OFFICE OF JUDICIAL EDUCATION
2023

January 2023

TO: Consumers of Wisconsin Jury Instructions – Children

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 1 of Wis JI-Children. The release contains material approved by the Wisconsin Juvenile Jury Instructions Committee through January 2023.

The following material is included in Release No. 1:

New Instructions	Revised Instructions
70	324
75	424

Withdraw Instructions

324A

324B

Content. The 2023 supplement updates the publication on legislative actions and judicial decisions through November 2, 2022.

Information. For information on the status of the Committee's work, please contact Bryce Pierson at bryce.pierson@wicourts.gov.

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OFFICE OF JUDICIAL EDUCATION
2023

WISCONSIN JURY INSTRUCTIONS

CHILDREN

VOLUME I

Wisconsin Juvenile Jury Instructions Committee

[Cite as Wis JI-Children]

- Includes 1/2023 Supplement (Release No. 1)

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WISCONSIN
JURY
INSTRUCTIONS
JUVENILE

Prepared for the Wisconsin Judicial Conference by its Juvenile Jury Instructions Committee, consisting of Hon. David Wilk; Hon. Juan Colas; Hon. Lindsey Grady; Hon. Brittany Grayson; Hon. Tammy Jo Hock; Hon. Wynne Laufenberg; Hon. Maria Lazar; Hon. Mark Schroeder; Hon. Kristine Snow.

Reporter:
Bryce Pierson
Office of Judicial Education

Published by
Wisconsin Court System
Office of Judicial Education

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WIS JI-CHILDREN

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NOTICE TO USERS

For information on the status of the Committee's drafting of new or revised instructions, please contact the Office of Judicial Education: 110 E Main St Suite 200, Madison, WI 53703, (608) 266-7807, https://www.wicourts.gov/courts/offices/judicialed.htm.

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Reporter: Bryce Pierson, University of Wisconsin Law School

FOREWORD

Since 1959, the Wisconsin Jury Instructions project has produced over one thousand jury instructions to assist judges, lawyers, and, most importantly, jurors in understanding what the jury must decide at the conclusion of a trial. In 2020, the Jury Instructions project was transferred entirely to the Wisconsin Court System after 60 years as a cooperative effort between the Judicial Conference and the University of Wisconsin Law School. Publication and distribution of the Wisconsin Jury Instructions – Children is now managed by the Office of Judicial Education with the assistance of the Wisconsin State Law Library. Throughout its sixty-three years of existence, the Wisconsin jury instructions model has proven unique in its longevity, continuity, and orientation toward the trial judge. Despite several structural changes over the last six decades, these distinctive aspects have remained consistent, and the jury instructions model has continued without interruption.

With the publication of ***Wisconsin Jury Instructions - Children***, we are proud to be involved in what has been simply and eloquently termed "law in action." The instructions in this publication respond to a need for a comprehensive set of instructions to assist judges, juries, and lawyers in performing their role in child in need of protection or services (CHIPS) cases and involuntary termination of parental rights (TPR) cases. Each of the three sets of jury instructions published by the law school share the same objective— they strive for a careful blending of the substantive law and the collective wisdom and courtroom experiences of the Committee members.

The criminal and civil sets have been enriched for over 63 years, and the children set for over 30 years, by valuable suggestions from the judges and lawyers who have used the instructions in trials. We hope this set will continue to receive the same valuable scrutiny from those who use it.

We are proud of this publication and of the cooperative effort that it represents. We hope those who use it find it valuable.

January 2023

Bryce Pierson
Committee Reporter
Office of Judicial Education

INTRODUCTION TO RELEASE NO. 1

Release No. 1 updates the 2019 edition. In preparing this release, the Committee reviewed appellate decisions and legislative changes between May 10, 2019, and November 6, 2022.

Suggestions. As in prior years, the Committee has benefitted from suggestions and input from judges and lawyers. As we begin work on the next release, we again welcome your comments and suggestions about these instructions. To submit suggestions, comments, and proposed revisions to the Committee: please contact Bryce Pierson at the Office of Judicial Education, 110 E. Main St., Ste. 200 Madison, WI 53703-3328, (608) 285-2209.

January 2023 **Wisconsin Juvenile Jury Instructions Committee**

EXPLANATION OF THE INSTRUCTIONS IN *WISCONSIN JURY INSTRUCTIONSCHILDREN*

[FROM "INTRODUCTION TO 1997 EDITION"]

The Juvenile Jury Instructions Committee was formally established in October 1991 as a one-year study committee of the Judicial Conference. In 1992, the Committee's term was extended for an additional four years. As with the civil and criminal jury instructions committees, this Committee's efforts have been a joint project between the Judicial Conference and the University of Wisconsin Law School. The Committee's first meeting was held on December 11, 1991, and thereafter has met about four times a year, generally for one and one- half days at a time.

The idea for this Committee began at a Family and Juvenile Law Section meeting at the 1990 Judicial Conference in Stevens Point where it was agreed that preparing standard jury instruction for trials under the Children's Code would provide valuable assistance to trial judges, particularly those who may encounter such a trial only on rare occasions. The Committee's primary mission has been to draft standard jury instructions for use in trials based on petitions which allege that a child is need of protection or services (CHIPS) under Wis. Stat. § 48.13 and petitions seeking the termination of parental rights (TPR) under Wis. Stat. § 48.415.

The first edition of ***Wisconsin Jury Instructions Children*** was published by the University of Wisconsin Law School in May 1996. This volume is the second edition. In addition to some general instructions, the Committee has included recommended instructions for most CHIPS and TPR grounds, including those grounds most likely to result in a jury trial. The Committee intends to complete work on the remaining jurisdictional grounds within the next year. These instructions represent a consensus of the full Committee, although most were arrived at only after many hours of disagreement and debate. The Committee recognizes, of course, that the facts of an individual case under the Children's Code may often require considerable modification and adaptation of these recommended instructions. As with the civil and criminal instructions, these instructions are suggested models. Their use is not required.

Instruction 100 provides a brief introduction for the jury panel in a Children's Code trial, and the "100" series is reserved for other general instructions applicable to both CHIPS and TPR cases. Instructions for trials based on CHIPS petitions are numbered in a series beginning with 200, and those for trials based on TPR petitions are numbered in a series beginning with 300. A composite instruction incorporating standard civil and criminal instructions is presented in Instruction 150. Consistent with the format used by the other instruction committees, the recommended instruction language is set forth first, followed by general comments and specific

notes where appropriate. When the instruction itself does not recite the special verdict questions, recommended special verdict language is also included.

The jurisdictional grounds in the Children's Code often contain ordinary terms such as "neglect," "inadequate," or "substantial risk of physical harm," which have no particular legal meaning. As a general rule, the Committee has sought to avoid defining ordinary words or phrases when the definition adds no clarity to the statutory terms. If a judge prefers to provide more by way of definitions, however, we do not mean to suggest that it would be error to expand upon terms defined in the instructions.

To avoid the many alternative designations necessary to accommodate the variety of parties who might be present for a CHIPS or TPR trial, the Committee decided that the instructions would be more readable and useful if all were drafted for a one parent-one child case. Thus, instead of "[Parent(s)/Guardian(s)] [is/are]," the instructions simply read "(Parent) is." Instead of "Child(ren) (has/have)," the instructions read "(Child) has."

While the comments and endnotes address some of the legal issues pertinent to these instructions, the Committee has not attempted to identify or discuss all of the questions which might arise as to a particular jurisdictional ground and tried not to duplicate the resource material in the Juvenile Benchbook.

Following the enactment of 1995 Wisconsin Act 275 in May 1996, the Committee reviewed each of the instructions published in the first edition. New CHIPS and TPR instructions were added, many existing instructions were revised, and some instructions were no longer required. However, because the legislation applied to petitions filed on or after 1996, the instructions published in the first edition will still apply to petitions pending before that effective date. (An analysis of the effective dates of the provisions of 1995 Wisconsin Act 275 appears in the "Special Materials" section, following Wis JI-Children 375. While the Committee will attempt to issue revised instructions to address material changes in the law, judges should remain alert to any legislation passed after the issuing date of an instruction.

Each member who volunteered for service on this Committee has considerable experience with the Children's Code and was forewarned about the many ambiguities and contradictions in Wis. Stat. Ch. 48. Even so, the endeavor to reduce these jurisdictional requirements to jury instructions has proved more daunting and difficult than anyone imagined. It is with considerable satisfaction and pride that the Committee offers this published volume to the trial judges of Wisconsin. The Committee, of course, welcomes your comments and suggestions about these instructions and about any additions you might find helpful.

October 1997 **Wisconsin Juvenile Jury Instructions Committee**

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50 PRELIMINARY INSTRUCTION: BEFORE TRIAL

(NOTE TO THE TRIAL JUDGE: The following is a suggested instruction to be given to the jury before opening statements are made by the lawyers for the parties. Read the instruction before it is given and delete any parts that are not applicable. Also, the language used in this instruction is "suggested" language. You may have another way of expressing the same ideas in this instruction and may do so, consistent with Wisconsin law.)

MEMBERS OF THE JURY:

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial. Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. Do not let any personal feelings about race, religion, national origin, sex, or age affect your consideration of the evidence.

In fairness to the parties, keep an open mind during the trial. Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror. Once deliberations begin in the jury room, you will then be in a position to intelligently and fairly exchange your views with other jurors.

CONDUCT

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers (interpreters) or witnesses do not speak with them. For their part, the parties, lawyers, (interpreters) and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or listen to any news reports on radio, ~~t~~elevision, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone, or other electronic devices, including personal wearable electronics, applications, or tools with communication capabilities, to share any information about this case. For example, do not communicate

by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you, the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone about this trial, except that you may not disclose the identities of the child(ren) or the family.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

100 CONFIDENTIALITY: PRELIMINARY INSTRUCTION

Because this case involves (a child) (children) and is being heard by the Children's Court, these proceedings are confidential. The child(ren) and the family involved in these proceedings have a statutory right to the protection of their identities. I caution you that any person, including a juror, who discloses the identity of the child(ren) or the family is

subject to sanctions for contempt of court. The bailiff will restrict access to the courtroom. These proceedings are closed to the general public.

