

Disposition and Modification

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Disposition and Modification

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Terminology

Despite the fact that most juvenile delinquency cases center upon what would otherwise be criminal law violations, the terminology used in the courtroom is somewhat different than what you hear in criminal matters. This is because “juvenile law” is a mixture of both criminal and family law principles and procedures. It is a “quasi-criminal” proceeding.

| <u>Criminal Law Term</u> | <u>Equivalent Juvenile Term</u> |
|---------------------------|---|
| Arrest | Taken into Custody |
| Guilty | Did Engage in Delinquent Conduct |
| Not Guilty | Did Not Engage in Delinquent Conduct |
| Criminal Offense | Delinquent Conduct |
| Convicted | Adjudicated |
| Punishment | Disposition |
| Information or Indictment | Petition |
| Defendant | Respondent |
| State | Petitioner |
| Deferred Adjudication | Deferred Prosecution (deferred adjudication does not exist in the juvenile code; however, deferred prosecution is the closest in concept) |
| Insanity | Lack of Responsibility |
| Competency | Fitness to Proceed |
| Bail or Bond | *does not exist; juveniles are either released or detained |
| Pre-Trial Supervision | PAT Supervision (Pre-Adjudication Team) |

The Adjudication Hearing Juvenile Justice Code §54.03

References to code sections throughout this paper are to the Family Code unless otherwise specified.

Adjudication

Like criminal cases, juvenile cases are bifurcated. The two phases of a juvenile case are adjudication and disposition. Adjudication is essentially a hearing or trial on the merits of the charge petitioned by the government. Essentially, adjudication is the finding of guilt or not. If a juvenile has been found to have engaged in delinquent conduct or conduct indicating a need for supervision (the equivalent of guilt), the court or jury must next decide whether or not disposition (the equivalent of punishment) should be made. If so, the appropriate disposition is determined in a disposition hearing.

Before proceeding to an adjudication hearing, the prosecuting attorney must first determine whether to proceed with the case as an ordinary delinquency or seek a determinate sentence. Determinate Sentencing is not within the scope of this paper, but determinate sentencing must be approved by a grand jury and then is presented in the juvenile court. Certification, again beyond the scope of this paper, is *not* a question for adjudication but rather a request by the prosecutor to transfer the case to adult court for further proceedings. For a certification to occur, there can be no adjudication.

In any event, adjudication must occur before we consider whether or not disposition is necessary. Adjudication can result from either a plea of true (a stipulation) or a trial by court or by jury.

The Disposition Hearing Juvenile Justice Code §54.04

Deferred Prosecution

Deferred prosecution is often thought of as a disposition to a juvenile case; however, by its very nature it is not a disposition because a disposition can only follow adjudication. When the prosecution of the child is deferred, there is no adjudication. Deferred prosecution is an alternative to seeking a formal adjudication. It is essentially a period of supervision without adjudication. It is a contract between the juvenile and the court, and sometimes the prosecutor. Upon successful completion of the terms of the contract, the court will dismiss the prosecution.

Section 53.03(e) provides the authority for the prosecutor or the probation department to place a child on deferred prosecution. And, §53.03(i) provides authority for the court to defer prosecution.

Offenses under Penal Code Sections 49.04, 49.05, 49.06, 49.07 and 49.08 (intoxication offenses) as well as third or subsequent offenses under Alcoholic Beverage Code Section 106.04 or 106.041 (consumption of alcohol by minor and driving under the influence of alcohol by a minor) are not subject to deferred prosecution.

The court may add to the period of deferred prosecution following a previous order of deferred prosecution but the combined period may not exceed one year. §53.03(j).

Disposition Hearing

The disposition hearing, the second phase in the bifurcated trial, shall be separate, distinct, and subsequent to the adjudication hearing. §54.04(a). The only question at **adjudication** is whether the respondent engaged in the conduct as alleged in the petition. The two questions at **disposition** are: (1) is disposition necessary and (2) what to do with a respondent who has been adjudicated. Because of the importance of this separation, the Houston Court of Appeals held it was reversible error for the juvenile court to permit the prosecutor to argue to the jury during adjudication that it should adjudicate the respondent for her own good. *In the Matter of C.L.*, 930 S.W.2d 935 (Tex.App. – Houston [14th Dist.] 1996).

Purpose of Disposition Hearing

With regard to the proper disposition of a child, the court is guided by the public purposes set out in §51.01:

- (1) to provide for the protection of the public and public safety;
- (2) consistent with the protection of the public and public safety:
 - (A) to promote the concept of punishment for criminal acts;
 - (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and
 - (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
- (3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
- (4) to protect the welfare of the community and to control the commission of unlawful acts by children;
- (5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and
- (6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

Required Finding For Disposition

No disposition may be made unless the court finds that either the child is in need of rehabilitation or that the protection of the public or the child requires that a disposition be made. If the court does not so find, the court must dismiss the child and enter a final judgment without any final or formal disposition. §54.04(c).

In essence this means that not all juveniles require disposition (punishment and rehabilitation). Unlike adults in criminal court, punishment is not always necessary.

The proper phase of the trial for a probation officer to testify that a juvenile is in need of rehabilitation is in the disposition phase and not adjudication. *In the Matter of J.K.R.*, 986

S.W.2d 278 (Tex.App. – Eastland 1998); therefore, it is improper for a prosecutor to argue a need for rehabilitation or teaching a lesson during the adjudication hearing.

Judicial Discretion

The trial judge has wide discretion at the disposition hearing. Unless the judge acts arbitrarily or unreasonably, the ruling will not be overturned. A judge acts arbitrarily or unreasonably if a ruling is made without reference to guiding rules or principals which would thereby be an abuse of discretion. *In the Matter of T.K.E.*, 5 S.W.3d 782 (Tex.App. – San Antonio 1999).

Generally, No Right to Jury

In ordinary delinquency cases and CINS cases, there is no right to a jury at the disposition hearing. The right to a jury determination for disposition exists *only* where the child is in jeopardy of a determinate sentence. §54.04(a).

Transfer of Disposition to County of Child's Residence

Interestingly, the court of adjudication need not be the same court that determines disposition. When a child has been found delinquent or in need of supervision, the juvenile court may transfer the case and transcripts of records and documents to the juvenile court of the county where the child resides for disposition of the case. It is not necessary that the receiving court consent to the transfer. §51.07.

Progressive Sanctions Model Discretionary

The juvenile court and probation department are no longer required to report deviations from the progressive guidelines when conducting disposition hearings. Further, the code now recognizes that deviation from the model in some cases is highly desirable. §59.001(5).

Statement of Reasons for Disposition

Section 54.04(f) provides that the court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child.

Evidence at the Disposition Hearing

At the disposition hearing, the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. §54.04(b). These reports might also contain a thorough social history, school records, psychological or psychiatric evaluations, and other prior juvenile records. Although reports from probation and other employees or consultants are hearsay, they are expressly admissible by statute, and generally, these reports are ordered by the court as a matter of course.

The attorney for the child is entitled to review all written material which is to be considered in disposition. Specifically, by statute, the court shall provide access to this material *prior to* the hearing. The trial court may properly consider such reports, even if defense counsel failed to read them, so long as the child and his attorney were provided access to them. *In the Matter of L.T.F.*, 656 S.W.2d 179 (Tex.App. 1983). And, though counsel is permitted to inspect the materials, the court may order counsel not to reveal items to the child or the child's parent or guardian if such disclosure would materially harm the treatment and rehabilitation of the child or

would substantially decrease the likelihood of receiving information from the same or similar sources in the future. §54.04(b).

Social History/Probation Report

A social history and evaluation report is a pre-disposition report that is prepared by the juvenile probation department and should, at a minimum, include the following: (1) detailed information on the father and mother; (2) detailed information on the child's siblings; (3) educational data on the child, including copies of school records; (4) prior involvement with penal offenses and the disposition of each; (5) prior informal adjustments or deferred adjudications; (6) details about the child's current attitude during personal contacts; (7) details about the child's present circumstances, including hobbies, habits, employment, etc.; (8) details about the child's religious activities, if any; (9) details about any serious physical or mental illnesses of the child, including prior contact with psychologists and psychiatrists; and (10) recommendations of the juvenile probation officer as to what disposition should be made, including how the child can best be rehabilitated in the least restrictive environment which could realistically accomplish rehabilitation.

If the disposition hearing is before a jury in a determinate sentence case, the social history report may not be admitted into evidence before the jury. §54.03(d). Though the social history report is not admissible before the jury, the prosecutor or the attorney representing the respondent should consider utilizing helpful information from the report via witness testimony.

Also, consider providing helpful information directly to the report writer for inclusion. If the probation officer is not willing to include additional information or seems skeptical of such, have these witnesses prepare affidavits or be available for testimony.

Due Process Claims

Section 54.04(b) specifically authorizes the use of reports even though persons who have contributed to them are not called as witnesses to testify. In concluding that §54.04 was not unconstitutional as denying due process, the court stated: "In the disposition hearing, there is good reason to give the judge the latitude afforded by §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." *Tyler v. State*, 512 S.W.2d 46 (Tex.Civ.App. – Beaumont 1974).

Further, courts have held that the legislature did not intend to subject the social history report to strict evidentiary standards such as hearsay and Rules 402, 403, 404 and 405. *In the Matter of A.A.A.*, 528 S.W.2d 337 (Tex.Civ.App. – Corpus Christi 1975); *In the Matter of A.F.*, 895 S.W.2d 481 (Tex.App. – Austin 1995).

5th Amendment Privilege

In some instances, the probation officer will attempt to interview the respondent as the social history report is being prepared. Whether this interview occurs pre-disposition or post-disposition, the respondent still enjoys a right against self-incrimination; therefore, the interviewer must warn the respondent of his privilege against self-incrimination and secure a waiver.

Evidence from the Adjudication Hearing

There is no reason in law for either party to formally move for the introduction of evidence from the adjudication hearing during the disposition hearing for the court to continue to consider such evidence. The court can consider adjudication evidence in making the disposition decision even if the adjudication evidence is not formally re-introduced at the disposition hearing. *In the Matter of A.N.M.*, 542 S.W.2d 916 (Tex.Civ.App. – Dallas 1976).

Detention Center Documents

Although reports of conduct, specifically misconduct, from the detention center staff will likely be included in the social history report, nothing in the law prohibits the detention center staff from transmitting that information to the court directly for consideration at disposition. In fact, §54.04(b) specifically contemplates such reports by its all encompassing language “written reports from probation officers, professional court employees, or professional consultants.” §54.04(b); *In the Matter of J.A.W.*, 976 S.W.2d 260 (Tex.App. – San Antonio 1998).

In practice, the detention center staff will forward misconduct to the probation officer for inclusion; however, it is seldom that detention center staff will go out of their way to forward exemplary conduct information to the probation officer. In such cases, the attorney for the respondent may ask for such records or testimony.

Restitution Evidence

Though we have seen many of the normal rules of evidence are relaxed during disposition hearings, with regard to restitution, the normal rules of evidence apply and require competent evidence be admitted to establish restitution. The victim or owner of the property must appear at the disposition hearing and testify, though not an expert, as to the value of the property or actual damages, unless the child and the attorney for the child stipulate to what the testimony would be or to the appropriateness of the restitution. Am.Jur.Evidence, Section 253; *Wilson v. Williamson*, 586 S.W.2d 148 (Tex.Civ.App. 1979); §54.041(b).

An insurance company is considered a victim for purposes of restitution. *In the Matter of M.S.*, 985 S.W.2d 278 (Tex.App. – Corpus Christi 1999).

In practice, restitution hearings are rare as most respondents agree to pay reasonable restitution as part of a plea-bargain, but where the respondent (or his parents/guardian) disagree with the restitution, the proper vehicle is a restitution hearing.

Lack of Responsibility Evidence Not Proper at Disposition

A juvenile’s lack of responsibility as a result of mental illness is not a proper issue during the hearing on disposition because the issue must be resolved in the adjudication hearing. *In re D.B.*, ___ S.W.3d ___, 2005 Lexis 8144 (Tex.App. – Dallas 2005).

Section 55.51(c) provides that the issue of whether a child is not responsible for the child's conduct as a result of mental illness shall be tried to the court or jury at the adjudication hearing.

However, assuming the evidence does not rise to a level of lacking responsibility, mental illness or retardation evidence may be used at disposition to explain either why disposition is not necessary or why disposition should be mitigated.

Parental Right to Address Court

After all the disposition evidence is complete but before the arguments of counsel, parents have a right to address the court and give an oral statement concerning the needs or strengths of the child or the family or any other information relevant to a disposition. There is no requirement for the oral statement to be given under oath and **the statement is not subject to cross examination** except the judge may ask clarification questions. §61.105.

Unadjudicated Conduct

During a disposition hearing a child may (1) admit having engaged in delinquent conduct or conduct indicating a need for supervision for which the child has not been adjudicated, and (2) request the court to take the admitted conduct into account in the disposition of the child.

§54.045(a). If the prosecuting attorney agrees in writing, the court may take the admitted conduct into account. §54.045(b). This would bar further prosecution of the unadjudicated conduct. But, be careful with unadjudicated conduct in another county over which exclusive venue lies in the other county. If dealing with another county, the court must obtain written permission from the prosecuting attorney for that county. §54.045(c).

Chapter 37 of the Texas Code of Criminal Procedure **is applicable** to juvenile proceedings. §51.17(c); thus overruling *In re C.J.M.*, 167 S.W.3d 892 (Tex.App. – Fort Worth 2005). With this legislative change a few years ago, extraneous bad acts and offenses, character evidence, prior juvenile history, and basically any matter the court deems relevant to sentencing is admissible. This is an important change to understand as it significantly broadens the scope of disposition hearings.

Dispositions Available Following Adjudication

Once the juvenile court makes the findings required by §54.04(c) and §54.04(i) it may employ the dispositional powers authorized in the Family Code. These include probation (§54.04), TYC commitment (§54.04), driver's license suspension (§54.042), orders affecting parents (§§54.06, 54.041, 54.061), restitution (§54.048), sex offender registration (Chapter 62, Code of Criminal Procedure), and HIV testing (§54.033).

Probation

The child may be placed on probation on such reasonable and lawful terms as the court may determine. Probation may be (A) in the child's own home or in the custody of a relative or other fit person; or (B) outside the child's home in a suitable foster home or suitable public or private institution or agency (except TYC). §54.04(d)(1).

The term or period of probation may be any period except that probation may not continue on or after the child's 18th birthday. And the probation period may be extended for any period, before the probation ends, and shall not extend to or after the 18th birthday. §54.04(l).

A minimum probation period of two years is applicable to sexual offenses punishable as a felony, except again, probation may not extend to or after the 18th birthday. §54.04(p).

Placement Outside the Home - Findings (Probation or TYC)

Placement on probation outside the child's home requires a finding by the court or jury that the child cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation in the child's home. §54.04(c). This finding is made either by the court or the jury, depending upon who is determining disposition.

While the jury (in a determinate sentence case) may find supervision outside the home is necessary, the court is required to make additional findings before removing a child from his home, either by placement outside the home on probation or placement at TYC. The court must make the following additional findings: (A) it is in the child's best interests to be placed outside 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. §54.04(i).

All three findings must be made to authorize removing the child from his or her home. The findings may be based upon the adjudication evidence as well as the disposition evidence. The evidence must be sufficient to support these findings; otherwise, in an appeal, the disposition may be set aside. For cases concerning insufficient evidence for such placement see *In the Matter of A.S.*, 954 S.W.2d 855 (Tex.App. – El Paso 1997), *In the Matter of K.L.C.*, 972 S.W.2d 203 (Tex.App. – Beaumont 1998), *In the Matter of J.S.*, 993 S.W.2d 370 (Tex.App. – San Antonio 1999).

Confinement in TYC

In **felony offenses** where the petition was not approved by a grand jury under §53.045, the court or jury may commit the child to the Texas Youth Commission without a determinate sentence (i.e. indeterminate commitment). §54.04(d)(2).

Note, in 2007 our legislature modified §54.04(d)(2) as follows:

54.04(d)(2) if the court or jury found at the conclusion of the adjudication hearing that 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 requirements of Subsection (s) or (t) are met, of the grade of misdemeanor,~~] and if the petition was not approved by the grand jury under Section 53.045, the court may commit the child to the Texas Youth Commission without a determinate sentence.

Subsections (s) and (t) were repealed, thus making it impossible to assess confinement in TYC for a *misdemeanor offense* disposition. [Under the prior law, two prior misdemeanor adjudications or one prior felony adjudication could result in a disposition to TYC for a misdemeanor offense.]

In short, to qualify for commitment to TYC, the juvenile must be charged with a felony offense under indeterminate sentencing or an enumerated offense under determinate sentencing!

“Delinquent conduct that violates a penal law of this state of the grade of felony does not include conduct that violates a lawful order of a county, municipal, justice, or juvenile court under circumstances that would constitute contempt of that court.” §54.04(u).

All confinement to TYC, not based upon a determinate sentence, is for an indeterminate term. In a TYC commitment, the juvenile court loses any further jurisdiction of the case; and instead, the commitment gives jurisdiction of the case exclusively to TYC.

Probation Conditions

Section 54.04(d)(1) allows for such reasonable and lawful terms as the court may determine. These conditions must be written and provided to the child. §54.04(f).

Limits: There are two primary limitations upon the court's discretion in setting the conditions of probation: (1) the vagueness doctrine and (2) the prohibition on delegating to others the court's authority to set the conditions. See *In the Matter of R.A.B.*, 525 S.W.2d 892 (Tex.Civ.App. – Corpus Christi 1975) and *K.K.B. v. State*, 609 S.W.2d 824 (Tex.Civ.App. – Texarkana 1980).

School: Under §54.043, if the court places a child on probation and requires as a condition of probation that the child attend school, the probation officer shall monitor the child's school attendance and report to the court if the child is voluntarily absent from school.

Monetary Conditions: Section 54.048 authorizes the juvenile court to order restitution of loss to the victim of the offense; Section 54.0411 requires payment of twenty dollars for costs of court; and Section 54.061 authorizes payment of up to fifteen dollars per month in probation supervision fees.

No Contact: The court may 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. §54.041(a)(2).

Counseling: The court may also require all persons living in the same household at attend counseling to aid in rehabilitation or strengthen the child's household. §54.041(a)(3).

Community Service: Section 54.044(a) mandates community service as a condition of probation. The court shall require as a condition of probation that the child work a specified number of hours at a community services project approved by the court and designated by the juvenile probation department.

The court may excuse community service by entering a finding that the child is physically or mentally incapable of participating in the project; that participating in the project will be a hardship on the child or the family of the child; or that the child has shown good cause that community service should not be required. §54.044(a).

Handguns: Section 54.0406 requires the court to impose a condition of disclosure in any case in which an element includes the possession, carrying, using, or exhibiting of a handgun. Not later than the 30th day after the date the court places the child on probation, the child is required to notify the probation officer the manner in which the child acquired the handgun, including the date and place of and any person involved in the acquisition. The probation officer is then required to pass that information along to the appropriate law enforcement agency. §54.0406(b). The child is protected by use immunity when making this disclosure. §54.0406(c).

Sex Offender Treatment: The court *may* require a sex offender treatment program which includes counseling and polygraph examinations. §54.0405. Although it appears the

treatment program and its features are mandatory, they are not. Parents or guardians may be required to attend special counseling sessions and participate with the child. §54.0405(g).

Graffiti: Special conditions for graffiti offenses include possible restoration of the damaged property and classes with instructions in self-responsibility and empathy. §54.046.

Alcohol Violations: Community service and license suspension are addressed in §54.047 for offenses to include purchase of alcohol by a minor, attempt to purchase alcohol by a minor, consumption of alcohol by a minor; possession of alcohol by a minor, and misrepresentation of age by a minor. Community service must be related to education about or prevention of misuse of alcohol.

Animal Cruelty: Section 54.0407 requires a child found delinquent for cruelty to animals to participate in psychological counseling for a period to be determined by the court.

Desecrating Cemetery or Abusing Corpse: Section 54.049, enacted in 2005, requires the court to order restitution for damages. If the child is financially unable to make restitution the court may order the child to perform community service to satisfy the restitution or may order a parent to make the restitution.

Driver's License Suspension

Special provisions under §54.042 allow for license suspensions that are either mandatory or discretionary and vary in length.

Graffiti statute violations – the court may (discretionary) order suspension or deny issuance of license or permit for *up to 365 days* on a first offense or *for 365 days* for a subsequent offense.

Drugs/Alcohol – DWI; vehicular assault; manufacture, sale, delivery, possession, transportation or use of alcoholic beverage; use, possession, sale, delivery, or manufacture of a controlled substance, a dangerous drug, or a volatile chemical – court shall (mandatory) order suspension or deny issuance for period of 365 days.

Any adjudication – court may (discretionary) order suspension or deny issuance for a period not to exceed 12 months if the court finds the child engaged in delinquent conduct or conduct in need of supervision, other than conduct otherwise specifically described (alcohol, graffiti, drugs).

Probation Violations – court may (discretionary) require a condition of probation that if the child violates the probation, the court may order DPS to suspend or deny issuance of a license for a period not to exceed 12 months. If the court makes this a condition of probation, upon violation, the court may order suspension.

A child whose license is suspended may apply for an occupational license if otherwise eligible.

Modification of Disposition Juvenile Justice Code §54.05

The Modification Hearing

Any disposition, except a commitment to TYC, may be modified by the juvenile court until the child reaches his 18th birthday or the child is earlier discharged by the court or operation of law. Except for commitment to TYC, all dispositions automatically terminate when the child reaches his 18th birthday. §54.05.

Some courts and prosecutors refer to this as a “petition to reopen,” although statutorily it is a modification (a petition to modify disposition). It can also be referred to as a “VOP” or “violation of probation” petition.

Essentially, a petition to modify is akin to a motion to revoke probation in adult criminal cases.

