

**313 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
ABANDONMENT: PLACEMENT AND FAILURE TO VISIT OR
COMMUNICATE FOR THREE MONTHS [WIS. STAT. § 48.415(1)(a)2.]**

The petition in this case alleges that (child) has been abandoned which is a ground for termination of parental rights. Your role as jurors will be to complete the special verdict form which consists of six questions.

Questions 1 and 2 read as follows:

1. Was (child) placed, or continued in a placement, outside the (parent)'s home pursuant to a court order which contained the termination of parental rights notice required by law?
2. Did (parent) fail to visit or communicate with (child) for a period of three months or longer?

As to these two questions, the petitioner (_____) must convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer to each of the two questions should be "yes."

Before you may answer question 1 "yes," (petitioner) must prove that (child) has been placed, or continued in placement, outside (parent)'s home pursuant to a court order that contained the termination of parental rights notice required by law.

[Add the following language if there is no dispute as to this element: Because there is no dispute in the evidence as to this question, I have answered this question. My answer has no bearing whatsoever on what your answers should be to the other questions in the special verdict form.]

Before you may answer question 2 "yes," (petitioner) must prove that (parent) failed to visit or communicate with (child) for a period of three months or longer. This means that (parent) did not visit and did not communicate with (child) for three months or longer. Incidental contact between (parent) and (child) does not prevent you from finding that the (parent) failed to visit or communicate. Incidental contact means insignificant contact or contact which occurred merely by chance. In calculating any period during which visitation did not occur, you should not include any period during which (parent) was prohibited by judicial order from visiting with (child). In calculating any period during which communication did not occur, you should not include any period during which (parent) was prohibited by judicial order from communicating with (child).

If you answer questions 1 and 2 "yes," abandonment has been established unless (parent) proves certain facts. Questions 3 through 6 of the special verdict address these facts and read as follows:

Questions 3-6 apply to the period of 3 months or longer as determined in question 2.

Answer question 3 only if the answers to questions 1 and 2 are "yes."

3. Did (parent) have good cause for having failed to visit with (child) during that period?

Answer question 4 only if the answer to question 3 is "yes":

4. Did (parent) have good cause for having failed to communicate with (child) during that period?

Answer question 5 only if the answer to question 4 is "yes":

5. Did (parent) communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

Answer question 6 only if the answer to question 5 is "no":

6. Did (parent) have good cause for having failed to communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

(Parent) has the burden of satisfying you by the greater weight of the credible evidence, to a reasonable certainty, that your answer to questions 3 through 6 should be "yes."

In determining if good cause existed as stated in questions 3, 4, and 6, you may consider whether the (child)'s age or condition would have made any communication meaningless; whether (parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (_____), who had physical custody of (child) [or the agency responsible for the care of the child during the time period]; attempts to contact (child); whether person(s) with physical custody of (child) prevented or interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond (parent)'s control which prevented or interfered with visitation or communication; and all other evidence presented at this trial on this issue.

BURDEN OF PROOF

I want to emphasize to you that as to questions 1 and 2, the burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer should be "yes." If it becomes necessary for you to answer questions 3 through 6, the burden is on (parent) to satisfy you by the greater

weight of the credible evidence, to a reasonable certainty, that your answer should be "yes."

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence, but may be less than beyond a reasonable doubt.

The greater weight of the credible evidence means that the evidence in favor of a "yes" answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

SPECIAL VERDICT

1. Was (child) placed, or continued in a placement, outside the (parent)'s home pursuant to a court order which contained the termination of parental rights notice required by law?

Answer: _____
Yes or No

2. Did (parent) fail to visit or communicate with (child) for a period of three months or longer?

Answer: _____
Yes or No

Questions 3-6 apply to the period of 3 months or longer as determined in question 2.

Answer question 3 only if the answers to questions 1 and 2 are "yes."

3. Did (parent) have good cause for having failed to visit with (child) during that period?

Answer: _____
Yes or No

Answer question 4 only if the answer to question 3 is "yes":

4. Did (parent) have good cause for having failed to communicate with (child) during that period?

Answer: _____
Yes or No

Answer question 5 only if the answer to question 4 is "yes":

5. Did (parent) communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

Answer: _____
Yes or No

Answer question 6 only if the answer to question 5 is "no":

6. Did (parent) have good cause for having failed to communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 313 and comment were originally approved by the Committee in 1997 and revised in 1999, 2001, 2004, and 2011. The instruction's section on burden of proof was revised in 2019. The verdict was revised in 2009. The comment was revised in 2014, 2015, and 2019.

