Trial Brief

by Greg Enos **April 18, 2012**

Re: Admitting Evidence of Conduct Before the Prior Order in Custody Modification Cases

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Evidence of events or conduct which occurred prior to the order to be modified can be introduced in child custody modification cases in Texas under several theories. The commonly held notion that no such evidence can be introduced is simply incorrect. However, it is still generally true that conduct by a parent which occurred prior to the first order is not admissible except to show a continuing course of conduct.

The General Rule: Evidence of Acts Before the Order to be Modified Is NOT Admissible

It all started in 1903 when the Texas Supreme Court addressed what evidence could be introduced in a Texas suit to modify a New Mexico divorce which originally gave the father primary custody. In *Wilson v. Elliott,* 73 S.W. 946, 947 (Tex. 1903), the Supreme Court said:

> ..."**The substance of this is that courts may modify the decree awarding the custody of children in divorce cases, but such modification must be upon matters which have arisen subsequent to the decree.'** The question upon the first trial in a case of a character of this is, which is the more suitable party to be intrusted with the care of the child at that time? The question in the subsequent proceeding is, which is the more suitable at the time of that trial? Since, in determining the second question, the first cannot be agitated, **it follows that evidence of prior conduct of either party cannot be introduced except to corroborate some evidence of similar conduct which was developed since the original decree.**
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> (emphasis added).
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> Later cases decided before the enactment of the Texas Family Code explained the rationale for this rule:
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> As a matter of public policy there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of constant re-litigation should be discouraged. Once a final judgment of custody is rendered, a subsequent suit to modify or to avoid the judgment should be res judicata of all causes of action which, with diligence, could have been asserted in the suit as a basis for obtaining custody and possession of the child.

Ogletree v. Crates, 363 S.W.2d 431, 436 (Tex. 1963)

A classic example of why this rule is applied is found in *Watts v. Watts*, 563 S.W.2d 314 (Tex. Civ. App. – Dallas 1978, writ ref'd n.r.e.):

> The evidence shows that three months prior to the divorce, Tom Black moved in with Mrs. Watts. The father knew that this situation existed when he agreed that the mother be appointed managing conservator, but testified that he only did so because she promised to marry Black as soon as possible after the divorce. Although the fact that the mother was living with a man to whom she was not married is likely against the best interest of the children, this circumstance existed at the time of the divorce as well as at the time of the

hearing on the motion to modify. Thus, there was no change with respect to the circumstances of the mother. Essentially, they were bad then and are no worse now, insofar as the present record shows.

Id. at 316.

The enactment of the Texas Family Code provided a statutory basis for this rule. Section 156.101 states in part:

Sec. 156.101. GROUNDS FOR MODIFICATIONOF ORDER ESTABLISHING CONSERVATORSHIP OR POSSESSION AND ACCESS. (a) The court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and:

(1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of:

(A) the date of the rendition of the order; or

(B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based;

. . . .

Case law interpreting Sec. 156.101 makes it clear that thegeneral rule that is still followed in Texas is that evidence of pre-divorce conduct is not by itself relevant or admissible in a later modification case, but such evidence may be offered to corroborate allegationsand evidence of similar conduct since the decree. *Blackwell v. Humble,* 241 S.W.3d 707, 716 (Tex. App.– Austin 2007, no pet.) This rule is almost 110 years old in Texas and is based on principles of res judicata and avoiding relitigation of child custody issues that have already been heard or which could have been heard when the first order was entered.

Exception No. 1: Evidence to Show A Continuing Course of Conduct

The Supreme Court Case which created the rule also created the major exception to the rule, stating, "evidence of prior conduct of either party cannot be introduced except to corroborate some evidence of similar conduct which was developed since the original decree." *Wilson v. Elliott,* 73 S.W. 946, 947 (Tex. 1903). Later cases have also allowed this exception. For example, the El Paso Court of Appeals said,"That is not to say that evidence of pre-divorce violence is never admissible-it is admissible to show a continuing course of conduct. *Dowell v. Dowell*, 276 S.W.3d 17, 23 (Tex. App.—El Paso 2008, no. pet.). See also *In re C. E. B.*, 604 S.W.2d 436, 443 (Tex. Civ. App.—Amarillo 1980, no writ). The Supreme Court in the original *Wilson v. Elliott* case actually provided two examples of evidence of continuing conduct that would be admissible, one of which was: "if, upon the second trial, evidence be introduced tending to show that since the first the party has become an habitual drunkard, we think that it might be shown in corroboration that previous to the first trial he was accustomed to use intoxicating liquors to excess." In *Wilson v. Elliott,* 73 S.W. 946, 947 (Tex. 1903)