Petition and Notice Requirements

The code states only that reasonable notice shall be given, but it does not specify what is reasonable. §54.05(d). This has resulted in a split among the courts. The Waco court holds that ten days notice is not required and upheld a revocation based upon 8 days notice. *In the Matter of J.C.*, 556 S.W.2d 119 (Tex.Civ.App. – Waco 1977). But the San Antonio court holds that the juvenile’s attorney must be given at least 10 days to prepare for a revocation hearing. *In the Matter of M.L.S.*, 590 S.W.2d 626 (Tex.Civ.App. – San Antonio 1979). Until this conflict is resolved, the proper remedy is to file a motion for continuance where counsel believes he has not been given adequate notice of the issues and time to prepare a defense. If the record does not show when the child was given notice, but the child’s attorney announced ready did not file a motion for continuance, and the child and his parents were present and fully advised by the court as to the issues before the court, reasonable notice is presumed. *In the Matter of D.E.P.*, 512 S.W.2d 789 (Tex.Civ.App. 1974).

Notice must be given to all parties. §54.05(d). But, again, the code does not state how this notice is to be given. Our only guidance comes from case law which precedes the enactment of the present Family Code. In *Franks v. State*, 498 S.W.2d 516 (Tex.Civ.App. – Texarkana 1973), the court held notice must be personally served upon the minor. The court relied upon due process concerns articulated in *State v. Casanova*, 494 S.W.2d 812 (Tex.Sup. 1973).

Notice must be given to the child and a least one of the adults in his or her life.

The code does not specify what must be included in a petition to modify disposition. However, the safe practice would be to follow the general requirements for a petition for adjudication or transfer. The petition to modify should articulate the conditions of probation the child is alleged to have violated and the manner and means in which the child is alleged to have acted in the violation. *Texas Juvenile Law*, Robert O. Dawson (6th Ed. 2004). And, a petition to modify disposition is not unlike a motion to revoke probation in adult cases. *In the Matter of R.A.B.*, 525 S.W.2d 892 (Tex.Civ.App. 1975).

Amending a Petition for Modification

The code does not specify the circumstances under which a petition for modification may be amended. However, the general principle is that the petition can be amended if that can be done without substantial prejudice to the respondent. *Texas Juvenile Law*, Robert O. Dawson (6th Ed. 2004).

No Right to Jury

There is no right to a jury at a hearing to modify disposition. §54.05(c).

Any Party Can Request Modification

A hearing to modify disposition shall be held on the petition of the child and his parent, guardian, 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. §54.04(d). Because any party may petition for a modification, the court is given flexibility to reward good behavior as well as address negative behaviors.

Waiver

In modifications other than placement in a secure facility for a period longer than 30 days or commitment to TYC, the child and the child's parent or attorney may waive the hearing in accordance with Section 51.09. §54.05(h). For placement in a secure facility, the court must hold a hearing which cannot be waived.

Probation Violations

A modification related to a violation of probation is a two-step process: First, the court must determine whether or not the child violated a condition of probation. Second, if the court found the violation to be true, the court must determine what to do about the violation. The court will be permitted to review social history reports from probation officers, professional court employees, or professional consultants in addition to the testimony of other witnesses to determine the appropriate modification. §54.05(e).

Appointment of Counsel

Section 51.101(e) provides the court shall determine indigence if a motion or petition is filed under Section 54.05 seeking to modify disposition by committing the child to TYC or placing the child in a secure correctional facility. A court making a finding of indigence shall appoint an attorney to represent the child on or before the fifth working day after the petition or motion has been filed.

Standard of Proof

Section 54.05(f) provides a disposition may be modified if the court finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court.

Plea of True

Revocation may be based on a violation of probation admitted by the respondent in a plea of true to the petition. *Texas Juvenile Law*, Robert O. Dawson (6th Ed. 2004).

Statement of Reasons

Section 54.05(i) provides that 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.

Revocation for Failure to Pay

Probation can be revoked for failure to pay only if the probationer had the ability to pay and deliberately refused to do so. The burden is on the probationer to prove by a preponderance that she did not have the ability to make the payments as required. *In the Matter of M.H.*, 662 S.W.2d 764 (Tex.App. – Corpus Christi 1983).

Modifying to Extend Probation Term

If the term of probation will expire before the 18th birthday, the probation may be extended. A motion or petition must be filed seeking extension before the probation term expires, otherwise, the court loses jurisdiction to modify. §54.05(l). Further, if the petition to extend is timely filed, the court must act on the petition to extend before the first anniversary of the date on which the period of probation expires. §54.05(l).

Modifying Disposition to Require Secure Placement

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 TYC as a modified disposition. §54.05(h). The hearing may not be waived.

Commitment to TYC as an Option

Not for CINS

A disposition based solely upon a finding that child engaged in conduct indicating a need for supervision may not be modified to commit the child to TYC. A new finding in compliance with Section 54.03 must be made that the child engaged in delinquent conduct that meets the requirements for commitment under Section 54.04.

Only for Felony Offense Modifications

In 2007, §54.05 was amended as follows:

§54.04(f) Except as provided by Subsection (j), a disposition based on a finding that 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 requirements of Subsection (k) are met, of the grade of misdemeanor,~~] may be modified so as to commit the child to the Texas Youth Commission if the court after a hearing to modify disposition finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court.

This amendment removes misdemeanor offenses from modification to TYC, leaving only felony offenses and determinate sentence offenses eligible for commitment to TYC.

Not for Misdemeanors

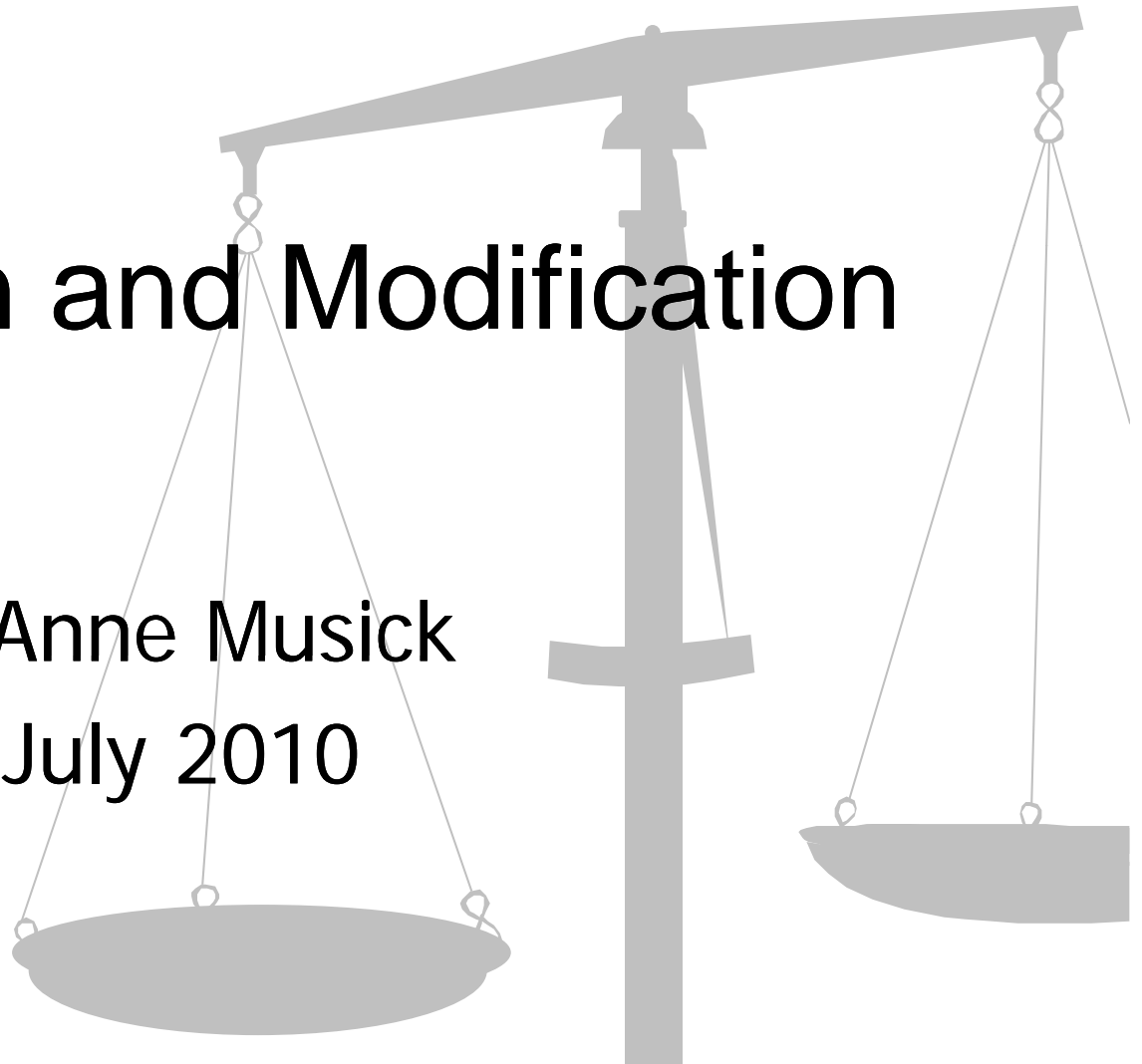
In repealing §54.05(k), the legislature eliminated the possibility that a misdemeanor disposition could be modified to include commitment to TYC.

Right to Appeal

The juvenile has the right to appeal under Section 56.01(c)(1)(C) and challenge the revocation decision. A finding of a single probation violation supported by evidence is sufficient to uphold a revocation. *In re T.R.S.*, 115 S.W.3d 318 (Tex.App. 2003).

Disposition and Modification

JoAnne Musick
July 2010



Terminology

Arrest = Taken into Custody

Defendant = Respondent

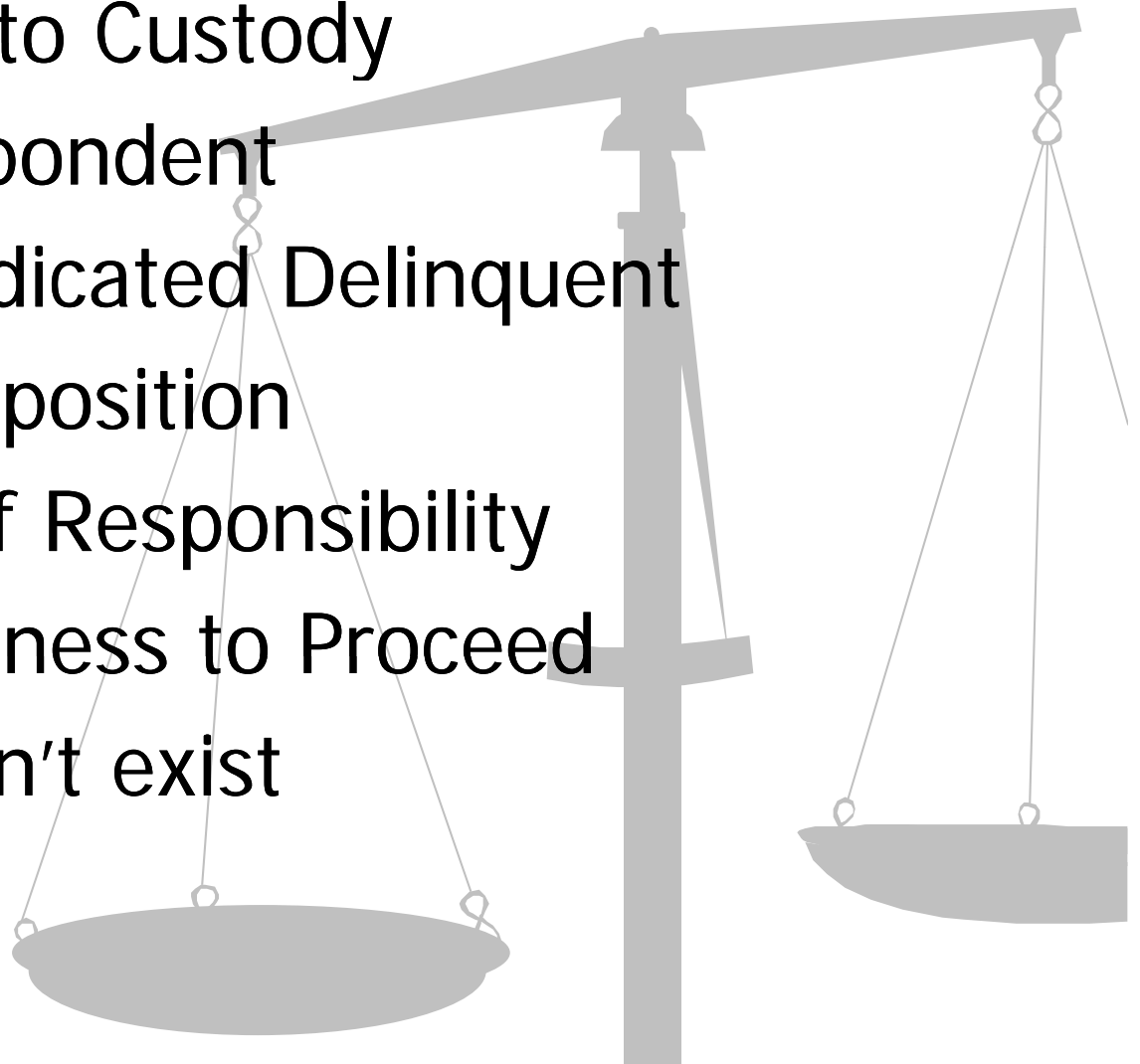
Convicted = Adjudicated Delinquent

Punishment = Disposition

Insanity = Lack of Responsibility

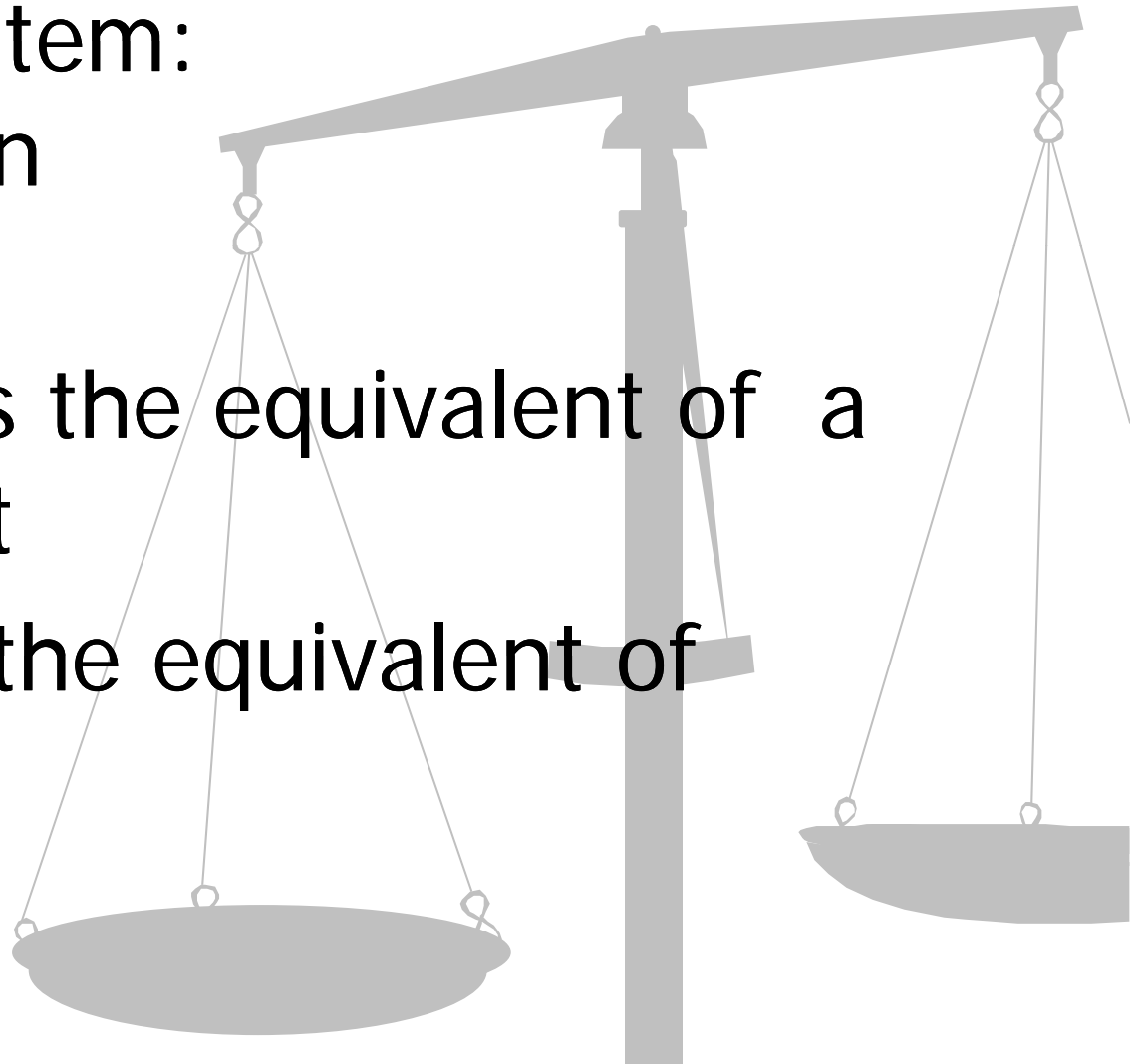
Competency = Fitness to Proceed

Bond/Bail = Doesn't exist



Juvenile Trials

- Bifurcated System:
Adjudication
Disposition
- Adjudication is the equivalent of a finding of guilt
- Disposition is the equivalent of punishment



Disposition Hearing Overview

- Is Disposition Necessary?
- What Happens in the Hearing?
 - Required Findings
 - Judicial Discretion
 - Right to Jury
 - Evidence
- What Dispositions are Available?



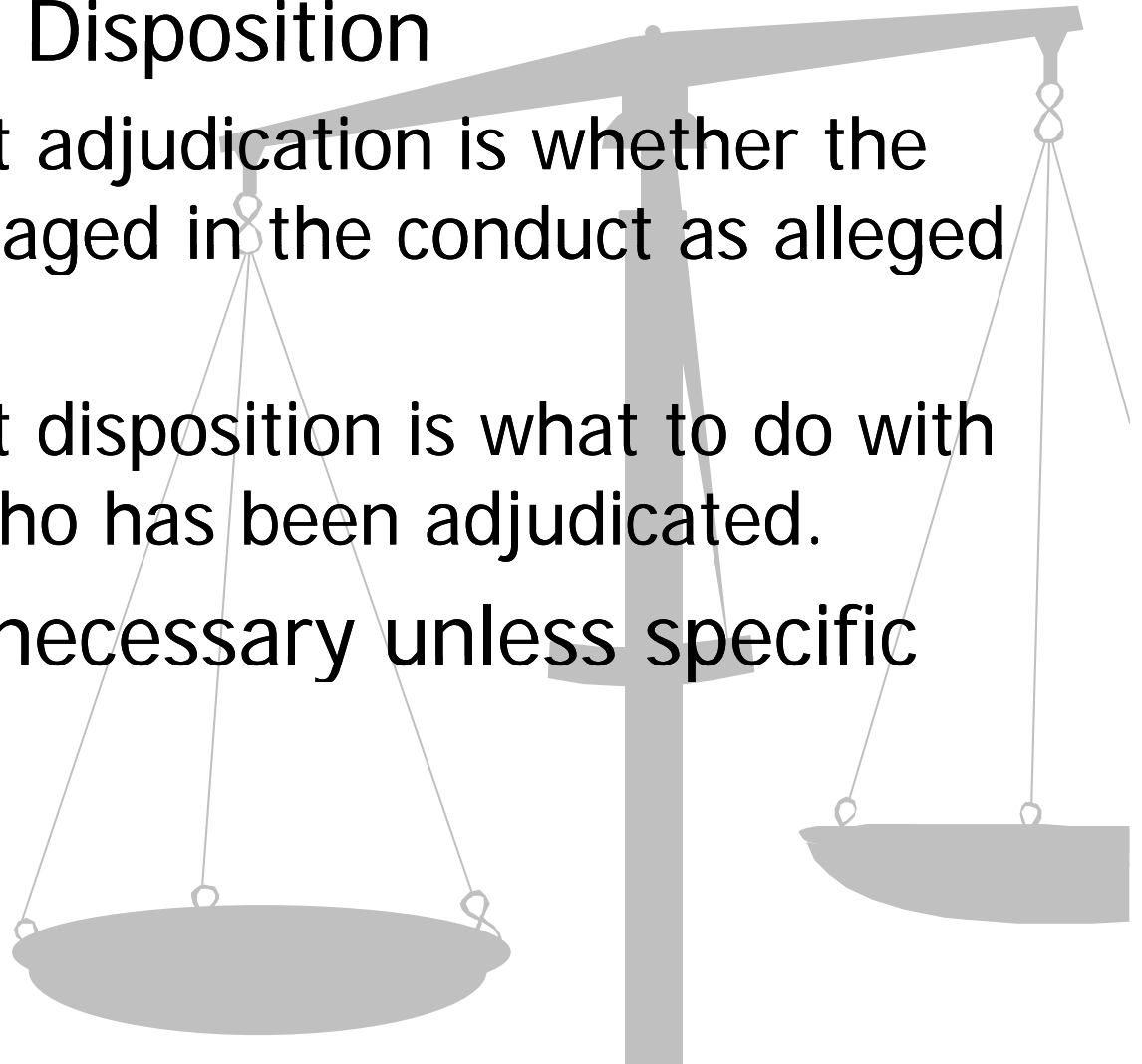
Is Disposition Necessary?