FOR CHIPS CASES, ADD WIS JI-CHILDREN 200

FOR UCHIPS CASES, ADD WIS JI-CHILDREN 202

FOR TPR CASES, ADD WIS JI-CHILDREN 300

EVIDENCE

You are to decide the case solely on the evidence offered and received at trial.

Evidence is:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who calls the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers agree or stipulate to or which I direct you to find.

Anything you may see or hear outside the courtroom is not evidence.

Remarks of the attorneys are not evidence. If any remarks suggest certain facts not in evidence, disregard the suggestion.

OBJECTIONS

At times during a trial, objections may be made to the introduction of evidence. I do not permit arguments on objections to evidence to be made in your presence. Any ruling

upon objections will be based solely upon the law and are not matters which should concern you at all. You must not infer from any ruling that I make or from anything that I should say during the trial that I hold any views for or against any party.

During the trial, I will sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, will instruct that it be stricken from the record and that you are to disregard it and dismiss it from your minds. You should not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. This is because the law requires that your decision be made solely upon the competent evidence before you.

NOTETAKING [ADD WIS JI-CHILDREN 60 OR 61 IF DESIRED]

QUESTIONS BY JURORS [ADD WIS JI-CHILDREN 57 IF DESIRED]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

USE OF DEPOSITIONS [IF DEPOSITIONS MAY BE OFFERED]

During the trial, the lawyers may refer to and read from depositions. Depositions are transcripts of testimony taken before the trial. The testimony may be that of a party or

anybody who has knowledge of facts relating to the case. Deposition testimony, just like testimony during the trial, if received into evidence at the trial, may be considered by you along with the other evidence in reaching your verdict in this case.

CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

BURDEN OF PROOF

In every trial there is a burden of proof. The phrase "burden of proof" means that when a party comes into a courtroom and makes a claim, the law says that claim must be proved. After the trial, I will instruct you on the proper burden of proof to be applied and which party has the burden of proof to the questions in the verdict that will be submitted to you.

CLOSING ARGUMENTS

After all of the evidence is introduced and the parties have rested, the lawyers will again have an opportunity to address you in a closing argument. While the closing arguments are very important, they are not evidence and you are not bound by the argument of any lawyer.

After the final arguments are concluded, I will instruct you on the rules of law applicable to the case, and you will then retire for your deliberations. Your function as jurors is to determine what the facts are and to apply the rules of law that I give you to the facts. The conclusion you reach will be your verdict. You will determine what the facts are from all the testimony that you hear and from exhibits that are submitted to you. You are the sole and exclusive judges of the facts. In that field, neither I nor anyone may invade

your province. I will try to preside impartially during this trial and not to express any opinion concerning the facts. Any views of mine as to what the facts are are totally irrelevant.

I do caution you, however, that under your oath as jurors, you are duty bound to accept the rules of law that I give you whether you agree with them or not. As the sole judges of the facts in this case, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it.

OPENING STATEMENTS

We have now reached that stage of the proceedings where the lawyers have the opportunity to make an opening statement.

The purpose of an opening statement is to outline for you what each side expects to prove so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

After [counsel/the parties] have completed their opening statements, we will begin the trial, by (petitioner)'s lawyer calling the first witness.

COMMENT

This instruction and commentary were approved in 2017. The court may choose not to include instructions 100, 200, 202, or 300 if they have been given during voir dire. This revision was approved by the Committee in May 2020; it expanded on the use of social media and other digital tools.

57 JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to submit written questions for the witnesses called to testify in this case. You are not encouraged to submit large numbers of questions because questioning witnesses is primarily the responsibility of counsel. Questions may be submitted only in the following manner.

After both lawyers have finished questioning a witness, and only at this time, if there are additional questions you would like the witness to answer you may then submit a written question for that witness. If you want to submit a question, simply raise your hand and the bailiff will collect your written question. Questions must be directed to the witness and not to the lawyers or the judge. After consulting with counsel, I will determine if your question is legally proper. If I determine that your question may properly be asked, I will ask it. If I do not allow a particular question to be asked, do not guess about what the answer might have been. Do not draw any conclusion from the fact that a question was not asked.

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 57.

This instruction is provided as a possible guide for those judges who wish to allow jury questioning of witnesses during trial. Questions to the judge from jurors during deliberations raise different issues.

There is no specific statutory or case law authority in Wisconsin requiring or prohibiting juror questioning of witnesses. The only appellate decision to consider the issue is *State v. Darcy N. K.*, 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), where the court found that the failure to allow juror questions did not prejudice the defendant. This part of the decision is consistent with the conclusion that trial courts have implied or inherent authority to allow juror questioning. See § 906.11: "The judge shall exercise reasonable control over the mode and order of interrogating witnesses. . . ." The court also concluded that when juror questions are allowed, "a trial court should employ safeguards recommended by the Criminal Jury Instructions Committee." The court's decision incorporated Section III. Recommended Procedures if Questions are Allowed and Section IV. Jury Instructions from Special Material 8 Juror Questioning Of Witnesses [c. 1992].

The discussion below was taken from the commentary to Wis JI-Criminal 57. It is a revision of material originally published by the Criminal Jury Instructions Committee in *Wis JI-Criminal* Special Materials 8 (SM-8).

Advantages and Disadvantages of Juror Questioning

a. **Advantages**
   i. Allows jurors to resolve issues that are important to them.
   ii. Brings out relevant material the lawyers missed.
   iii. Aids jury deliberations by reducing the number of uninformed jurors or resolving questions in the courtroom that would prolong or distract deliberations.
   iv. Increases juror attentiveness.
   v. Increases juror satisfaction; decreases frustration and discontent.
   vi. Helps lawyers direct their cases toward the issues jurors are concerned about.
   vii. Promotes compliance with the admonition that jurors are not to do research on their own.

b. **Disadvantages**
   i. Disrupts trial strategy of the lawyers who intentionally left a question unasked.
   ii. Jurors anticipate where the case is going and jump ahead of the lawyers.
   iii. Makes jurors less impartial and more partisan.
   iv. Questions may be to the disadvantage of clients.
   v. Disrupts or delays courtroom procedure and order.

If a trial court decides to allow juror questions, notice should be given to counsel. If counsel objects, proceeding with juror questions should be supported by findings on the record.

Recommended Procedures if Questions are Allowed

There appears to be consensus on the basic procedures to be followed if juror questions are allowed. The major aspects are as follows:

a. Whether to allow questions lies within the judge's discretion.
b. Jurors should be given preliminary instructions advising them of the right to submit questions and explaining the procedure to be used.
c. After a witness is interrogated by counsel, but before the witness leaves the stand, the jurors are asked if they have any questions.
d. Questions are submitted in writing to the judge and are shown to the lawyers, who may object without the jury knowing of it.
e. The judge reviews the questions and any objections.
f. If the judge sustains the objection, the jury is advised that questions cannot be asked.
g. If the judge overrules the objection, the judge asks the question.
h. Lawyers are allowed to follow up on issues raised by juror questions.
i. Make a record of the juror questions submitted and asked.

Jury Instructions

If the jury is to be allowed to ask questions, a preliminary instruction telling the jury about the procedure ought to be given. Thus, the content of the instruction is dependent upon the type of procedure that is adopted.

60 NOTETAKING NOT ALLOWED

Do not take notes during the trial. You may not take notes because:

_____

_____

_____

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 60.

If notetaking is not allowed, the court must state the reasons for the determination on the record. See Wis. Stat. § 805.13(2). See the commentary to JI-Children 61.

The stating of reasons need not be done in the presence of the jury, but it is probably a good practice to tell the jurors why they are not being allowed to take notes.

See supreme court rationale in *Fischer v. Fischer*, 31 Wis.2d 293, 304, 142 N.W.2d 857 (1965).

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61 NOTETAKING PERMITTED

You may take notes during the trial, except during the opening statements and closing arguments. Court personnel will give you writing materials.

Be careful that notetaking does not distract you from carefully listening to and observing witnesses.

You may rely on your notes during your deliberations. Otherwise, keep them confidential. Court personnel will collect and destroy any notes after the trial.

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 61.

This instruction implements Wis. Stat. § 805.13(2), as amended by Chapter 358, Laws of 1981:

> (2) Preliminary instructions and notetaking.
> (a) After the trial jury is sworn, the court shall determine if the jurors may take notes of the proceedings:
>
> 1. If the court authorizes notetaking, the court shall instruct the jurors that they may make written notes of the proceedings, except the opening statements and closing arguments, if they so desire and that the court will provide materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.
>
> 2. If the court does not authorize notetaking, the court shall state the reasons for the determination on the record.
>
> (b) The court may give additional preliminary instructions to the jury which instructions may again be given in the charge at the close of the evidence.

Under the statute, the court must decide whether the jury should be allowed to take notes. The only Wisconsin decision discussing notetaking preceded the statute by several years, see *Fischer v. Fischer*, 31 Wis.2d 293, 142 N.W.2d 857 (1965).

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70 TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a written transcript of the trial testimony to use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely on your memory of the testimony and evidence when you are deliberating.

COMMENT

Wis JI-Children 70 was approved by the Committee approved this revision in June 2022.

The purpose of this instruction is to correct any misimpressions jurors may have about the immediate availability of written transcripts of the trial testimony.

In some cases, the trial judge may want to add the following: "You may ask to have specific portions of the testimony read to you."

This is not intended to encourage jury requests for the rereading of testimony. However, "When a jury has questions regarding testimony, 'the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading.'" See State v. Anderson, 2006 WI 77, ¶83, 291 Wis.2d 673, 717 N.W.2d 74 citing Kohlhoff v. State, 85 Wis.2d 148, 159, 270 N.W.2d 63 (1978). Anderson was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126 on different grounds.

[Note: Anderson, supra, was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. In Alexander, the supreme court held that "Anderson changed what should have been a fact-specific due-process inquiry (did the communication between the judge and jury deny the defendant a fair and just hearing?) into an absolute Confrontation Clause right to be present whenever the trial court speaks with members of the jury. Alexander, supra, ¶28. The court in Alexander thus withdraw all language from Anderson intimating such a right."].

