community supervision, probation automatically terminates at age 18. If the case is transferred, the balance of probation is served under adult community supervision.

F. Conditions of Probation

1. Texas Family Code § 54.04(d)(1)
The court is authorized to place the child on probation "on such reasonable and lawful terms as the court may determine."
2. Texas Family Code § 54.04(f)
Provides that the "terms of probation shall be written" and shall provide a copy of the order to the child.
3. 2 LIMITS TO A COURT'S DISCRETION IN SETTING CONDITIONS OF PROBATION

a. Vagueness Doctrine:

In the Matter of R.A.B., 525 S.W.2d 892 (Tex.Civ.App.-Corpus Christi 1975)
Court held that probation condition was not vague. The order placing the child on delinquency probation read "contingent upon the proper and lawful comportment of said child". The child was modified on a possession of marijuana (over 4 ounces), a felony offense. "While it is true that the language used in the ... order is colloquial rather than legal, we cannot agree with the juvenile that he did not know that the commission of a felony was not prohibited under the terms of his probation." Id. at 897.

b. No Delegation Doctrine:

In K.K.B. v State, 609 S.W. 2d 824 (Tex. Civ. App.-Texarkana 1980)
The Appellate Court held that the juvenile court did not unlawfully delegate

to the foster parent the authority to set the conditions of probation: the conditions read "reside in the home of the person or persons to whom you are released and obey all of their instructions". A petition had been filed alleging "although specifically instructed to do so, [the child] on two occasions refused to do her homework. . ." The trial court committed the child to TYC on an adjudication for refusing to do her homework.

The Appellate Court went on to state that an order cannot spell out every minute detail, but that sufficient general conduct spelled out in terms sufficiently clear for the juvenile to understand is sufficient.

A certain amount of discretion vested in the custodian is necessary if the home or facility is to be successful in its rehabilitative efforts. Id. at 825-26.

G. Other Probationary Conditions

1. Freedom of Speech:

Opinion Texas Attorney General No. LO. 93-95 (1993)

Dress and hair probation conditions may violate a juvenile's right to free expression. While the Attorney General cannot categorically decide that such conditions would or would not always be unconstitutional, it would depend upon the relationship of the condition to the rehabilitation of the probationer or protection of the public.

2. School Attendance:

Texas Family Code § 54.043

If the court places a child on probation under Section 54.04(d) and requires as a condition of probation that the child attend school, the probation officer charged with supervising the child shall monitor the child's school attendance and report to the court if the child is voluntarily absent.

3. Monetary Conditions:

There are 3 monetary conditions of probation:

a. Texas Family Code 54.041(b)

The court is authorized to require a child on probation or child's parent to make full or partial restitution to the victim of the offense.

b. Texas Family Code § 54.0411

Requires a twenty dollar payment of costs of court; if child, parent or other person is financially able to do so.

c. Texas Family Code § 54.061

Requires the juvenile court under certain circumstances to order the child, parent or other person (if financially able to do so) to pay up to \$ 15.00 per month in probation supervision fees.

4. 77th Legislature Regular Session (2001) H.B. 1118, Section 26

Adds to Texas Family Code § 54.048 to clarify that a restitution order may apply to both the child and the child's parents and may be ordered whether or not the petition included a plea for restitution. Effective September 1, 2001.

H. Community Service

Texas Family Code § 54.044(a)

Mandates the court to "require as a condition of probation that the child work a specified number of hours at a community service project approved by the court and designated by the juvenile board."

77th Legislature Regular Session (2001) H.B. 1118, Section 25

Amends Texas Family Code § 54.044(a) to require a juvenile probation department (and not the juvenile board) to designate community service sites.

1. Community Service Excuses

Texas Family Code § 54.044(a)

The court may excuse the requirement of community service if the court determines and enters a finding that:

- a. the child is physically or mentally incapable of participating in the project;
- b. participating in the project will be a hardship on the child or the family of the child; or
- c. the child has shown good cause that community service should not be required.

2. Parental Community Service

Texas Family Code § 54.044(b)

Allows the court but does not mandate the court to order "the child's parent [to] perform community service with the child".

Community service excused for good conduct of parents/guardians

Texas Family Code § 54.044(g)

Prohibits the court from requiring community service from a parent if the court finds:

"that the child's parents or guardians have made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or CINS that despite the parent's or guardian's efforts, the child continues to engage in such conduct."

3. Limit to total number of community service hours

a. Texas Family Code § 54.044(c)

Limits the total number of hours to be performed by the child and parent to no more than 500 hours together.

b. Procedures:

- 1) Texas Family Code § 54.044(f)
A person subject to an order under Subsection (a) or (b) is entitled to a hearing on the order before the order is entered by the court.

NOTICE:

Texas Family Code § 54.041(a) Orders Affecting Parents and Others

"The juvenile court on notice by any reasonable method to all persons affected."

- 2) Host Agencies and Projects:

Texas Family Code § 54.044(e)

Permits flexibility in the selection of community service sites.

4. The idea behind community service is for an offender to return to the community at large, some value that was taken from it by the offense. Projects should be those that benefit the community at large. Consequently, the projects should be limited to those governmental or non-profit organizations.

ROBERT O. DAWSON, TEXAS JUVENILE LAW, 186 (5TH ED. 2000)

5. Parental Contempt Enforcement

Texas Family Code § 54.044(h)

An order under this section is enforceable by Section 54.07 (Contempt)

6. Legal liability

Texas Family Code § 54.044(d)

Limits the liability of a municipality or county for injuries or damages caused by a child or parent while performing community service.

7. Opinion Attorney General No. JM-898 (1998)

The Attorney General opined that neither the County Judge nor the County would be liable for injuries inflicted by or on a juvenile while performing court ordered community service.

8. Mandatory Disclosure of Handgun Source

- a. Texas Family Code § 54.0406

Requires a child placed on probation for an offense involving a handgun to inform his probation officer of how he obtained the handgun.

- b. Texas Family Code § 54.0406(c)

Ensures that any information provided by the child to the probation officer cannot be used against the child in later juvenile or adult criminal proceedings.

9. Treatment Conditions for Sex Offender Probation

a. Texas Family Code § 54.0405

This statute though not mandatory, provides for sex offender treatment involving counseling and regular polygraph examinations. The court can make participation in such a condition of probation. This section is only applicable to juvenile offenders whose victims are under 17 years of age as defined by Texas Penal Code § 22.011(c)(1).

b. Self-Incrimination regarding the Polygraph Test? (U.S. Const. amend V, VI)

Opinion Texas Attorney General No. JC-0070 (1999)

Whether submission to the polygraph violates the juvenile's 5th Amendment right to remain silent. The Attorney General opined that the juvenile does have the right to invoke his/her privilege against self-incrimination if an answer may lead to incriminating evidence.

The state may not revoke probation or parole for invoking his/her right. Should the state wish to compel the juvenile to answer the question after invoking his/her right, the state must provide immunity. A court probably would find that a juvenile is not entitled to counsel (6th Amendment) during the course of the polygraph examination.

c. Texas Family Code § 54.0405(g)

Authorize the court to order parents/guardians to attend counseling sessions.

Notice must be provided as per Texas Family Code § 54.041(a).

I. Mandatory Child Abuse Reporting

1. Texas Family Code § 261.101(b)

Requires a professional who has cause to believe that a child has been abused or neglected or may be abused or neglected or that a child has been a victim of an offense under Section § 21.11 of the Texas Penal Code is required to report the incident within 48 hours.

2. Opinion Texas Attorney General No. DM-458 (1997)

Opined a registered sex offender treatment provider must report all information, even if dated or incomplete, regarding child abuse.

J. Probation Conditions for Graffiti Offenses

Texas Family Code § 54.046

This section authorizes the juvenile court upon adjudication for graffiti under Penal Code Section 28.08, to order the child to restore damaged property and attend classes in self-responsibility and empathy for victims. This section is not mandatory upon the court.

K. Probation Conditions for Alcohol Violations

Texas Family Code § 54.047

This section references Section 106.071(d) of the Alcoholic Beverage Code. This section requires the court to impose 8-12 hours of community service for first offenses and 20-40 hours for subsequent offenses and mandates the court to order driver's license

suspension.

L. Commitment to the Texas Youth Commission

1. Texas Family Code § 54.04(d)(2)

If the court or jury found at the conclusion of the adjudication hearing, the child engaged in delinquent conduct that violates a penal law of this state or the United States, of the grade of felony or if the requirement of Subsection (q) are met of the grade of misdemeanor, . . . the court may commit the child to the Texas Youth Commission without a Determinate Sentence.

2. a. Texas Family Code § 54.04(q)

The court may make disposition under Subsection (d)(2) for delinquent conduct that violates a penal law of the grade of misdemeanor if:

- 1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least two previous occasions;
- 2) of the previous adjudication, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication; and
- 3) the conduct that is the basis of the current adjudication occurred after the date of at least two previous adjudications.

b. This section became effective September 1, 1999 as a means of restricting indeterminate commitments to TYC.