- Candidate for Deferred Prosecution?
 - Not an actual disposition
 - Disposition can only follow adjudication
 - Alternative to formal disposition
 - Not available for most intoxication offenses
 - Period is 6 mos – 1 year
- §53.03(i) - Court may grant
- §53.03(e) - Probation/Prosecutor may grant
- Immediately Sealable



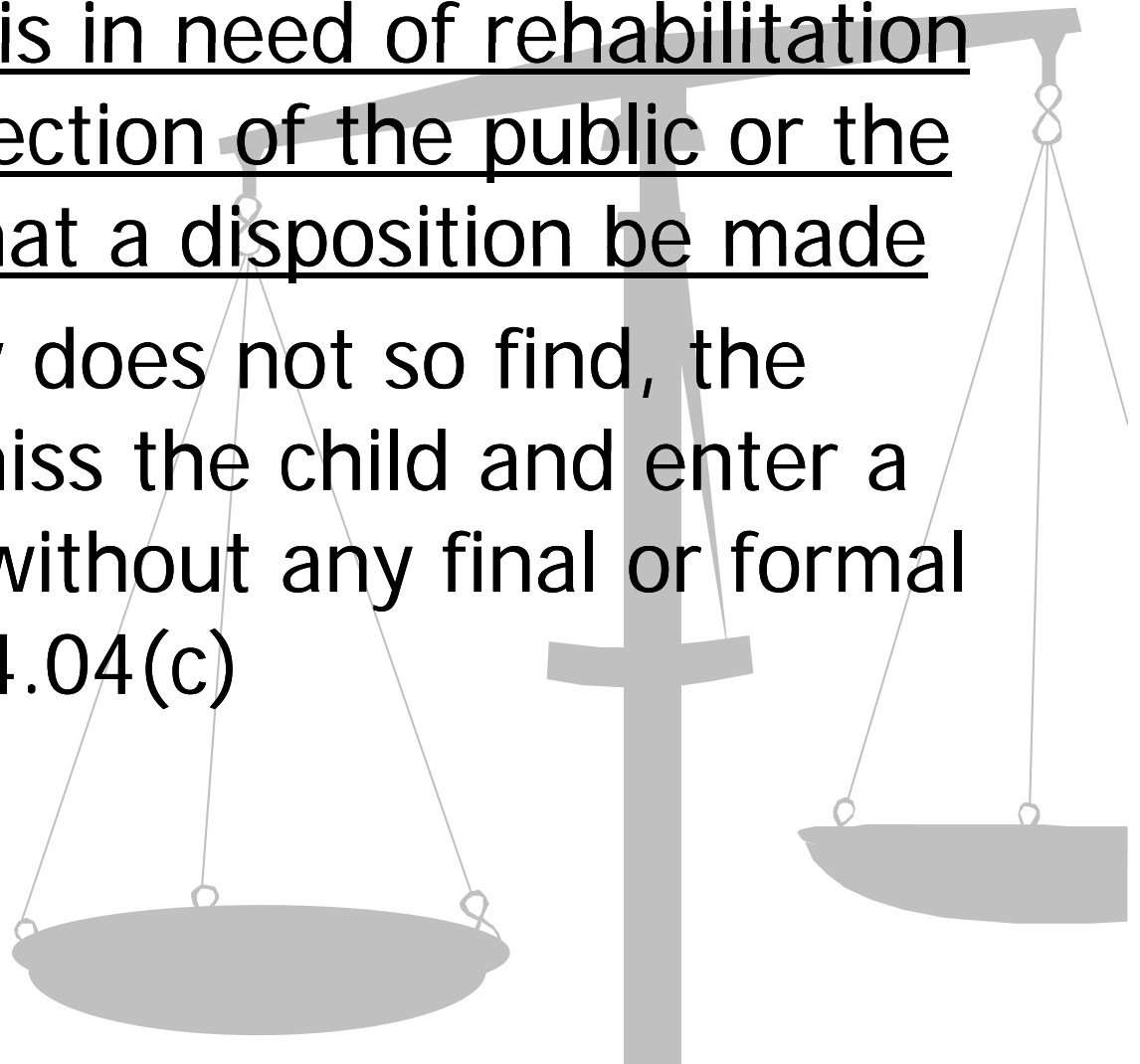
The Hearing

- Adjudication vs. Disposition
 - only question at adjudication is whether the respondent engaged in the conduct as alleged in the petition
 - only question at disposition is what to do with a respondent who has been adjudicated.
- Disposition not necessary unless specific findings made...



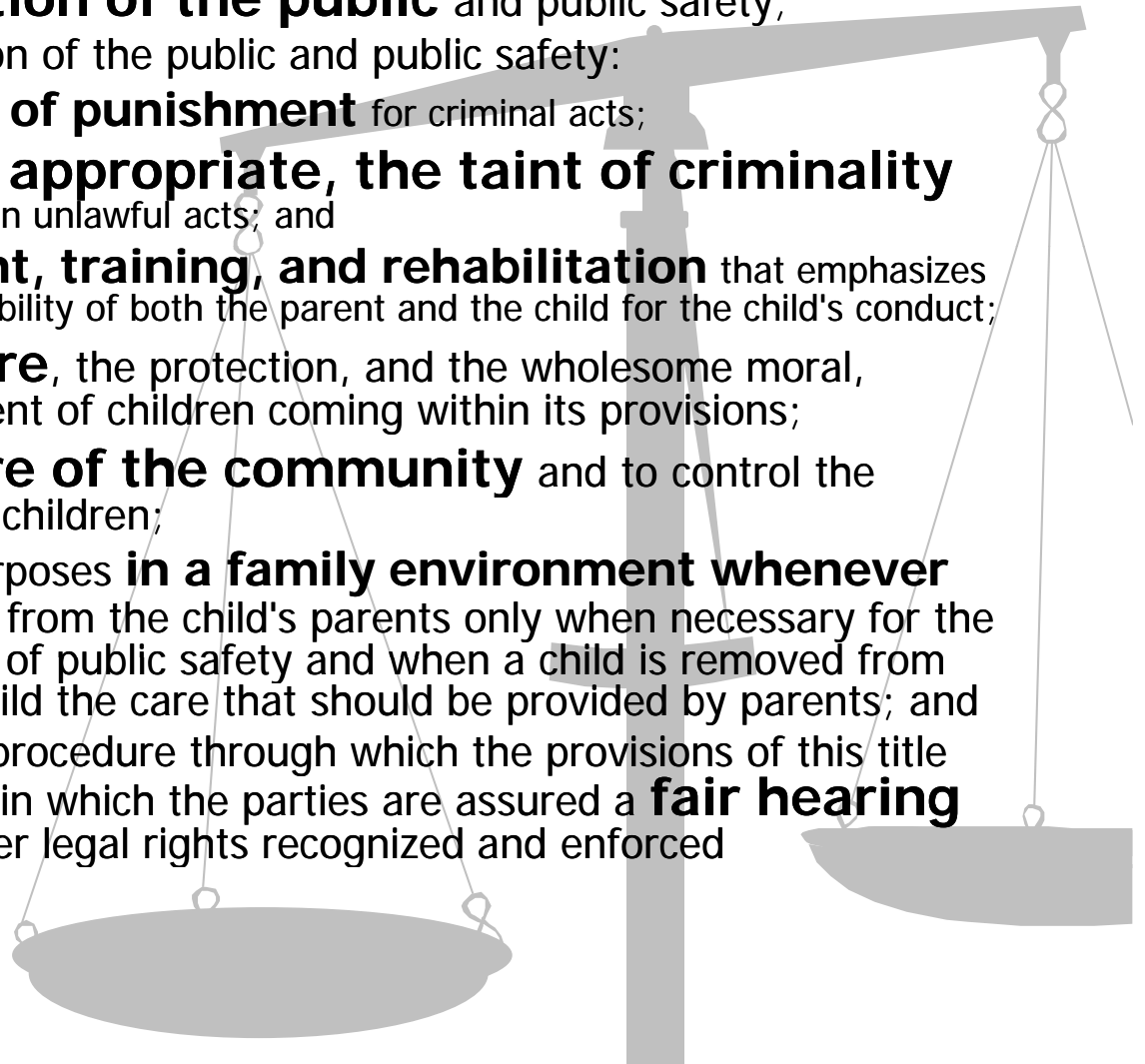
Required Finding

- Either the child is in need of rehabilitation or that the protection of the public or the child requires that a disposition be made
- If the court/jury does not so find, the court must dismiss the child and enter a final judgment without any final or formal disposition. §54.04(c)



Purposes of Hearing

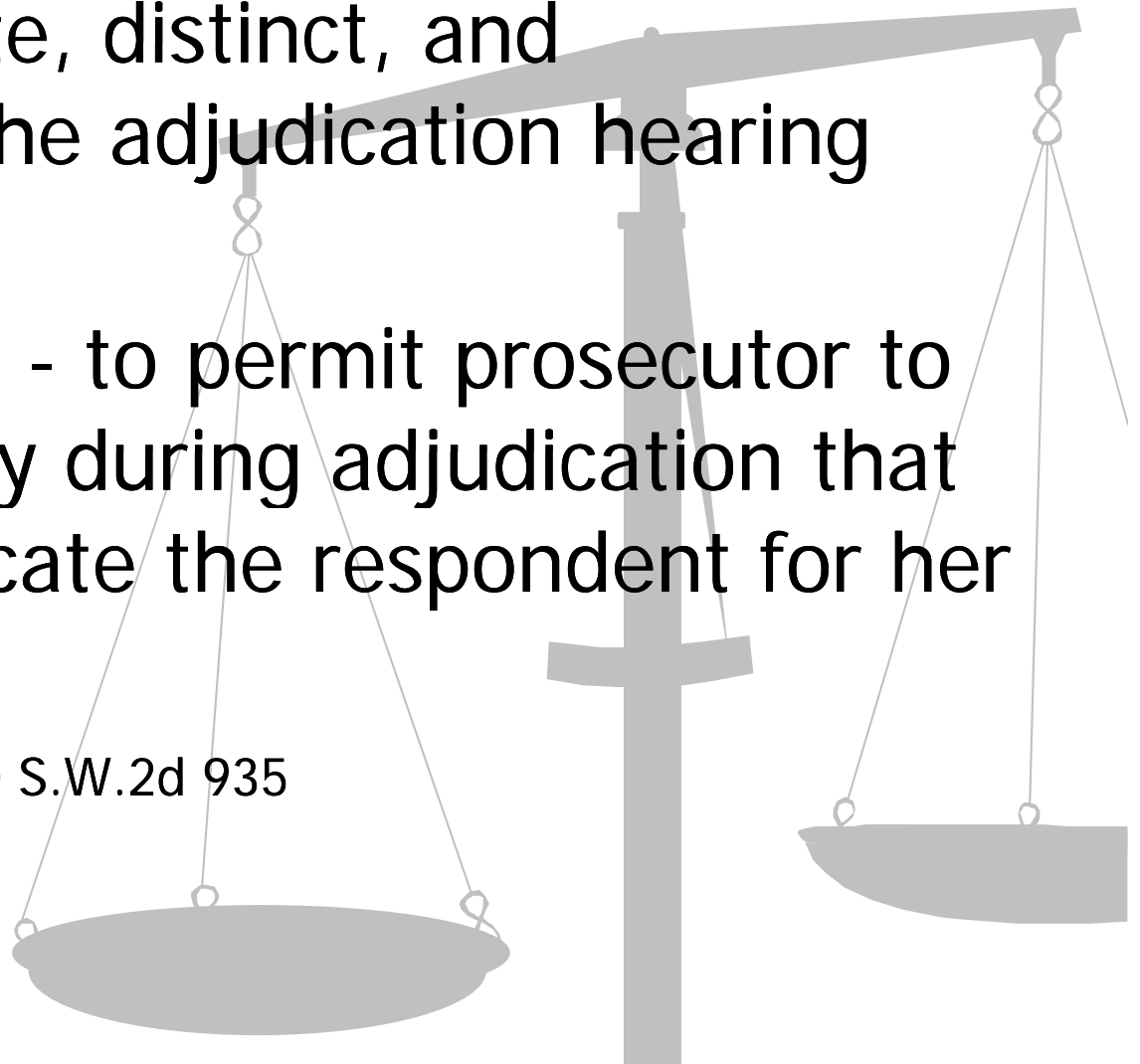
- (1) to provide for the **protection of the public** and public safety;
- (2) consistent with the protection of the public and public safety:
 - (A) to promote the **concept of punishment** for criminal acts;
 - (B) to **remove, where appropriate, the taint of criminality** from children committing certain unlawful acts; and
 - (C) to **provide treatment, training, and rehabilitation** that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
- (3) to **provide for the care**, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
- (4) to **protect the welfare of the community** and to control the commission of unlawful acts by children;
- (5) to achieve the foregoing purposes **in a family environment whenever possible**, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and
- (6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a **fair hearing** and their constitutional and other legal rights recognized and enforced



The Hearing

- Shall be separate, distinct, and subsequent to the adjudication hearing §54.04(a)
- Reversible Error - to permit prosecutor to argue to the jury during adjudication that it should adjudicate the respondent for her own good.

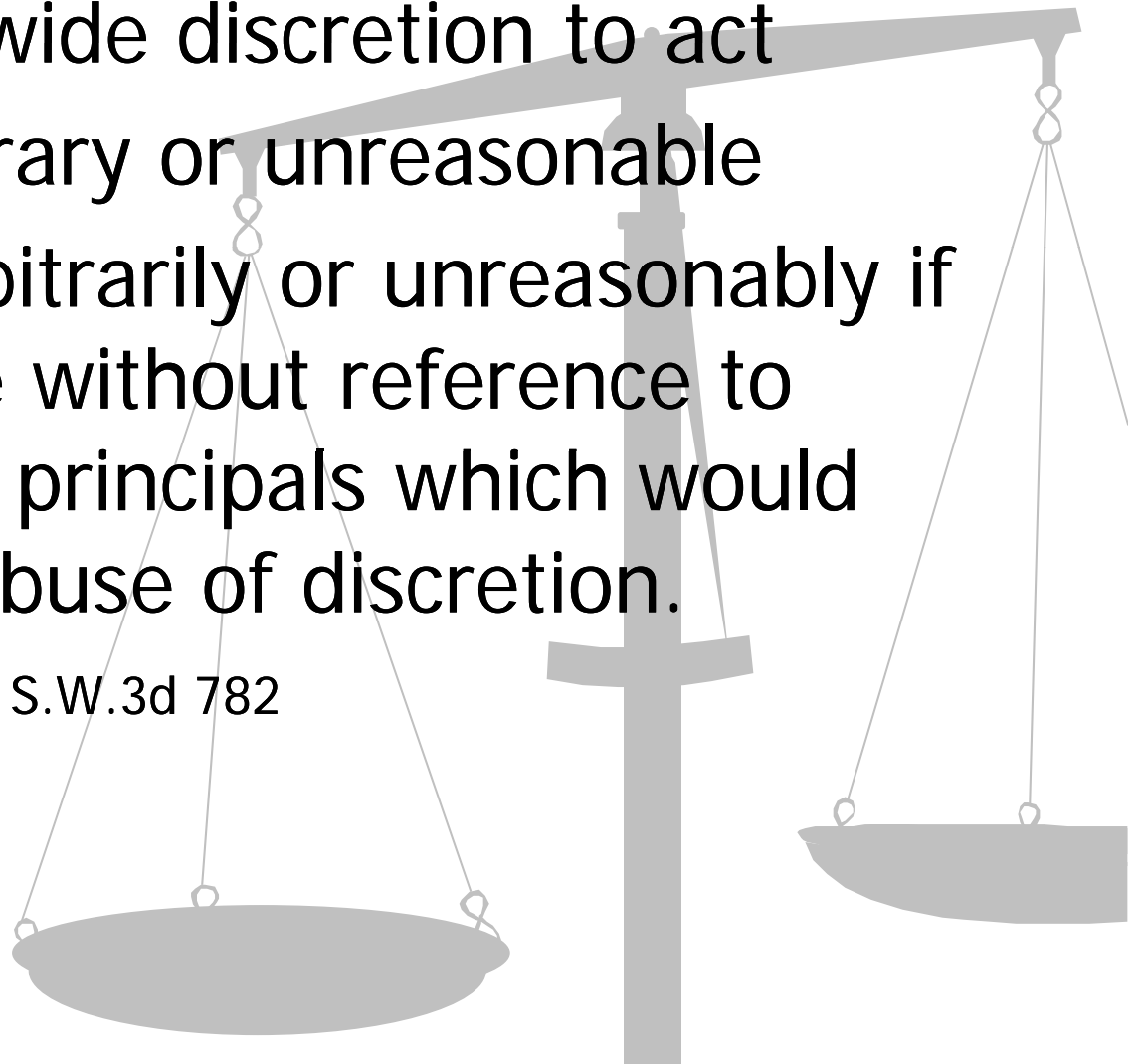
In the Matter of C.L., 930 S.W.2d 935



Judicial Discretion

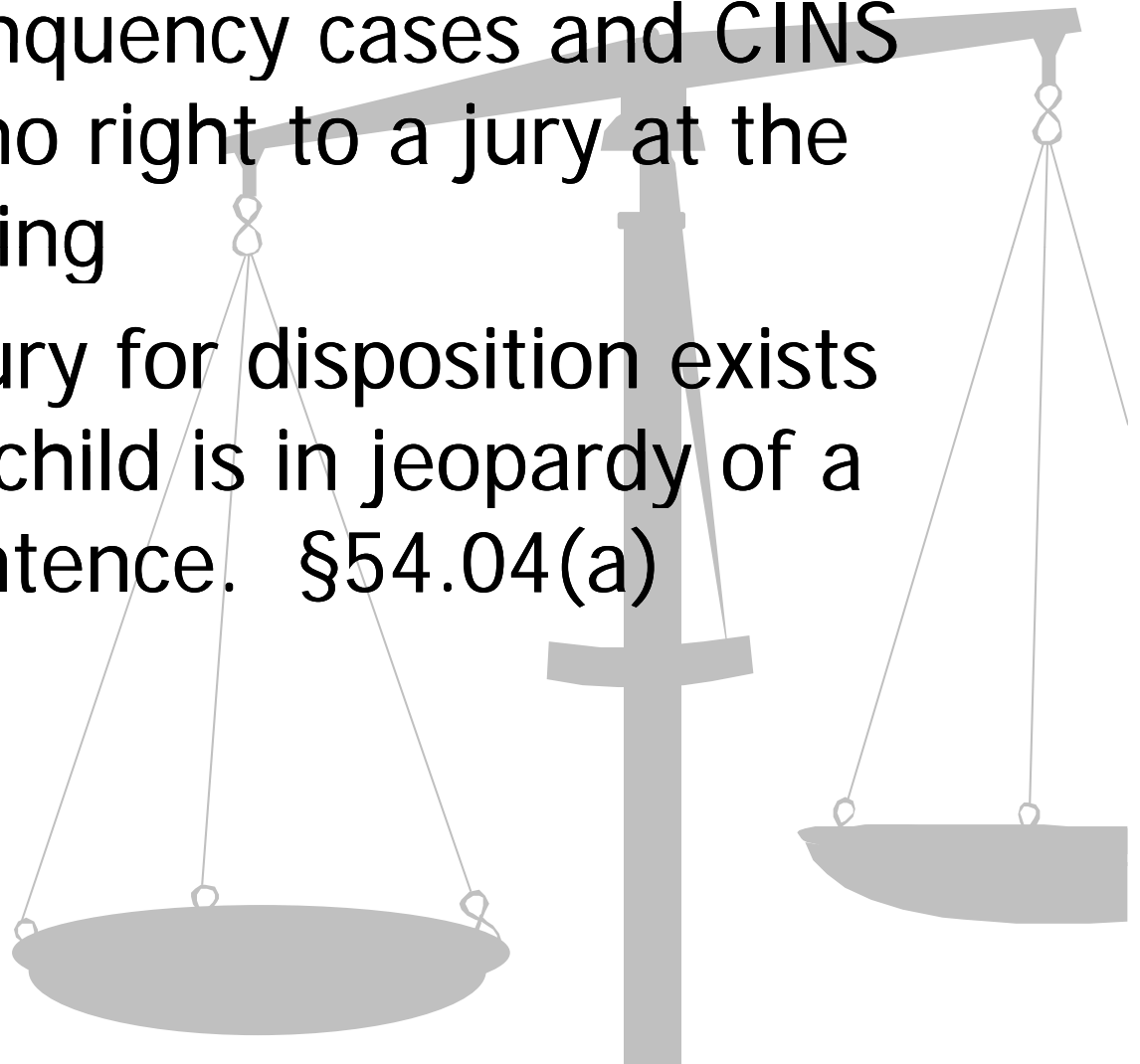
- Court afforded wide discretion to act
- Cannot be arbitrary or unreasonable
- A judge acts arbitrarily or unreasonably if a ruling is made without reference to guiding rules or principals which would thereby be an abuse of discretion.