The judge may choose to summarize the testimony in lieu of having it read. Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893). See also, Kohlhoff v. State, supra at 160. In Kohlhoff, the jury requested clarification of the defendant's testimony. Subsequent to this request, a conference was held in chambers and out of the presence of the jury between the defendant, respective counsel, and the trial judge. The record reflects that during the conference, a portion of the testimony was read, and that both counsel and the defendant participated in regard to the trial judge's summary. However, the record did not set forth in detail what was actually discussed. In its holding, the supreme court took the opportunity to make two observations. First, when a jury poses a question regarding testimony that has been presented,

"the judge may, in the exercise of his [or her] discretion, choose to present a summary of the testimony to the jury instead of having it read." Id. at 160. However, the court further provided that "the far better practice is to have the testimony read to the jury." Second, conferences such as the in chambers meeting conducted in Kohlhoff should be fully transcribed. Id. For other cases applying these standards, see State v. Tarrell, 74 Wis.2d 647, 659, 247 N.W.2d 696 (1976); and Jones v. State, 70 Wis.2d 41, 57 58, 233 N.W.2d 430 (1975).

75 RECORDING PLAYED TO THE JURY

You are about to (hear an audio recording) (hear and view an audiovisual recording). Recordings are proper evidence and you may consider them, just as any other evidence. Listen carefully; some parts may be hard to understand.

[You may consider the actions of a person, facial expressions, and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]

[You will be provided a transcript to help you listen to the recording. If you notice any difference between what you heard on the recordings and what you read in the transcript(s), you must rely on what you heard, not what you read.]

COMMENT

Wis JI-Children 75 was approved by the Committee in June 2022.

This draft was based on an instruction adapted from The Pattern Jury Instructions for the 7th Circuit, 3.17. [Available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf.]

Effective January 1, 2010, SCR 71.01 (2) is amended to create new subsection (e):

(2) All proceedings in the circuit court shall be reported, except for the following:

. . .

(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record.

In the Matter of Amendment of Supreme Court Rule 71.01 Regarding Required Reporting of Court Proceedings. 2009 WI 104

If the jury requests that a recording be played back during jury deliberations, see State v. Anderson, 2006 WI 77, &&30-31, 291 Wis.2d 673, 717 N.W.2d 74 (overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126): the jury should return to the courtroom and the recording should be played for the jury in open court.

The Committee recommends that the court or the parties should make a record of exactly what was played during deliberations by noting the beginning and end times from the exhibit.

A helpful summary of the procedures that a trial judge should follow when an audio/visual recording has been received into evidence and played at trial and a jury requests to listen to or watch the recording during deliberations is provided in Wis JI-Criminal SM-9 When a Jury Requests to Hear/See Audio/Visual Evidence During Deliberations.

100 CONFIDENTIALITY: PRELIMINARY INSTRUCTION

Because this case involves (a child) (children) and is being heard by the Children's Court, these proceedings are confidential. The child(ren) and the family involved in these proceedings have a statutory right to the protection of their identities. I caution you that any person, including a juror, who discloses the identity of the child(ren) or the family is subject to sanctions for contempt of court.

The bailiff will restrict access to the courtroom. These proceedings are closed to the general public.

[If the child(ren) (is) (are) not expected to be in the courtroom, add: Under the laws that govern this proceeding, I have excused the child(ren) from having to appear in person.]

COMMENT

This instruction was approved in 1996 and was revised in 2008 and 2017.

See Wis. Stat. § 48.299(1) for the exclusion of the public from proceedings and the requirement of confidentiality.

Wis JI-Children 200, 220, and 300, which are preliminary instructions, also contain language regarding the requirement of confidentiality.

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101 OPENING

Members of the jury, (this case) (these cases) will now be submitted to you in the form of a special verdict consisting of _____ questions. Your duty is to answer those questions which, according to the evidence and my instructions, it becomes necessary for you to answer to arrive at a completed verdict. It then becomes my duty to direct judgment according to law and according to the facts as you have found them.

Evidence is defined as follows:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial. You are to be guided by my instructions and your own sound judgment in considering the evidence in (this case) (these cases) and in answering these questions.

You should not concern yourselves about whether your answers will be favorable to one party or to the other nor with what the final result of (this case) (these cases) may be.

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 100.

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110 REMARKS AND ARGUMENTS OF COUNSEL

Remarks of the attorneys are not evidence. If any remarks suggested certain facts not in evidence, disregard the suggestion.

You should consider carefully the closing arguments of the attorneys, but their arguments, conclusions, and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence and answer the questions in the verdict according to the evidence and my instructions on the law.

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 110.

Mullen v. Reinig, 72 Wis. 388, 392, 39 N.W. 861, 862-63 (1888); *Merco Distrib. Corp. v. O. & R. Engines, Inc.*, 71 Wis.2d 792, 239 N.W.2d 97 (1976). See also *Kenwood Equip., Inc. v. Aetna Ins. Co.*, 48 Wis.2d 472, 180 N.W.2d 750 (1970).

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115 OBJECTIONS OF COUNSEL

The lawyers for the parties have a duty to object to what they feel are improper questions. Do not draw any conclusion for either side if an objection was made to a question and the witness was not permitted to answer.

COMMENT

The instruction was approved in 2017. It was adapted from Wis JI-Civil 115.

Frion v. Craig, 274 Wis. 550, 557, 80 N.W.2d 808, 812 (1957); *Johnson v. Cintas Corp. No. 2.*, 2015 WI App 14, 360 Wis.2d 350, 860 N.W.2d 515.

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120 IGNORING JUDGE'S DEMEANOR

If any member of the jury has an impression that I have an opinion one way or another in this case, disregard that impression entirely and decide the issues solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

COMMENT

The instruction was approved in 2017. It was adapted from Wis JI-Civil 120. It replaced the instruction entitled "Suggested Order of Instructions: CHIPS or TPR Case" which was renumbered Wis. JI-Children 10.

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125 IMPEACHMENT OF WITNESS: PRIOR CONVICTION OR JUVENILE ADJUDICATION

Evidence has been received that (one) (some) of the witnesses[1] in this trial (has) (have) been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the credibility of the witness. It must not be used for any other purpose.

NOTE

1. It is within the trial judge's discretion to refer to the witness by name. See *Koss v. State*, 217 Wis. 325, 258 N.W. 860 (1935).

COMMENT

This instruction was approved in 2017. It is adapted from Wis JI-Criminal 325.

The comment to Wis JI-Criminal 325 provides:

> This instruction is to be given upon request when evidence of prior convictions is admitted to impeach a witness other than the defendant. See Wis JI-Criminal 327 for an instruction on impeachment of a defendant who has testified. Evidence of prior crimes admitted as "other acts" evidence under § 904.04(2) is addressed by Wis JI-Criminal 275.
>
> The rationale for allowing the proof of prior convictions to impeach is that one who has been convicted of a crime is less likely to be a truthful witness. See *State v. Kruzycki*, 192 Wis.2d 509, 531 N.W.2d 429 (Ct. App. 1995); *State v. Kuntz*, 160 Wis.2d 722, 467 N.W.2d 531 (1991); *Liphford v. State*, 43 Wis.2d 367, 168 N.W.2d 549 (1969). But the admissibility is supposed to be limited to this purpose C the effect on credibility. Whenever evidence is admitted for a limited purpose, a jury instruction describing the limits must be given on request. See Wis. Stat. § 901.06.
>
> In *Nicholas v. State*, 49 Wis.2d 683, 183 N.W.2d 11 (1971), the court addressed the common law rule in existence in Wisconsin before the adoption of the Rules of Evidence. The present rule under § 906.09 is the same. A testifying defendant, or any other witness, can be asked two questions: (1) "Have you ever been convicted of a crime?" and (2) "How many times?" If the witness answers truthfully, that ends it. If witness is not truthful, questions can be asked about each conviction, referring to them by the name of the offense. But the questioner may not go into the facts relating to the underlying crimes. Also see *State v. Sohn*, 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995); and *State v. Midell*, 39 Wis.2d 733, 159 N.W.2d 614 (1968).

A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. *State v. Smith*, 203 Wis.2d 288, 295-96, N.W.2d (Ct. App. 1996), citing *State v. Kruzycki*, *supra* at 525. The court must also determine that the probative value of the evidence is not outweighed by the danger of unfair prejudice. See §§ 906.09(3) and 901.04.

Note that Wis. Rule 906.09 is not the same as the federal counterpart, Rule 609. Under the federal rule impeachment is limited to felonies and crimes involving dishonesty or false statement. And, there is generally a 10-year limit, that is, convictions older than 10 years are not admissible.

130 STRICKEN TESTIMONY

I ordered certain testimony to be stricken during the trial. Disregard all stricken testimony and do not let it affect your answers to the verdict questions.

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 130.

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140 CREDIBILITY OF WITNESSES; WEIGHT OF EVIDENCE

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses.

COMMENT

This instruction was approved by the Committee in 2017. It was adapted from Wis JI-Civil 215.

Jury's Duty: *Collier v. State*, 30 Wis.2d 101, 140 N.W.2d 252 (1966). See also *Shawver v. Roberts Corp.*, 90 Wis.2d 672, 280 N.W.2d 226 (1979); *American Family Mut. Ins. Co. v. Dobrzynski*, 88 Wis.2d 617, 277 N.W.2d 749 (1979).

Weight of Evidence: *O'Brien v. Chicago & N.W. Ry.*, 92 Wis. 340, 343, 66 N.W. 363, 364 (1896).

Juror's Knowledge: *Solberg v. Robbins Lumber Co.*, 147 Wis. 259, 266-70, 133 N.W. 28, 30-32 (1911), laid down the rule held that a juror may use individual knowledge, observation, and experience. See also *Coenen v. Van Handel*, 269 Wis. 6, 10, 68 N.W.2d 435, 437 (1955); *McCarty v. Weber*, 265 Wis. 70, 72, 60 N.W.2d 716, 718 (1953); and *De Keuster v. Green Bay & W. R.R.*, 264 Wis. 476, 479, 59 N.W.2d 452, 454 (1953).