Thus, any felony adjudication committed before or after September 1, 1999 will suffice for indeterminate commitment to TYC. The restrictions apply when the third misdemeanor occurs on or after September 1, 1999. Prior to this date any misdemeanor adjudication would have qualified for indeterminate commitment to TYC.

Example:

Texas Family Code § 54.04(d)(2)

Commission of felony → adjudication of felony → commitment to TYC

Texas Family Code § 54.04(q)

Commission of misdemeanor A or B → adjudication of misdemeanor A or B → commission of felony → adjudication of felony → commission of misdemeanor A or B → adjudication of misdemeanor A or B → commitment to TYC.

c. Effective September 1, 2001

- 1) 77th Legislature Regular Session (2000) H.B. 1118, Section 23 renumbers Texas Family Code § 54.04(q) (Second of Three) to follow alphabetically Texas Family Code § 54.04(r). If the judge orders a disposition under this section and there is an affirmative finding that the victim or intended victim was younger than 17 years

of age at the time of the alleged conduct, the judge shall enter the finding in the order.

- 2) Section 23 of H.B. 1118 also amends Texas Family Code §54.04(s)[q] as well as substantive changes to subsection (1) as follows:

Texas Family Code § 54.04(s)[q] the court may make a disposition under Subsection (d)(2) for delinquent conduct that violates a penal law of the grade of misdemeanor if:

- (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of ~~felony or~~ misdemeanor on at least two previous occasions;

[Subsections (2) and (3) remain unchanged.]

Net Effect: Need 2 prior misdemeanor adjudications before the third misdemeanor adjudication will qualify a child for indeterminate commitment to TYC.

Example:

Misdemeanor A or B offense→adjudication Misdemeanor A or B offense→Misdemeanor A or B offense→adjudication of Misdemeanor A or B offense→Misdemeanor A or B offense→commitment to TYC.

- 3) Section 23 of H.B. 1118 also amends Texas Family Code § 54.04 by adding Sections (t) and (u).

Texas Family Code § 54.04(t)

The court may make a disposition under Subsection (d)(2) for delinquent conduct that violates a penal law of the grade of misdemeanor if:

- (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony on at least one previous occasion; and
(2) the conduct that is the basis of the current adjudication occurred after the date of that previous adjudication.

Net Effect: A child qualifies for indeterminate commitment to TYC for one Misdemeanor A or B adjudication following only a previous felony adjudication. This is consistent with current law allowing for indeterminate TYC commitment for a single felony adjudication.

Example: Felony offense→adjudication of felony offense→Misdemeanor A or B offense→adjudication of Misdemeanor A or B→TYC commitment.

- 4) Texas Family Code § 54.04(u)
For the purposes of disposition under Subsection (d)(2), delinquent conduct that violates a penal law of this state of the grade of felony or misdemeanor does not include conduct that violates a lawful order of a municipal, justice, or juvenile court order under circumstances that would constitute contempt of that court.

Net Effect: Prohibition from commitment to TYC for contempt of justice, municipal or juvenile court.

3. Offenses that DO NOT qualify as offenses for indeterminate commitment to TYC.

In the Matter of A.N.M., 542 S.W. 2d 916 (Tex. Civ. App.-Dallas 1976)

- a. The juvenile court Class C Misdemeanors are not delinquent conduct.

Texas Family Code § 51.03(a)(1)
". . . is punishable by confinement in jail."

- b. Cases transferred to juvenile court pursuant to Texas Family Code § 51.08 as they are CINS cases under Texas Family Code § 51.03(b).
- c. Contempt of justice or municipal court pursuant to Texas Family Code §51.03(a)(3) are not misdemeanors.
- d. CINS violations under Texas Family Code §51.03(a)(2) was rendered "inoperable" by Texas Family Code § 54.04(q) in 1999 which restricts indeterminate TYC commitments felony or third jailable misdemeanors. As of September 1, 1999 this section has not been used.
- e. A child on CINS probation for a status offense pursuant to Texas Family Code § 51.02(15) may never be committed to TYC due to Texas Family Code §54.04(o) which states a status offender may not be committed to TYC for engaging in conduct that would not under state or local law, be a crime if committed by an adult.
- f. 77th Legislature Regular Session (2001) H.B. 1118 Section 2 amends Texas Family Code § 51.03(a) by deleting § 51.03(a)(2). This eliminates from the definition of "delinquent conduct", conduct that violates a reasonable and lawful order of a juvenile court. Effective September 1, 2001.

4. Indeterminate Commitment

- a. All commitments to TYC, with the exception of determinate sentencing cases, are for an indeterminate term not to extend beyond the child's 21st birthday.
committed the child to TYC for a one year period. the appellate court set the commitment order aside. The appellate court held that once a court commits a child to TYC, discretion as to further disposition is vested in TYC and the court cannot invade this discretion by committing the juvenile for a

definite period of time. No provision of the code authorizes the court to make a commitment for a definite period.

b. Age limit to Indeterminate Commitment

1) Texas Family Code § 54.04(e)
TYC shall accept a person properly committed to it by a juvenile court, even though the person may be 17 years of age or older at the time of commitment.

2) Indeterminate commitment to TYC-Minimum length of stay

A child is granted conditional release from TYC on indeterminate commitments before age 21 based on the child serving the minimum length of stay attached to his/her "classifying offense". The classifying offense is the most serious of the relevant offenses. Upon commitment from a juvenile court, the relevant offenses are the committing offenses and any offenses for which the youth was on probation at the time of committing the offense.

3) TYC aggregate classifying offenses in to 4 broad categories for determining minimum length of stay:

a.) Type A violent offender has a 24 month minimum length of stay.

Example: Murder, Capital Murder, Sexual Assault, Aggravated Sexual Assault, Attempt to Commit, Solicitation of Minor to Commit, Engaging in Organized Criminal Activity to Commit the Included Offenses.

b.) Type B violent offender has a 12 month minimum length of stay.

Example: Manslaughter, Criminally Negligent Homicide, Felony Unlawful Restraint, Kidnapping, Aggravated Kidnapping, Felony Assault, Indecency with a Child, Aggravated Assault, Injury to Child, Elderly or Disable Individual, Felony Deadly Conduct, Felony Terroristic Threat, Felony Aiding Suicide, Tampering with Consumer Product, Arson, Robbery, Aggravated Robbery, Burglary, Intoxicated Assault, Intoxicated Manslaughter, certain offenses against TYC employees, contract program employees or volunteers, or (in concert with six or more persons) Endangering TYC persons or property by substantially obstruction operations, Attempt to Commit, Conspiracy to Commit, Solicitation of a Minor to Commit, or e.o.c.a. to commit listed offenses.

- c.) Chronic Serious Offender, Controlled Substance Dealer or Firearms Offender has a minimum of 12 month minimum length of stay.

Chronic Serious Offender-Youth whose classifying offense is a felony and who has committed 3 separate felony offenses where the second felony was committed after the disposition of the first offense and the third felony was committed after the disposition of the second felony.

Controlled Substance Offender-Youth whose classifying offense is any felony grade offense of manufacture or delivery under the Texas Controlled Substances Act.

Firearms Offender-Youth whose classifying offense involved a finding by a court or TYC hearing examiner that the youth possessed a firearm during the offense.

- d.) General Offender has a 9 month minimum length of stay and is a youth who is not eligible for any other classification.

Texas Youth Commission General Administrative Policy Manual GAP 85.25.

ROBERT O. DAWSON, TEXAS JUVENILE LAW 190 (5TH ED. 2000)

V. Determinate Sentence Statutory Minimum Length of Stay

Determinate Sentences for adjudicated covered offenses carry their own statutory minimum length of stay.

- A. 10 years minimum for Capital Murder
- B. 3 years for Aggravated Controlled Substance Felony, First Degree Felony
- C. 2 years for Second Degree Felony
- D. 1 year for Third Degree Felony

Texas Human Resources Code § 61.081(f)

VI. Mentally Ill or Retarded Children

Human Resources Code § 61.077(b)

Unless a child is committed to the commission under a Determinate Sentence. . .the commission shall discharge a child who is mentally ill or mentally retarded from its custody if:

- A. the child has completed the minimum length of stay for the child's committing offense; and
- B. the commission determines that the child is unable to progress in the commission's rehabilitation programs because of the child's mental illness or mental retardation.

TYC cannot discharge a child from Determinate Sentence because these children can only be paroled.

Due to public safety concerns, Human Resources Code § 61.0772 was enacted to require TYC to examine such children and initiate proceedings for mental health or mental retardation commitments of children who meet statutory standards.

Committing Foreign Nationals to TYC

Opinion Texas Attorney General No. H-521 (1975)

TYC cannot refuse to accept a properly committed child because the child is a foreign national.