Colvin v. Colvin , No. 03-03-00234-CV, 2004 WL 852266 *5 (Tex. App.– Austin April 22, 2004 , no pet.)(mem. op. not designated for publication) is a recent example of the cases which restate this exception to the general rule:

It was error, the father asserts, for the court to admit, over proper objection, evidence of his sexual

misconduct which occurred prior to the divorce of these parties. We agree. Evidence of prior conduct of one of the parties cannot be introduced except to corroborate some evidence of similar conduct since the prior decree....

So, for example, if a mother after the first custody order left the child with others while she lived with various men, evidence of similar conduct before the order would be admissible under this exception as a course of continuing conduct in a later modification case.

Exception No. 2: Evidence Regarding a Step-Parent or Others Not Involved in the First Case

Evidence about what a step-parent did before the date of the prior order to be modified can be considered in a modification suit if the step-parent was not in the picture when the first case was decided. *In re C.Q.T.M.*, 25 S.W.3d 730, 736 (Tex. App.—Waco 2000, pet. denied). There, the court said:

> If a parent becomes involved in a relationship with another after entry of a custody decree and then marries that person, the parent's spouse would not have been a party to the prior custody litigation nor in privity with the parent who was a party to that litigation. For this reason, res judicata would not bar the introduction of evidence regarding the conduct and parental abilities of that spouse, even if such evidence concerned events occurring prior to rendition of the previous custody decree.

(Citation omitted).

Exception No. 3: History of Domestic Violence or Child Abuse

The Texas Family Code provides a statutory exception that could allow admission evidence of domestic violence or child abuse, even if it occurred before the first custody order. Section 153.004 states in part:

> Sec. 153.004. HISTORY OF DOMESTIC VIOLENCE.
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> (a) In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.
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> (b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Section 22.011 or 22.021, Penal Code, that results in the other parent becoming pregnant with the child. A history of sexual abuse includes a sexual assault that results in the other parent becoming pregnant with the child, regardless of the prior relationship of the parents. It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.
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> (c) The court shall consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.

. . . .

This statute would seem to require a trial court to consider evidence of domestic violence during the two years prior to the filing of the modification suit, even if some of that violence occurred before the first order, because Section 153.004(a) says the "court shall" consider such evidence. Section 153.004(b) would appear to allow admission of evidence of child abuse at any time in the past, even if it occurred before the order to be modified. However, perhaps the argument could be made that res judicata would bar such evidence.

Exception No. 4: Evidence Used To Show the Circumstances at the Time of The Order to be Modified

Case law requires the movant in a suit to modify the parent child relationship to provide evidence of the circumstances surrounding the parties and child when the order to be modified was made. As one court said,"[t]o prove that a material change in circumstances has occurred, the petitioner must demonstrate what conditions existed at the time of the entry of the prior order as compared to the circumstances existing at the time of the hearing on the motion to modify." *Zeifman v. Michels,* 212 S.W.3d 582, 589 (Tex. App.—Austin 2006, pet. denied). The Houston First Court of Appeals has said, "Without evidence of the circumstances at the time the existing support order was entered, the trial court cannot determine whether there has been a material and substantial change in the circumstances of the children or the parties affected by the order. *Swate v. Crook*, 991 S.W.2d 450, 453 (Tex. App.– Houston [1st Dist.] 1999, pet. denied).

The court in *Zeifman v. Michels,* 212 S.W.3d 582, 594 (Tex. App.– Austin 2006, pet. denied)(footnote 1) stated:

> For the trial court to determine if a material and substantial change has occurred, most courts require a comparison between the original circumstances of the child and the affected parties at the time the existing order was entered with their circumstances at the time the modification is sought. **Thus, the record must contain both historical and current evidence of the relevant circumstances.** Without both sets of data, the court has nothing to compare and cannot determine whether a change has occurred.
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> (Citations omitted)(emphasis added).