Although a jury may, if it so desires, place less credence in the testimony of a witness whose evidence is inconsistent, the inconsistency does not render that testimony incredible as a matter of law. It is the function of the jury to determine where in the discrepant testimony and contradiction of the witness the truth really is. *Millonig v. Bakken*, 112 Wis.2d 445, 453-54, 334 N.W.2d 80 (1983).

For the credibility of a child witness, see Wis JI-Criminal 340.

145 SPECIAL VERDICT QUESTIONS: INTERRELATIONSHIP

Some questions in the verdict are to be answered only if you have answered a preceding question in a certain manner. It is important for you to read the introductory portion of each question carefully before you answer it. Do not answer questions you are not required to answer.

COMMENT

This instruction was approved by the Committee in 2017. It was adapted from Wis JI-Civil 145.

The form of a special verdict is discretionary with the trial court. A reviewing court will not interfere as long as material issues of fact are encompassed within the questions and appropriate instructions are given. *Meurer v. ITT General Controls*, 90 Wis.2d 438, 280 N.W.2d 156 (1979); *Murray v. Holiday Rambler, Inc.*, 83 Wis.2d 406 265 N.W.2d 513 (1978).

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150 WITNESS: ABSENCE

If a party fails to call a material witness within (his) (her) control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

COMMENT

The instruction was approved in 2017. It was adapted from Wis JI-Civil 410. See the commentary in that instruction for case law on instructing a jury on missing witnesses. Previously, Wis JI-Children 150 was entitled "Composite Instruction at the Conclusion of Evidence." That instruction was eliminated by the Committee in 2017.

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151 CLOSING: SHORT FORM

Now, members of the jury, this case is ready to be submitted to you for your serious deliberation. You will consider the case fairly, honestly, impartially, and in the light of reason and common sense. Give each question in the verdict your careful and conscientious consideration. In answering each question, free your minds of all feelings of sympathy, bias, or prejudice. Let your verdict speak the truth, whatever the truth may be.

When you retire to the jury room, your first duty will be to elect a juror who will preside over your deliberations and write in the answers you have agreed upon. The vote of your presiding juror is entitled to no greater weight than the vote of any other juror. When your deliberations are concluded and your answers are inserted in the verdict, the presiding juror will sign and date the verdict, and all of you will return to the courtroom with the verdict.

The clerk may now swear the bailiffs.

COMMENT

This instruction was approved by the Committee in 2011. For a longer closing instruction, see Wis JI-Children 152.

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152 CLOSING: LONG FORM

Now, members of the jury, this case is ready to be submitted to you for your serious deliberation. You are free to deliberate in any way you wish consistent with your oath as jurors, but these suggestions may help you proceed in a smooth and timely way.

I would remind you to follow the instructions about the law. Respect each other's opinions and value the different viewpoints you each bring to the case. Listen to one another and be respectful of each other's opinions. Do not be afraid to change your opinion if you are convinced by reasoning of your fellow jurors. Be thoughtful and do not rush. The parties to this case deserve your complete attention and consideration.

Selecting the Presiding Juror

When you retire to the jury room, select one of your members to preside over your deliberations. That person's vote is entitled to no greater weight than the vote of any other juror. The presiding juror should:

- Encourage discussions that include all jurors.
- Keep the deliberations focused on the evidence and the law.
- Let the court know when there are any questions or problems.
- Tell the court when a verdict has been reached.

Discussing the Evidence and the Law

I will send written copies of the instructions to the jury room for you to refer to during deliberations. It is a violation of the juror's oath not to follow the instructions, to refuse to deliberate, or to rely on any information outside of the evidence.

I remind you that you may not bring into the jury room any research materials or additional information; this includes dictionaries, computers, electronic communication devices, or other reference materials. You may not communicate in any way with anyone other than jurors until you have reached your verdict.

Getting Assistance from the Court

You will not have a copy of a written transcript of the trial testimony available for use during your deliberations. You must rely primarily on your memory of the evidence and testimony introduced during the trial. You may ask to have specific portions of the testimony read to you, but you may not receive everything you ask for or you may receive more than you ask for.

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you not communicate with me except by a written note.

If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the issues in this case unless I ask you to do so.

Reaching a Verdict

Agreement by ten (five) or more jurors is sufficient to become your verdict. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten (five) jurors

should agree in all the answers necessary to support a judgment on each verdict.[1] I ask you to be unanimous if you can.

At the bottom of each verdict,[2] you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers (the number of the verdict question(s)) with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

After you have reached a verdict, the following steps will be followed:

- The presiding juror tells the bailiff that a verdict has been reached.
- The judge calls everyone, including you, back into the courtroom.
- The verdict is read into the record in open court.
- I may ask for an individual poll of each of you to see if you agree with the verdict. You need only answer "yes" or "no" to the question.

Members of the jury, you will consider the case fairly, honestly, impartially, and in the light of reason and common sense. Give each question in the verdict your careful and conscientious consideration. In answering each question, free your minds of all feelings of sympathy, bias, or prejudice. Let your verdict speak the truth, whatever the truth may be.

The clerk may now swear the bailiffs.

NOTES

1. & 2. **Single Verdict**. Where only one verdict is given to the jury, use "the verdict," instead of "each verdict."

COMMENT

The instruction was approved in 2011 and revised in 2016. The comment was revised in 2017. It is an alternative to Wis JI-Children 151 and provides additional guidance on the process of deliberating and reaching a verdict.

For a discussion of the five-sixths rule and also the use of separate verdicts, see the Comment to Wis JI-Children 185.

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155 EXHIBITS

An exhibit becomes evidence only when received by the court. An exhibit marked for identification and not received is not evidence. An exhibit received is evidence, whether or not it goes to the jury room.

COMMENT

This instruction and comment were approved by the Committee in 2017. It was adapted from Wis JI-Criminal 155.

Permitting exhibits to be taken to the jury room is a decision resting within the discretion of the trial court. For a discussion of factors bearing on this discretionary decision, see Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929).

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160 EXPERT TESTIMONY: GENERAL

Usually, witnesses can testify only to facts they know.

But, a witness with expertise in a calling (specialty) may give an opinion in that calling (specialty). In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. Opinion evidence was admitted in this case to help you reach a conclusion. You are not bound by any expert's opinion.

(In resolving conflicts in expert testimony, weigh the different expert opinions against each other and consider the qualifications and credibility of the experts and the reasons and facts supporting their opinions.)

COMMENT

This instruction and comment were approved by the Committee in 2017. It was adapted from Wis JI-Civil 260.

Wis. Stat. '' 907.02 and 907.03; *Black v. General Elec. Co.*, 89 Wis.2d 195, 212-13, 278 N.W.2d 224 (1979); *Milbauer v. Transport Employes' Mut. Benefit Soc'y*, 56 Wis.2d 860, 203 N.W.2d 135 (1973); *Rabata v. Dohner*, 45 Wis.2d 111, 172 N.W.2d 409 (1969); *Andersen v. Andersen*, 8 Wis.2d 278, 283, 99 N.W.2d 190, 193 (1959); *Anderson v. Eggert*, 234 Wis. 348, 361, 291 N.W. 365, 371 (1940).

For Expert Testimony: Hypothetical Questions, see Wis JI-Children 165.

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165 EXPERT TESTIMONY: HYPOTHETICAL QUESTIONS

During the trial, an expert witness was told to assume certain facts and asked for an opinion based upon the assumed facts. This is called a hypothetical question. Consider the opinion in answer to the question only if you believe the assumed facts upon which it is based. If you find that the assumed facts in the hypothetical question have not been proved, do not give any weight to the opinion.

COMMENT

This instruction and comment were approved by the Committee in 2017. It was adapted from Wis JI-Civil 265.

Wis. Stat. § 907.03; a hypothetical question during the trial may be based on facts not yet in evidence. *Novitzke v. State*, 92 Wis.2d 450, 285 N.W.2d 868 (1979). See also *Schulz v. St. Mary's Hosp.*, 81 Wis.2d 638, 652, 260 N.W.2d 783 (1978), and *Rabata v. Dohner*, 45 Wis.2d 111, 126, 172 N.W.2d 409 (1969).

Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 866, 203 N.W.2d 135 (1973).

McGaw v. Wassman, 263 Wis. 486, 492, 57 N.W.2d 920, 922 (1953).

For Expert Testimony: General, see Wis JI-Children 160.

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170 BURDEN OF PROOF: ORDINARY

The burden of proof on question(s) _____ rests upon the party contending that the answer to the question(s) should be "yes." The burden is to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that "yes" should be your answer to (that) (those) question(s).

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.

COMMENT

This instruction was approved in 2017. It is adapted from Wis JI-Civil 200. The comment to that instruction by the Civil Jury Instructions Committee discusses the ordinary burden of proof as follows:

> In 2002, the Committee reviewed the standard civil burden of proof instructions following the decision of the supreme court in *Nommensen v. American Continental Insurance Co.*, 2001 WI 112, 246 Wis.2d 132, 629 N.W.2d 301. The Committee is mindful of a number of suggestions made by the supreme court in *Nommensen*. From that case, we glean the following:
>
> > (1) The two element approach (the greater weight standard and the reasonable certainty standard) should not be abandoned. ¶ 4.
> >
> > (2) The term, "the greater weight of the credible evidence," is understandable by the average juror. ¶ 16.
> >
> > (3) The term, "reasonable certainty" has been firmly established in our case law. ¶ 26.
> >
> > (4) Substituting "reasonable probability" for "reasonable certainty" would be inconsistent with precedent and is not the solution here. ¶ 56.

(5) A jury should first consider the greater weight standard, then apply the reasonable certainty standard. ¶ 27.

(6) The revision should separate the two elements. ¶ 57.

Our revision in 2002 endeavors to satisfy the guidelines set out in *Nommensen*.

Nommensen was a medical malpractice action. When the plaintiff filed proposed jury instructions, he asked the trial judge to replace the word "certainty" with the word "probability" in Wis JI-Civil 200, Burden of Proof: Ordinary. The trial judge declined to do so and charged the jury with Wis JI-Civil 200 without modification.

