

280 UNBORN CHILD IN NEED OF PROTECTION OR SERVICES
[WIS. STAT. § 48.133]

The petition in this case alleges that the unborn child of (expectant mother) is in need of protection or services. Your role as jurors will be to answer the following questions in the special verdict:

1. Does (expectant mother) habitually lack self-control in the use of (alcohol beverages) (controlled substances) (controlled substance analogs) exhibited to a severe degree?

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

2. Does (expectant mother)'s habitual lack of self-control in using (*e.g.*, alcohol beverages) present a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless (expectant mother) receives prompt and adequate treatment for the habitual lack of self-control?

In answering question 1, the term "habitually" means conduct established by or repeated by force of habit. "Self-control" means control of oneself as shown by restraint exercised over one's own impulses, emotions, or desires. In determining whether a lack of self-control is exhibited to a severe degree, you may consider the frequency of use, the duration of the use, and the amount used. In answering question 1, you must consider the facts and circumstances as they existed on (_____), which was the date on which this petition was filed. Your answer must reflect your finding as of that date.

If you are to answer question 2, the term "substantial risk" means that a significant and appreciable threat exists. The physical health of an unborn child and the child when born is seriously affected or endangered if the expectant mother's failure to receive prompt and

adequate treatment for the lack of self-control in using (alcohol beverages) (controlled substances) (controlled substance analogs) creates a significant risk that the unborn child and the child when born will be seriously harmed. However, actual harm or injury need not have occurred. In determining whether the physical health of the unborn child and the child when born is seriously affected or endangered, you may consider the natural and probable consequences of the failure to promptly receive adequate treatment. 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.

Before you may answer either question in the special verdict "yes," you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Does (expectant mother) habitually lack self-control in the use of (alcohol beverages) (controlled substances) (controlled substance analogs) exhibited to a severe degree?

Answer: _____
Yes or No

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

2. Does (expectant mother)'s habitual lack of self-control in using (*e.g.*, alcohol beverages) present a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless (expectant mother) receives prompt and adequate treatment for the habitual lack of self-control?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 280 and comment were originally approved by the Committee in 1999 and revised in 2001, 2004, and 2009. Editorial corrections were made to paragraphs 1 and 2 in 2005.

Wis. Stat. § 48.133 reads:

48.133. Jurisdiction over unborn children in need of protection or services and the expectant mothers of those unborn children. The court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. The court also has exclusive original jurisdiction over the expectant mother of an unborn child described in this section.

This statute creates a separate category of petitions covering unborn children and their expectant mothers. The term "unborn child" means a human being from the time of fertilization to the time of birth. Wis. Stat. § 48.02(19).

Substantial Risk. The definition of "substantial risk" is taken from Wis JI-Children 224. As the above statutory section is drafted, it appears the petitioner must establish that the conduct of the parent is a risk both to the health of the unborn child and the child when born.

Preliminary Instruction. See Wis JI-Children 202.

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.