

375 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: PRIOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS TO ANOTHER CHILD [WIS. STAT. § 48.415 (10)]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 375 comment was approved by the Committee in 1997 and revised in 1999, 2005, 2007, 2008, and 2011.

Wis. Stat. § 48.415(10) 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:

(10) PRIOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS TO ANOTHER CHILD. Prior involuntary termination of parental rights to another child, which shall be established by proving all of the following:

(a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13 (2), (3) or (10); or that the child who is the subject of the petition was born after the filing of a petition under this subsection whose subject is a sibling of the child.

(b) That, within 3 years prior to the date the court adjudged the child to be in need of protection or services as specified in par. (a) or, in the case of a child born after the filing of a petition as specified in par. (a), within 3 years prior to the date of birth of the child, a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

The Committee concluded that a jury instruction on this ground was neither necessary nor appropriate. The statute provides that the prior findings of the juvenile court are conclusive in establishing the grounds for termination. See *Lee v. State Board of Dental Examiners*, 29 Wis.2d 330, 139 N.W.2d 61 (1966); *In re Estate of Safran*, 102 Wis.2d 79, 306 N.W.2d 27 (1981). Whether the prior findings resulted from a trial, admission, or no contest plea, the prior judgments are admissible and determinative. *Lee, supra* at 334-35; *Safran, supra* at 97. Any relitigation of the factual issues in the underlying proceedings would also be barred by the doctrine of claim preclusion (*res judicata*) and, in certain circumstances, issue preclusion (*collateral estoppel*). See *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 525 N.W.2d 723 (1995); *Michelle T. v. Crozier*, 173 Wis.2d 681, 495 N.W.2d 327 (1993).

Use of Summary Judgment and Directed Verdicts. The Wisconsin Supreme Court has held that summary judgment is available in the first phase of a TPR proceeding at which parental unfitness is determined. *In re Termination of Parental Rights to Alexander V.*, 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856. See Wis JI-Children SM-2 which discusses this decision and the use of summary judgments and directed verdicts.

Conviction or Prior Adjudication. The Wisconsin Court of Appeals has held that the term "conviction" as used in Wis. Stat. § 48.415(5)(a) (child abuse), means a "conviction after the appeal as of right has been exhausted. The appeal as of right is limited to the right to appeal to the court of appeals under sec. 808.03, Stats." *Monroe County v. Jennifer V.*, 200 Wis.2d 678, 690, 548 N.W.2d 837 (Ct. App. 1996). The Committee believes it likely that the same rationale would be applied with respect to a prior adjudication that a child is in need of protection or services or order terminating parental rights forming the basis of a petition on this ground.

Need to Specify to the Statutory Ground for the Prior TPR. In 2007, the Wisconsin Supreme Court held that Wis. Stat. § 48.415(10)(b) does *not* require proof of which § 48.415 ground was relied upon for a prior termination of parental rights because the phrase "on one or more of the grounds specified in this section," in § 48.415(10)(b) refers to proving only that the prior termination was an involuntary TPR. *Oneida County v. Nicole W.*, 2007 WI 30, 299 Wis.2d 637, 728 N.W.2d 652.

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