In the Matter of T.K.E., 5 S.W.3d 782



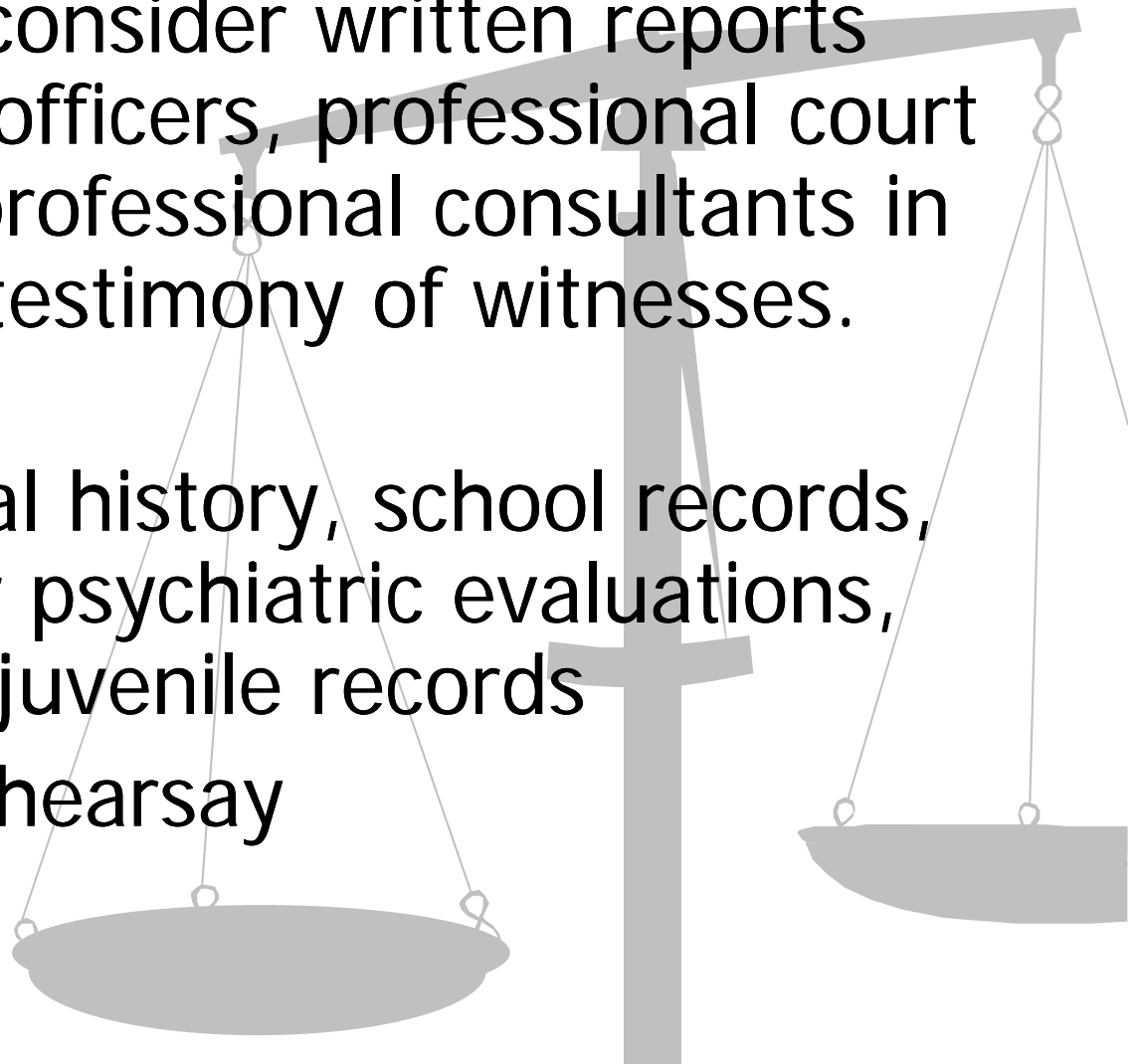
Right to Jury

- In ordinary delinquency cases and CINS cases, there is no right to a jury at the disposition hearing
- The right to a jury for disposition exists only where the child is in jeopardy of a determinate sentence. §54.04(a)



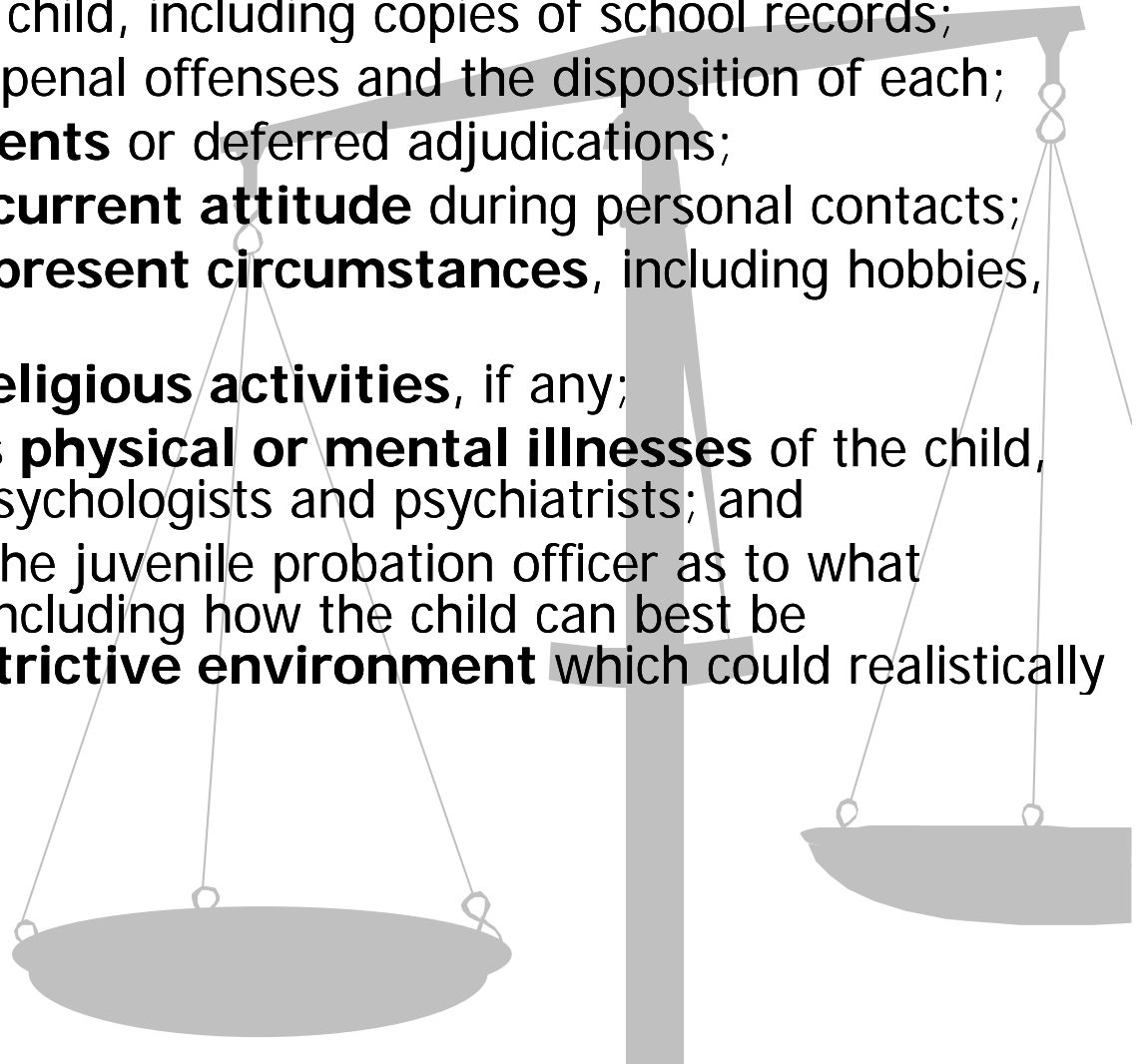
Evidence for Disposition

- The court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. §54.04(b)
- Including: social history, school records, psychological or psychiatric evaluations, and other prior juvenile records
- Not considered hearsay



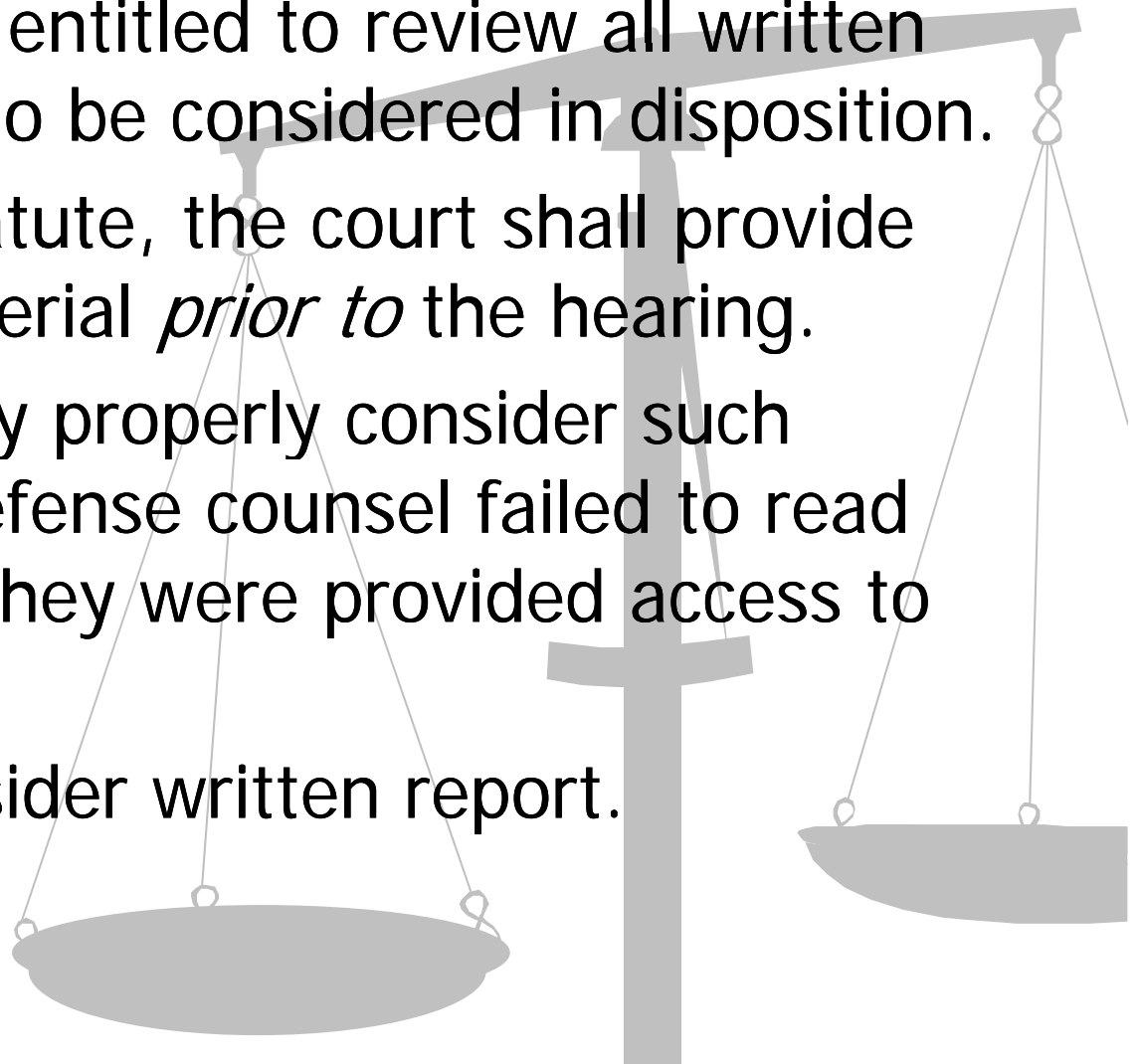
Social History Report

- (1) detailed information on the **father and mother**;
- (2) detailed information on the child's **siblings**;
- (3) **educational** data on the child, including copies of school records;
- (4) **prior involvement** with penal offenses and the disposition of each;
- (5) **prior informal adjustments** or deferred adjudications;
- (6) details about the **child's current attitude** during personal contacts;
- (7) details about the **child's present circumstances**, including hobbies, habits, employment, etc.;
- (8) details about the child's **religious activities**, if any;
- (9) details about any **serious physical or mental illnesses** of the child, including prior contact with psychologists and psychiatrists; and
- (10) **recommendations** of the juvenile probation officer as to what disposition should be made, including how the child can best be rehabilitated in the **least restrictive environment** which could realistically accomplish rehabilitation



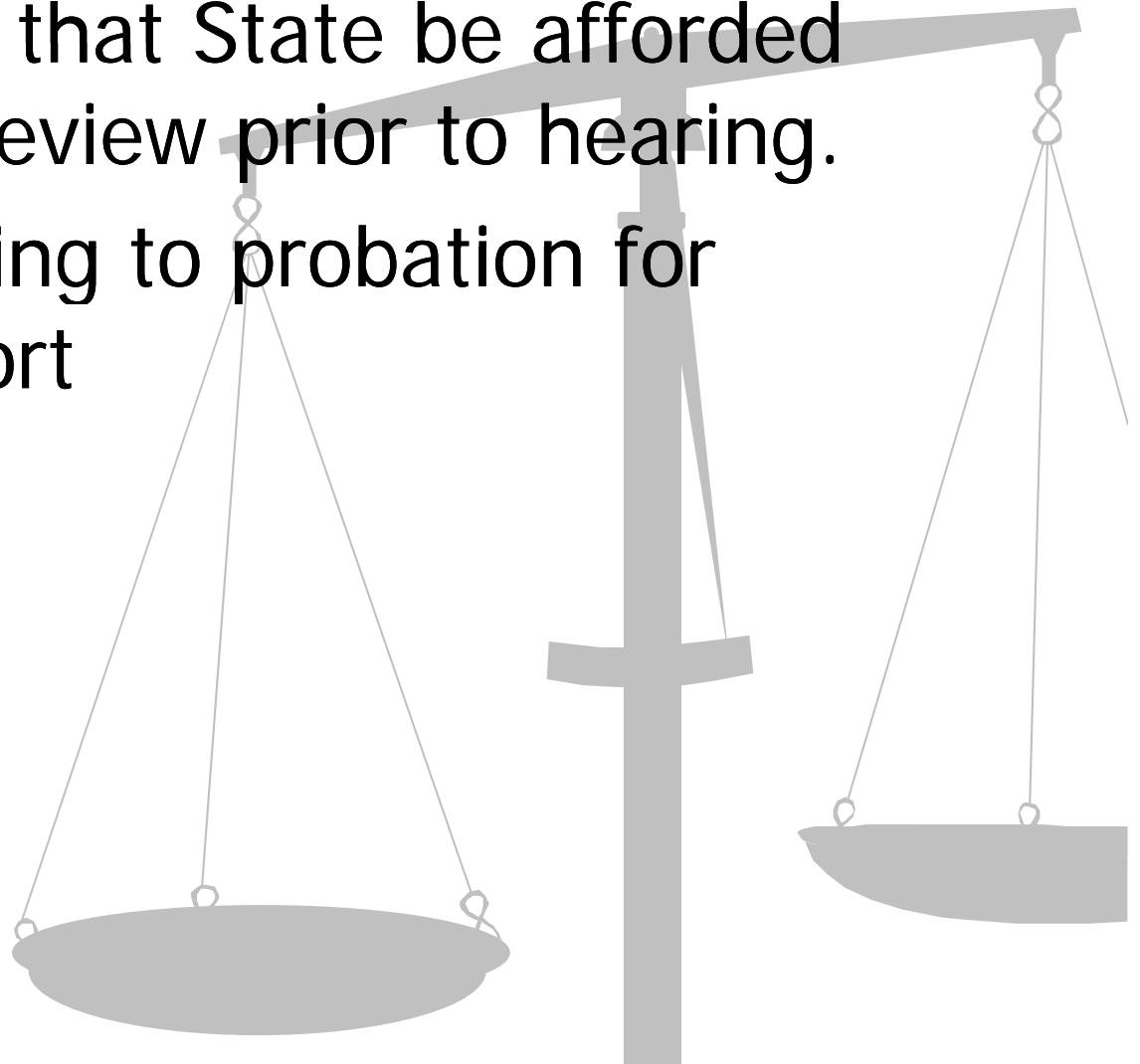
State/Probation Written Material

- Child's attorney is entitled to review all written material which is to be considered in disposition.
- Specifically, by statute, the court shall provide access to this material *prior to* the hearing.
- The trial court may properly consider such reports, even if defense counsel failed to read them, so long as they were provided access to them.
- Jury may not consider written report.



Defense Written Material

- No requirement that State be afforded opportunity to review prior to hearing.
- Consider providing to probation for inclusion in report



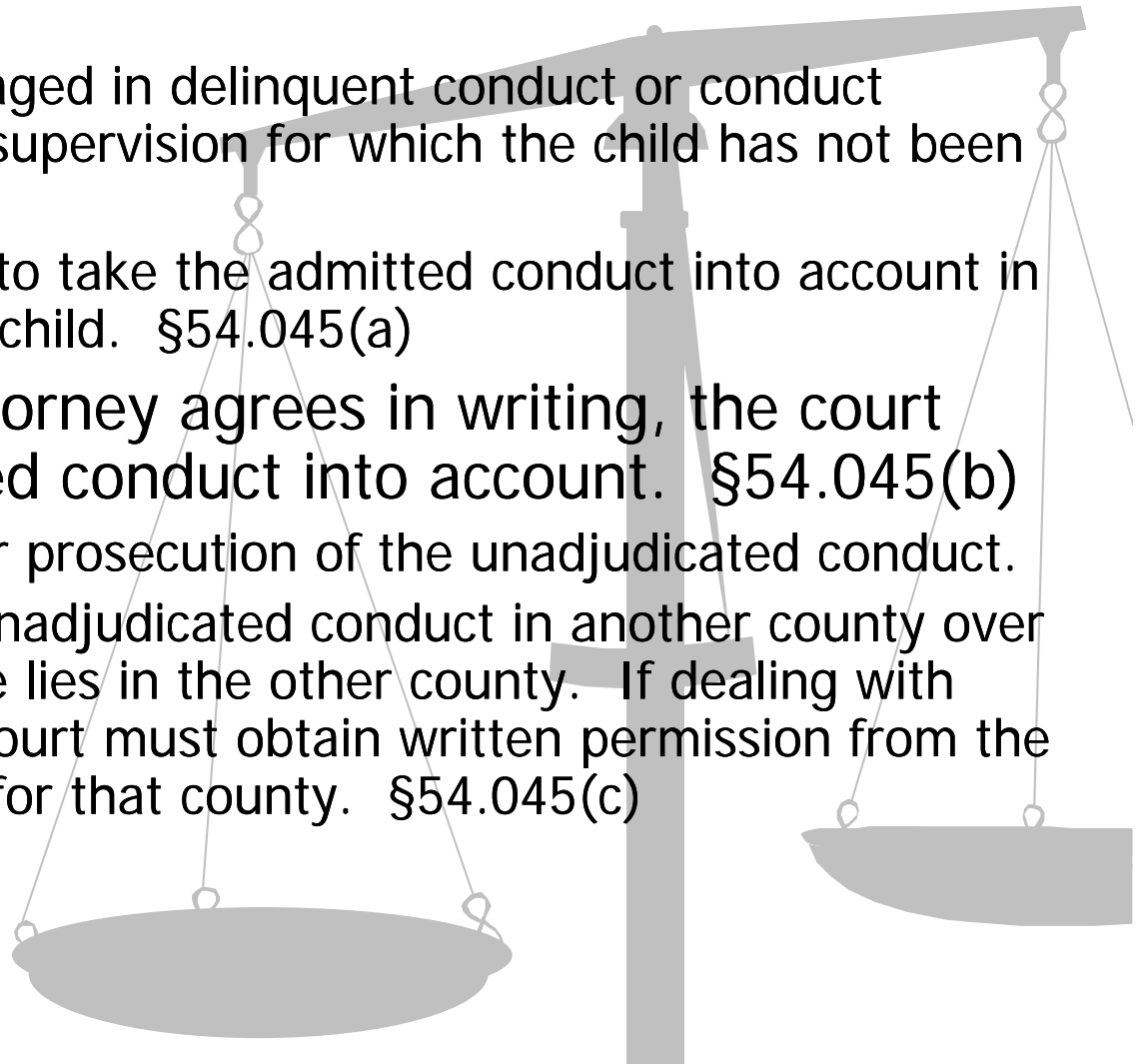
Other Evidence

- Evidence from Adjudication hearing
 - Need not formally re-introduce
- Restitution Evidence
 - normal rules of evidence apply and competent evidence is required
- NOT Lack of Responsibility
 - Lack of responsibility is adjudication issue
 - Mental illness/mental retardation could be disposition issue



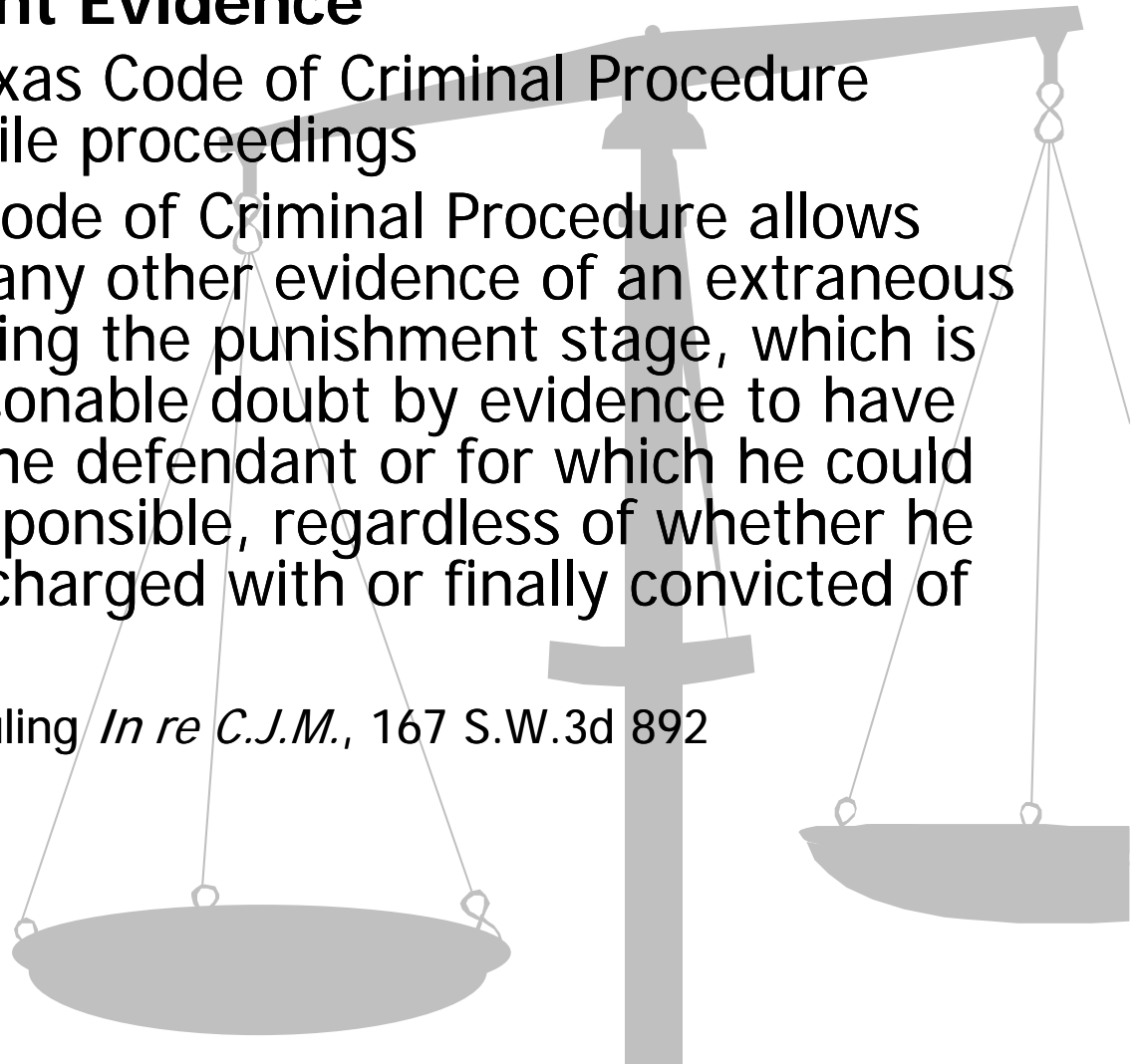
Unadjudicated Conduct

- A child may
 - (1) admit having engaged in delinquent conduct or conduct indicating a need for supervision for which the child has not been adjudicated, and
 - (2) request the court to take the admitted conduct into account in the disposition of the child. §54.045(a)
- If the prosecuting attorney agrees in writing, the court may take the admitted conduct into account. §54.045(b)
 - This would bar further prosecution of the unadjudicated conduct.
 - But, be careful with unadjudicated conduct in another county over which exclusive venue lies in the other county. If dealing with another county, the court must obtain written permission from the prosecuting attorney for that county. §54.045(c)