So, for example, if a mother wants to support her modification request based on her improved mental health and track record of good child care, she must also present historical evidence of her poor mental health and bad child care which gave rise to the order to be modified, even if some of that occurred months before the first order.

There are plenty of child support modification cases where the evidence admitted included what the obligor made during the year before the date of the prior order. See e.g. *In re T.K.W*, No. 04-09-00048-CV (Tex. App.- San Antonio 2010, no pet.)(mem. op.)(the parties were divorced in 2005 and evidence at the modification trial in 2008 included evidence how much the father earned in 2004 (the year before the divorce); 2005, 2006, and 2007). In those child support modification cases, the court in the second trial is considering evidence of what the obligor earned as far back as twelve or more months before the date of the original order being modified. Obviously, the circumstances that the court can consider are not just those as of the specific date of the first order. For example, what if a mother had been in prison for two years and had just been released three months before the divorce trial. Six years later at the modification trial, surely the mother could point to the fact that she has been not in jail and out of trouble with the law for the last six years as a major change of circumstances even though her last incarceration was technically a few months before the first trial.

The trial court has wide discretion in deciding how far back to go before the prior order in order to show the "historical evidence of the relevant circumstances" existing at the time the prior order was entered. A lot depends on the unique facts of each case and what the court determines is in the best interests of the child. "A court's determination as to whether a material and substantial change of circumstances has occurred is not guided by rigid rules and is fact specific." *Zeifman v. Michels,* 212 S.W.3d 582, 593 (Tex. App.– Austin 2006, pet. denied).

Exception No. 5: Evidence Used for Background Information

The trial court in a modification case surely has discretion to allow some evidence of events that occurred prior to the order to be modified in order to get some basic background on the parties and the child. For example, in *In re A.N.O.,* 332 S.W.3d 673 (Tex. App. – Eastland 2010, no pet.), the trial court considered the fact that the child had lived primarily with her mother for most of her life and also that the child had lived in a certain town for her entire life. Technically, most of those years of living with the mother or in that town occurred prior to the parents' divorce, but the trial court and the court of appeals were allowed to consider that background information in the modification trial.

Hollon v. Rethaber, 643 S.W.2d 783 (Tex. App.– San Antonio 1982, no writ) involved a scary mannequin called "Ugly Face" which the mother had used prior to the divorce to scare the children. At the trial of the modification suit, evidence was presented that the children were still scared of "Ugly Face" (which had not apparently been used by the mother since the divorce) and the trial court allowed the father to explain to the jury what "Ugly Face" was. The court of appeals held that this explanation of essential background information which involved acts prior to the first order was not error. *Id*. at 785.

In a modification case following a divorce, it would be common place to allow evidence of the parents' college education, the dates the children were born, the date the family moved to the Houston area, etc. even though all of those events happened before divorce. Admission of such basic background information would be essential to the court to understand the parents and children involved, even if it would all involve actions prior to the order being modified.

Basic background information from before the prior order that is not any sort of "bad" conduct which would justify modification would almost certainly not be error to admit. This is especially true since, after a bench trial, the appellate court will assume that the trial judge did not base her ruling on evidence of acts which occurred prior to the first order, even if such evidence is admitted. *Dunker v. Dunker,* 659 S.W.2d 106, 108 (Tex.App.– Houston [14th Dist.] 1983, no writ)("The appellant contends in the second point of error that the trial court erred as a matter of law in allowing testimony in the modification hearing regarding events which occurred prior to the time of the original divorce decree.... The case at bar was tried to the court and not to the jury. Therefore, the judge is presumed not to have considered any evidence that is inadmissible.").

Possible Exception No. 6: Evidence That was Not Known at the Time of the Prior Order

It is probably not error for a trial court to allow testimony about a parent's bad behavior from before the first order if the other parent and the court did not know about it at the time the first order was entered. There are no Texas cases exactly on point, but several cases from other states which follow the same general rule as Texas in custody modification cases are persuasive.