In the Matter of M.A.C., 999 S.W. 2d 442 (Tex. App.-El Paso 1999)

Juvenile challenged a TYC commitment based on Equal Protection grounds, stating had he been a United States citizen he would have been given probation. The court held that probation was not available to the juvenile because the juvenile probation department lacks jurisdiction to supervise in Mexico. The child did not qualify for the Mexican National Program due to an unstable home and there were not other alternatives available. The state has a legitimate interest in taking steps to rehabilitate the child and protect the public, commitment to TYC is an appropriate sanction that is rationally related to these interests.

VII. Driver's License Suspension

A. 2 Provisions in Texas Family Code § 54.042 for suspending driver's licenses, one mandatory and one discretionary.

1. Mandatory Suspension-There are 2 categories of Mandatory Suspension:

a. Texas Family Code §54.042(a)(1) references Transportation Code §521.342(a).

The period of suspension is until the child reaches 19 years of age or a 365 day period, whichever is longer.

Offenses listed under Section 521.342(a) of the Transportation Code include:

driving while intoxicated by use of alcohol, jailable violations of the Alcoholic Beverage Code, Misdemeanor violations of Dangerous Drugs Act and violations of the Chemicals Act.

b. Texas Family Code § 54.042(a)(2)-Second category of mandatory suspension

The period of suspension is a minimum of 180 days. Failure to comply with the mandated educational program approved by the Texas Commission on Alcohol and Drug Abuse (TCADA), increases the suspension to an indefinite period of time.

1.) Offenses listed under Section 521.372(a)of the Transportation Code include:

several controlled substance violations to include the Federal Controlled Substances Act and driving while intoxicated by use of a controlled substance under the Texas Controlled Substance Act.

2.) Under the second category of mandatory suspension, the juvenile court must notify the Department of Public Safety (DPS) of the adjudication. The juvenile court also has the discretion of ordering

suspension pursuant to a period listed in the first mandatory category. In the Matter of C.E.M., 981 S.W. 2d 771 (Tex. App.-Houston [1st Dist.] 1998)

3.) In the Matter of R.S.J., 999 S. W. 2d 871 (Tex. App.-Tyler 1999)
Second mandatory suspension category applicable to possession of less than 2 oz. of marijuana in a drug free zone because this offense is covered by federal law.

4.) What if child has no driver's license? Texas Family Code § 54.042

This section allows for a denial of a driver's license during the period for which a license could have been suspended.

5.) What if child needs a commercial driver's license to work?

Texas Family Code § 54.042(e)

Provides that if a child qualifies for a commercial driver's license pursuant to Chapter 521 of the Transportation Code, the court may grant the child permission to obtain one.

2. Discretionary Suspension

a. Texas Family Code § 54.042(f)

The juvenile court has discretion to order suspension or denial of a license for a child adjudicated for any delinquency act or CINS not previously covered under mandatory provisions.

b. The period of suspension shall not exceed 12 months.

Texas Family Code § 54.042(h)

Allows the court to state as a reasonable term of probation (i.e., Notice) that if probation is violated, the court will order suspension or deny issuance of the license for a period not to exceed 12 months. This order can be issued in addition or in lieu of revocation. Suspension upon violation of probation can be ordered even if the court previously suspended the license upon initial probation.

c. Texas Family Code § 54.042(e)

Regarding court permission to apply for a commercial driver's license if the child qualifies is also applicable.

B. Graffiti Suspension

Texas Family Code § 54.042(b) and (c)

Grant discretion to a court to order suspension or denial of a license if child adjudicated for Texas Penal Code § 28.08 (Graffiti). The period of suspension for a first offense is up to 365 days. For a subsequent offense the period may be extended to 19 years of age.

C. Overlapping Suspension

Texas Family Code § 54.042(f)

Provides that credit shall be given for period of suspension ordered when a child refuses to take an intoxilizer test or fails an intoxilizer test, for suspension ordered on first time

adjudications for driving while under the influence, intoxication assault or intoxication manslaughter.

- Suspension beyond 18 years of age

Texas Family Code § 54.042

Allows for suspension beyond a respondent's 18th birthday despite Texas Family Code §54.05(b) which states "all dispositions automatically terminate when the child reaches his 18th birthday". This is possibly due to the specificity of suspension over 18 years of age which controls over the general provision.

Texas Government Code § 311.026

VIII. Orders Affecting Persons Other Than the Child

There are six areas where the juvenile court has authority over people in addition to the adjudicated child:

A. Child Support

1. Texas Family Code § 54.06(a)
At any stage of the proceeding, when a child has been placed outside of the child's home, the juvenile court after giving the parent or other person responsible for the child's support a reasonable opportunity to be heard, shall order the parent or other person to pay in a manner directed by the court a reasonable sum for support in whole or in part of the child or the court shall waive the payment by order.

"At any stage in the proceeding. . . could allow a court to order support for a child prior to adjudication or disposition placed outside of the home at such time."
2. Existing support orders issued pursuant to Title 5 of the Family Code may be modified pursuant to Texas Family Code § 54.06(b) which directs a court to order the original obligee of the Title 5 support to assign this right to support to a juvenile probation department or TYC when appropriate.
3. Texas Family Code § 54.06(e)
Requires the juvenile court to use the Family Code Chapter 154 child support guidelines in creating support orders. The juvenile court must also include the medical support provisions of Chapter 154.
4. Texas Family Code § 54.06(f)
Provides that a child support order pursuant to this section prevails over any previous child support order to the extent of conflict.
5. Enforcement: Texas Family Code § 54.06(c)
Allows Title 3 support order to be enforced through garnishment of wages. Also available are any means available to enforce a child support order under Title 5 of the Family Code and perhaps even interest accrued pursuant to Texas Family Code §157.265.

Texas Family Code § 54.06(d)

Also provides for enforcement by civil contempt proceedings of § 54.07(b) provided the defaulting party is given 10 days notice of the failure to pay or refusal to carry out the terms of the order.

6. Public Agency Not Liable

In the Matter of D.H., 556 S.W. 2d 628 (Tex. Civ. App.-Waco, 1977 writ ref'd n.r.e.)

The juvenile court ordered a child placed in the custody of the Deveraux Foundation and ordered the county to pay \$ 180 per month child support and also ordered the Department of Human Services (DHS), the child's managing conservator to pay \$1020 per month child support. DHS appealed and the appellate court held that under the Texas Constitution and DHS Appropriations Bill, the juvenile court was prohibited from ordering DHS to pay Deveraux.

B. Injunctive Orders

1. Texas Family Code § 54.041(a)

Authorizes the juvenile court to issue 3 types of injunctions once a juvenile has been adjudicated.

Texas Family Code § 54.041 Orders Affecting Parents and Others

(a) When a child has been found to have engaged in delinquent conduct or conduct indicating a need for supervision and the juvenile court has made a finding that the child is in need of rehabilitation or that the protection of the public or the child requires that disposition be made, the juvenile court, on notice by any reasonable method to all persons affected, may:

- (1) order any person found by the juvenile court to have, by willful act or omission, contributed to, caused, or encouraged the child's delinquent conduct or conduct indicating a need for supervision to do any act that the juvenile court determines to be reasonable and necessary for the welfare of the child or to refrain from doing any act that the juvenile court determines to be injurious to the welfare of the child;
- (2) enjoin all contact between the child and a person who is found to be a contributing cause of the child's delinquent conduct or conduct indicating a need for supervision; or
- (3) after notice and a hearing of all persons affected order any person living in the same household with the child to participate in social or psychological counseling to assist in the rehabilitation of the child and to strengthen the child's family environment.

2. Due Process: Notice and an Opportunity to be Heard

a. Texas Family Code § 54.041(d)

A person subject to an order under Subsection (a) of this section is entitled to a hearing on the order prior to the entering of the order by the court.

b. Enforcement:

Texas Family Code § 54.041(e)

An order under this section may be enforced by contempt of court proceedings under Texas Family Code § 54.07.

C. Truancy Classes

1. Texas Family Code § 54.041(f)
Provides a court in a case where a child has been adjudicated of CINS for truancy the authority to order a parent or guardian to attend classes offered by a school district on truancy if offered by the district.
2. Due Process: Notice and an Opportunity to be Heard
Though not stated in this section, it should be given pursuant to Texas Family Code §54.041(a).

D. Probation Supervision Fees

1. Texas Family Code § 54.061(a)
The juvenile court is required to order payment of probation supervision fees:

If a child is placed on probation. . . , the juvenile court, after giving the child, parent, or other person responsible for the child's support a reasonable opportunity to be heard, shall order the child, parent, or other person, if financially able to do so, to pay the court a fee of not more than \$ 15.00 a month during the period that the child continues on probation.
2. Enforcement:

Texas Family Code § 54.07(b)
Provides the juvenile court "may enforce its order...for the payment of ... probation fees by civil contempt proceedings after 10 days notice to the defaulting party, person of his failure or refusal to carry out the terms of the order".
3. Finding of Inability to Pay

Texas Family Code § 54.061(d)
The court is required to enter a statement of its finding into the record that the "child, parent or other person responsible for the child's support is financially unable to pay the probation fees". Once this is done the court may waive the probation fees.