On appeal, the plaintiff, who had failed to establish causation, argued that the trial judge erroneously instructed the jury when it gave the standard jury instruction although he concluded the instruction correctly sets out current Wisconsin authority. The court of appeals affirmed the use of the instruction without modification, but said it was bound by precedent. A concurring opinion criticized the current instruction and urged the supreme court to reevaluate the use of the phrase "reasonable certainty."

The supreme court affirmed the trial judge's use of Wis JI-Civil 200. Its opinion contains the following passages:

- We think the Wisconsin Civil Jury Instructions Committee was standing on solid ground when it commented that "The Committee believes the term 'reasonable certainty' has been firmly established in our case law and accurately reflects the degree of certitude jurors must reach in answering verdict questions." Wis JI-Civil 200 cmt . . .

- We disagree with the criticism that "reasonable certainty" is not firmly established in our case law, or that it is not well supported by the cases that adopted it. Reasonable certainty is one of the two essential elements of the ordinary burden of proof in this state . . .

- Another of Nommensen's proposals—to eliminate discussion of the degree of certitude altogether—runs contrary to well-established case law . . . This idea of Nommensen's does not square with this state's long-standing two-element approach to the burden of proof. The Wisconsin Civil Jury Instructions Committee also has expressly rejected this proposal. Accordingly, we decline to rewrite instruction 200 in the manner proposed by Nommensen . . .

- We have carefully considered petitioner's argument that there is potential for juror confusion in Wis JI-Civil 200, with respect to the elements of degree of certitude and

> quantum of evidence. With this in mind, we respectfully request the Wisconsin Civil Jury Instructions Committee to revisit the instruction for a thorough review . . .
>
> • Changing "reasonable certainty" to "reasonable probability" in the instruction is not the proper tonic for potential juror confusion and would be inconsistent with precedent. However, we concur with Nommensen that instruction 200 as written is deserving of a thorough review. Such a review should consider all legitimate reformulations of the current instruction, so long as the instruction maintains the two-element approach to the burden of proof . . .
>
> • In examining instruction 200, the committee should make every effort to remedy one of the most troubling aspects of the instruction: the juxtaposition of the two elements of the burden of proof . . .

Case Law. Wisconsin law recognizes and requires differing degrees of persuasion for different types of cases. Thus, separate and distinct burdens exist for: (1) criminal cases (beyond a reasonable doubt); (2) civil cases with penal aspects or involving criminal type behavior (higher civil standard: to a reasonable certainty by evidence that is clear, satisfactory, and convincing); and (3) ordinary civil actions (ordinary civil standard to a reasonable certainty by the greater weight of the credible evidence).

Each of these three burdens of proof has a mental element. This mental component is identical for the two civil standards (*i.e.*, "satisfaction to a reasonable certainty"). Criminal cases call for a higher mental element: "beyond a reasonable doubt." In addition to the mental component, the two civil standards include a requirement as to the kind of evidence needed to carry a burden, *i.e.*, "clear, satisfactory, and convincing evidence" for the middle civil burden and "greater weight of the credible evidence" for the ordinary civil burden.

Chief Justice Hallows in 1972 discussed the two components of the civil burdens in writing for the court in *State ex rel. Brajdic v. Seber*, 53 Wis.2d 446, 448, 193 N.W.2d 43 (1972):

> Every standard of burden of proof, other than the standard applied to criminal cases, is composed of two elements: (1) The degree of certitude required of the trier of the fact, *i.e.*, reasonable certainty, and (2) either the quantity of the evidence, *i.e.*, the greater weight or convincing power, or the quality of the evidence, *i.e.*, clear, satisfactory, and convincing.

Along these same lines, the court, in *Kuehn v. Kuehn*, 11 Wis.2d 15, 104 N.W.2d 138 (1960), said the "complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence."

Some have suggested, pointing to decisions predating 1920, that the dual component civil burdens can be abbreviated by simply dropping the mental element. See *Sullivan v. Minneapolis, St. Paul & S.S.M.R. Co.*, 167 Wis. 518, 167 N.W. 311 (1918). The Committee disagrees with such proposals and follows the rationale expressed by the Wisconsin Supreme Court in *Kuehn v. Kuehn*, *supra*, in which Chief Justice Hallows said:

> The statement of the complete rule of the burden of proof contains both the element of reasonable certainty and some degree of preponderance of the evidence. It is possible the contestant having the burden of proof may have the preponderance of the evidence fair, clear, or otherwise in his favor and still fall short of convincing the jury to a reasonable certainty of the existence of the facts for which he is contending. 11 Wis.2d at 28

Based on the Committee's review of the case law, the Committee concluded in 1989 that this instruction, as well as the instruction on the middle burden (JI-Civil 205), correctly instruct juries on the burdens of proof in civil actions.

Suggestions have also been made to the Committee and to trial judges during instruction conferences that the certainty element ("to a reasonable certainty") should be replaced with the term "reasonable probability." Apparently, this suggestion is prompted by the fact that most expert witnesses, at least in medical malpractice cases, are asked to give opinions "to a reasonable probability." In *Victorson v. Milwaukee & Suburban Transport. Corp.*, 70 Wis.2d 336, 356-57 234 N.W.2d 332 (1975), the trial judge used the word "probability" in place of "certainty" in Wis JI-Civil 200. The remainder of the instruction defining "greater weight" and "credible evidence" was given. The court said using the term "reasonable probability" was error, although not reversible error. The court also said the "use of probability rather than certainty was not to be encouraged."

The Committee feels that "greater weight" is an exact synonym for "fair preponderance" and much more understandable by the average juror. This expression of the ordinary burden was cited approvingly by the supreme court in *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 299, 294 N.W.2d 437 (1980) . . . .

175 BURDEN OF PROOF: MIDDLE

The burden of proof on question(s) _____ rests upon the party contending that the answer to the question should be "yes." The burden is to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that "yes" should be the answer to (that) (those) question(s).

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.

"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.

[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.]

COMMENT

This instruction was approved by the Committee in 2017. It was adapted from Wis JI-Civil 205. The comment to that instruction by the Civil Jury Instructions Committee discusses the middle burden of proof as follows:

> The Committee revised this instruction in 1997 because it concluded that the prior version of the instruction did not adequately explain to a jury what the middle burden of proof is. Under this former version, the jury was instructed as follows:
>
> > The burden of proof as to each question in the verdict is on the plaintiff to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the question should be answered "yes."
> >
> > If you have to guess what the answer should be after discussing all evidence which relates to a particular question, then the party having the burden of proof as to that question has not met the required burden. Wis JI-Civil 205 (1989).

Some have suggested that explaining the differences between the two civil burdens is merely an academic/legalistic exercise because juries cannot realistically tell the difference between the "ordinary" and "middle" burden of proof. See Judge Cane's concurrence, joined by Judge Fine, in *Carlson & Erickson v. Lampert Yards*, 183 Wis.2d 220, 515 N.W.2d 305 (Ct. App. 1993). Others have argued that the "greater weight of the evidence" component of the ordinary burden actually sounds like a more rigorous or higher standard than Aclear, satisfactory, and convincing" in our currently established middle burden. Although the Committee is aware of this criticism, it believes that (1) the supreme court has consistently required two civil burdens, and (2) the current version of this instruction conforms to the expressions of the court that the middle burden be expressed in terms of clear, satisfactory, and convincing evidence.

Weight; Degree of Certitude. Wisconsin case law provides little instruction on the middle burden. As to quantity, the middle burden is said to mean the clear preponderance which has been translated to mean "clear weight of the evidence" or "clearly more probable than not." *Klipstein v. Raschein*, 117 Wis. 248, 94 N.W. 63 (1903). As to quality, the supreme court has said that clear, satisfactory, and convincing evidence refers to the quality or convincing power of the evidence necessary to produce the greater certainty a degree of reasonable certitude required. *Kuehn v. Kuehn*, 11 Wis.2d 15, 104 N.W.2d 138 (1960).

The middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases, but a lesser degree than that required to convict in a criminal case. *Kruse v. Horlamus Indus.*, 130 Wis.2d 357, 363, 387 N.W.2d 64 (1986).

Variations of Middle Burden at Common Law. The Committee recognizes that variations of this middle burden are found throughout earlier Wisconsin case law. For example, in release cases, the court in 1949 held that to impeach a written release on the ground of fraud or mistake, the proof must be "clear and convincing beyond reasonable controversy." *Jandrt v. Milwaukee Auto Ins. Co.*, 255 Wis. 618, 39 N.W.2d 698 (1949). Similarly, the court said in 1981that use of excessive force in a battery action must be proved by a "clear and satisfactory preponderance of the evidence." *Johnson v. Ray*, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Further variations of this middle burden are presented in *Kuehn*, *supra*. Despite these variations, the supreme court has expressly stated that the "preferential way" of stating the middle standard of proof is in terms of "clear, satisfactory, and convincing." *Madison v. Geier*, 27 Wis.2d 687, 135 N.W.2d 761 (1965). See also *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980). In the interests of achieving uniformity in the expression of the middle standard, the Committee strongly recommends that whenever the trial court determines that the middle burden is required, the above instruction should be used even though a variation of the standard may exist in case law.

180 APPROPRIATE DATE FOR JURY'S FINDING

In answering question(s) ____ in the special verdict, you must consider the facts and circumstances as they existed on _____, which was [the date on which the petition was filed] [the date on which the child was removed from the home by the Department of Social Services]. Your answer must reflect your finding as of that date.

[**Note: If post-petition evidence is admissible, add the following**: In answering question _____ in the special verdict, you may consider all evidence bearing on that question, including evidence of events and conduct occurring before the petition was filed on ____ and since the filing of the petition. Your answer must reflect your finding as of today's date.]

COMMENT

Wis JI-Children 180 and comment were originally approved by the Committee in 1996 and revised in 2001. The comment was updated in 2004, 2008, 2013, 2014, and 2016.

