Admitting Evidence of Conduct Before the Prior Order in Modification Cases – 2024

by Greg Enos

Evidence of events or conduct which occurred prior to the order to be modified can be introduced in modification cases under several theories. The commonly held notion that no such evidence can be introduced is simply incorrect, although it is true that the general rule remains that conduct by a parent which occurred prior to the first order is not admissible.

1. 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.** As just intimated, **we think, however, where testimony upon the second trial tends to show conduct on part of the one to whom the custody has been previously committed, and that he or she, since the first, has become a person not suitable for so important a charge, the rule of res adjudicata would not preclude the introduction of evidence of conduct previous to the first decree, provided it tended to corroborate the evidence of subsequent conduct of a like nature**. For example, upon the second trial evidence might be introduced tending to show that the party had, since the first, become a spendthrift, has wasted his subsistence, and was incapable of maintaining and educating the child as it should be maintained and educated. In such a case we see no reason why improvident conduct previous to the first decree may not be offered in evidence. **Or 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**.*

(emphasis added).

Later cases decided before the enactment of the Texas Family Code explained the rationale for rule:

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 classical 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.), rev'd on other grounds, *Jones v. Cable*, 626 S.W.2d 734 (Tex. 1981):

> *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.

Thus, the general 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 allegations and evidence of similar conduct since the decree. *Blackwell v. Humble*, 241 S.W.3d 707, 716 (Tex. App.--Austin 2007, no pet.) The rule is over 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.

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

The Supreme Court Case which created the rule also created the 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 (Tex. App.-Austin April 22, 2004, no pet.)(mem. op.) is a recent example of the cases which restate this exception to the general rule:

> *In cases specifically addressing the admissibility of evidence of pre-divorce conduct in motions to modify divorce decrees, courts have held that evidence of prior conduct of one of the parties can be introduced to corroborate evidence of similar conduct since the decree.*

So, if the mother after the order to be modified left the child with others while she partied with various men, evidence of similar conduct before the order would be admissible under this exception as a course of continuing conduct.

3. 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).

4. Exception No. 3: 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.*

(Citations omitted)(emphasis added).

Thus, 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 evidence of her poor mental health and bad child care that gave rise to the order to be modified.

There are plenty of child support modification cases where the evidence admitted included what the obigor 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.)[1] In those 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 jail for three

[1] Parties were divorced in 2005. Evidence at the modification trial in 2008 included evidence the father made $167,776 in 2004 (the year before the divorce); $365,021 in 2005 (the year of the divorce); $237,079 in 2006; and $115,453 in 2007.

years and 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 thinks 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).

5. Exception No. 4: 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 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.

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.").

6. Exception No. 5: 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 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.* ....
>
> *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.*

(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.*

(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).

7. Exception No. 6: Evidence Used to Argue AGAINST Modification

Suppose that the father molested a neighbor child two years before the divorce, which resulted in a probated criminal conviction and then a divorce decree that granted the father only supervised visitation with his children. Five years 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 related to evidence the person seeking modification wanted to use or did use in trial. For example, in *Watts v. Watts*, 563 S.W.2d 314 (Tex. Civ. App. - Dallas 1978, writ ref'd n.r.e.), the court ruled that the father in the modification case could not attack the mother because she lived with the child and a man outside of marriage when that was the case at the time of the

divorce. There, the mother got custody the first time in the divorce and that father was trying to change custody to him.

If res judicata is a reason for the general rule described above, then res judicata would seem to allow a party who won custody in the prior order to remind the court why that happened. Res judicata basically prevents a party from relitigating a case he or she lost before. If the evidence of bad behavior by the parent who did not win custody in prior case is allowed in, that is not relitigating the case but instead is merely explaining why the prior order should not be changed. Reminding the judge in the above example that the father molested a child is not relitigating the case. It is in fact simply showing that the circumstances that existed at the time of the prior order have not changed - he was a convicted child molester then and he still is now.

The Texas Supreme Court has explained res judicata as follows:

> *For res judicata to apply, there must be: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action. The doctrine seeks to bring an end to litigation, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery.*

Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 449 (Tex. 2007)(citations omitted).

Res judicata prevents a party who lost a case from filing a second case based on the same facts. This would not seem to apply to a parent who won the first custody case and who, in the subsequent modification case, merely wants to bring in evidence of the petitioner's bad behavior that was used in the first case as a defense to the request for modification. This defensive use of such evidence by the parent opposing modification would not involve bringing "a second action based on the same claims" and it would not involve potential double recovery. It would in fact promote stability of court decisions since it is being used to maintain the prior custody ruling.

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 could be used against the party who is seeking the modification. How could it ever been in a child's best interests to ignore really bad parental behavior from before the divorce if that bad behavior is always going to be a good reason that bad parent should not get custody switched to him or her?

There are no Texas cases specifically on point, but almost every judge who is interested in

the best interests of the child will consider this exception to the general rule if the behavior that occurred prior to the first order is bad enough.