E. Costs of Court

1. Texas Family Code § 54.0411(a)
If a disposition hearing is held under Section 54.04 of this code, the juvenile court after giving the child, parent or other person responsible for the child's support a reasonable opportunity to be heard, shall order the child, parent or other person, if financially able to do so, to pay a fee as costs of court of \$ 20.00.
2. Enforcement

Texas Family Code § 54.0411(b)
Texas Family Code § 54.07 Civil Contempt Proceedings

Opinion Texas Attorney General No. LO 97-074 (1997)
The Attorney General has stated that a modification of disposition in which a hearing has been waived under Section 54.05(h) is not covered by the cost of court statute.

F. Graffiti Eradication Fees

Texas Family Code § 54.0461

The court is required to impose a five dollar eradication fee on the child or parent when a child is adjudicated for a violation of Penal Code § 28.08. The fee goes into a pool to be used in the restoration of property damaged by graffiti. It can be imposed with probation or in connection with a TYC commitment. The court can also make a finding on the record that the child, parent, or other person responsible for the child's support is unable to pay the fee. Once this is done, the court may waive the fee.

Rationale: The appellate court relied on adult criminal proceedings to find that "the amount of restitution is required to be 'just', that is, supported by sufficient factual evidence in the record that the expense was incurred. . . The amount of expense incurred need not be supported by proof that it was reasonable. . ."

"Similarly, we construe the term 'actual damages' consistently with the approach to restitution in criminal cases. The trial court therefore correctly admitted the statements of expense actually incurred for [the victim's] medical case without proof that the amounts charged were reasonable." The juvenile and/or parent must be given the opportunity in judicial proceedings under criminal procedural rules to dispute the amount of loss claimed by the victim.

D. Restitution to Insurance Company

1. In the Matter of M.S., 985 S.W. 2d 278 (Tex. App.-Corpus Christi 1999)
Juvenile stole victim's car and wrecked it. The restitution order also named the insurance company for the amount it paid to the victim.

The appellate court upheld the order in concluding that there was no abuse of discretion by determining that the victim's actual damages included the amount paid by the insurance company for the loss of the car.

2. The court of appeals relied upon Code of Criminal Procedure Article 42.037(f)(1) which provides:

The court may not order restitution for a loss for which the victim has received or will receive compensation. The court may in the interest of justice, order restitution to any person who has compensated the victim for the loss to the extent the person paid compensation. An order of restitution shall require that all restitution to a victim be made before any restitution to another person is made under the order.

E. Order Must Relate to Adjudicated Offense

In the Matter of D.S., 921 S.W. 2d 860 (Tex. App.-San Antonio 1996)
Juvenile originally charged with Burglary of Habitation with intent to commit theft. The petition was amended to add Criminal Trespass. The juvenile plead true to the trespass and was placed on probation and ordered to pay restitution. The appellate court struck the restitution order holding that there may have been property loss from the burglary, with intent to commit theft, but there was no property loss from a criminal trespass.

F. Pleadings for Restitution

1. There is a split of authority in appellate cases regarding whether it is necessary to specifically ask for restitution in the Petition.
2. 77th Legislature Regular Session (2001) H.B. 1118, Section 25
Adds Texas Family Code § 54.08 Restitution (a) A juvenile court, in a disposition hearing under Section 54.04, may order restitution to be made by the child and the child's parents.
(b)This section applies without regard to whether the petition in the case contains

a plea for restitution.

Effective September 1, 2001

G. Duration of the Restitution Order

1. Texas Family Code § 54.05(b)
A restitution order made a condition of probation expires automatically upon the child's 18th birthday, whether fully satisfied or not. Enforcement under this provision would be modification or revocation of probation.
2. Texas Family Code § 54.041(b)
A restitution order may extend beyond the child's 18th birthday as a court order independent of probation if the child is currently enrolled in a secondary school. Enforcement would be through civil contempt of § 54.07.

The child's parent may be ordered to make restitution to the victim of the offense. This type of order may extend beyond the child's 18th birthday until such time as the child is no longer enrolled in a secondary school. Enforcement is through civil contempt under § 54.07.

H. Parental Defense of Reasonable Good Faith Effort

Texas Family Code § 54.041(g)

If a parent can show the court that he/she has "made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or CINS," then the juvenile court "shall waive any requirement for restitution that may be imposed on a parent".

I. Deferred Prosecution

Texas Family Code § 59.005(a)

"the juvenile court, prosecuting attorney or probation department may. . .(2) require the child to make restitution to the victim of the child's conduct or perform community service restitution."

J. Community Service

Texas Family Code § 54.041(b)

Restitution and community service are separate dispositional powers. If a child is placed on probation, community service is a mandatory condition and parents can also be ordered to participate in the child's community service.

X. HIV Testing

Texas Family Code § 54.033

Mandates HIV testing of juveniles adjudicated for Indecency with a Child by Sexual Contact [Texas Penal Code § 21.11(a)(1)], Sexual Assault [Texas Penal Code § 22.011] or Aggravated Sexual Assault [Texas Penal Code § 22.021].

The court can compel the juvenile to submit to testing and the test results are given to the victim and respondent only.

XI. Order to Protect Victim From Juvenile

Texas Family Code § 57.008

Authorizes the juvenile court to enter an order to protect the victim from harm from the juvenile. These are similar to injunctive orders for adults. Due process requires notice and an opportunity to be heard both at issuance of the order and enforcement.

XII. Specific Statement of Reasons

Texas Family Code § 54.04(f)

"the court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child."

A. 2 separate matters must be distinguished:

1. Whether the dispositional order recites reasons with sufficient specificity.

- a. In the Matter of T.R.W., 533 S.W. 2d 139 (Tex. Civ. App.-Dallas 1981)
Overruled on other grounds K.K.H. v. State, 612 S.W. 2d 657 (Tex. App.-Dallas 1981)
Juvenile committed to TYC with dispositional language which read "for the protection of the public and to rehabilitate said child". Held not sufficient.

Rationale: Texas Family Code § 54.04(f)
Requires specificity in order to advise the child and the family of the reasons for commitment and allow the juvenile an opportunity to challenge those specific reasons on appeal.

Specificity is also required by the appellate court in order to review the reasons recited and determine if the evidence supports the reasons and are sufficient to justify the disposition.

- b. The standard adopted was that the juvenile court in its statement of reasons must "set out the rationale of its order, and that is, the rationale basis for the court's conclusion or motive constrained entry of the order of disposition."
- c. In the Matter of F.L.J. v. State, 577 S.W. 2d 532 (Tex. Civ. App.-Waco 1979)
The dispositional order contained 4 recitations. The first only recited the child was adjudicated for burglary of habitation. The last 3 combined satisfied §54.04(f). The appellate court held that while simply describing the details of the offense and tracking the findings required by § 54.04 do not constitute a specific statement of reasons, a statement that the offense is so serious that protection of the public does satisfy the specificity requirement.
- d. Remedies When Statement is Inadequate:
In the Matter of K.K.H. v State, 612 S.W. 2d 657 (Tex. Civ. App.-Dallas 1981)
If the appellate court finds the juvenile court did not comply with § 54.04(f)

in stating dispositional reason with specificity, it should abate the appeal and remand the case to the juvenile court for entry of a new statement.

e. Findings of Fact:

In the Matter of J.R., 907 S.W. 2d 107 (Tex. App.-Austin 1995)

The Family Code requirement of a specific statement of reasons for disposition replaces any requirements of the Rules of Civil Procedure that the trial court must upon request, make findings of fact. The statements of reasons serve the same purpose as findings of facts.

2. Whether there was evidence in the record to support the reasons specified.

a. In the Matter of N.S.D., 555 S.W. 2d 807 (Tex. Civ. App.-El Paso 1977)

The juvenile court gave 3 reasons for commitment to TYC.

The appellate court held 2 of them insufficient. The appellate court found that the second reason, "b) there are no services, which have not been used in the past, within the community to effectuate the juvenile's rehabilitation."

To be sufficient, however, there was no evidence to support the findings in recital b). The testimony showed that local services were available and they had not been used in the past and the child could have been rehabilitated locally.

b. In the Matter of L.G., 728 S.W. 2d 939 (Tex. App.-Austin 1987, writ ref. of n.r.e.)

Child committed to TYC for cocaine use. The appellate court remanded the case for a fuller statement of reasons. Basically, the juvenile court stated both the community and school had a drug problem and in the best interest of society required removing the child rather than placing the child on probation.

The appellate court affirmed the delinquency, but set aside the TYC commitment. Rationale was a reliance upon § 51.01(1-2) which was construed to effectuate the purposes of providing care, protection and the wholesome, mental and physical development of children along with the protection of the community. Texas Family Code § 51.01(4) provides that these purposes are to be achieved whenever possible in a family environment and the child is to be separated from his parents only when necessary for his welfare or in the interest of public safety.

c. In the Matter of R.W., 694 S.W. 2d 578 (Tex. App.-Corpus Christi 1985)

The appellate court affirmed a commitment to TYC when the evidence showed the child was problematic at school and at home as well as possibly influenced by a relative in the home who did drugs and was involved in shootings.