Use of this Instruction. This instruction is intended for use when the jury requires guidance on the question of the appropriate date as to which a verdict question is to be answered. As an alternative to giving this instruction, the applicable date may simply be included in the verdict question.

Issue of Date or Time Period for Jury Verdict. The issue of the date or time period upon which the jury must focus is most likely to arise with respect to the many jurisdictional grounds which are worded in the *present* tense. For example, Wis. Stat. § 48.13(8) provides for CHIPS jurisdiction over a child "who is receiving inadequate care during the period of time a parent is incarcerated." Department intervention will often have resulted in the provision of adequate care at the time of the hearing, perhaps even by the time the petition is filed, but it hardly seems logical that this should defeat jurisdiction. The issue is somewhat less clear when the parent or other family members remedy the problems between the filing of the petition and the date of the hearing. Similarly, the TPR ground in Wis. Stat. § 48.415(3) refers to a parent who "is presently . . . an inpatient" in a hospital and to a child who "is not being provided adequate care." Should the parent's discharge on the eve of the hearing or last minute provisions for a child's care defeat jurisdiction? As another example, Wis. Stat. § 48.13(4) provides for CHIPS jurisdiction where a parent signs the petition and states that he or she "is unable to care for the child." If the inability clearly existed at the time of the filing but has completely disappeared by the time of the hearing, should there be jurisdiction?

In *State v. Gregory L.S.* (*In the Interest of Gregory R.S.*), 2002 WI App 101, 253 Wis.2d 563, 643 N.W.2d 890, the court of appeals concluded that "when a court considers the child's need for protection and services . . . the determination should be made based on the facts in existence on the date the petition is filed." The court rejected the argument that the determination should be made based upon conditions as they existed on the date of the fact-finding hearing, "as this would allow the court's jurisdiction over the child to change daily." The court said the trial court should consider changes subsequent to the petition's filing at the *dispositional* hearing. The court of appeals left open the question of under what circumstances the date of removal may be more appropriate. See 2002 WI App 101, fn. 6.

Conduct by Biological Father after Learning of His Status as Parent. In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the parent did not know of the child's existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father until the TPR petition was filed, and therefore he had no opportunity to assume parental responsibility. *State v. Bobby G.*, 2007 WI 77. The supreme court held that the circuit court must consider the biological father's efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding.

Admissibility of Evidence of Post-Petition Conduct. Since this instruction was first approved in 1996, the legislature has added a number of CHIPS and TPR grounds which open the door for the admissibility of evidence of postpetition conduct (*e.g.*, see § 48.13(10m), § 48.13(3m), § 48.133, and § 48.415(2)). For these grounds, which contain an element that is predictive in nature (*e.g.*, substantial risk of neglect), postpetition conduct may be relevant to the allegations of the petition.

The Committee reaffirms its original position that the question of timing the jury's consideration of pre-petition and post-petition evidence must be resolved by the trial judge in the context of the jurisdictional ground at issue.

The Committee has approved instructions, which require a prediction by the jury; the instructions listed below allow the jury to consider postpetition conduct when answering the special verdict:

1.	JI-Children 222 CHIPS:	Substantial Risk of Physical Abuse
2.	JI-Children 223 CHIPS:	Substantial Risk of Abuse (Manufacturing Methamphetamine)
3.	JI-Children 224 CHIPS:	Substantial Risk of Sexual Abuse
4.	JI-Children 255 CHIPS:	Substantial Risk of Neglect
5.	JI-Children 280 CHIPS:	Unborn Child in Need of Protection or Services
6.	JI-Children 324A	Involuntary Termination of Parental Rights: Continuing Need of Protection or Services

For an unpublished one-judge opinion discussing the parent's argument that it was error to instruct the jury with both Wis JI-Children 180 and 324A see *Portage County Dep't of Health and Human Services v. Tanya G.*, Appeal No. 2014AP86.

Post-Petition Efforts of County Agency. For a discussion of the jury's consideration of post-petition efforts by the county agency in a TPR based on continuing need, see the unpublished opinion, *State v. Stacee P.*, Appeal No. 2012AP169. The parent argued that the trial court erred in holding that the "reasonable effort" obligation encompassed things that the agency did after the date the petition was filed and up to the date of trial. The court of appeals considered whether the trial court should not have allowed the jury to consider what the county agency did after the petition for termination was filed and up to the date of trial. The parent argued that the agency responsible for helping her meet the court-ordered conditions for the return of her children had to make the "reasonable effort" before the petition was filed and what the agency did after that was not material to the agency's "reasonable effort" obligation. The court of appeals disagreed, finding that the agency's duty to help the parent continues past the petition's filing date.

Knowledge of Paternity. For an unpublished opinion discussing the appropriate date for the jury's determination of knowledge of paternity in a TPR based on failure to assume parental responsibility, see *Dane County Dep't of Human Services v. John L.-B.*, Appeal No. 2013 AP 462.

185 FIVE-SIXTHS VERDICT

Agreement by ten (five) or more jurors is sufficient to become your verdict. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten (five) jurors should agree in all the answers. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers (the number of the verdict question(s)) with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

This instruction was approved by the Committee in 2017. It is adapted from Wis JI-Civil 180.

Five-Sixths Verdict Rule. In Wisconsin, the five-sixths rule does not require that the same ten jurors must agree on every question. *Nommensen v. American Continental Ins.*, 2000 WI App 230, 239 Wis. 2d 129, 619 N.W.2d 137. Instead, the rule requires that the same ten jurors must agree on all questions necessary to support a judgment on a particular claim. Prior to 2017, a preliminary instruction (Wis JI-Children 150) instructed jurors that "at least the same ten jurors should agree in all the answers." This language was addressed in a 2016 one-judge opinion of the Wisconsin Court of Appeals, *Racine County Human Services Department v. L.H.*, Appeal No. 2015AP1872. The court noted that Athe parties and the trial judge agree that the language in the five-sixths instruction - "at least the same ten jurors should agree in all the answers" - was incorrectly worded for a situation where there is more than one ground alleged for termination. The opinion cited *Waukesha County Department of Social Services v. C.E.W.*, 124 Wis.2d 47, 368 N.W.2d 47 (1985), in which the supreme court held that the trial court erred in instructing the jury that "at least the same ten jurors should concur in all the answers made." The supreme court said this instruction to the jury was error "because the six verdicts given to the jury were independent, each verdict being separate and distinct from the others."

The *C.E.W.* decision was preceded by the decision in *Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 331 N.W.2d 585 (1983) in which the supreme court held that:

> "it is well established in Wisconsin law that this statute (Wis. Stat. § 805.09(2)) requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all questions necessary to support a judgment on a particular claim."

The *C.E.W.* and *Giese* decisions and the five-sixths rule were discussed in two court of appeals decisions in 2014 (both decided by one judge): *Portage County Department of Health and Human Services v. Tanya G.*, Appeal No. 2014AP86, and *State v. Jimmy J.*, Appeal No. 2014AP573. In *Tanya G.* the court said:

> ¶17 *Tanya G.* contends that the version of Wis JI 152 read by the court was a misstatement of law and thus the instruction was misleading and erroneous. The court instructed the jury as follows:
>
> > Agreement by 10 or more jurors is sufficient to become the verdict of the juryϒ.
> >
> > If you can do so consistently with your duty as a juror, at least the same 10 jurors should agree in all the answers. I ask you to be unanimous if you can.
>
> (Emphasis added.) Tanya G. argues that, contrary to the court's instruction, case law does not require the same ten persons to agree when the civil verdict presents two or more claims, citing *In Interest of C.E.W.*, 124 Wis. 2d 47, 59, 368 N.W.2d 47 (1985), and *Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983) (the five-sixths verdict rule requires that the same ten jurors agree on all questions necessary to support a judgment *only on a particular claim*). The County essentially concedes this point. We agree with Tanya G. that the five-sixths verdict instruction read to the jury in this case misstates the law. As we quoted above, the jury was instructed that "at least the same 10 jurors should agree in *all the answers*," which necessarily included the second and separate claim that Tanya G. failed to assume her parental responsibility for Autumn B.A. *See C.E.W.*, 124 Wis. 2d at 59; *Giese*, 111 Wis. 2d at 401.

Similarly in *State v. Jimmy J.*, the court said:

> ¶ 4. . . [T]he general rule is that the same ten persons do not have to agree when the civil verdict presents two or more claims. *See* WIS. STAT. RULE 805.09(2) ("A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."); *Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 401, 331 N.W.2d 585, 590 (1983) ("It is well established in Wisconsin law that this statute requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all questions necessary to support a judgment on a particular claim."). Further, Jimmy J. points to *Waukesha Cnty. Dep't of Social Services v. C.E.W.*, 124 Wis. 2d 47, 71-72, 368 N.W.2d 47, 59 (1985), which determined that it was error to tell the jury that it had to agree on all the bases on which the County sought to terminate the parent's parental rights.

Separate Verdict for Each Child; Each Parent; and Each Ground. The Committee recommends that the trial judge submit separate verdicts for each child; each parent; and each ground alleged in the petition.

195 SUPPLEMENTAL INSTRUCTION WHERE THE JURY IS UNABLE TO AGREE

The court has been informed that the jury is unable to agree on a verdict. You are not going to be kept here until you do agree, but you jurors are as competent to agree on a verdict as the next jury that may be called to hear the same evidence and arguments that you have heard.

You do not have to violate your individual judgment and conscience. However, you do have the duty to be open-minded to discuss the evidence freely and fairly, to listen to the arguments of your fellow jurors, and to examine your own position and to make a conscientious effort to agree on a verdict.

Remember, agreement by ten (five) or more jurors is sufficient to become the verdict of the jury. [If you can do so consistently with your duty as a juror, at least the same ten (five) should agree in all the answers (as to a particular claim).] If possible, I ask you to be unanimous.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their name or names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

The instruction and comment were approved in 2017. The instruction was adapted from Wis JI-Civil 195.

Wis. Stat. § 805.13(5).

Kelley v. State, 51 Wis.2d 641, 645, 187 N.W.2d 810 (1971). See also *Lewandowski v. Continental Casualty Co.*, 88 Wis.2d 271, 282, 276 N.W.2d 284 (1979).