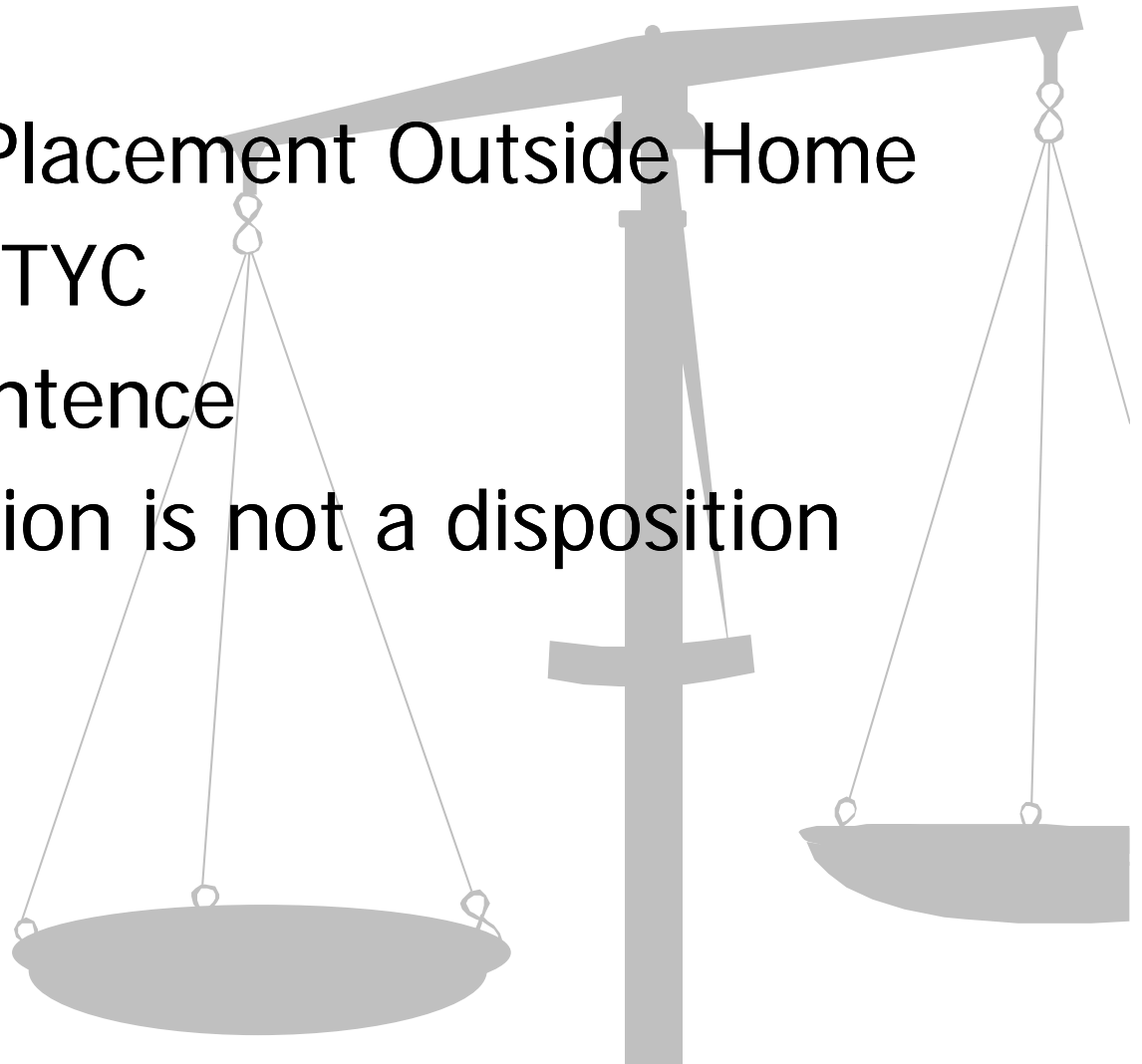
Unadjudicated Conduct

- **Broader Punishment Evidence**
- Chapter 37 of the Texas Code of Criminal Procedure is applicable to juvenile proceedings
- Article 37.07 of the Code of Criminal Procedure allows for the admission of any other evidence of an extraneous crime or bad act, during the punishment stage, which is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.
- §51.17(c); effectively overruling *In re C.J.M.*, 167 S.W.3d 892



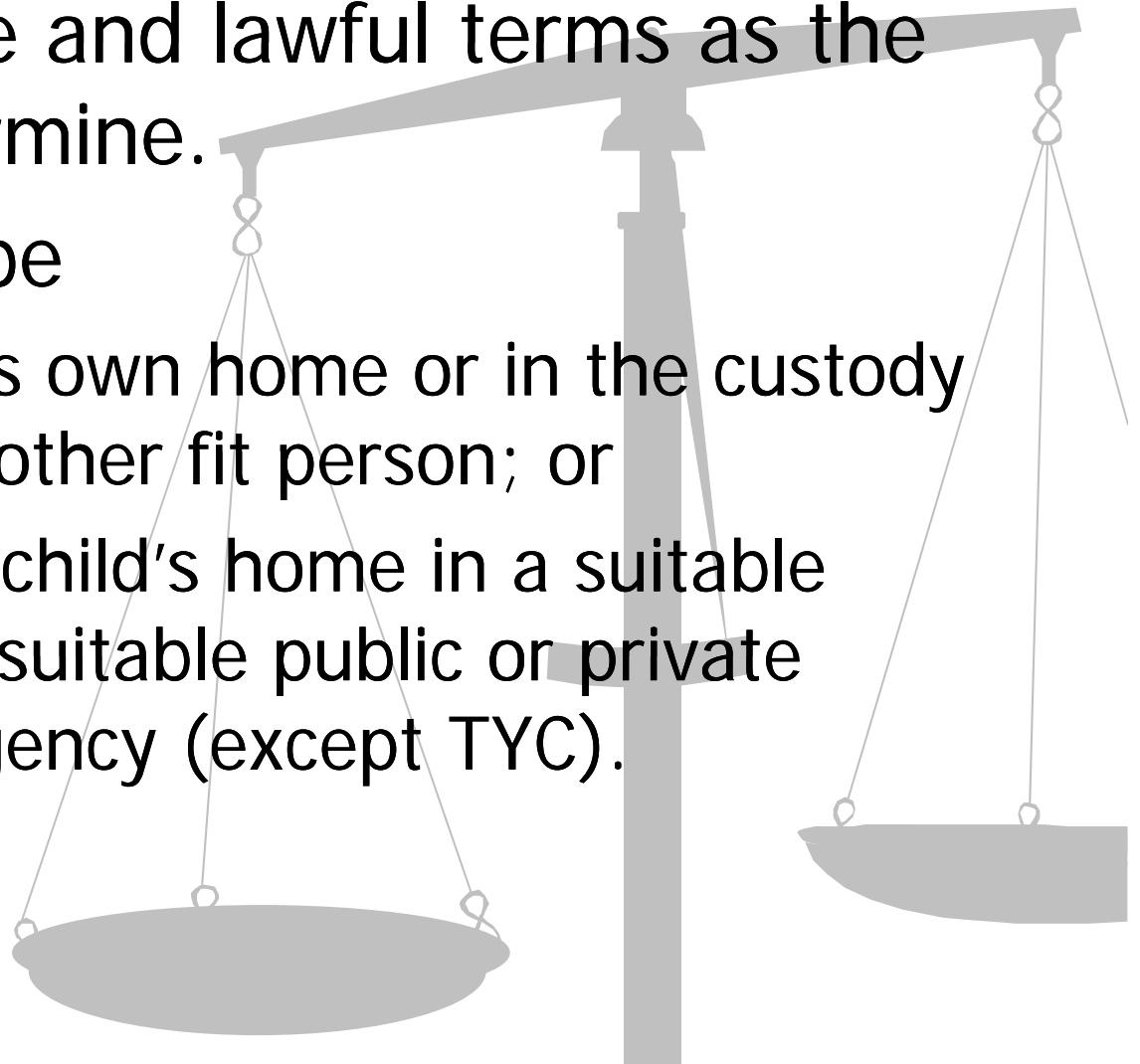
Dispositions Available

- Probation
- Probation with Placement Outside Home
- Confinement in TYC
- Determinate Sentence
- Note – certification is not a disposition



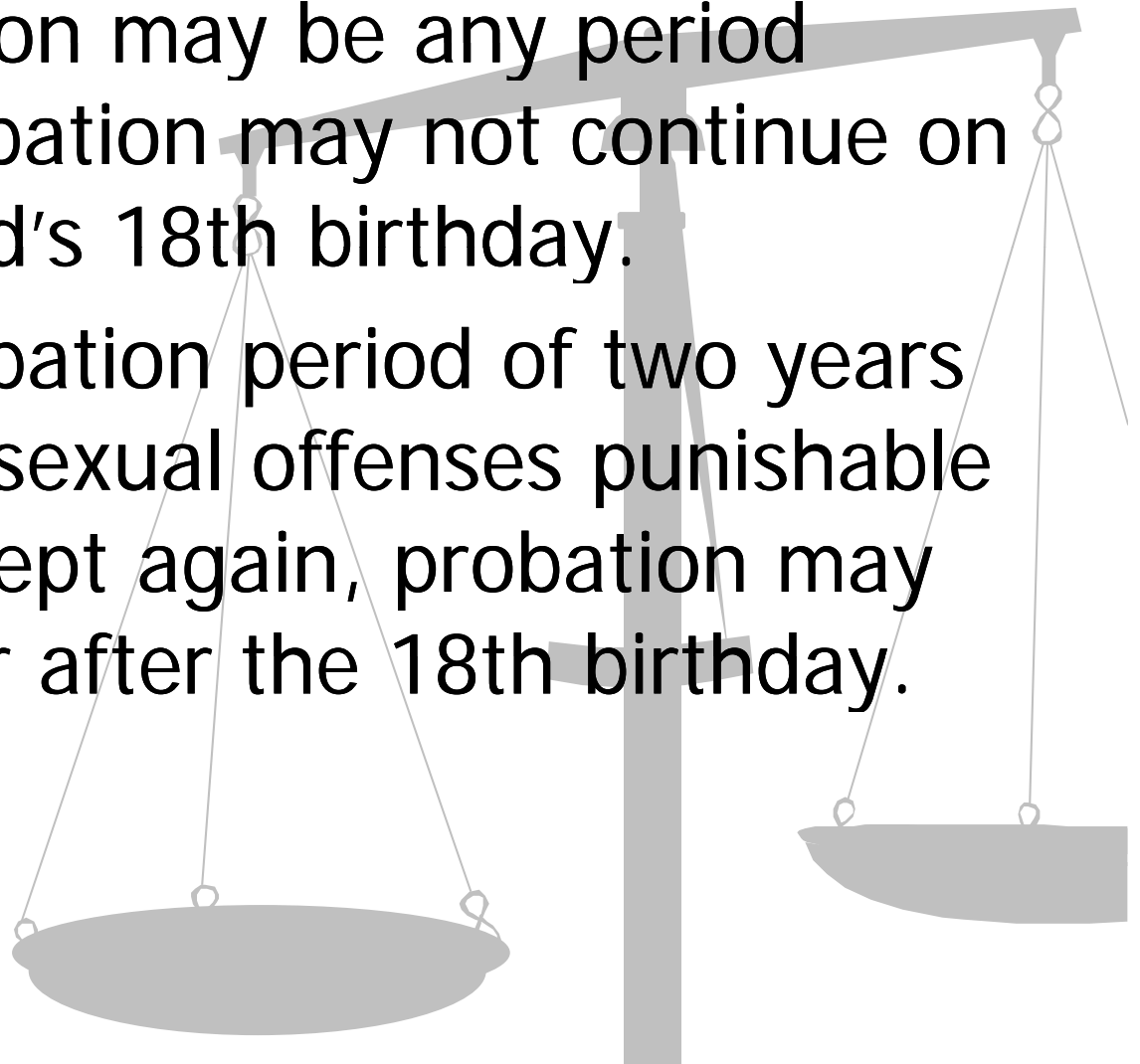
Probation

- Such reasonable and lawful terms as the court may determine.
 - Probation may be
 - (A) in the child's own home or in the custody of a relative or other fit person; or
 - (B) outside the child's home in a suitable foster home or suitable public or private institution or agency (except TYC).
- §54.04(d)(1)

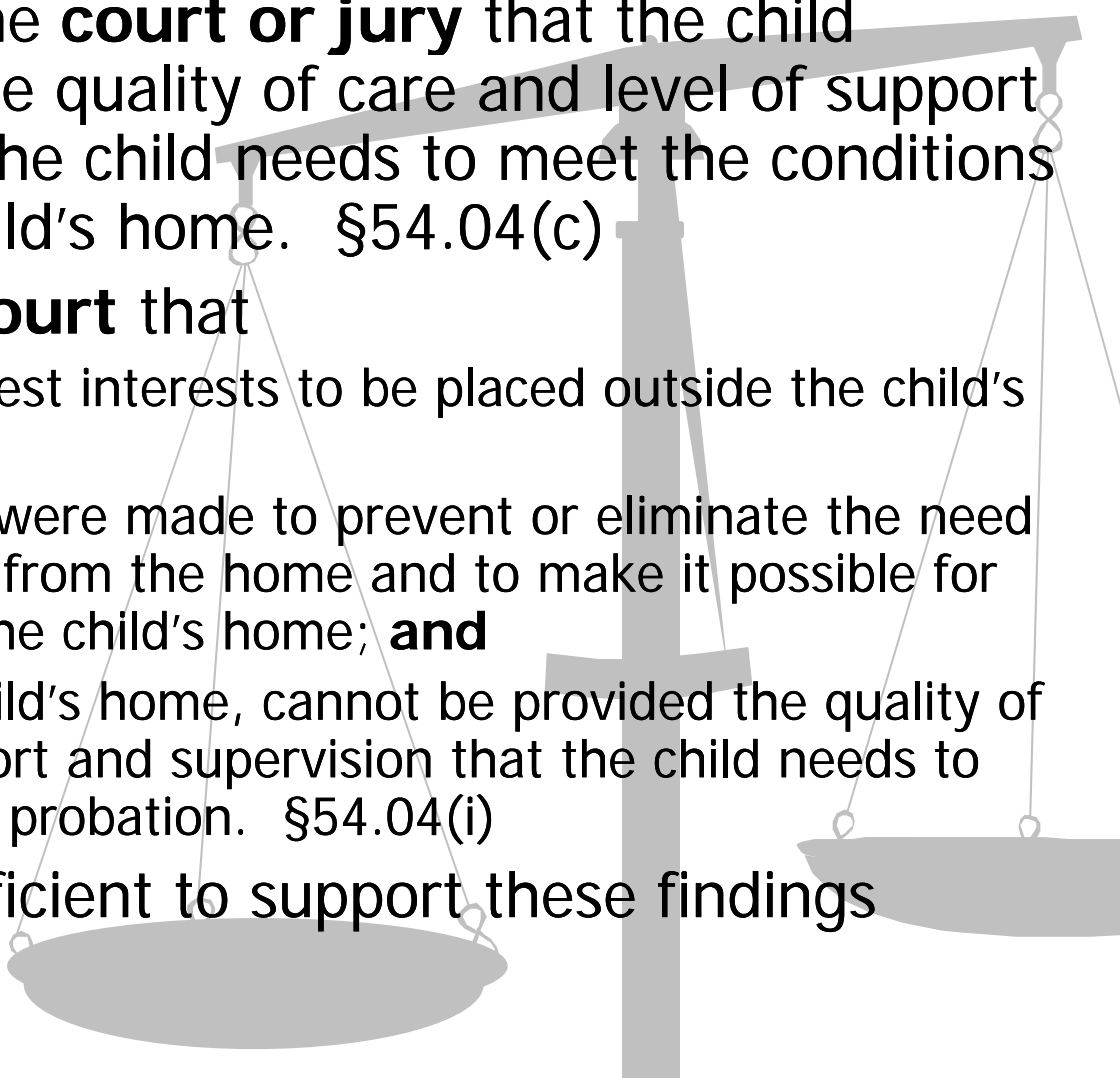


Probation Term

- Term of probation may be any period except that probation may not continue on or after the child's 18th birthday.
- A minimum probation period of two years is applicable to sexual offenses punishable as a felony, except again, probation may not extend to or after the 18th birthday.
§54.04(p)



Placement Outside Home

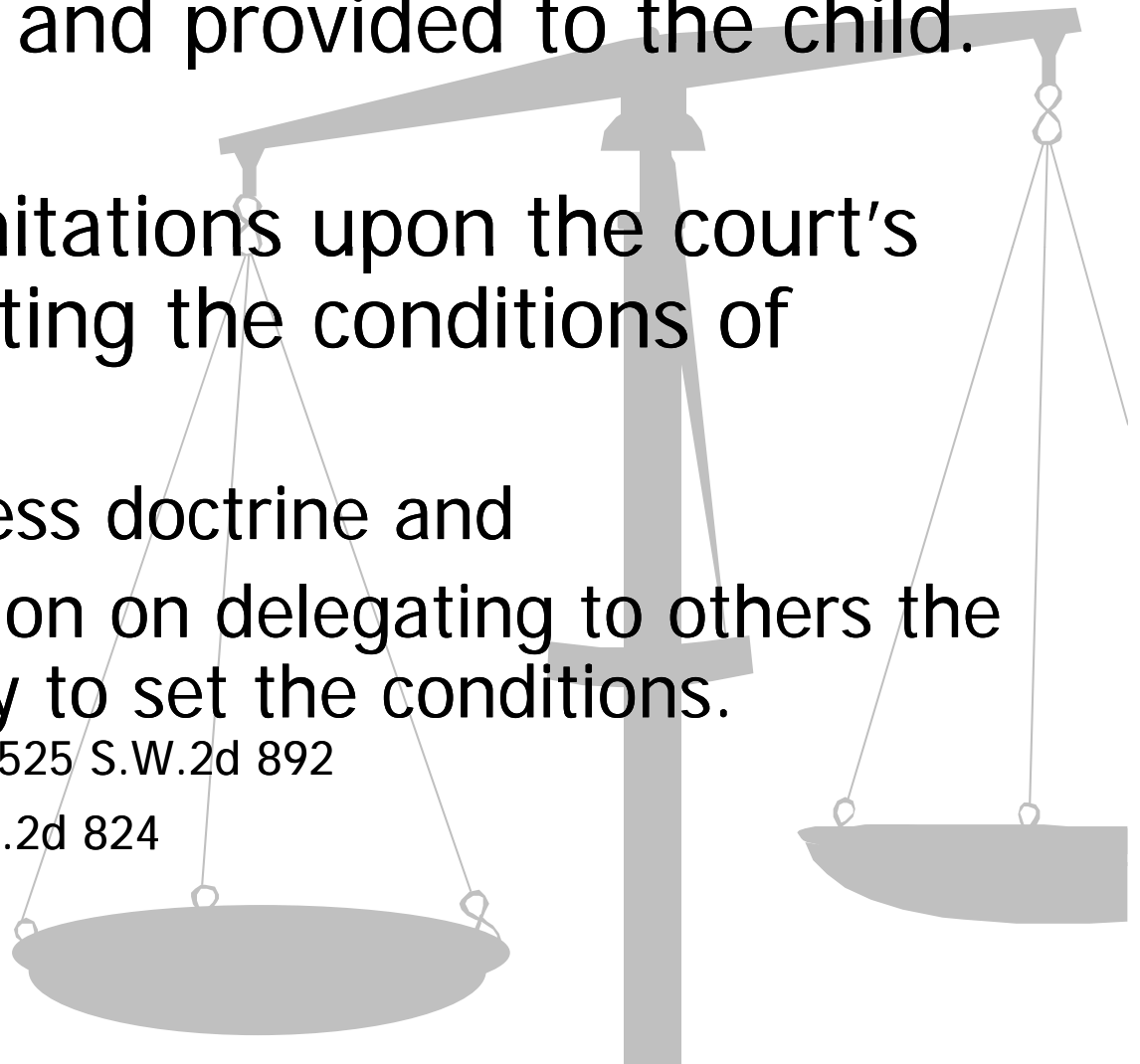
- Required finding by the **court or jury** that the child cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation in the child's home. §54.04(c)
 - Required finding by **court** that
 - (A) it is in the child's best interests to be placed outside 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. §54.04(i)
 - Evidence must be sufficient to support these findings
- 

Probation Conditions

- Must be written and provided to the child.
§54.04(f)
- Two primary limitations upon the court's discretion in setting the conditions of probation:
 - (1) the vagueness doctrine and
 - (2) the prohibition on delegating to others the court's authority to set the conditions.