Like Texas, North Carolina requires a material change of circumstances to modify custody and generally only allows evidence of what has happened since the prior order in modification cases. The North Carolina Court

of Appeals in *Newsome v. Newsome*, 42 N.C. App. 416, 425-6, 256 S.E.2d 849 (N.C. App. 1979) stated:

> The reason behind the often stated requirement that there must be a change of circumstances before a custody decree can be modified is to prevent relitigation of conduct and circumstances that antedate the prior custody order. It assumes, therefore, that such conduct has been litigated and that a court has entered a judgment based on that conduct. The rule prevents the dissatisfied party from presenting those circumstances to another court in the hopes that different conclusions will be drawn. ....
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> Suppose, for instance, it should appear that, unknown to the first judge, the child had been regularly confined to a closet for long periods of time or otherwise abused but those facts are made known to the second judge. Surely it could not be said that the second judge is powerless to act merely because the circumstances are the same in that the abuse is no greater or the environment no worse than before. Moreover, evidence of the abusive environment that existed prior to the first hearing (but unknown to the judge who conducted that hearing) could properly be considered by the judge conducting the second hearing in deciding what disposition of the case would be in the best interest of the child.
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> (Citations omitted).

The Supreme Court of Nebraska in *Cline v. Cline*, 200 Neb. 619, 622, 264 N.W.2d 680 (1978) stated:

> Modern authority supports the view that where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, and, particularly in default cases, where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody.

The Court in *Selvey v. Selvey*, 102 P.3d 210, 214 (Wyo. 2004) stated:

> In cases like the present, where a fact, although known to one or both parties, was neither raised nor adjudicated at the time of the decree, courts have generally allowed evidence of that fact to be considered. This is especially true where the original decree was entered without true judicial consideration of that evidence, such as by stipulation or default.
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> (Citations omitted).

Other cases that follow the same rule include *Kolb v. Kolb*, 324 N.W.2d 279, 281 (S.D. 1982), *Stewart v. Stewart*, 86 Idaho 108, 113-14, 383 P.2d 617 (1963)("Where facts, affecting their welfare, existing at the time of the divorce or order awarding custody, are not called to the attention of the court, and particularly in default cases where the issues affecting custody have not been fully tried, the court upon a proper application may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody."), *Perez v. Hester*, 272 Ala. 564, 133 So.2d 199 (1961); *Henkell v. Henkell*, 224 Ark. 366, 273 S.W.2d 402(1954); *Weatherall v. Weatherall*, 450 P.2d 497 (Okl.1969), *Stewart v. Stewart*, 86 Idaho 108, 383 P.2d 617, 619-20 (1963); *Harms v. Harms*, 323 Ill.App. 154, 55 N.E.2d 301, 303 (1944); *Hulm v. Hulm*, 484 N.W.2d 303, 305 (S.D.1992); and *Rowles v. Reynolds*, 29 Tenn.App. 224, 196 S.W.2d 76, 79 (1946).

Possible Exception No. 7: Evidence Used to Argue AGAINST Modification

Suppose that the father molested a neighbor child two years before the divorce, which resulted in a divorce decree that granted the father only supervised visitation with his children. A year and one day after the divorce,

the father files for modification asking for unsupervised visitation. Since the divorce, he has not molested any child. Surely, the mother can use his terrible conduct from before the divorce to keep arguing that there should not be a modification! All of the cases in Texas involving evidence that should not have been admitted from before the first order, involve evidence the person seeking modification wanted to use. See e.g., *Watts v. Watts*, 563 S.W.2d 314, 316 (Tex. Civ. App. – Dallas 1978, writ ref'd n.r.e.)(mother lived with a man when they got divorced and they still are living together so the father cannot use that against her). No Texas cases specifically hold that the parent opposing modification cannot offer evidence of something the petitioner did prior to the first order.

If the consideration in modification suits is always the best interests of the child, *In re R.K.B.*, 14-09-00455-CV (Tex. App. – Houston [14th Dist.] 3/24/2011)(mem. op.), then it would seem logical that truly bad behavior that occurred prior to the first court order could be used against the party who is seeking the modification. While logical, there are apparently no Texas cases that specifically support this conclusion, but it is an argument that could persuade a trial judge.