It is not error to permit a civil jury to separate at night and return the next morning to continue deliberations. Annot., 77 A.L.R.2d 1086 (1961).

For reinstruction of the jury, see *Hareng v. Blanke*, 90 Wis.2d 158, 279 N.W.2d 437 (1979).

197 INSTRUCTION AFTER VERDICT IS RECEIVED

Your service in this case is completed. Many jurors ask if they are allowed to discuss the case with others after receipt of the verdict. Because your role in the case is over, you are not prohibited from discussing the case with anyone except that you may not disclose the identity of the child(ren) or the family. However, you should know that you do not have to discuss the case with anyone or answer any questions about it from anyone other than the court. This includes the parties, lawyers, or anyone else.

If you do decide to discuss the case with anyone, I would suggest you treat any discussion with a degree of solemnity such that whatever you do say, you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of the parties. It is in the public interest that there be the utmost freedom of debate in the jury room and that jurors be permitted to express their views without fear of incurring the anger of any litigants or criticism of any person. Please respect the privacy of the views of your fellow jurors.

I want to remind you that because this case involves (a child) (children) and is being heard by the Children=s court, these proceedings are confidential. The child(ren) and the family involved in these proceedings have a statutory right to the protection of their identities. I caution you that any person, including a juror, who discloses the identity of the child(ren) or the family is subject to sanctions for contempt of court.

Finally, should any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room. You may confer with me at any time before answering any questions asked by anyone.

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 197.

200 CHIPS: PRELIMINARY INSTRUCTION

This is a fact-finding proceeding on a petition which alleges that a child is in need of protection or services. It is conducted pursuant to the Children's Code of this state. It is a civil, not a criminal, proceeding.

This hearing is a part of a process which was started by the filing of a petition by (petitioner). The petition alleges that (child) (insert grounds under Wis. Stat. § 48.13).

Your role is to determine whether the allegations in the petition have been proved. In doing so, you should not consider what the final result of this proceeding might be. If you determine that the allegations of the petition have been proved, it is my responsibility to determine what services should be ordered.

The petitioner, _____, is represented in this proceeding by Attorney _____.

[The mother of (child) is (_____). She is represented by Attorney _____.] [The father of (child) is (_____). He is represented by Attorney _____.][1]

[The interests of (child) will be represented by Attorney _____, who is the child's guardian ad litem.] [(Child) will be represented by Attorney _____.][2] [(Child) is not in the courtroom because the laws governing this proceeding do not require that (he) (she) attend.]

At the end of this hearing, you will be given a special verdict to answer. I will give you further instructions on the law that applies to the verdict questions.

I want to remind you that (child) and (his) (her) family have a statutory right to keep their identities confidential. This is why these hearings are closed to the public. You must never disclose the identity of the child or family members to anyone.

COMMENT

Wis JI-Children 200 and comment were approved by the Committee in 1996.

The Committee considered at great length the extent to which a jury should be advised about its role in a CHIPS case. While appellate courts have not specifically endorsed such informational instructions, the trial judge clearly has the discretion to provide some legal background for the case, provided the information is accurate. See *P.M.H. v. Kenosha County*, 166 Wis.2d 1052 (1991); *In re C.E.W.*, 124 Wis.2d 47, 368 N.W.2d 47 (1985).

As a general rule, the Committee felt that jurors should be aware of their function and purpose and that it must be presumed that they will follow the law in reaching a verdict. While there is always the risk that informing the jurors about the impact of their decision might affect that decision, the Committee believes the greater risk is that jurors might be inclined to speculate incorrectly about the consequences of their verdict. The instruction, therefore, advises the jury, in very brief terms, as to their role in the process, indicating that their verdict is not dispositive on the question of termination. While additional information might not be harmful, the Committee considered and rejected more detailed comment about possible subsequent proceedings and about the specific dispositional options available to the court.

NOTES

1. If a parent is not present, jurors may logically wonder about his or her absence, and the court should consider providing some explanation about the absence or at least acknowledge that the parent is not participating as a party in the case. In most cases, the evidence will indicate the absent parent's circumstances or, perhaps, indicate that the parent is completely out of the picture or has otherwise failed to respond to notices from the court. If there is no dispute about the circumstances, it might be helpful to explain them to the jury at the outset.

2. In jury trials under Chapter 48, the guardian ad litem (GAL) or the court may tell the jury that the GAL represents the interests of the person or unborn child for whom the GAL was appointed. Wis. Stat. § 48.235(6).

202 UNBORN CHILD IN NEED OF PROTECTION OR SERVICES: PRELIMINARY INSTRUCTION [WIS. STAT. § 48.133]

This is a fact-finding proceeding on a petition which alleges that an unborn child is in need of protection or services. It is conducted pursuant to the Children's Code of this state. It is a civil, not a criminal, proceeding.

This hearing is a part of a process which was started by the filing of a petition by (petitioner). The petition alleges that (expectant mother) habitually lacks self-control in the use of (alcohol beverages) (controlled substances) (controlled substance analogs) exhibited to a severe degree to the extent that there is a substantial risk that the physical health of her unborn child and of the child when born will be seriously affected or endangered unless (expectant mother) receives prompt and adequate treatment for that habitual lack of self-control.

Your role is to determine whether the allegations in the petition have been proved. In doing so, you should not consider what the final result of this proceeding might be. If you determine that the allegations of the petition have been proved, it is my responsibility to determine what services should be ordered.

The petitioner, _____, is represented in this proceeding by Attorney _____.

[The expectant mother of the unborn child is (_____). She is represented by Attorney _____.] [The father of the unborn child is (_____). He is represented by Attorney _____.]

[The interests of the unborn child will be represented by Attorney _____, who is the unborn child's guardian ad litem.][1]

At the end of this hearing, you will be given a special verdict to answer. I will give you further instructions on the law that applies to the verdict questions.

I want to remind you that the parties have a statutory right to keep their identities confidential. This is why these hearings are closed to the public. You must never disclose the identity of the unborn child or family members to anyone.

COMMENT

Wis JI-Children 202 and comment were approved by the Committee in 1999. An editorial correction was made to paragraph 2 of the instruction in 2005.

This instruction applies to petitions seeking jurisdiction over unborn children in need of protection or services. Wis. Stat. § 48.133. For a jury instruction covering a petition on this ground, see Wis JI-Children 280.

If a minor expectant mother of an unborn child alleged to be in need of protection and services is before the court and it appears that the expectant mother is developmentally disabled, mentally ill, or drug dependent or suffers from alcoholism, the court may proceed under Wis. Stat. Chapter 51 or 55. If the expectant mother is an adult and appears to be drug dependent or suffers from alcoholism, the court may proceed under Chapter 51. Wis. Stat. § 48.135.

An "unborn child" means a human being from the time of fertilization to the time of birth. Wis. Stat. § 48.02(19).

Father as a Party. It is the consensus of the Committee that if the mother is married, the presumptive father should be allowed to participate.

NOTES

1. In jury trials under Chapter 48, the guardian ad litem (GAL) or the court may tell the jury that the GAL represents the interests of the person or unborn child for whom the GAL was appointed. Wis. Stat. § 48.235(6).

205 CHIPS: CHILD WITHOUT A PARENT OR GUARDIAN [WIS. STAT. § 48.13(1)]

The petition in this case alleges that (child) is without a parent or guardian. Your role as jurors will be to answer the following question in the special verdict:

1. Is (child) without a parent or guardian?

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

"Without a parent or guardian" means that (child) has no parent or guardian who exists or can be identified.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) is without a parent or guardian, you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (child) without a parent or guardian?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 205 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(1) 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:
>
> (1) Who is without a parent or guardian

The Committee believes it is not necessary to instruct the jury on what is a "parent." Determination of whether an individual is a parent for the purpose of this instruction is a question of law.

210 CHIPS: ABANDONMENT [WIS. STAT. § 48.13(2)]

The petition in this case alleges that (child) has been abandoned by (his) (her) parent(s). Your role as jurors will be to answer the following question in the special verdict:

1. Has (child) been abandoned?

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

"Abandonment" means that the parent(s) separated (himself)(herself)(themselves) from (his)(her)(their) child under circumstances which show a lack of reasonable parental concern for the well-being, support, or care of (his)(her)(their) child during the period of time alleged in the petition.

You are to examine all the circumstances surrounding this separation, including its duration or whether it created any foreseeable danger for the child.

SPECIAL VERDICT

1. Has (child) been abandoned?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 210 and comment were originally approved by the Committee in 1997 and revised in 1999 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(2) 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:
>
> (2) Who has been abandoned

Relationship to TPR Petition. A CHIPS finding that a child has been abandoned when the child was under one year of age provides the basis for the involuntary termination of parental rights under Wis. Stat. § 48.415(1)(a)1r. See Comment to Wis JI-Children 308.

212 CHIPS: RELINQUISHMENT OF CUSTODY OF NEWBORN CHILD [WIS. STAT. § 48.13(2m)]

The petition in this case alleges that the custody of (child) was relinquished by (his) (her) parent(s). Your role as jurors will be to answer the following questions in the special verdict:

1. Did (parent) relinquish custody of (child) to a (law enforcement officer) (emergency medical technician) (hospital staff member) on (date) without expressing an intent to return for the child?

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

2. At the time (he) (she) took custody of (child) on (date), did the (law enforcement officer) (emergency medical technician) (hospital staff member) reasonably believe that (child) was 72 hours old or younger?

The burden of proof 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."

The term "relinquish custody" means to give the child to a (law enforcement officer) (emergency medical technician) (hospital staff member) or leave the child with such a person. [A parent may relinquish custody directly or with the assistance of (another) (other) person(s).]

In answering question 1, you should consider whether (parent) made or gave any verbal or written statement or any other form of expression indicating an intent to return for (child).

In answering question 2, you should consider the age and appearance of (child) at the time the (law enforcement officer, emergency medical technician, or hospital staff member) took (child) into custody. You should also consider any statement made to the (law enforcement officer, emergency medical technician, or hospital staff member) by the parent (or person assisting the parent) about the age of the child.

