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## **DISPOSITIONS AND MODIFICATIONS**

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## **The Disposition Hearing Juvenile Justice Code §54.04**

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

### **A. 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).

### **B. 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. It is important to note that 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. FC §54.04(c).

### **C. 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 only question at **disposition** is 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 [14<sup>th</sup> Dist.] 1996).

**1. 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.

## **2. 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).

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.

## **3. 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).

## **4. 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).

## **5. 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.

## **6. 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).

## 7. Statement of Reasons

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.

### D. 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).

#### 1. 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.

##### a. 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).

**b. 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.

**2. 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).

**3. 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.

**4. 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.

**5. Lack of Responsibility Evidence**

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.

## 6. 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.

## 7. 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).

In a recent legislative change, Chapter 37 of the Texas Code of Criminal Procedure is **now 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 change, 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 will significantly broaden the scope of disposition hearings.

## E. 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).

### 1. 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 18<sup>th</sup> birthday. And the probation period may be extended for any period, before the probation ends, and shall not extend to or after the 18<sup>th</sup> 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 18<sup>th</sup> birthday. §54.04(p).

## 2. 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).

## 3. 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.

#### 4. 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 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 30<sup>th</sup> 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.

## 5. 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**

### **A. The Modification Hearing**

Any disposition, except a commitment to TYC, may be modified by the juvenile court until the child reaches his 18<sup>th</sup> 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 18<sup>th</sup> birthday. §54.05.

#### **1. 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 (6<sup>th</sup> 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).

#### **2. 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 (6<sup>th</sup> Ed. 2004).

#### **3. No Right to Jury**

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

#### **4. 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.

#### **5. 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.

#### **6. 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).

#### **B. 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.

#### **C. 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.

#### **D. 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 (6<sup>th</sup> Ed. 2004).

#### **E. 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.

#### **F. 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).

#### **G. 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).

## **H. 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.

## **I. Commitment to TYC as an Option**

### **1. 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.

### **2. 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.

### **3. 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.

## **J. 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).