B. Miscellaneous Changes to § 54.04

1. 77th Legislature Regular Session (2001) H.B. 1118, Section 23
Adds Subsections 2 and 3 to Texas Family Code § 54.04(o) and adds Section (u) to Texas Family Code § 54.04 which together prohibits confinement in a post-

adjudication secure correctional facility for a first time status offender and prohibits such confinement or TYC commitment for a child adjudicated for contempt of a justice or municipal court.

Additionally, Section 23 adds to Texas Family Code § 54.04(j), the requirement of a thumbprint being affixed and allow a photograph to be attached to an order for ailable misdemeanors since both can now be used in the punishment phase of adult proceedings.

2. 77th Legislature Regular Session (2001) H.B. 1118, Section 24 Amends Texas Family Code § 54.041(b) and adds Subsection (h) to require restitution orders to follow the juvenile from the juvenile court to the criminal court when probation is transferred at age 18 in a Determinate Sentence case.

XIII. Progressive Sanction Guidelines

- A. There are 7 sanction levels starting with supervisory caution and ending with determinate or certification as an adult.

2 main features of this system are the seven program descriptions and the guidelines for assigning cases to each sanction level.

- B. Texas Family Code § 59.001
Provides 5 purposes of the system, however, the two main purposes are to encourage uniformity of disposition of juvenile offenders by providing non-mandatory guidelines for disposition, §59.001(1) and to encourage uniform reporting of all dispositions to enable intelligent planning and resource allocation to be made by public officials, § 59.001(5):

The guidelines also permit discretion and flexibility in disposition decisions, §59.001(3) and (4).

1. Discretion appears at 3 levels with the first one stated in § 53.013 wherein the juvenile board has the discretion to accept or reject these guidelines.
2. Texas Family Code § 59.003 inserts another type of discretion by authorizing assignment of guidelines to be followed or not, Texas Family Code § 59.003(e).
3. The third level of flexibility appears within each of the 7 levels which are structured to allow flexibility in the number of programs to be placed in each.

ROBERT O. DAWSON, TEXAS JUVENILE LAW 207 (5th ed. 2000)

- C. Appellate Review of Dispositions Under the Guidelines

1. Texas Family Code § 59.014
Prohibits an appellate court from reviewing a disposition to determine whether it was made in conformity with guidelines.

A child may not bring an appeal or post conviction writ of habeas corpus based upon:

- a. the failure or inability of any person to provide a service listed under sections 59.004-59.010;

- b. the failure of a court or of any person to make a sanction level assignment as provided in section 59.002 or 59.003; or
 - c. a deviation from the sanction level assignment guidelines provided by this chapter; or
 - d. the failure of a juvenile court or probation department to report a deviation from the guidelines as required by section 59.003(e)
2. In the Matter of A.S., 954 S.W. 2d 855 (Tex. App.-El Paso 1997)
The appellate court retains the right to determine whether there is sufficient evidence to support mandatory removal from the home findings and set the disposition aside if there is not sufficient evidence, or to set aside a disposition on abuse of discretion grounds. Holding in A.S. was refusing guidelines review but finding inadequate evidence to support removal from home.
- D. There is not requirement that all of the programs described at any sanction level must be used in each disposition at that sanction level. However, for a disposition to qualify as a disposition at any given sanction level, at least the primary sanction described in that sanction level must be included in the disposition.

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- The following is a listing of progressive sanction guideline levels and corresponding sanctions:

SANCTIONS: Below are 7 sanction levels, listing the primary sanctions in bold print. Along with these primary sanctions are some standard sanctions common to all levels.

- Require child or parent(s) to participate in program or services as appropriate.
- Additional sanctions as required
- Require restitution to victim or community service (levels 2-7)

Juvenile Sanction Guidelines

	SANCTION LEVEL	OFFENSES COVERED*	SANCTIONS
T.F.C. §59.004	1	<p>C.I.N.S.(excluding expulsion from an AEP for serious or persistent misbehavior [Texas Education Code §37.007(c); or Class A or B Misdemeanor].</p> <ul style="list-style-type: none"> • Expulsion from an AEP for serious or persistent misbehavior [Texas Education Code §37.007(c)] 	<p>(Admonish and counsel the child and parent) Referrals to community-Based intervention programs. Discharge upon completion.</p>
T.F.C. §59.005	2	<p>Misdemeanor "A" or "B" (No firearm)</p> <ul style="list-style-type: none"> • Violation of court ordered probation Texas Family Code §51.03(a)(2) • Contempt of JP or Municipal Court Court [Texas Family Code §51.03(a)(3)] <p>As of 09/01/01-this category will be eliminated. Section 2 of Acts 2001 77th Legislature H.B. 1118</p>	<p>Deferred Prosecution (3-6 months) Discharge upon completion (or) at 18.</p>
T.F.C. §59.006	3	<p>*Misdemeanor with firearm. *State Jail Felony *3rd Degree Felony</p>	<p>Court Ordered Probation (6-12 months) Discharge upon completion (or) at 18</p>
T.F.C. §59.007	4	<p>*2nd Degree Felony 77th Legislature Regular Session (2001) H.B. 1118, Section 43 Amends T.F.C. §59.007(a) for a child at sanction level four, the juvenile court may:</p> <p>(1) require the child to participate as a condition of probation for not less than 3 months or more than 12 months in <u>an [a highly] intensive services probation [and regimented] program that emphasizes frequent contact and reporting with a probation officer, discipline, intensive supervision services [physical fitness], social responsibility and productive work; Effective 09/01/01</u></p> <p>This amendment clarifies that a child may not be assigned to a boot camp/secure correctional facility which is under Sanction Level 5.</p>	<p>Intensive Supervision Probation (3-12 months) Plus Court Ordered Probation (6-12 months) Discharge upon completion (or) at 18</p>

T.F.C. §59.008	5	*1st Degree Felony	Placement in Post-Adjudication Secure Correctional Facility (6-12 months) Plus Court Ordered Probation (6-12 months) Discharge upon completion (or) at 18
T.F.C. §59.009	6	*1st Degree Felony with deadly weapon or with serious bodily injury or *Aggravated Controlled Substance Offense Capital Felonies	(TYC 9-24 mos., subject to extensions. Parole for not less than 6 months) Discharge upon completion (or) at 19
T.F.C. §59.010	7	Either Determinate Sentencing §53.045 (or) Transfer to Adult Court §54.02 for Level 6 Offenses	Determinate Commitment to TYC for 12 months-10 years. Parole of not less than 12 months (or) transfer to Adult Court.

Guideline Level-Recommended Level of sanction that should be assigned to juvenile based (GL) upon offense classification of the adjudicated offense.

Assigned Level-Level (1-7) of sanction actually given to juvenile upon disposition by (AL) juvenile court, probation department or prosecuting attorney.

Deviation-Result which occurs when the juvenile court, JPD or prosecutor assigns (at (D) Disposition) a Progressive Sanction Assigned Level (AL) that is higher or lower than the Progressive Sanction Guideline Level (GL) that should be assigned.

Subsequent Offense-Offense committed by juvenile subsequent to (after)the disposition (SQO) of prior offense for which juvenile was assigned a progressive sanction level.

INITIAL OFFENSE:

How to determine Progressive Sanction Guideline Level (GL) for initial disposition offense (DO), (either a judicial disposition or administrative disposition).

TWO STEP PROCESS:

1. Determine penal code classification level of Disposition Offense (DO).
2. Determine Progressive Sanctions Guideline Level (GL) based upon offense classification listed under Texas Family Code § 59.003.

DETERMINE GUIDELINE LEVEL (GL) FOR SUBSEQUENT OFFENSE (SQO) WITH OR WITHOUT PREVIOUS DEVIATION

Key: The previous Assigned Level (AL) is the starting point for any progression that may be allowed by Progressive Sanction Guidelines.

RULE #1: LESS SEVERE OFFENSE

IF the penal classification of the Subsequent Offense (SQO) is of less severity than the initial or prior offense, then the Assigned Level (AL) will be the greater of:

1. The current Assigned Level or
2. The level corresponding to the penal classification of the Subsequent Offense (SQO). Texas Family Code § 59.003(c).

UNLESS:

The juvenile's initial or prior offense resulted in an Assigned (AL) of 4 or 5 and the juvenile commits any felony grade offense (i.e., Capital Felony, First Degree Felony, Second Degree Felony, Third Degree Felony, State Jail Felony) in which case the level is increased by one level: Texas Family Code § 59.003(d).

OR UNLESS:

The juvenile is found to have engaged in delinquent conduct on 2 separate occasions (either pursuant to (1) an adjudication hearing pursuant to Texas Family Code § 54.03 (OR) (2) a modification disposition hearing pursuant to Texas Family Code § 54.05) that were each a violation of a penal law of a classification that is less than the classification of the juvenile's previous Assigned Level (AL) in which case the level is increased one level: Texas Family Code § 59.003(b).

