

222 CHIPS: SUBSTANTIAL RISK OF PHYSICAL ABUSE [WIS. STAT. § 48.13(3m)]

The petition in this case alleges that (child) is in need of the protection or services of the court because (he) (she) is at substantial risk of becoming the victim of abuse. Your role as jurors will be to answer the following questions in the special verdict:

1. Does reliable and credible information exist that another child in the home of (child) has been the victim of abuse?

If the answer to question 1 is "yes," answer question 2:

2. Is (child) at substantial risk of becoming the victim of abuse?

The burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the questions should be answered "yes."

In answering the questions in the special verdict, you should apply the following meanings to the terms and phrases in those questions.

"Reliable information" means information which is accurate, trustworthy, and dependable. "Credible information" means information which in the light of reason and common sense is worthy of belief.

Information may be reliable and credible even though it may not establish the identity of the alleged abuser of another child. In other words, you may be convinced that reliable and credible information exists that another child has been the victim of abuse in the home of (child) even though the information does not establish who committed the abuse.

"Another child in the home" means someone under the age of 18, not (child), who resides or resided in the home of (child) either permanently or temporarily. The other child does not have to be related to (child). In answering question 1, you must consider the facts

and circumstances at they existed on (_____), which was the date on which this petition was filed. Your answer must reflect your finding as of that date.

"Substantial risk" means that a significant and appreciable threat of abuse exists.¹ [In assessing the seriousness of the risk, among the factors you may consider are: (1) the nature and severity of the abuse to the other child in the home; (2) the similarity of (the subject child) to the abused child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of (the subject child) to the abused child by way of relationship or position of favor or disfavor in relation to the alleged abuser; and (4) any changes which have occurred in the home since the prior abuse.] In answering question 2, you may consider all evidence bearing on that question, including evidence of events and conduct occurring since the filing of the petition on (_____). Your answer must reflect your finding as of today's date.²

In this case, "abuse" means physical injury which is intentionally or recklessly inflicted on a child, including injury which is self-inflicted.³ "Intentionally" means that the person who causes the physical injury had the purpose to cause physical injury or was aware that his or her conduct was practically certain to cause that result. "Recklessly" means that the physical injury was caused by conduct which creates an unreasonable risk of harm to the child and demonstrates a conscious disregard for the safety of the child. Abuse does not include physical injury which is inflicted by accident.

"Physical injury" includes, but is not limited to, lacerations, fractured bones, burns, internal injuries, and severe or frequent bruising. It also includes bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes

a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.⁴

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that reliable and credible information exists that another child in the home of (child) has been the victim of abuse, you should answer question 1 in the special verdict "yes." If you are not so convinced, you must answer question 1 "no."

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, based upon that information, that (child) is at substantial risk of becoming a victim of abuse, you should answer question 2 of the special verdict "yes." If you are not so convinced, you must answer question 2 "no."

SPECIAL VERDICT

1. Does reliable and credible information exist that another child in the home of (child) has been the victim of abuse?

Answer: _____
Yes or No

If the answer to question 1 is "yes," answer question 2:

2. Is (child) at substantial risk of becoming the victim of abuse?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 222 and comment were originally approved in 1997 and revised in 1999, 2001, 2004, 2009, and 2010. An editorial correction was made in 2008. Editorial corrections were made to paragraphs 6 and 11 in 2005. Note No. 1 was updated in 2005 and 2010. The comment was updated in 2007. The verdict was revised in 2009.

Wis. Stat. § 48.13(3m) reads:

48.13. Jurisdiction over children alleged to be in need of protection or services.

The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

(3m) Who is at substantial risk of becoming the victim of abuse, as defined in s. 48.02(1)(a), (b), (c), (d), (e), (f), or (g) including injury that is self-inflicted or inflicted by another, based on reliable and credible information that another child in the home has been the victim of such abuse

Summary Judgment. The Committee believes that summary judgment is not available for this ground if the parent disputes the allegation of substantial risk. It has been contended by some that this statutory ground limits the fact finder's role so that if the parent has been the subject of previous court findings, no defense is possible and summary judgment is appropriate. The Committee disagrees.

NOTES

1. The Committee notes that it is important that this CHIPS ground is not simply worded along the lines that this child is living in a home where another child had been living when that other child had been a victim of abuse. In other words, the statute does not assume that there is a substantial risk to the child named in the petition simply because another child in his or her home has been the victim of abuse. The statute requires that, based on the facts and circumstances of the prior abuse of another child, the child in the petition appears to be at substantial risk of also becoming a victim.

This instruction provides that "substantial risk" means "that a significant and appreciable threat of abuse exists." The statutory language does not advise how to assess that risk, but in thinking about the statute, this Committee has identified a number of factors which a fact finder might consider in trying to assess the seriousness of that risk. Those factors may include the following: (1) the nature and severity of the abuse to the other child in the home; (2) the similarity of the subject child to the abused child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of the subject child to the abused child by way of relationship or position of favor or disfavor in relation to the alleged abuser; and (4) any changes which have occurred in the home since the prior abuse. The addition of these factors to the instruction is discretionary with the trial judge.

The Committee believes it is not a condition requisite that there is an adjudication under Wis. Stat. § 48.13(3) for another child in the home.

2. **Postpetition Evidence.** The Committee believes that evidence of postpetition conduct is relevant to the petition's allegations of "substantial risk" to the child. A sentence was added in 2001 to the instruction on the second element to allow the jury to consider events and conduct occurring since the petition was filed.

3. The requirement that the injury be "intentionally or recklessly inflicted" reflects the Committee's interpretation of the phrase "by other than accidental means." It is the Committee's view that the phrase "by other than accidental means" is intended to exclude an injury caused by simple negligence. The Committee further concluded that rather than attempting to define "accident," the effect of requiring more than simple negligence is best expressed by a requirement that the injury be caused intentionally or recklessly. Anything less would arguably be "an accident." The definition of "intentionally" is taken from § 939.23(3). The definition of "recklessly" is from § 948.03(1).

4. For the sake of clarity, we have broken the definition of "physical injury" into two sentences. The first sentence recites the definition except for the reference to "great bodily harm." The second sentence incorporates the statutory definition of "great bodily harm" from § 939.22(14), without using the term "great bodily harm."