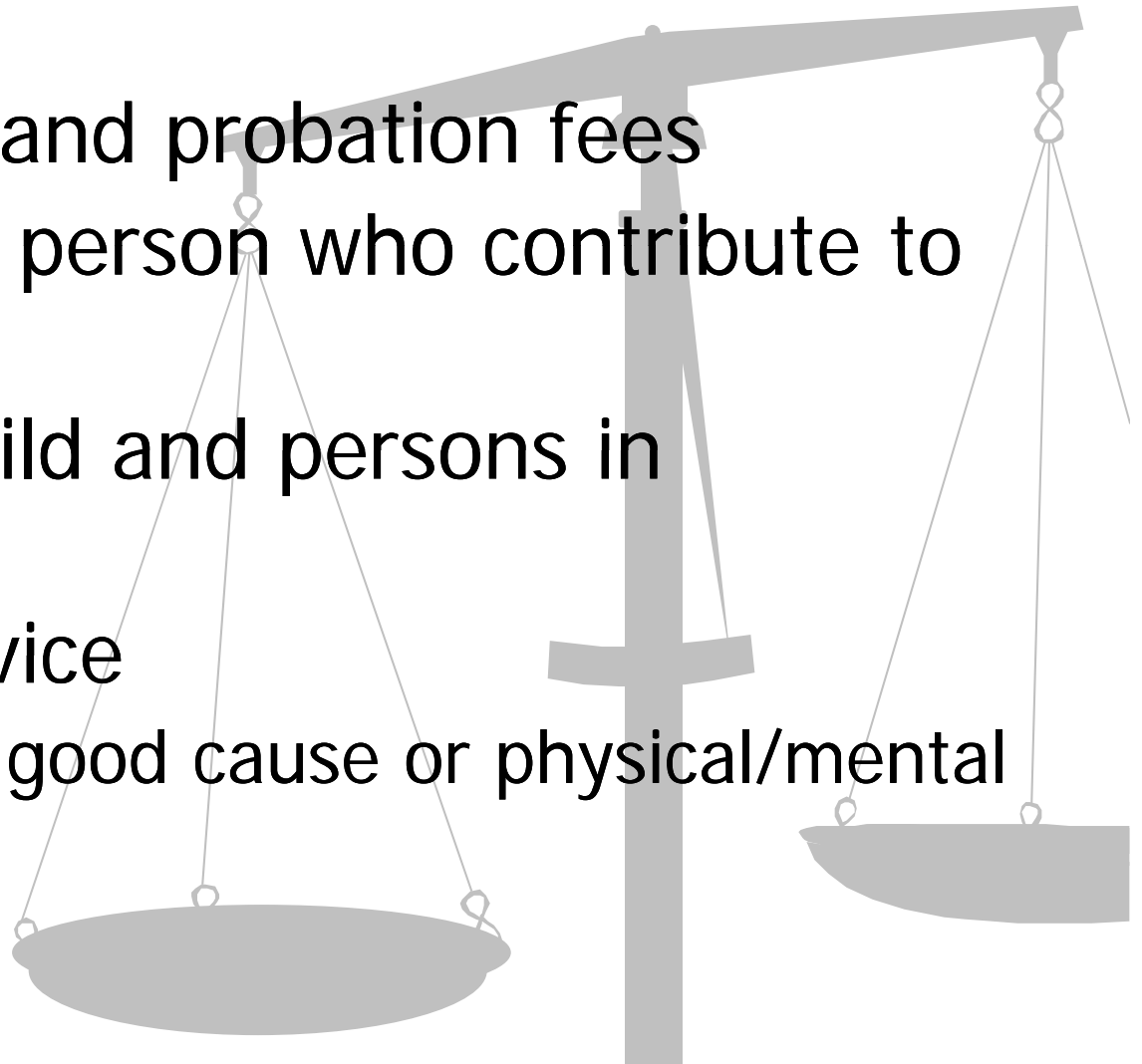
In the Matter of R.A.B., 525 S.W.2d 892

K.K.B. v. State, 609 S.W.2d 824



Typical Probation Conditions

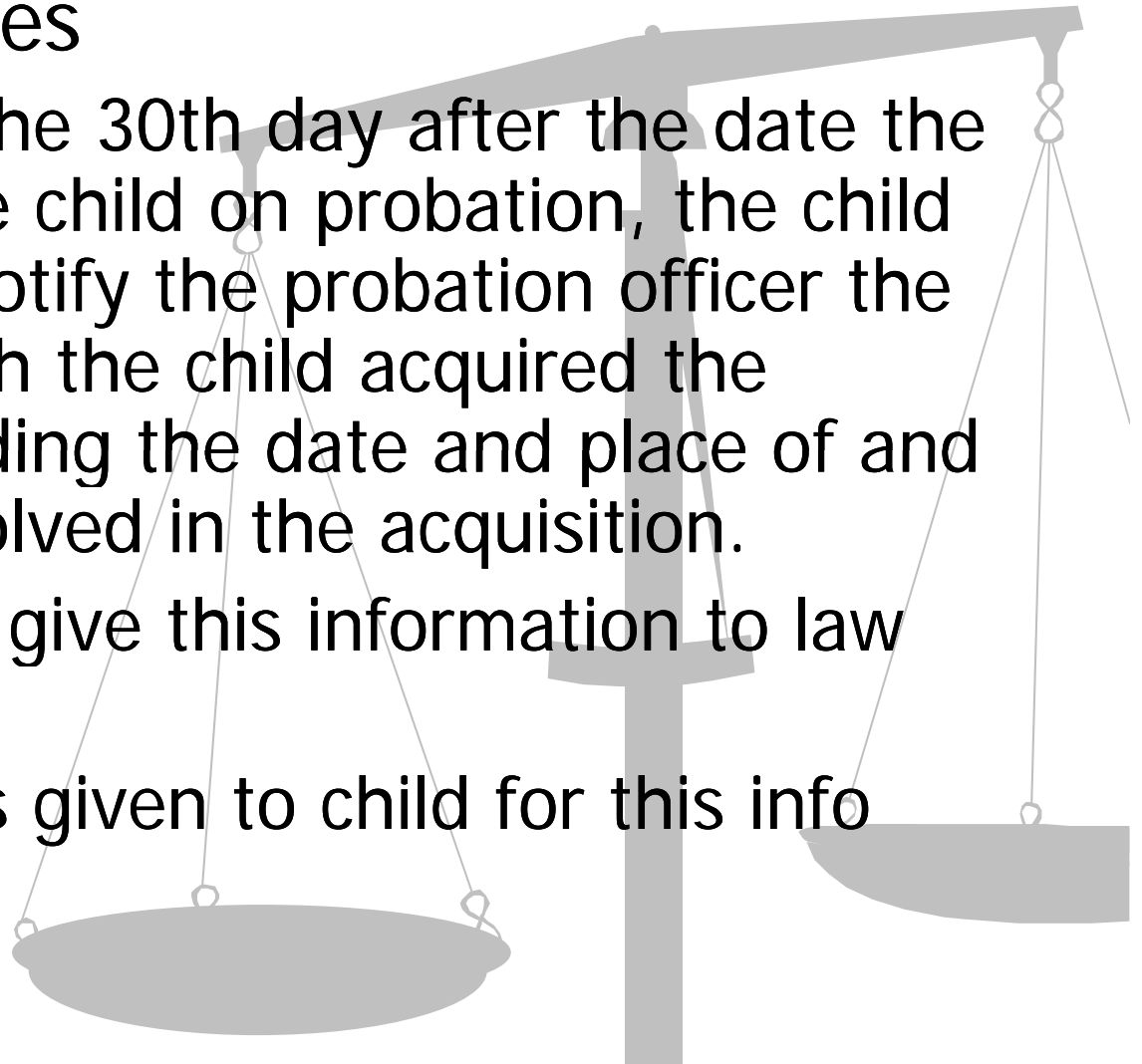
- Attend School
- Pay court costs and probation fees
- No contact with person who contribute to delinquency
- Counseling – child and persons in household
- Community Service
 - May excuse for good cause or physical/mental issues



Other Probation Conditions

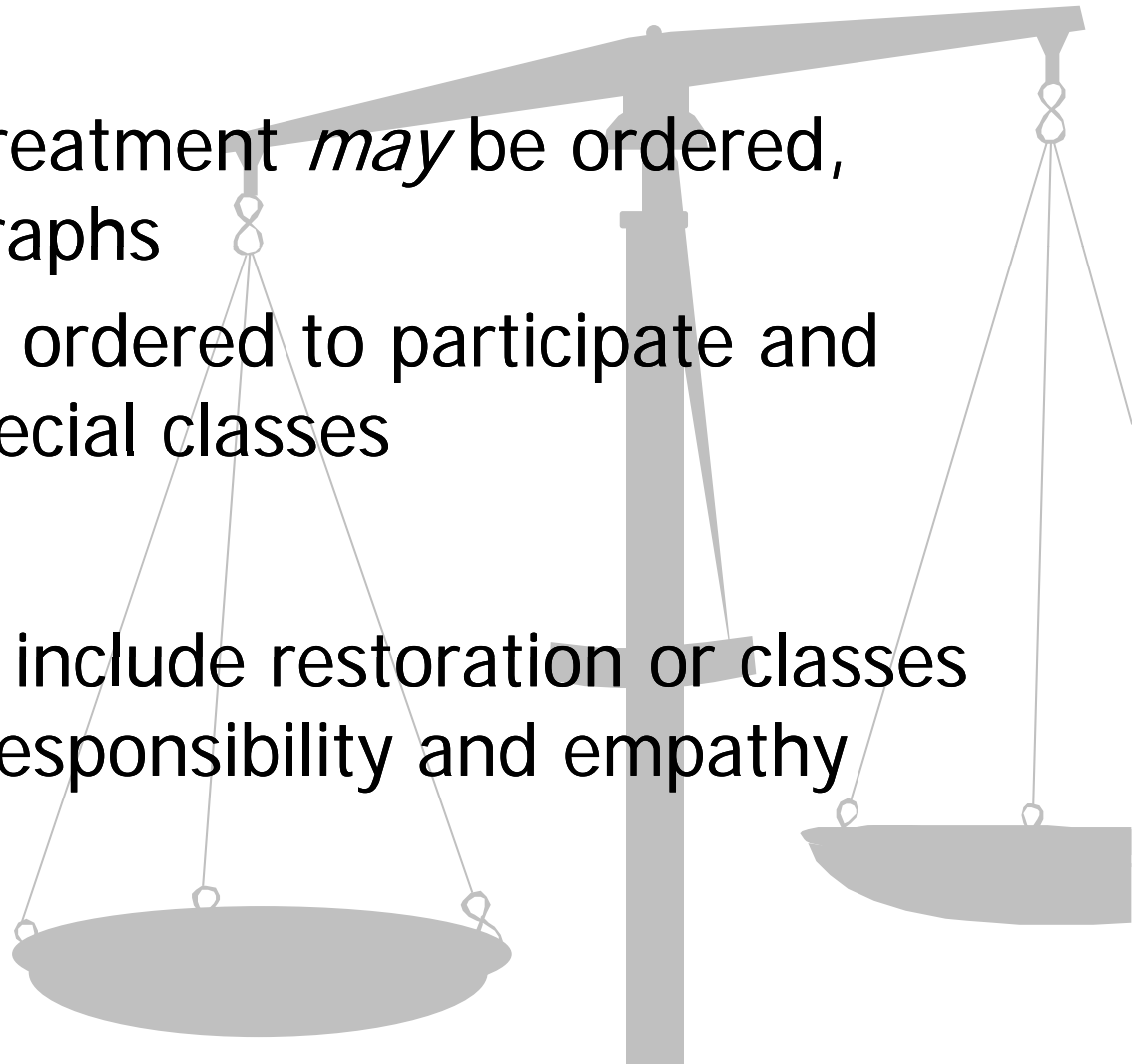
■ Handgun offenses

- Not later than the 30th day after the date the court places the child on probation, the child is required to notify the probation officer the manner in which the child acquired the handgun, including the date and place of and any person involved in the acquisition.
- Probation must give this information to law enforcement.
- Use immunity is given to child for this info



More Probation Conditions

- Sexual offenses
 - Sex Offender Treatment *may* be ordered, including polygraphs
 - Parents may be ordered to participate and attend other special classes
- Graffiti offenses
 - Conditions may include restoration or classes related to self-responsibility and empathy



Even More Probation Conditions

- Alcohol Violations

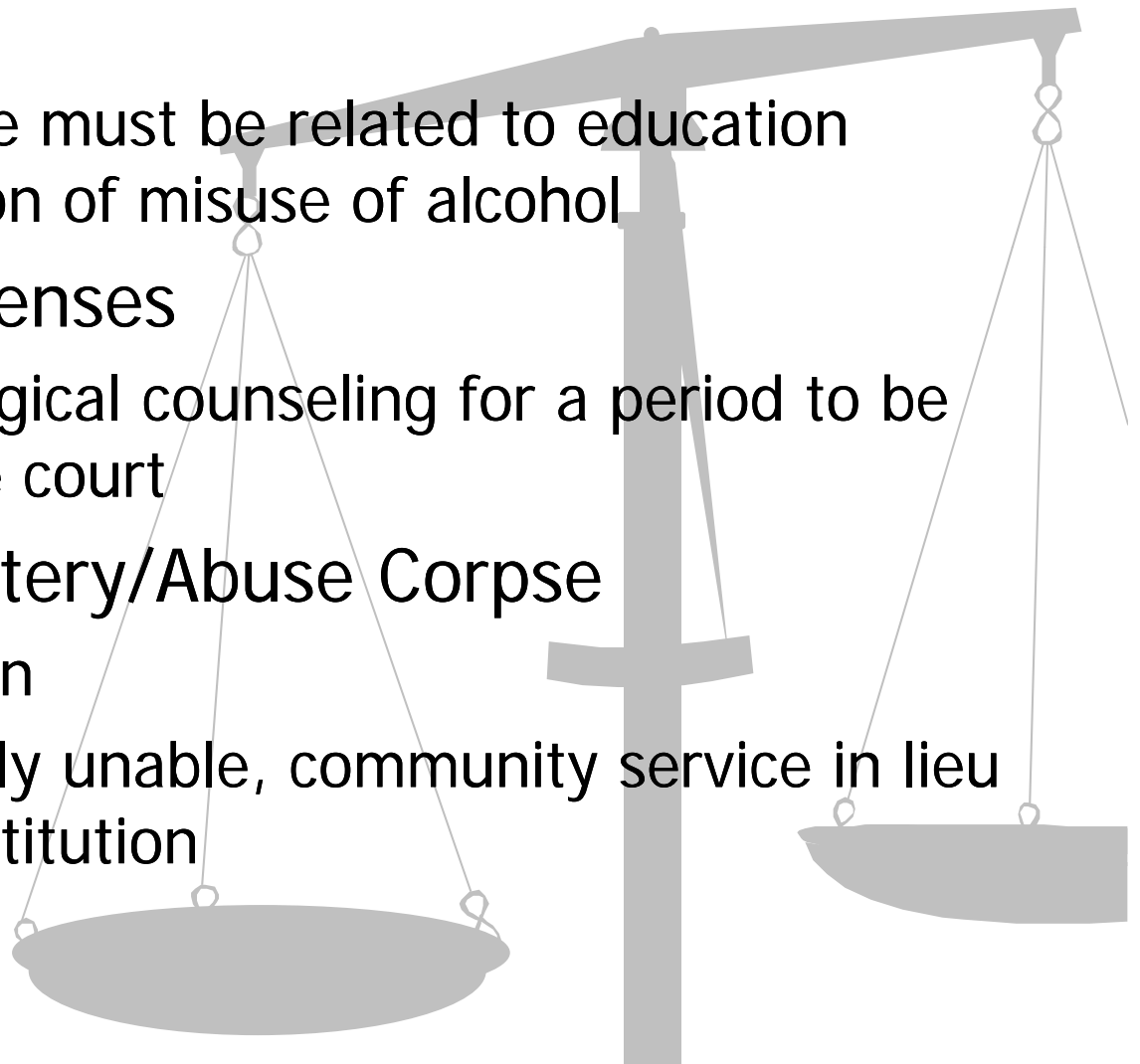
- Community service must be related to education about or prevention of misuse of alcohol

- Animal Cruelty offenses

- Requires psychological counseling for a period to be determined by the court

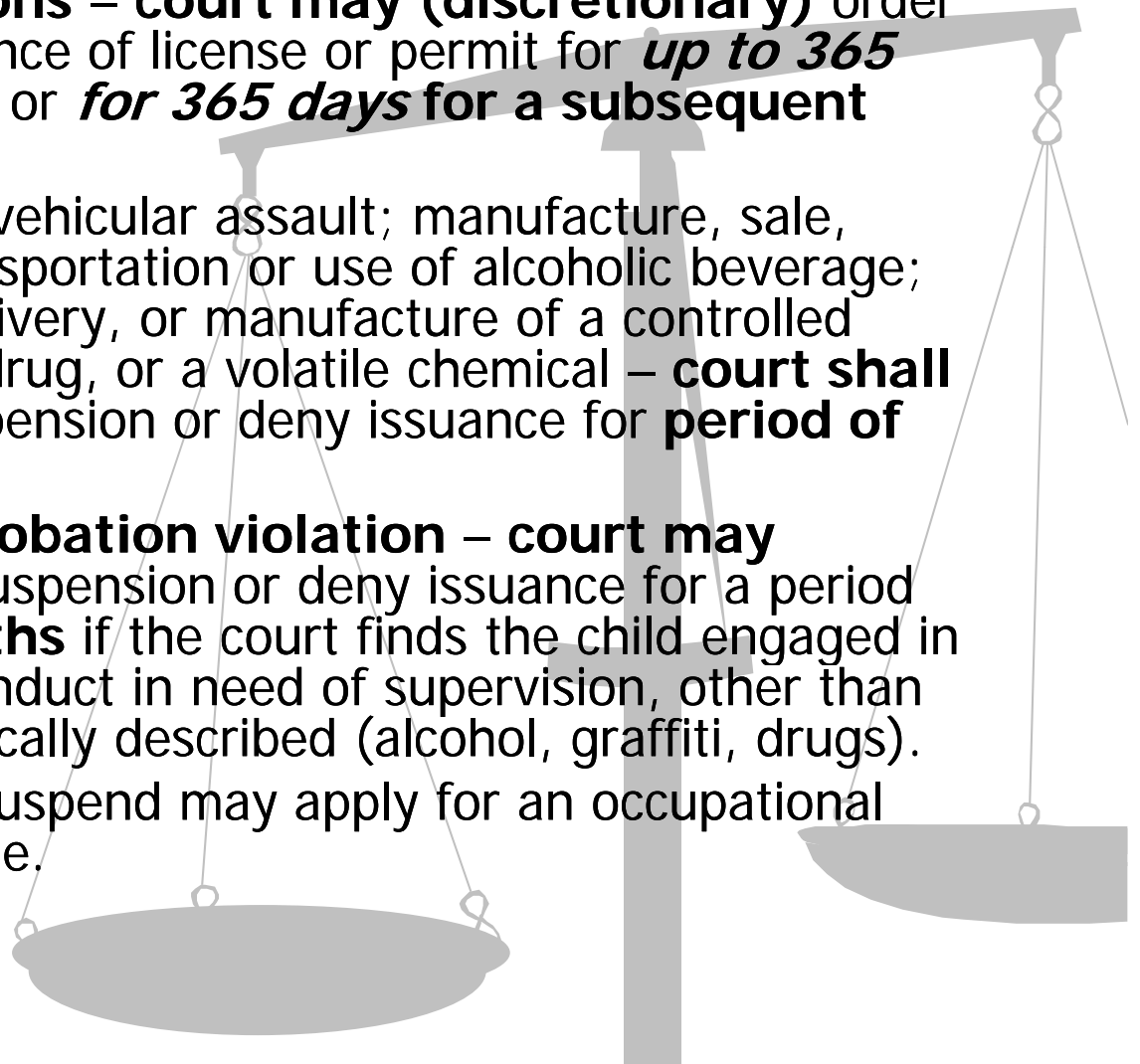
- Desecrating Cemetery/Abuse Corpse

- Requires restitution
- If child is financially unable, community service in lieu or parents pay restitution



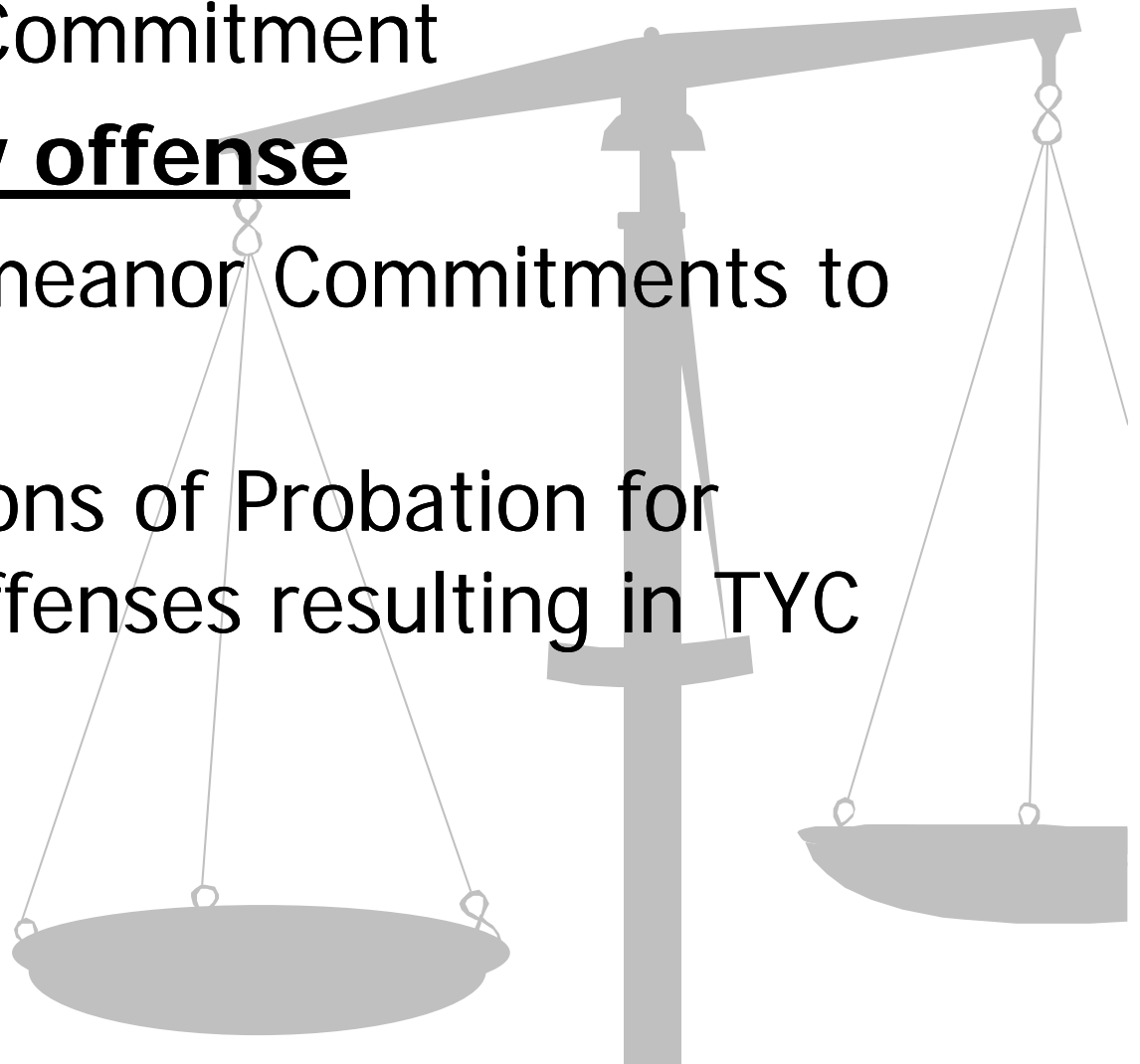
Drivers License Suspension

- **Graffiti statute violations – court may (discretionary)** order suspension or deny issuance of license or permit for *up to 365 days on a first offense* or *for 365 days for a subsequent offense*.
- **Drugs/Alcohol –** DWI; vehicular assault; manufacture, sale, delivery, possession, transportation or use of alcoholic beverage; use, possession, sale, delivery, or manufacture of a controlled substance, a dangerous drug, or a volatile chemical – **court shall (mandatory)** order suspension or deny issuance for **period of 365 days**.
- **Any adjudication or probation violation – court may (discretionary)** order suspension or deny issuance for a period **not to exceed 12 months** if the court finds the child engaged in delinquent conduct or conduct in need of supervision, other than conduct otherwise specifically described (alcohol, graffiti, drugs).
- A child whose license is suspend may apply for an occupational license if otherwise eligible.