RULE #2: SAME OR EQUAL OFFENSE SEVERITY

IF the penal code classification of the Subsequent Offense (SQO) is of the SAME severity (i.e., prior offense Class A Misdemeanor Assault and (SQO) Class A Misdemeanor Assault) or EQUAL severity (i.e., prior offense Class A Misdemeanor Assault and (SQO) Class A Misdemeanor Burglary of Vehicle) to the initial or prior offense, then the sanction level is increased by one level. Texas Family Code § 59.003(c).

UNLESS:

The juvenile's previous Assigned Level (AL) is 5 and the juvenile has not been adjudicated for delinquent conduct (i.e., CINS alone can never be used to commit a juvenile to TYC). Texas Family Code § 59.003(c)(1).

OR UNLESS:

The juvenile's previous Assigned Level (AL) is 6 and the subsequent violation is not a listed Determinate Sentence, Texas Family Code § 53.045) offense NOR a Certification to Criminal Court, Texas Family Code § 54.02, offense (i.e., Need Determinate Sentence or Certification Case to get to GL7). Texas Family Code § 59.003(c)(2).

(Please See Legislative Update On Next Page)

RULE #3: GREATER OFFENSE SEVERITY

IF the penal classification of the Subsequent Offense (SQO) is of greater severity than the initial or prior offense, then the Guideline Level (GL) will be the greater (higher) of:

- The level corresponding to the penal classification of the Subsequent Offense (SQO); OR
- The next higher level from the previously Assigned Level (AL).

- 77th Legislature Regular Session (2001) H.B. 1118, Section 42 Amends § 59.003(c) as follows:

(c) Subject to Subsection (e), if the child's subsequent commission of delinquent conduct or conduct indicating a need for supervision involves a violation of a penal law of a classification that is the same as or greater than the classification of the child's previous conduct, the juvenile court may assign the child a sanction level authorized by law that is one level higher than the previously assigned sanction level, ~~unless:~~

~~[(1) the child's previously assigned sanction level is five and the child has not been adjudicated for delinquent conduct;~~

~~[(2) the child's previously assigned sanction level is six, unless the subsequent violation is of a provision listed under Section 53.045(a) and the petition has been approved by a grand jury under Section 53.045; or~~

~~[(3) the child's previously assigned sanction level is seven].~~

Effective September 1, 2001: This amendment clarifies that a child may not be assigned a higher sanction level under Progressive Sanction Guidelines, if it is not authorized by law. It also eliminates the 2 exceptions in the application of Rule #2: Same of Equal Offense Severity.

E. Reporting: Texas Family Code § 59.003(e)

(e) A juvenile court or probation department that deviates from the guidelines under this section shall state in writing its reasons for the deviation and submit the statement to the juvenile board regardless of whether a progressive sanctions program has been adopted by the juvenile board. Nothing in this chapter prohibits the imposition of appropriate sanctions that are different from those provided at any sanction level.

- 77th Legislature Regular Session (2001) H.B. 1118, Section 42 Amends § 59.003(e) as follows:

(e) Except as otherwise provided by this subsection, a [A] juvenile court or probation department that deviates from the guidelines under this section shall state in writing its reasons for the deviation and submit the statement to the juvenile board regardless of whether a progressive sanctions program has been adopted by the juvenile board. Nothing in this chapter prohibits the imposition of appropriate sanctions that are different from those provided at any sanction level. A juvenile court that makes a disposition required by this title that deviates from the guidelines under this section is not required to report the disposition as a deviation.

This amendment provides that when a particular disposition is required by law, it need not be reported as a deviation from the Progressive Sanction Guidelines.

- § 59.011 Duty of Juvenile Board
A juvenile board shall prepare a report to the Texas Juvenile Probation Commission, at least quarterly on forms provided by the commission, showing the referrals, probation or progressive sanctions violations, and commitments to the Texas Youth Commission administered under this chapter according to the progressive sanctions guidelines and the reasons for any deviation from the guidelines.
- 77th Legislature Regular Session (2001) H.B. 1118, Section 44 Amends section 59.011 to read as follows:

Sec. 59.011 DUTY OF JUVENILE BOARD. A juvenile board shall require the juvenile probation department to [prepare a] report progressive sanctions data electronically to the Texas Juvenile Probation Commission in the format and time frames specified by the commission.

~~[; at least quarterly on forms provided by the commission, showing the referrals, probation or progressive sanction violations and commitments to the Texas Youth Commission, administered under this chapter according to the Progressive Sanction Guidelines and the reasons for any deviations from the guidelines.]~~

- This amendment requires that juvenile probation departments report progressive sanction dates electronically to the Texas Juvenile Probation Commission in the format and time frames it specifies.

F. § 59.013 Liability

The Texas Youth Commission, a juvenile board, a court, a person appointed by a court, an attorney for the state, a peace officer, or a law enforcement agency is not liable for a failure or inability to provide a service listed under Sections 59.004-59.010.

G. § 59.014 Appeal

A child may not bring an appeal or post-conviction writ of habeas corpus based on:

- (1) the failure or inability of any person to provide a service listed under Sections 59.004-59.010;
- (2) the failure of a court or of any person to make a sanction level assignment as provided in Section 59.002 or 59.003;
- (3) a deviation from the sanction level assignment guidelines provided by this chapter; or
- (4) the failure of a juvenile court or probation department to report a deviation from the guidelines as required by Section 59.003(e).

H. § 59.015 Waiver of Sanction on Parents/Guardians

On a finding by the juvenile court or probation department that a child's parents or guardians have made a reasonable good faith effort to prevent the child from engaging in conduct indicating a need for supervision and that, despite that parents' or guardians' efforts, the child continues to engage in such conduct, the court or probation department shall waive any sanction that may be imposed on the parents or guardians at any sanction level.

XIV. Sex Offender Registration Hearing

A. 77th Legislature Regular Session (2001) H.B. 1118, Section 54

Chapter 62, Code of Criminal Procedure is amended by adding Article 62.13 to read as follows:

Art. 62.13. HEARING TO DETERMINE NEED FOR REGISTRATION OF A JUVENILE. (a) A person who has an adjudication of delinquent conduct that would otherwise be reportable under Article 62.01(5) does not have a reportable adjudication of delinquent conduct for purposes of this chapter if the juvenile court enters an order under this article excusing compliance by the person with the registration requirements of this chapter.

(b)After disposition of a case under Section 54.04, Family Code, for adjudication of an offense for which registration is required under this chapter, the juvenile court on motion of the respondent shall conduct a hearing to determine whether the interests of the

public require registration under this chapter.

(c)The hearing is without a jury and the burden of persuasion is on the respondent to show by a preponderance of evidence that the criteria of Subsection (e) have been met. The court at the hearing may make its determination based on:

(1)the receipt of exhibits;

(2)the testimony of witnesses;

(3)representations of counsel for the parties; or

(4)the contents of a social history report prepared by the juvenile probation department that may include the results of testing and examination of the respondent by a psychologist, psychiatrist, or counselor.

(d)All written matter considered by the court shall be disclosed to all parties as provided by Section 54.04(b), Family Code.

(e)The court shall enter an order excusing compliance with the registration requirements of this chapter if the court determines:

(1)that the protection of the public would not be increased by registration of the respondent under this chapter; or

(2)that any potential increase in protection of the public resulting from registration is clearly outweighed by the anticipated substantial harm to the respondent and the respondent's family that would result from registration under this chapter.

(f)The prosecuting attorney may waive a state's right to a hearing under this article and agree that registration under this chapter is not required. If the waiver is entered under a plea agreement, the court shall without a hearing enter an order excusing compliance with the registration requirements of this chapter or, under Section 54.03(j), Family Code, inform the respondent that the court believes a hearing under this article is required and give the respondent the opportunity to withdraw the respondent's plea of guilty, nolo contendere, or true or to affirm the respondent's plea and participate in the hearing. If the waiver is entered other than under a plea agreement, the court shall without a hearing enter an order excusing compliance with the registration requirements of this chapter. The waiver must state whether or not it is entered under a plea agreement. The respondent may as part of a plea agreement promise not to file a motion seeking an order excusing registration, in which case the court may not recognize the motion.

(g)Notwithstanding Section 56.01, Family Code, on entry by a juvenile court of an order under Subsection (e) excusing registration under this chapter, the prosecuting attorney may appeal that order by giving notice of appeal within the time required under Rule 26.2(b), Texas Rules of Appellate Procedure. The appeal is civil and the standard of review in the appellate court is whether the juvenile court committed procedural error or abused its discretion in excusing compliance with registration. The appeal is limited to review of the order excusing compliance with registration and may not include any other issues in the case.

(h) The respondent may under Section 56.01, Family Code, appeal the juvenile court's order requiring registration in the same manner as the appeal of any other legal issue in the case. The standard of review in the appellate court is whether the juvenile court committed procedural error or abused its discretion in not excusing compliance with registration.

(i)If the juvenile court enters an order excusing registration, the respondent may not be required to register in this or any other state for the offense for which registration was excused.