Wis. Stat. § 48.415(1)(a)2. reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(1) Abandonment. (a) Abandonment, which, subject to par. (c), shall be established by proving that:

2. The child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356(2) or 938.356(2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer;

(b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a)2 or 3. The time periods under par. (a)2 or 3 shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

(c) Abandonment is not established under par. (a)2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a)2. or 3., whichever is applicable, or, if par. (a)2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a)2.

b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

This instruction is to be used where the petition is filed on January 1, 1997, or thereafter.

Subsection 48.415(1)(a)2 was revised to shorten the period for abandonment on a court ordered out-of-home placement from six months to three months. This is generally effective July 1, 1996. However §§ 9110 and 9310 of Act 275 prohibit the filing of a termination of parental rights petition on

this ground unless the parent has received the appropriate notice under § 48.356(2) or § 938.356(2) of this ground for termination, as affected by this act, and three months or longer have elapsed since the date of the notice. It should be noted, however, that § 9110 of Act 275 specifically indicates that it "does not preclude a person from filing a petition," under Wis. Stat. § 48.415(1)(a)2, against a parent who received appropriate notice under the then-existing statute and if six months or longer have elapsed since the date of that notice.

The Committee believes that Wis. Stat. § 48.415(1)(a)2 requires only that the last order placing the child/children out of the home contain the written warnings regarding the termination of parental rights. The last order must have been issued at least 6 months prior to the filing of the TPR petition. The failure of each and every order to contain such warnings is not a fatal defect.

Wis. Stat. § 48.415(1)(a)3 shortened the time period on a child who had been left by the parent from a period of one year down to six months. This statute does not have as an element that there was any type of TPR warning. However, the legislature determined that this particular part of the act would not apply until six months after the effective date of the act. In other words, it first applies to petitions filed on January 1, 1997, or thereafter.

Effect of Court Order Prohibiting Visitation. When a parent is prohibited from "visitation" by a court order, he or she may still communicate with the child by telephone and letters. *In re Termination of Parental Rights to Jessica N.*, 228 Wis.2d 695, 598 N.W.2d 924 (Ct. App. 1999). The court of appeals held that when a court prohibits visitation, but does not prohibit communication, periods in which there has been no contact will be counted when considering whether abandonment has been established.

Condition Precedent in Court Order. In *In re. Jessica N.*, *supra*, the father challenged the trial court's termination for abandonment because he was prohibited by a family court order from visiting his daughter. In this case, the court order allowed the father to have supervised visitation if he saw a therapist and made progress sufficient so that in the therapist's opinion visitation would not be harmful to the daughter. The court of appeals said this "condition precedent" to visitation gave the father the "keys to the door."

Following *In re. Jessica N.*, the court of appeals considered whether a father who was prohibited from having contact with his child unless he was either adjudicated as her father or sought third-party contact to facilitate visitation or childcare issues held the "keys to the door." *In re. Z.J.E.*, 2018AP1206 (September 18, 2018). The court held that he did, and approved the trial court's addition of the following verbiage to the standard instruction:

"However, a court order which prohibits a parent from visiting and/or communicating until the parent meets certain conditions which the parent can meet through reasonably diligent efforts does not "prohibit" visitation and/or communication."

Id. at p. 7.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI-Children 420-424.

Termination of CHIP Order. The "three-month" abandonment provision requires that the three-month period of abandonment fall within the duration of the CHIPS placement of the child outside the parent's home. *In re Termination of Parental Rights to Cordell J.B.*, 2011 WI App 26, 331 Wis.2d 666, 794 N.W.2d 800. Therefore, this TPR ground does not apply if the CHIPS order placing the child outside her home was terminated prior to the running of the required three months of abandonment.

Summary Judgment. For two cases involving the use of summary judgment when the issue to be resolved is abandonment, see *Dane County Dep't of Human Services v. Wesley J.* Appeal No. 2013AP1226 (not published; one judge) and *Racine County Dep't of Human Services*, Appeal No. 2012AP1974 (not published; one judge). The decision in *Wesley J.* notes that the burden of proof as to 'good cause' for failing to visit or communicate rests with the parent, not the department.

"Communicate with the Child." In an unpublished opinion, the court of appeals discussed the meaning of the statutory element "communicate with the child." *Dane County Dep't of Human Services v. Hershula B.*, Appeal No. 2014AP2076 (one-judge decision, February 26, 2015). The parent in this case argued that she had "communicated indirectly with" her child when she left messages with the foster parents. The opinion concluded that the phrase "communicate with the child means more than just communicating; it means that the child shares in the action of communicating."