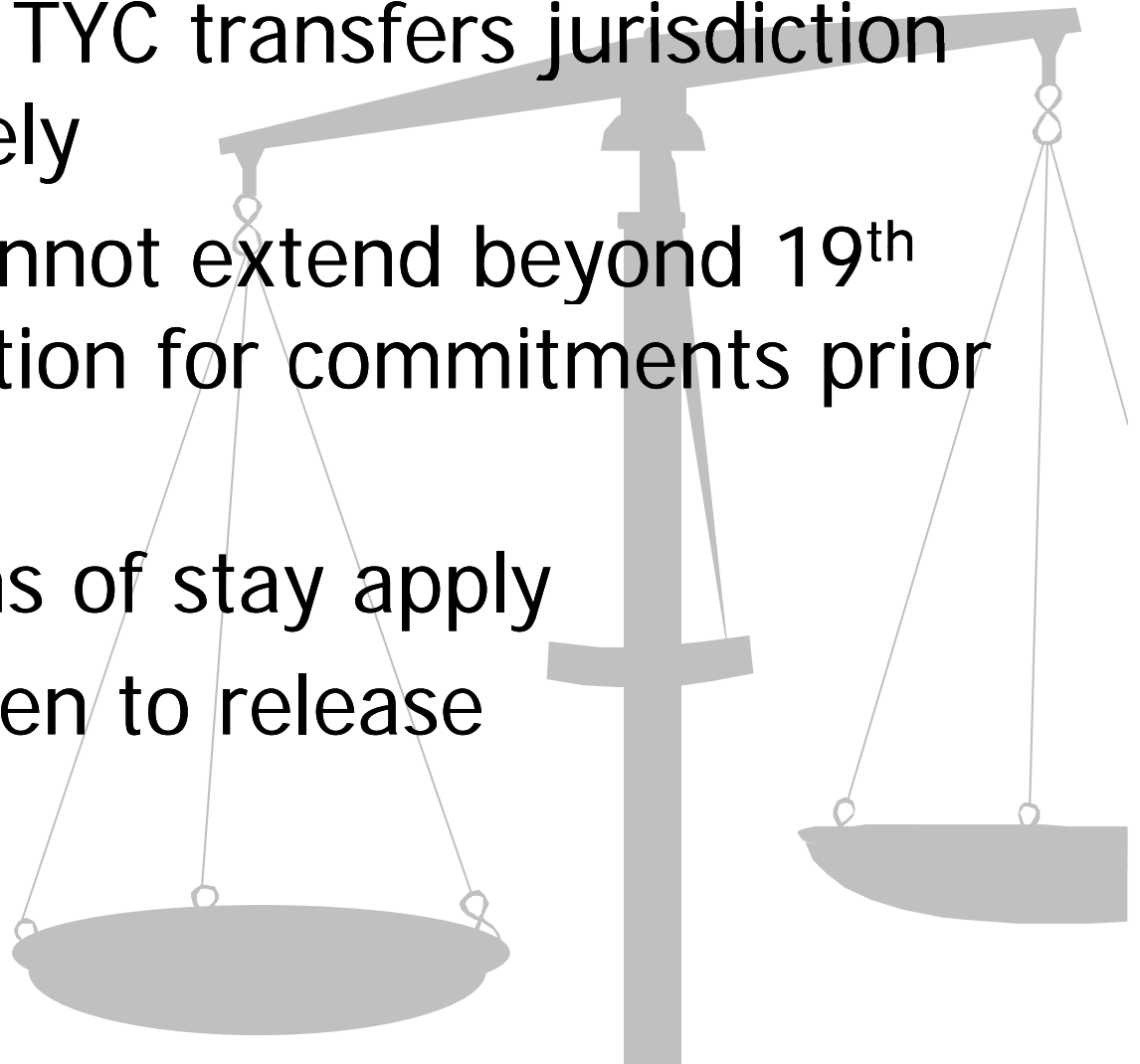
Confinement in TYC

- Indeterminate Commitment
- Must be **Felony offense**
- No More Misdemeanor Commitments to TYC
- No More Violations of Probation for Misdemeanor offenses resulting in TYC Commitments



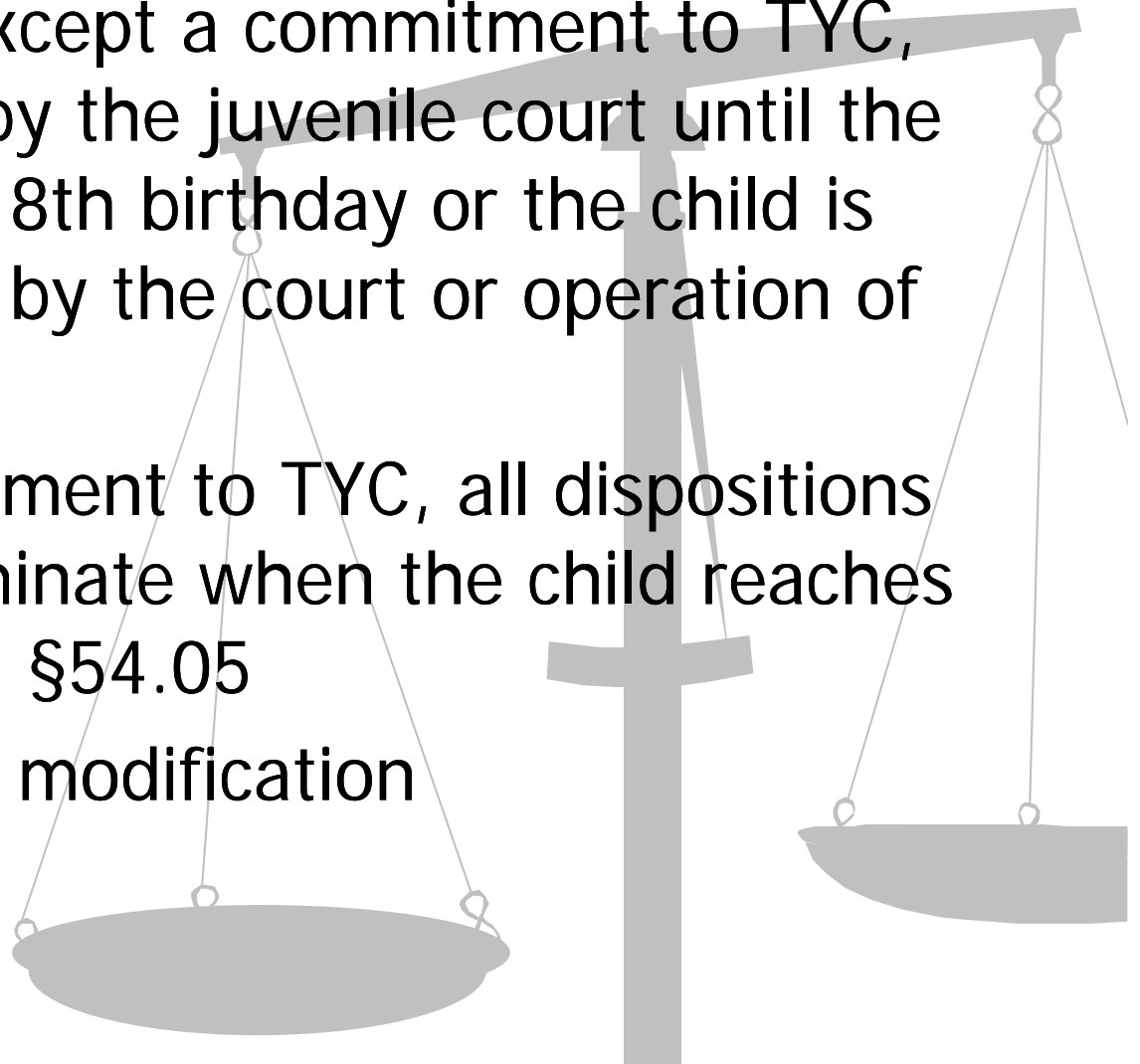
TYC

- Commitment to TYC transfers jurisdiction to TYC exclusively
- Commitment cannot extend beyond 19th birthday (exception for commitments prior to 6/6/07)
- Minimum lengths of stay apply
- TYC decides when to release



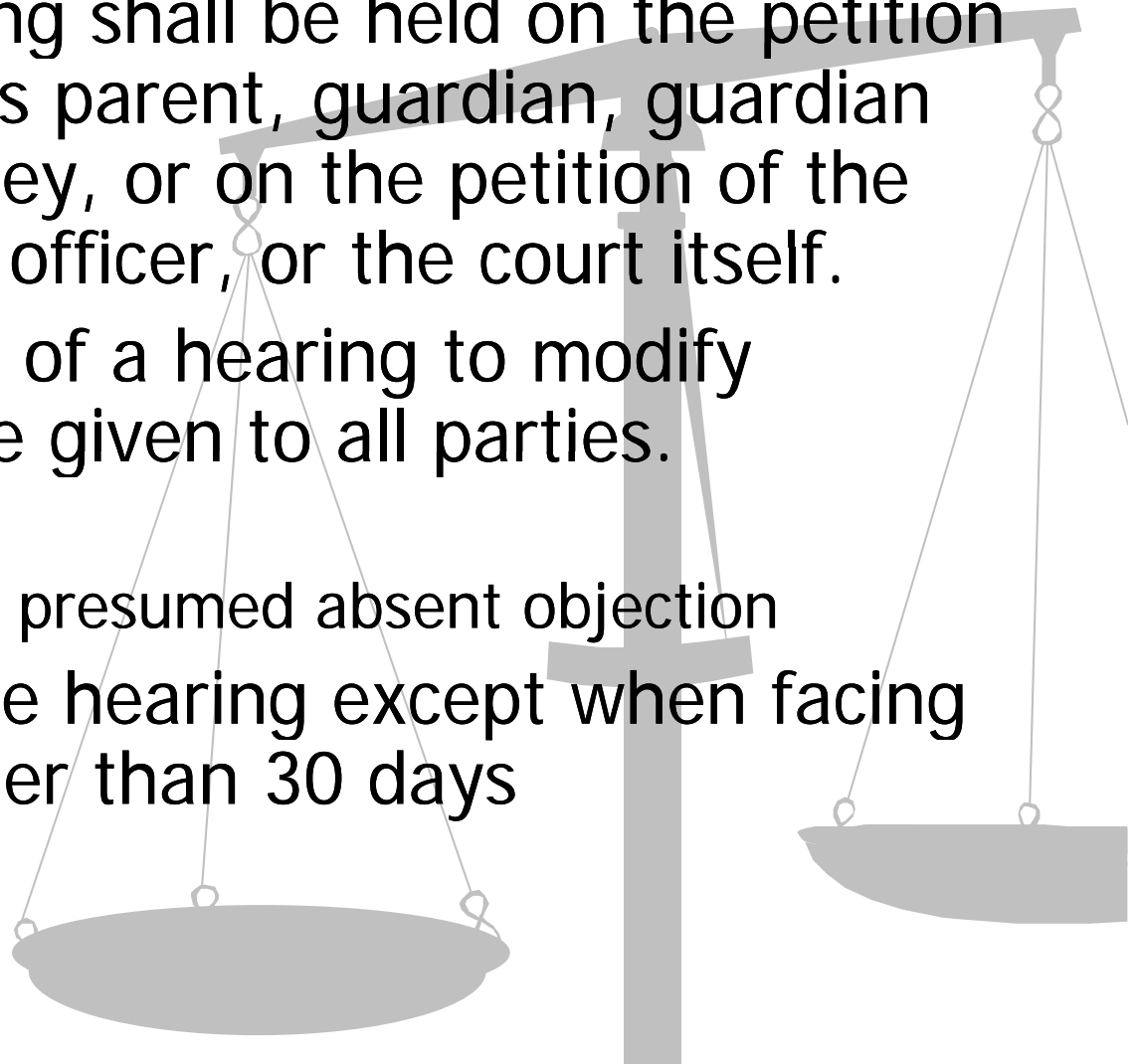
Modification Hearing

- Any disposition, except a commitment to TYC, may be modified by the juvenile court until the child reaches his 18th birthday or the child is earlier discharged by the court or operation of law.
- Except for commitment to TYC, all dispositions automatically terminate when the child reaches his 18th birthday. §54.05
- No right to jury at modification



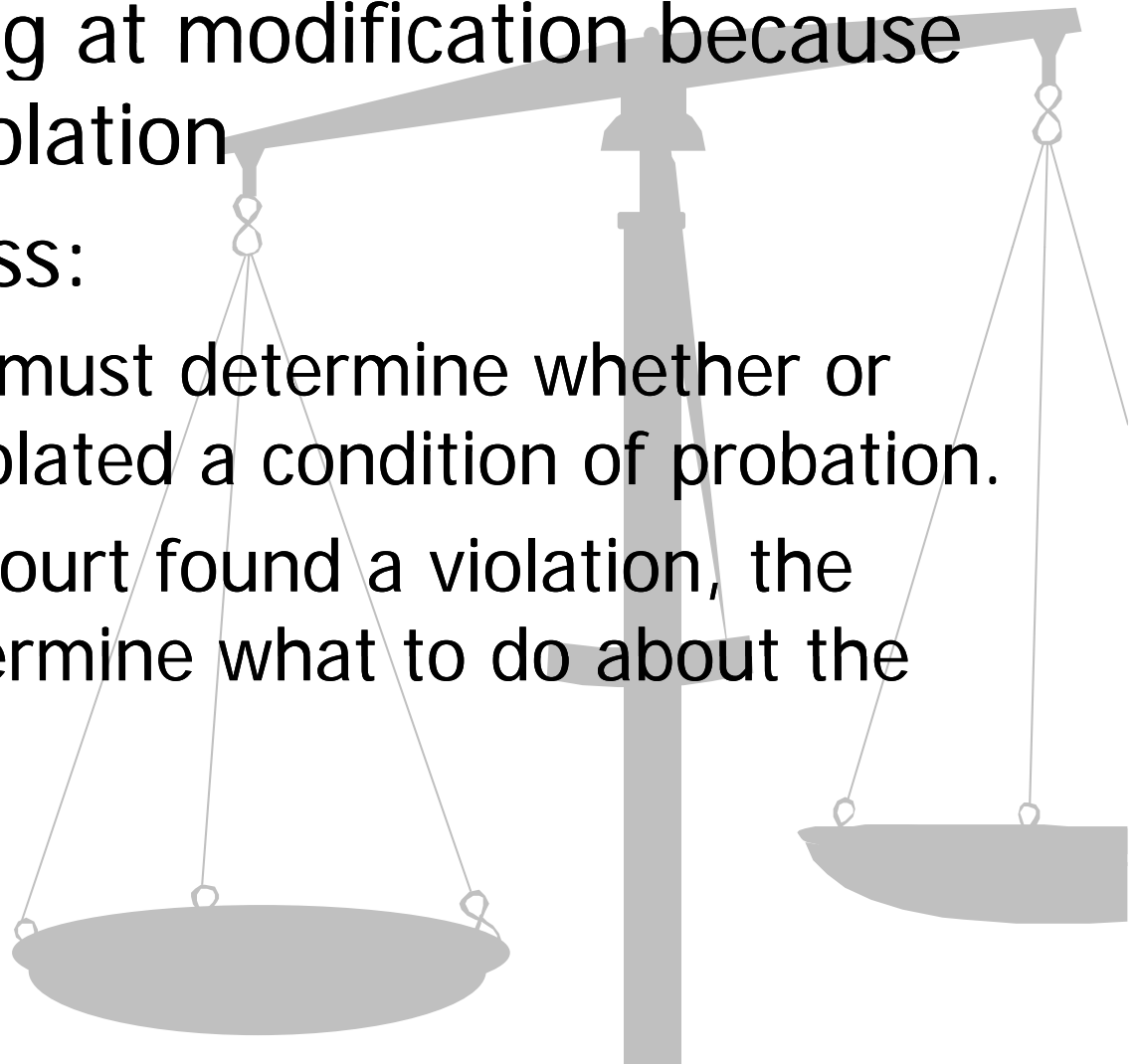
General Rules for Modification

- Modification hearing shall be held on the petition of the child and his parent, guardian, 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.
§54.04(d)
 - Reasonable notice presumed absent objection
- Juvenile may waive hearing except when facing confinement greater than 30 days



Modification Hearing

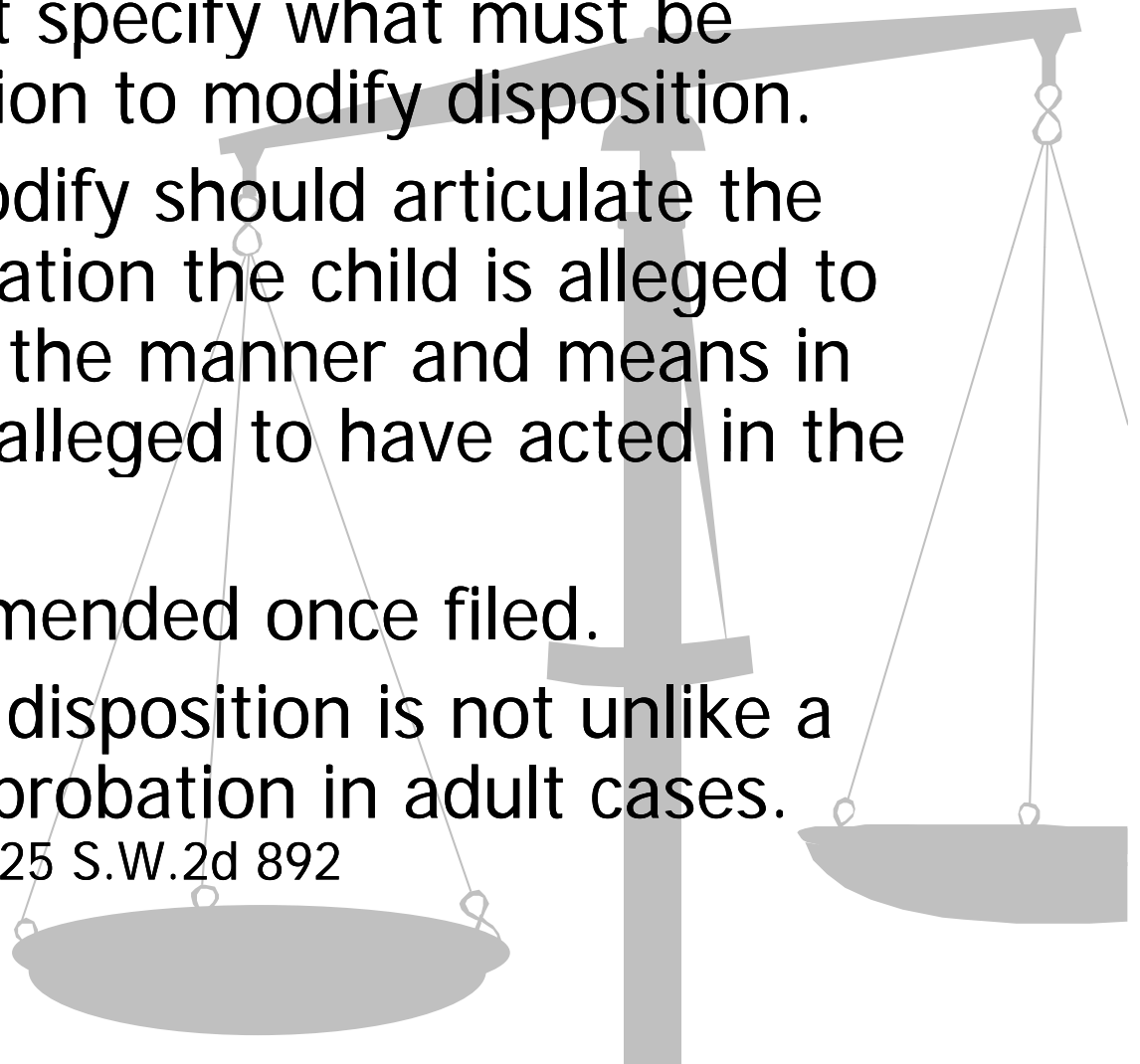
- Generally looking at modification because of an alleged violation
- Two-step process:
 - First, the court must determine whether or not the child violated a condition of probation.
 - Second, if the court found a violation, the court must determine what to do about the violation.