(j)After a hearing under Subsection (b) or under a plea agreement under Subsection (f), the juvenile court may enter an order deferring decision on requiring registration until the respondent has completed a sex offender treatment program as a condition of probation or while committed to the Texas Youth Commission. The court retains discretion to require or to excuse registration at any time during the treatment program or on its successful or unsuccessful completion. During the period of deferral, registration may not be required.

(k)After a hearing under Subsection (b) or under a plea agreement under Subsection (f), the juvenile court may enter an order requiring the respondent to register as a sex offender but provide that the registration information is not public information and is restricted to use by law enforcement and criminal justice agencies. Information obtained under this subsection may not be posted on the Internet or released to the public.

(l)A person who has registered as a sex offender for an adjudication of delinquent conduct, regardless of when the delinquent conduct or the adjudication for the conduct occurred, may file a motion in the adjudicating juvenile court for a hearing seeking excusal from registration as provided by Subsection (e) seeking under Subsection (k) an order that the registration become nonpublic.

(m)The person may file a motion under Subsection (l) in the original juvenile case regardless of whether the person is at the time of filing 18 years of age or older. Notice of the motion shall be provided to the prosecuting attorney. A hearing on the motion shall be provided to the prosecuting attorney. A hearing on the motion shall be provided as in other cases under this article.

(n)A motion may be filed under Subsection (l) only if a previous motion under this article has not been filed concerning that case.

(o)To the extent feasible, the motion under Subsection (l) shall identify those public and private agencies and organizations that possess sex offender registration information about the case.

(p)The juvenile court, after a hearing, may:

(1)deny the motion;

(2)grant the motion to excuse all registration; or

(3)grant the motion to change the registration from public to nonpublic.

(q)If the court grants the motion, a copy of the court's order shall be sent to each public and private agency or organization that the court determines may be in possession of sex offender registration information. The order shall require the recipient to conform its records to the court's orders either by deleting the information or changing its status to nonpublic, as the order requires.

(r)A private agency or organization that possess sex offender registration information it obtained from a state, county, or local governmental entity is required to conform its records to the court's order on or before the 30th day after the date of its entry. Failure to comply in that period automatically bars the agency or organization from obtaining sex offender registration information from any state, county, or local governmental entity in this state in the future.

- B.
1. Article 62.13(b)
Following the disposition of a case, pursuant to Texas Family Code § 54.04, of an offense requiring sex offender registration, pursuant to Chapter 62 of the Code of Criminal Procedure, the juvenile can file a motion pursuant to this section to determine if the juvenile shall be required to register as a sex offender.
 2. Once the motion is filed, the juvenile court shall conduct a hearing to determine whether the interests of the public require registration under this Chapter.
 3. UNREGISTRATION (i.e., juveniles NOT YET registered as of September 1, 2001)
Procedure: Article 62.13(b) HEARING:
 - a. Juvenile files the motion pursuant to this section.
 - b. The hearing is without a jury.

- c. The burden of persuasion is on the juvenile, by a preponderance of the evidence to show the criteria of Subsection (e) have been met.
- d. Article 62.13(e) criteria to be met by juvenile.
 - 1.) There would not be any increased protection to the public if the juvenile registers as a sex offender; (or)
 - 2.) The anticipated substantial harm to the juvenile and his/her family due to registration would clearly outweigh any potential increase in public protection.
- e. The juvenile court makes the determination regarding the motion based upon the following:
 - 1.) Report of Exhibits
 - 2.) Witness Testimony
 - 3.) Representation of Counsel for the parties; or
 - 4.) The Contents of a Social History Report / Pre-Disposition Report prepared by the juvenile probation department that may include test and examination results from a psychiatrist, psychologist or counselor.

C. Article 62.13(d)
All written matter considered by the court shall be disclosed to all parties as provided by Texas Family Code § 54.04(b).

D. Article 62.13(f) STATE WAIVER OF HEARING

Prosecutor may waive the state's right to a hearing. Two (2) options:

- 1. Waiver entered under plea agreement
Court shall inform the juvenile that the court is not required to accept the agreement as per Texas Family Code § 54.03(j) and give the juvenile the choice to withdraw the juvenile plea of true.
- 2. Waiver entered other than plea agreement
The court shall without a hearing enter an order.

E. FOUR (4) OPTIONS FOR THE COURT

Following a hearing under Article 62.13(b) or plea agreement under Article 62.13(f) the court has 4 options:

- 1. Require full sex offender registration, requirements pursuant to Article 62.01(5) to include all public internet disclosure;
- 2. Excuse all sex offender registration requirements to include registration with local law enforcement, pursuant to Article 62.13(e);
- 3. Require only non-public registration, this means the sex offender registration information is not open to the public and can only be used by law enforcement and criminal justice agencies, pursuant to Article 62.13(k);

4. Defer any decision regarding the 3 options above until the court reviews the results of the court ordered sex offender treatment, pursuant to Article 62.13(j).
- F. Second Half Article 62.13 allows for De-registration (i.e., juveniles already registered as of 9/01/01)
1. If a juvenile is already a registered sex offender then on or after September 1, 2001, Article 62.13(1) allows the juvenile to file a motion in the adjudicating court for a hearing seeking excusal from registration under Article 62.13(e) or making the registration non-public under Article 62.13(k).
 2. Article 62.13(m)
No age limit to file a de-registration motion in the original juvenile case.
[Recall, Article 62.12(b)(1)-The duty to register expires 10 years after the disposition date or the person completes the terms of disposition.]
 3. Three (3) options for the court: following a hearing under Article 62.13(l), the juvenile court has 3 options:
 - a. Deny the motion, continue status quo [Article 62.01(5)]
 - b. Grant the motion to excuse all registration [Article 62.13(e)] or
 - c. Grant the motion to change registration from public [Article 62.01(5)] to non-public [Article 62.13(k)].

The order under options 2 and 3 above shall be sent to each public and private organization that the court determines is in possession of sex offender registration information. These agencies have 30 days to conform their records.

4. Appeal:

Article 62.13(g)-The prosecutor can appeal an Article 62.13(e) (full excusal from registration) Order by giving notice of appeal under Rule 26.2(b), Texas Rules of Appellate Procedures.

a. 26.2 Criminal Cases

(b)*By the State*. The notice of appeal must be filed within 15 days after the day the trial court enters the order, ruling, or sentence to be appealed.

b. Article 62.13(h)

The juvenile has the standard Texas Family Code § 56.01 appellate avenue. The standard of Review is procedural error or abuse of discretion.

XV. Miscellaneous: Code Amendments

Section 45. Section 59.012, Family Code, is amended to read as follows:

Section 59.012 REPORTS BY CRIMINAL JUSTICE POLICY COUNCIL. (a) ~~[The Texas Youth Commission shall compile information, at least quarterly, showing the commitments, placements, parole, releases, and revocations administered under this chapter according to the progressive sanctions guidelines and the reasons for any deviation from the guidelines.]~~

~~[(b) The Texas Juvenile Probation Commission and the Texas Youth Commission shall compile the information obtained under this section and Section 59.011 and submit this information to the Criminal Justice Policy Council.~~

~~[(e) The Criminal Justice Policy Council shall analyze trends related to juvenile referrals, compliance with the progressive sanctions guidelines, and the impact of the guidelines and related reforms on recidivism rates using standard scientific sampling or appropriate scientific methodologies to represent statewide patterns. The council shall compile other policy studies as determined by the executive director of the council or as requested by the governor, lieutenant governor, or speaker of the house of representatives to assist in policy development.~~

~~(b) The Criminal Justice Policy Council shall report its findings and related recommendations to improve juvenile justice policies to the governor and the members of the legislature on or before January 15 of each odd-numbered year.~~

~~(c) The Criminal Justice Policy Council may incorporate its findings and recommendations under this section into its report required under Section 413.013, Government Code [the information compiled by the Texas Juvenile Probation Commission and the Texas Youth Commission under this section and submit the council's findings and recommendations at least annually to the governor and both houses of the legislature showing the primary reasons for any deviation and the effect of the implementation of the sanctions guidelines on recidivism rates].~~

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Texas Family Code § 54.05 Hearing to Modify Disposition

I. Texas Family Code 54.05(d)

A hearing to modify disposition shall be held on the petition of the child and his parent(s), guardian(s), guardian ad litem or attorney or on the petition of the State, a probation officer, or the court itself. Reasonable notice of a hearing to modify disposition shall be given to all parties.

3 Issues are presented:

A. When must notice of the hearing be given?

1. There currently remains a split of authority in Texas between two (2) Courts of Appeals.

In the Matter of J.C., 556 S.W. 2d 119 (Tex. Civ. App.-Waco 1977)

Held that a Revocation Hearing held eight (8) days following the filing of the Petition to Modify was sufficient.

In the Matter of M.L.S., 590 S.W. 2d 626 (Tex. Civ. App.-San Antonio 1979)

Held that a Revocation Hearing held six (6) days following the service of the Petition to Modify was insufficient. The juvenile's attorney must be given ten (10) days to prepare for a Revocation Hearing.

