

MODIFICATION OF DISPOSITION

Texas Family Code § 54.05 Hearing to Modify Disposition

I. Texas Family Code 54.05(d)

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

3 Issues are presented:

A. When must notice of the hearing be given?

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

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

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

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

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

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

Texas Family Code § 51.10(h)

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

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

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

B. How must notice be given?

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

Texas Family Code § 51.02(10)

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

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

C. What must the petition to modify disposition state?

1. Texas Family Code § 54.03

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

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

2. Texas Family Code § 54.05

Does not state what language is required

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II. Amending A Petition For Modification

A. Texas Family Code § 54.05

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

B. Burden of Proof for Probation Violation

Texas Family Code § 54.05(f)

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

1. Reasonable Probation Conditions:

Texas Family Code 54.05(f)

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

In the Matter of D.E.P., 512 S.W. 2d 789 (Tex. Civ. App.-Houston 14th District 1974)

Held that although the probation conditions were reasonable when imposed, subsequent events **beyond** the control of the juvenile caused them to become unreasonable.

2. Revocation for Failure to Pay

Probationers required to make periodic payments such as: Texas Family Code § 54.041(b) Restitution; Texas Family Code § 541.0411 Juvenile Probation Diversion Fund; Texas Family Code § 54.061 Probation Fees; Court costs, etc., probation may be revoked if it can be shown that the juvenile had the ability to pay and deliberately refused to do so.

In the Matter of M.H., 662 S.W. 2d 764 (Tex. App.-Corpus Christi 1983)

The 13th Court of Appeals used the standard established in Article 42.12, Section 21(c), of the Texas Code of Criminal Procedure. The court held that the State must prove a condition of probation required payment of money and that the juvenile intentionally failed to make a required payment.

Once this is established, probation will be revoked unless juvenile can prove by a preponderance of the evidence that he/she was unable to make the payment.

3. Appeal of Revocation

Texas Family Code § 56.01(c)(1)(c)

To successfully appeal, juvenile must show that there was insufficient evidence to sustain each (if more than one) violation.

C. TYC Modification Commitments

In 1999, the legislature eliminated the delinquency, CINS, distinction for TYC commitment purposes.

Texas Family Code § 54.05(j)

Essentially rendered Texas Family Code 54.05(g) inoperable by requiring a TYC commitment to be based upon a felony adjudication or repeated jailable misdemeanor adjudication.

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D. No TYC Commitments for CINS Modifications.

Texas Family Code §54.05(d)

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.

E. Restrictions on TYC Commitments for Misdemeanors

Texas Family Code § 54.05(j)

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

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

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

Example:

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

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

3. Section 54.05, Family Code, is amended by amending Subsection (k) and adding Subsection (l) to read as follows:

- (k) The court may modify a disposition under Section (f) that is based on an adjudication (~~a finding~~) that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if:
- (1) The child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least one (~~two~~) previous occasion before the adjudication that prompted the disposition that is being modified (occasions); and
 - (2) (~~of the previous adjudication,~~) the conduct that was the basis (~~for one~~) of the adjudication that prompted the disposition that is being modified (adjudications) occurred after the date of the (another) previous adjudication
- (l) The court may extend a period of probation under this section at any time during the period of probation or, if a motion for revocation or modification of probation is filed before the period of supervision ends, before the first anniversary of the date on which the period of probation expires.

78th Legislature Regular Session (2003) H.B. 2319 Section 21.

·This change is made in hopes of clarifying that in order to Modify a child to TYC for a violation of a Class A or B Misdemeanor Probation, there had to be at least one adjudication for either a felony or a class A or B Misdemeanor prior to this adjudication that is now being modified.

·Another change is section 54.05(1) which allows the juvenile court to extend probation at any time during a child's current period of probation, or allows the juvenile court to extend probation even after the period of probation ends as long as the motion for revocation or modification of probation is filed before the current probation term ends and this order extending probation is entered within a year of the expiration of the current probation period.

F. Modification Hearing

Texas Family Code § 54.05(c)

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

1. In the Matter of A.M.B., 676 S.W. 2d 448 (Tex. App.-Houston {1st District} 1984)
The court held there was no violation of Article 5, Section 10 of the Texas Constitution as this court extrapolated from similar findings in adult criminal cases that a revocation hearing is not a "trial" as the term is used by the Constitution because the defendant does not go to the penitentiary for probation violations, but due to the original conviction. Id. 450-1.
2. All rules of evidence are applicable in revocation proceedings.

In the Matter of R.A.B., 525 S.W. 2d 892 (Tex. Civ. App.-Corpus Christi 1975)

The court held illegally seized evidence inadmissible in a probation revocation hearing.

G. NOT ALL MODIFCATION HEARINGS CAN BE WAIVED

Texas Family Code §54.05(h), as follows:

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

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

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

Texas Family Code § 54.05(e)

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

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

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I. If it Walks Like a Duck. . .

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

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

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

J. No Removal From Home or TYC Placement Findings Required

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

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

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

K. Statement of Reasons:

Texas Family Code § 54.05(i)

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

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

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

L. Revocation of Probation Following its Expiration

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

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

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

of the child, the court has authority to modify the prior disposition specified by the prior order.

In the Matter of J.A.D., 31 S.W. 3d 668 (Tex. App. – Waco 2000)

- Childs probation term expired
- Motion to revoke probation not filed until after probation expired
- Juvenile court granted the revocation
- Appellate Court reversed the juvenile court
- Rationale: The juvenile court lacked jurisdiction to revoke probation because the motion was filed too late

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In the Matter of D.C., 49 S.W. 3d 26 (Tex. App. – San Antonio 2001)

- Child is on probation
- Motion to Revoke filed while child is on probation
- Revocation Hearing is held following the expiration of probation at age 18
- Juvenile court granted the revocation
- Appellate Court reversed
- Rationale: Since the hearing was held after the 18th birthday, the juvenile court Had no authority to modify.

SOLUTION:

Texas Family Code Section 51.0412. Jurisdiction Over Incomplete Proceedings.

The court retains jurisdiction over a person, without regard to the age of the person, who is a respondent in an adjudication proceeding, a disposition proceeding, or a proceeding to modify disposition if:

- (1) the petition or motion to modify was filed while the respondent was younger than 18 years of age;
- (2) the proceeding is not complete before the respondent becomes 18 years of age; and
- (3) the court enters a finding in the proceeding that the prosecuting attorney exercised due diligence in an attempt to complete the proceeding before the respondent became 18 years of age.

This section now enables a court to extend its jurisdiction long enough to complete either its adjudication, disposition, or modification of disposition.

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