Petition to Modify

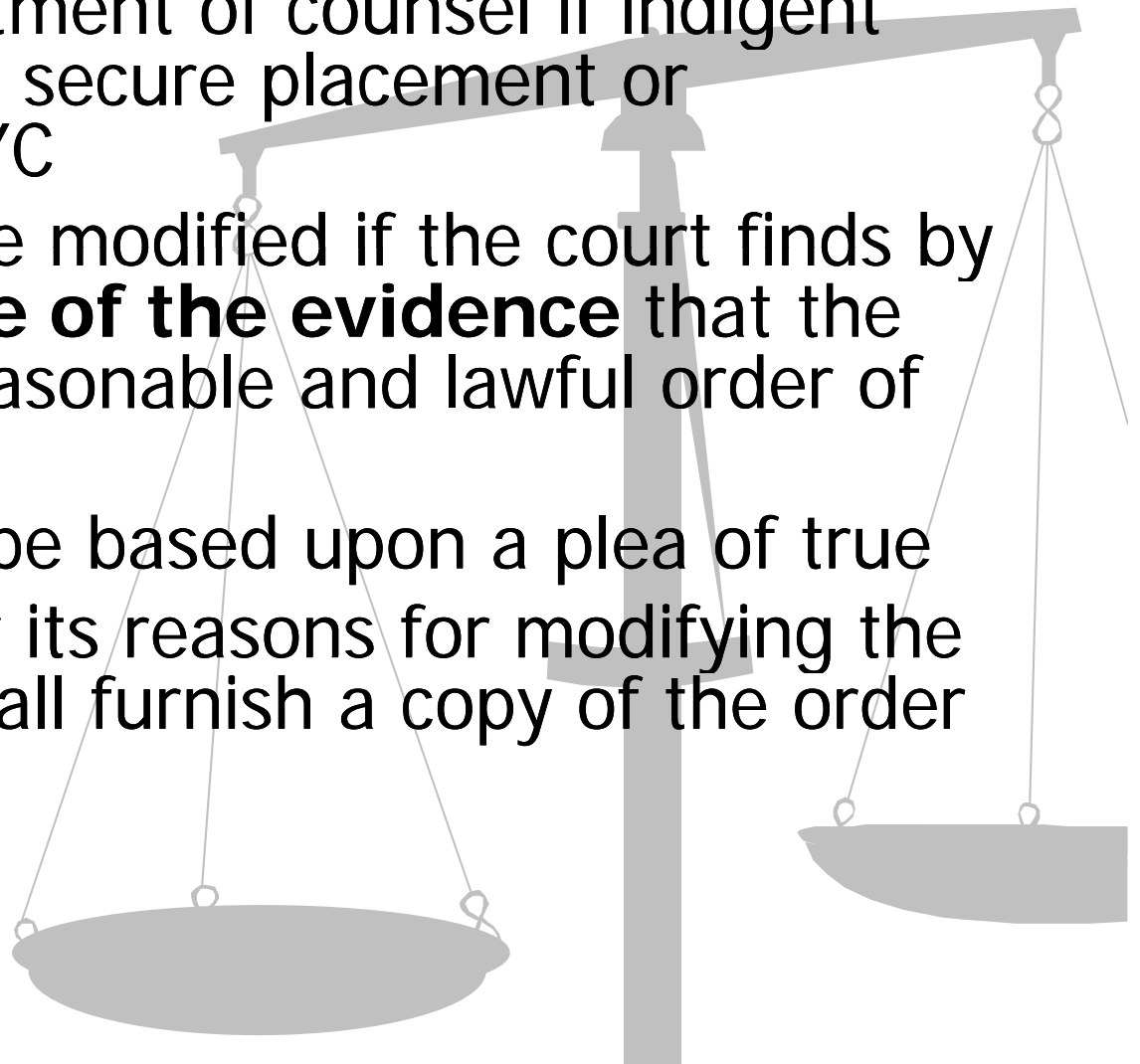
- The code does not specify what must be included in a petition to modify disposition.
- The petition to modify should articulate the conditions of probation the child is alleged to have violated and the manner and means in which the child is alleged to have acted in the violation.
- Petition may be amended once filed.
- Petition to modify disposition is not unlike a motion to revoke probation in adult cases.

In the Matter of R.A.B., 525 S.W.2d 892



More General Rules

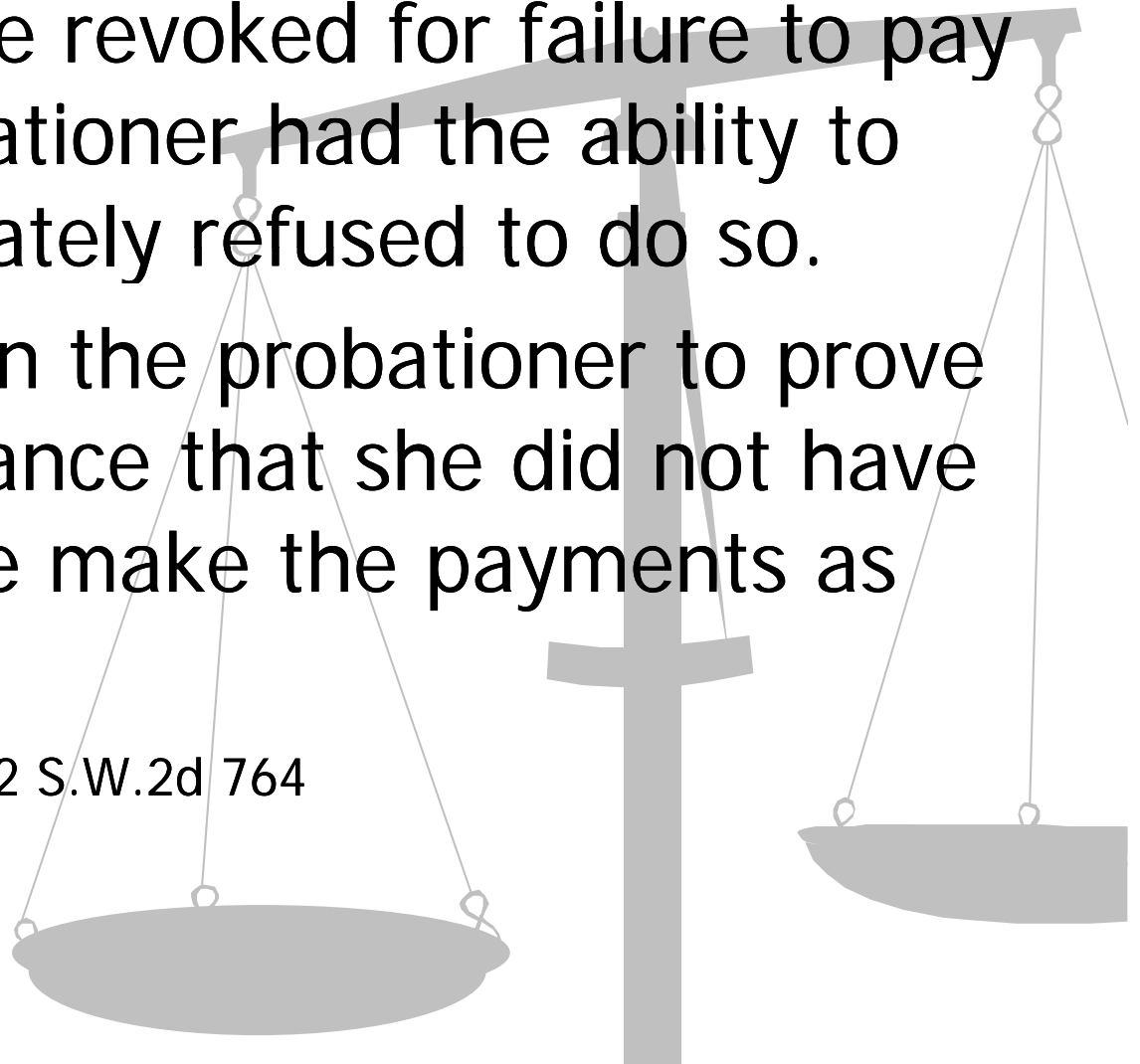
- Entitled to appointment of counsel if indigent and petition seeks secure placement or commitment to TYC
- Disposition may be modified if the court finds by a **preponderance of the evidence** that the child violated a reasonable and lawful order of the court
- Modification may be based upon a plea of true
- Court shall specify its reasons for modifying the disposition and shall furnish a copy of the order to the child



Modification for Money?

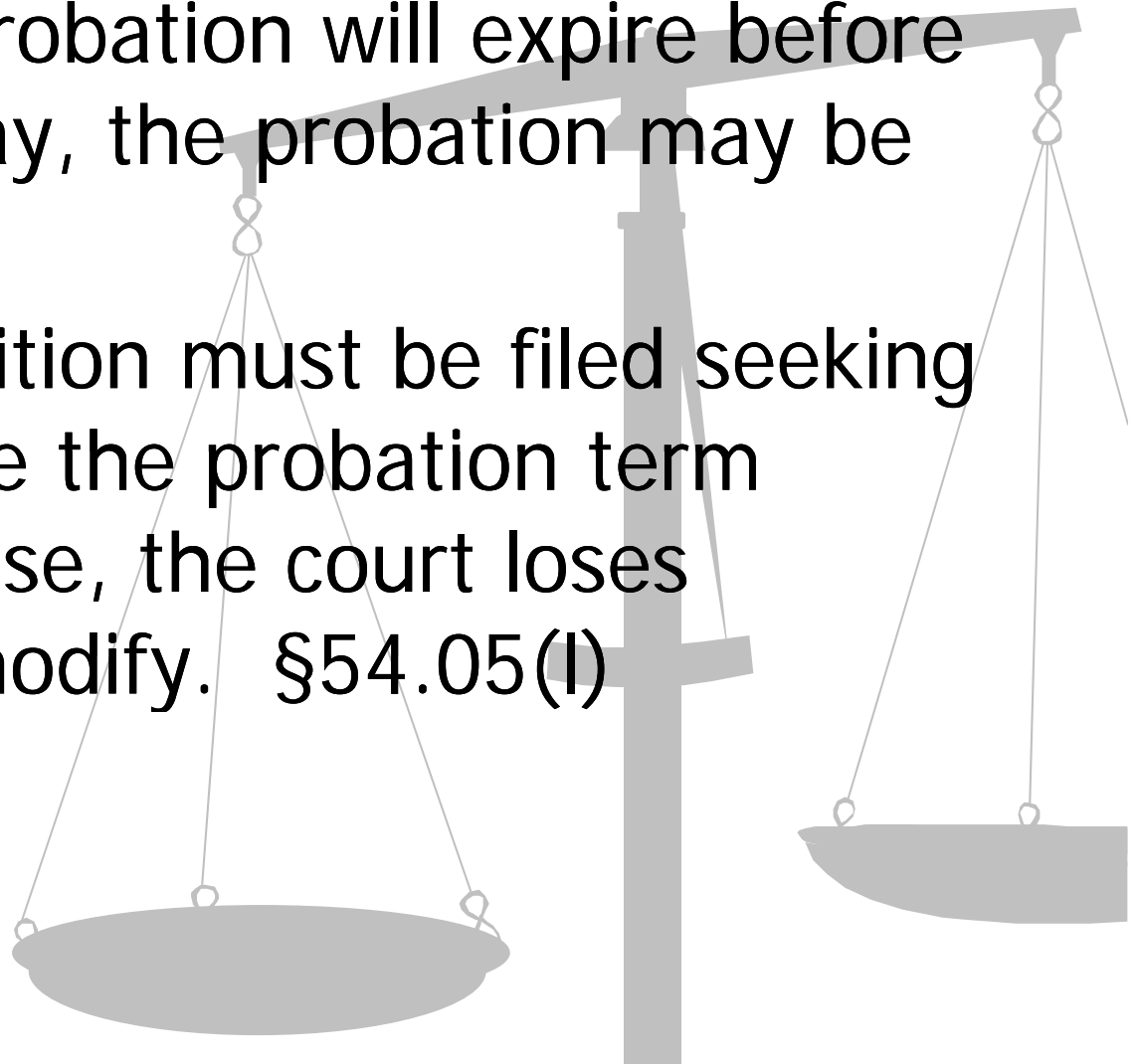
- Probation can be revoked for failure to pay only if the probationer had the ability to pay and deliberately refused to do so.
- The burden is on the probationer to prove by a preponderance that she did not have the ability to make the payments as required.

In the Matter of M.H., 662 S.W.2d 764



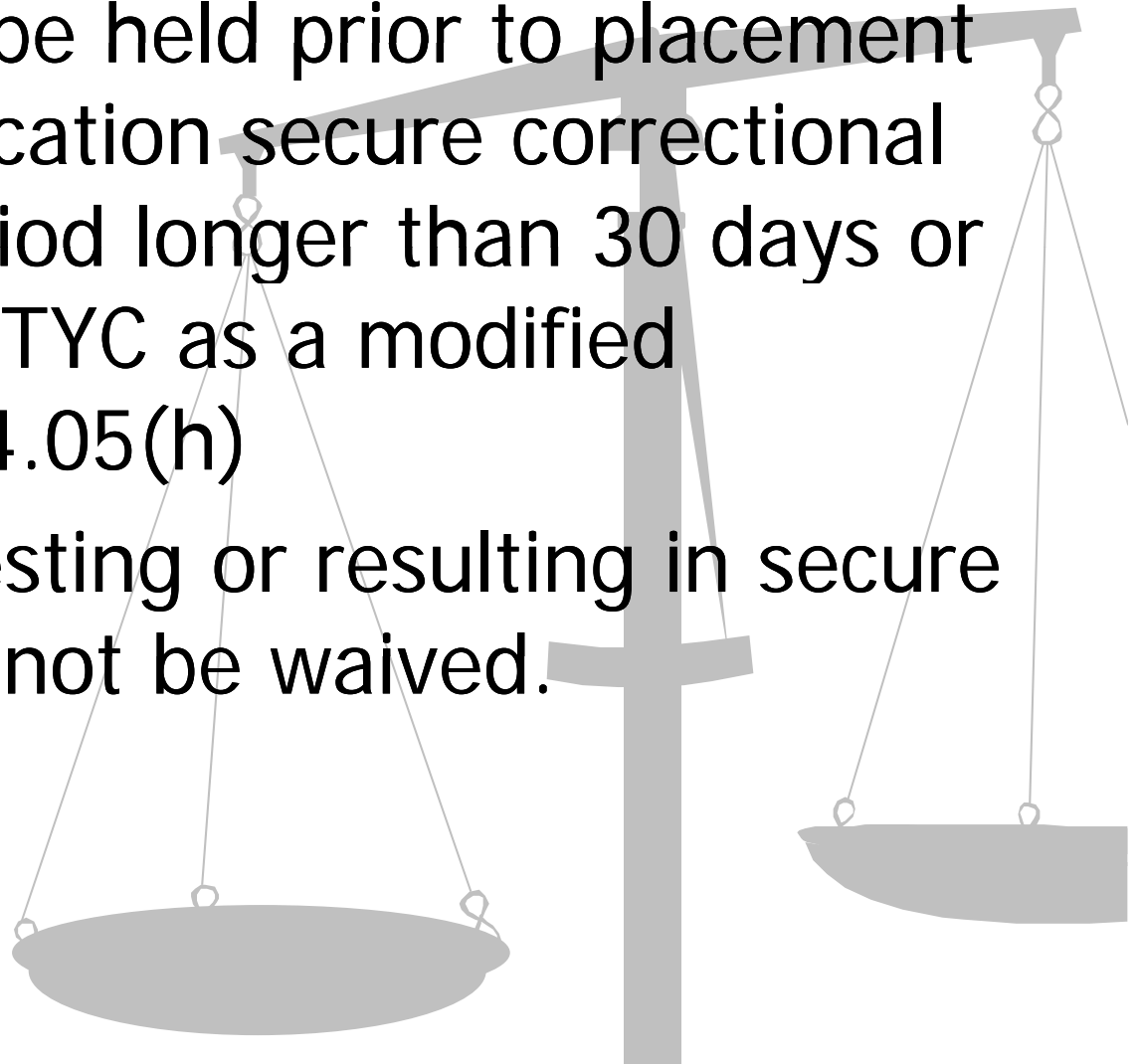
Modifying to Extend Term

- If the term of probation will expire before the 18th birthday, the probation may be extended.
- A motion or petition must be filed seeking extension before the probation term expires, otherwise, the court loses jurisdiction to modify. §54.05(I)



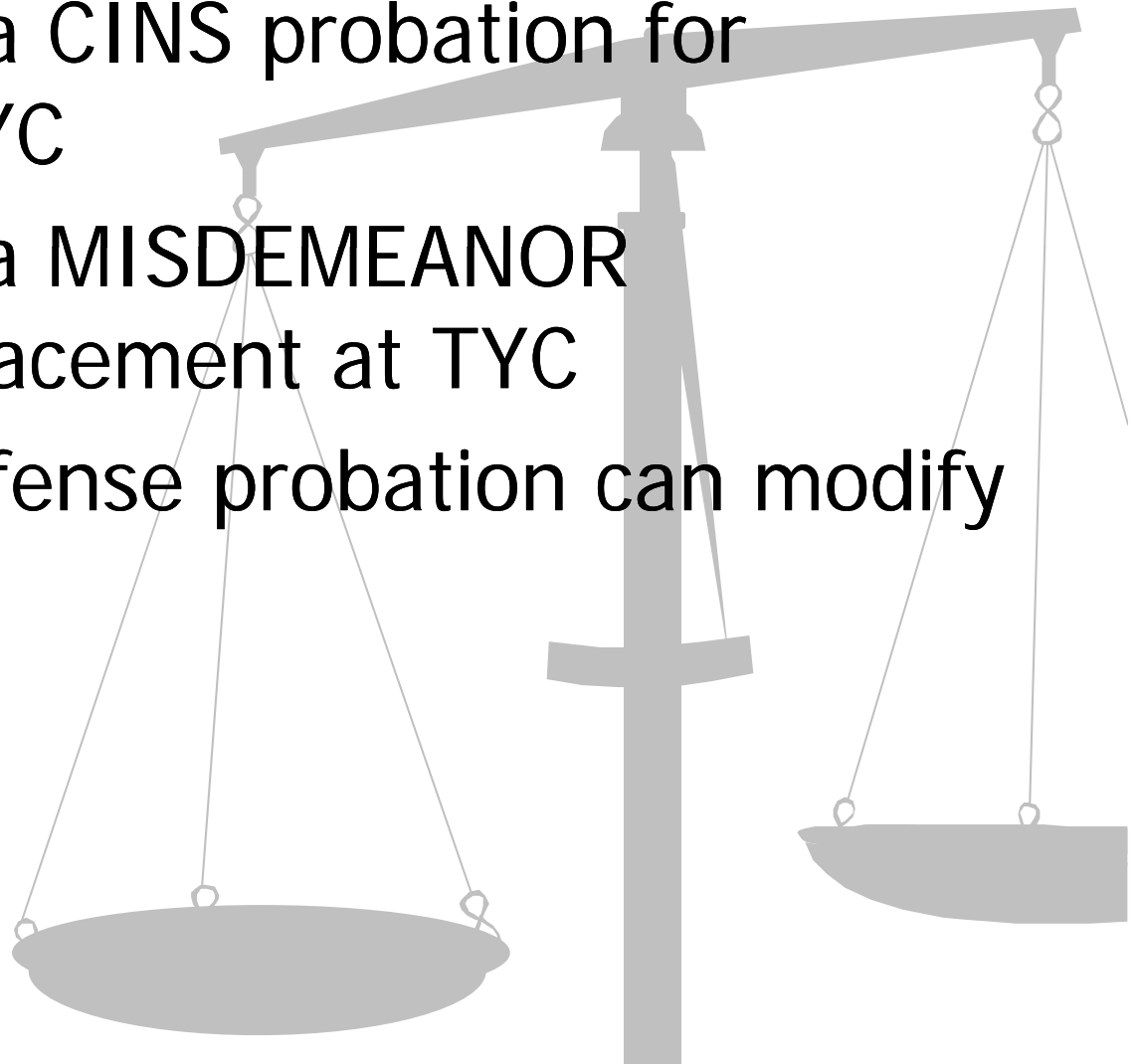
Modifying for Secure Placement

- 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 TYC as a modified disposition. §54.05(h)
- A hearing requesting or resulting in secure placement may not be waived.



Modifying to TYC

- Cannot modify a CINS probation for placement at TYC
- Cannot modify a MISDEMEANOR probation for placement at TYC
- ONLY Felony offense probation can modify to TYC





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