2. Texas Family Code § 54.05(d)
Simply requires notice to be "reasonable".

Texas Family Code § 51.10(h)

Starts out promising, but then appears to limit ten (10) days to prepare for Adjudication and Transfer Hearings only.

In the Matter of J.C., 556 S.W. 2d 119 (Tex. Civ. App.-Waco 1977)

The safest course of action would be to provide defense counsel with at least ten (10) days from the date the juvenile is served and thus provided with notice of the obligations being made.

B. How must notice be given?

1. Texas Family Code § 54.05(d)
". . . Reasonable Notice of hearing to modify disposition shall be given to all parties."

Texas Family Code § 51.02(10)

Defines "party" as "the state, a child who is the subject of proceedings under this subtitle, or the child's parent, spouse guardian, or guardian ad litem."

2. One posted, Texas Family Code, enactment case dealing with a declaration of juvenile delinquency, the Texas Supreme Court held notice must be personally served as a process is required to revoke the probation of one already declared to be a juvenile delinquent. No one should be deprived of liberty without due process of law. State v. Casanova, 494 S.W. 2d 812 (Tex. 1973).

C. What must the petition to modify disposition state?

1. Texas Family Code § 54.03

Provides specific information regarding information for a petition. At a minimum, the petition to modify disposition should contain the following:

- a. the name, age and residence address of the child; the names and residence addresses of the parent, guardian or custodian of the child and the child's spouse, if any;
- b. the fact that the child was adjudicated delinquent and was placed on probation, including the dates of adjudication and disposition and the court that conducted the adjudication and disposition proceedings;
- c. those conditions of probation the child is believed to have violated should be set out verbatim from the probation order;
- d. with reasonable particularity, the time, place and manner of the child's acts believed to have violated those conditions must be set out;
- e. if the child is on probation for a misdemeanor adjudication, the prior misdemeanor or felony adjudication that would enable a TYC commitment upon revocation of probation; and
- f. a prayer for relief, such as a request that the juvenile court revoke the child's probation and commit him or her to the custody of the Texas Youth Commission.

2. Texas Family Code § 54.05

Does not state what language is required

ROBERT O. DAWSON, TEXAS JUVENILE LAW 217 (5TH ED. 2000)

II. Amending A Petition For Modification

A. Texas Family Code § 54.05

Does not specify when such circumstances present themselves, however, the general principle is that the petition can be amended if that can be done without substantial surprise prejudice to the juvenile.

B. Burden of Proof for Probation Violation

Texas Family Code § 54.05(f)

Proof by preponderance of the evidence is the standard since January 1, 1996. Consequently, many courts may rely on adult revocation case history for assistance.

1. Reasonable Probation Conditions:

Texas Family Code 54.05(f)

The juvenile court is authorized to revoke probation if the court finds that the child violated "a reasonable and lawful order of the court".

In the Matter of D.E.P., 512 S.W. 2d 789 (Tex. Civ. App.-Houston 14th District 1974)
Held that although the probation conditions were reasonable when imposed, subsequent events **beyond** the control of the juvenile caused them to become unreasonable.

2. Revocation for Failure to Pay

Probationers required to make periodic payments such as: Texas Family Code § 54.041(b) Restitution; Texas Family Code § 541.0411 Juvenile Probation Diversion Fund; Texas Family Code § 54.061 Probation Fees; Court costs, etc., probation may

E. Restrictions on TYC Commitments for Misdemeanors

Texas Family Code § 54.05(j)

The court may modify a disposition under Subsection (f) based upon a finding that a child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor, if:

1. the child has previously been adjudicated for a felony or misdemeanor on at least 2 previous occasions; and
2. regarding the previous adjudication, the conduct leading to adjudication occurred after a previous adjudication.

Under this rule, a violation of misdemeanor probation may substitute for the third misdemeanor offense and would enable commitment to TYC.

Example:

First adjudication (misdemeanor A or B), Second adjudication (misdemeanor A or B); then the court makes a finding of violation of probation. The modification will serve as the third misdemeanor adjudication.

A modification of prior felony adjudication will suffice in meeting the prior adjudication as a felony and can qualify for commitment to TYC.

3. Upcoming changes: Effective September 1, 2001

a) 77th Legislative Regular Session (2001) H.B. 1118 Section 28

Amending § 54.05(j) to § 54.05(k) and amending § 54.05(k)(2) as follows:

(2) of the previous adjudications, the conduct that was the basis for **one of** the adjudications occurred after the date of another previous adjudication.

This change allows for TYC commitment at a modification hearing for two previous adjudications.

b) 77th Legislative Regular Session (2001) H.B. 1118, Section 27

§ 54.05(h) A hearing shall be held prior to placement in a post-adjudication secure correctional facility for a period longer than 30 days or commitment to the Texas Youth Commission as a modified disposition. In other disposition modifications, the child and the child's parent, guardian, guardian ad litem or attorney may waive hearing in accordance with § 51.09.

Amended § 54.05(h) to require a modification hearing to be held prior to placement in a post-adjudication correctional facility for a 30-day period of time. This is currently the practice for placement in TYC.

F. Modification Hearing

Texas Family Code § 54.05(c)

There is no right to a jury at a hearing to modify disposition

1. In the Matter of A.M.B., 676 S.W. 2d 448 (Tex. App.-Houston {1st District} 1984)
The court held there was no violation of Article 5, Section 10 of the Texas Constitution as this court extrapolated from similar findings in adult criminal cases

that a revocation hearing is not a "trial" as the term is used by the Constitution because the defendant does not go to the penitentiary for probation violations, but due to the original conviction. Id. 450-1.

2. All rules of evidence are applicable in revocation proceedings.

In the Matter of R.A.B., 525 S.W. 2d 892 (Tex. Civ. App.-Corpus Christi 1975)
The court held illegally seized evidence inadmissible in a probation revocation hearing.

G. Waiver of Modification Hearing:

Current Law:

With the exception of a revocation hearing seeking commitment to TYC, all other disposition modification hearings can be waived in accordance with Texas Family Code § 51.09 by the child, child's parent(s), guardian(s), guardian ad litem or attorney.

77th Legislative Regular Session (2001) H.B. 1118, Section 27, amends Texas Family Code §54.05(h), as follows:

"A hearing shall be held prior to placement in a post-adjudication secure correctional facility for a period longer than 30 days or commitment to the Texas Youth Commission as a modified disposition. In other disposition modifications, the child and the child's parent, guardian, guardian ad litem, or attorney may waive hearing in accordance with Section 51.09."

As of September 1, 2001:

No waiver of a modification hearing will be permitted currently in TYC commitments or in placement for longer than 30 days in a post-adjudication secure correctional facility.

H. 2 Step Process Regarding Modification Hearings and Social History Reports

Texas Family Code § 54.05(e)

"After the hearing on the merits or facts, the court may consider written reports from probation officers, professional court employees or professional consultants in addition to the testimony of the other witnesses."

The first question to be considered is whether the juvenile court finds a violation of probation by a preponderance of the evidence. Secondly, the court may consider a social history report to determine what to do about the violation(s).

ROBERT O. DAWSON, TEXAS JUVENILE LAW, 222 (5TH ED. 2000)

I. If it Walks Like a Duck. . .

Procedural protections are guaranteed under Texas Family Code § 54.05 regardless of what a court may label its type of community supervision (i.e., probation).

In the Matter of M.A.S., 679 S.W. 2d 548 (Tex. App.-San Antonio 1984)

The court held that the child was entitled to notice and a hearing prior to termination of the modified conditional liberty granted by the trial court which it called "delayed disposition". The "delayed disposition" carried with it the conditions of an otherwise formal disposition.

J. No Removal From Home or TYC Placement Findings Required

Unlike Texas Family Code § 54.04(i), no such findings are required under Texas Family Code §54.05.

In the Matter of H.G., 993 S.W. 2d 211 (Tex. App.-San Antonio 1999)

Texas Family Code § 54.05(f) allows a trial court to modify a disposition by ordering commitment if it finds "that a child violated a reasonable and lawful order of the court".

K. Statement of Reasons:

Texas Family Code § 54.05(i)

"The court shall specifically state in the order its reasons for modifying the disposition and shall furnish a copy of the order to the child".

In the Matter of K.W.H. v. State, 596 S.W. 2d 248 (Tex. Civ. App.-Texarkana 1980)

The court held Section 54.05(i) contemplates more than merely reciting the statutory language or using general terms.

L. Revocation of Probation Following its Expiration

In the Matter of R.G., 687 S.W. 2d 774 (Tex. App.-Amarillo 1985)

Court of Appeals affirmed trial court's revocation of probation based upon a petition to modify filed within the probationary term, even though the hearing on modification was held following the expiration of the probationary term.

It was held that when a petition to modify disposition is filed within the probationary term for an alleged violation of the terms and conditions of probation which occurred within the probationary period and the court proceeds to orderly disposition of that petition within a reasonable time with full regard for the procedural and substantive rights of the child, the court has authority to modify the prior disposition specified by the prior order.