SPECIAL VERDICT

1. Did (parent) relinquish custody of (child) to a (law enforcement officer) (emergency medical technician) (hospital staff member) on (date) without expressing an intent to return for the child?

Answer:_____
Yes or No

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

2. At the time (he) (she) took custody of (child) on (date), did the (law enforcement officer) (emergency medical technician) (hospital staff member) reasonably believe that (child) was 72 hours old or younger?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 212 and comment were approved by the Committee in 2001 and revised in 2004. An editorial change was made to the comment in 2005. The verdict was updated in 2009.

Wis. Stat. § 48.13(2m) 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:
>
> (2m) Whose parent has relinquished custody of the child under s. 48.195(1).

The Committee sees a number of potential problems with this new legislation, especially with § 48.195.

The bracketed language in the third paragraph can be used in cases where the parent relinquished the child with assistance from another person or other persons.

A CHIPS finding that a newborn's custody was relinquished by his or her parent provides the basis for a TPR under Wis. Stat. § 48.415(1m). See Wis JI-Children 303.

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215 CHIPS: ABUSE BY PHYSICAL INJURY [WIS. STAT. § 48.13(3) and § 48.02(1)(a)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, "abuse" means physical injury which is intentionally or recklessly inflicted on a child, including injury which is self-inflicted.[1] "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.[2]

The burden is on (petitioner) to establish that abuse occurred, but (petitioner) need not prove who caused the abuse.

[**The following paragraph is for use if the court determines that an instruction on reasonable discipline is appropriate**:[3] Abuse does not include injury which is the result of reasonable discipline of a child by a parent or other person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person would believe to be necessary under the circumstances. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or which creates an unreasonable risk of great bodily harm or death. "Great bodily harm" means 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.]

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 215 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial change was made to the comment in 2005. A statutory citation in the comment was updated in 2008.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(a), based on physical injury as defined in § 48.02(14g). The physical abuse jurisdictional basis was substantially revised by 1995 Wisconsin Act 275. With respect to physical abuse, the most notable change was the addition of a specific definition of "physical injury."

Subsection 48.13(3) now provides as follows:

> **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:
>
> **(3)** Who has been 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

Subsection 48.02(1)(a) defines abuse to include physical injury:

> (1) "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:
>
> (a) Physical injury inflicted on a child by other than accidental means.

The term "physical injury" is defined in 48.02(14g):

> **(14g)** "Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

When a petition alleges more than one theory of abuse under § 48.02(1), this instruction should be combined with other appropriate abuse instructions. See Wis JI-Children 217 through 219.

NOTES

1. 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." Our definition of "intentionally" is taken from § 939.23(3). The definition of "recklessly" is from § 948.03(1).

2. The statutory definition of "physical injury" is shown in the comment above. For the sake of clarity, we have broken this definition 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."

3. **Reasonable Discipline**. The Committee did not reach a consensus as to whether this jurisdictional basis was intended to preclude a defense of reasonable parental discipline. 1995 Senate Bill 501, which ultimately became 1995 Wisconsin Act 275, initially defined physical injury by reference to the very broad "bodily harm" definition of § 939.22(4), and specifically exempted reasonable discipline of a child. While the law ultimately passed with a definition of physical injury which is closer to the Criminal Code concept of "great bodily harm" and without any reference to reasonable discipline, the trial court might still encounter a reasonable discipline defense. Subsection 939.45(5) provides that such discipline is a defense to prosecution for a crime based on that conduct, limiting reasonable discipline as follows:

> Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

While this statutory privilege is not specifically applicable to a CHIPS petition, it does seem incongruous to allow for Children's Code jurisdiction based on conduct deemed "reasonable" by the Criminal Code. Moreover, while an injury which is great bodily harm can never be reasonable discipline, the new CHIPS definition of "physical injury" appears to reach beyond great bodily harm. Despite the nebulous quality of the "great bodily harm" definition, which ends with the phrase "or other serious bodily injury," great bodily harm does not seem to include all lacerations or burns or bruising. Thus, if discipline results in an injury which arguably satisfies the CHIPS definition but not the definition of "great bodily harm," a parent could claim that the jury should be instructed on this issue.

216 CHIPS: ABUSE BY METHAMPHETAMINE MANUFACTURING [WIS. STAT. § 48.13(3) and § 48.02(1)(g)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, "abuse" means manufacturing methamphetamine in violation of Wisconsin Statute § 961.41 under any of the following circumstances:

X with a child physically present during the manufacture;

X in a child's home, on the premises of a child's home, or in a motor vehicle located on the premises of a child's home; or

X under any other circumstances in which a reasonable person should have known that the manufacture would be seen, smelled, or heard by a child.

Wisconsin Statute § 961.41 makes it unlawful to manufacture methamphetamine.

The burden is on (petitioner) to establish that abuse occurred, but (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 216 and comment were approved by the Committee in 2006. Editorial corrections were made to the instruction in 2010 and to the comment in 2008 and 2009.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(g), based on manufacturing of methamphetamine. This jurisdictional ground was added by 2005 Wis. Act 113. For a detailed discussion of "manufacturing" see Wisconsin Jury Instructions-Criminal 6021 and the instruction's extensive commentary.

Subsection 48.13(3) now provides as follows:

> **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:
>
> **(3)** Who has been 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

Subsection 48.02(1)(a) defines "abuse" to include manufacturing methamphetamine under any of the following circumstances:

> (a) Physical injury inflicted on a child by other than accidental means.

The term "physical injury" is defined in 48.02(14g):

> **(14g)** "Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

217 CHIPS: ABUSE BY SEXUAL INTERCOURSE OR CONTACT [WIS. STAT. § 48.13(3) and § 48.02(1)(b)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, "abuse" means that (child) had not yet attained the age of 16 years and was subjected to (sexual intercourse) (sexual contact).[1]

[**For allegations involving sexual intercourse, use the following:** "Sexual intercourse" means vulvar penetration as well as cunnilingus, fellatio, or anal intercourse, or any other intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of the child. Emission of semen is not required.]

[**For allegations involving the alleged abuser touching the child, use the following:** "Sexual contact" means any intentional touching by the alleged abuser of the (name the intimate part) of the child, if that touching is done for the purpose of becoming sexually aroused or gratified.[2] The touching may be of the (name intimate part) directly or it may be through clothing. The touching may be done by any body part or by any object, but it must be intentional touching.]

[**For allegations involving the alleged abuser causing the child to touch the alleged abuser, use the following:** "Sexual contact" means any intentional touching by (child) of the (name intimate part) of the alleged abuser, if the alleged abuser intentionally caused (child) to do that touching and if that touching is done for the purpose of sexually

arousing or gratifying the alleged abuser.[3] The touching may be of the (name intimate part) directly or it may be through clothing.]

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

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

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 217 and comment were originally approved in 1996. The instruction was revised in 1997, 2004, 2009, and 2010. An editorial change was made to the comment in 2005. A statutory citation in the comment was updated in 2008.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(b), based on sexual intercourse or contact as defined in § 48.02(1)(b), and where the petition relies on § 948.02(2) for the underlying crime of sexual assault. As discussed in this comment, the state will rarely need to use any other sexual assault theory.

For an analysis of Wis. Stat. § 948.02, as amended by 2007 Wis. Act 80, see Wis JI-Criminal 2102-2104.

Wis. Stat. § 48.13(3) provides as follows:

> **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:
>
> **(3)** Who has been 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

Wis. Stat. § 48.02(1)(b) defines "sexual abuse" by reference to various criminal statutes:

> **(1)** "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:
>
> (b) Sexual intercourse or sexual contact under s. 940.225, 948.02, 948.025, or 948.085.

Virtually all petitions will allege a violation of Wis. Stat. § 948.02.

Wis. Stat. § 948.025 requires repeated violations of § 948.02 and, therefore, adds nothing to the scope of sexual abuse jurisdiction. Because any sexual intercourse or sexual contact with a child under 16 violates § 948.02, the general criminal statute covering sexual assault, § 940.225 would be needed only if the department seeks jurisdiction over a 16- or 17-year-old who has been the victim of sexual assault under that statute. Section 948.085 applies to sexual assault of a child in substitute care or by a stepparent.

NOTES

1. As noted above, this instruction assumes the petition relies on a violation of § 948.02(2), requiring only proof that there was sexual intercourse or contact with a child under 16 years of age. If the petition alleges a violation of § 948.02(1), the age reference should be changed to 13 years (§ 948.02(1)(am) or 12 years (§ 948.02(1)(b)). If the petition alleges some other type of sexual assault, the instruction will need to define "abuse" by reference to the elements of that offense.

2. Where appropriate, the instruction should refer to the alternative purpose of sexually degrading or sexually humiliating the child. See Wis. Stat. § 948.01(5).

3. See note 2, *supra*.

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218 CHIPS: ABUSE BY SEXUAL EXPLOITATION: VIOLATION OF WIS. STAT. § 948.05(1)(a) [WIS. STAT. § 48.13(3) and § 48.02(1)(c)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, "abuse" means sexual exploitation. Sexual exploitation of a child occurs when a person employs, uses, persuades, induces, entices, or coerces a child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.

The burden is on (petitioner) to establish that the following three elements were present:

First, that some person (employed) (used) (persuaded) (induced) (enticed) (coerced) (child) to engage in sexually explicit conduct.

Second, that the purpose for (*e.g.*, employing, using, etc.) (child) was to record or display in any way sexually explicit conduct involving the child.

Third, that (child) had not attained the age of 18 years.[1]

"Sexually explicit conduct" means actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of intimate parts). [Emission of semen is not required.]

(Petitioner) is not required to prove that the alleged abuser had knowledge of (child)'s age, and any mistake regarding (child)'s age is not a defense.[2] Similarly, consent is not an issue, and any consent by (child) is not a defense.

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 218 and comment were originally approved in 1996 and revised in 1997, 2004, 2009, and 2010. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. The comment was revised in 2008 and 2010. The notes were revised in 2010.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(c), which define "abuse" by reference to the crime of sexual exploitation of a child. Wis. Stat. § 948.05.

Wis. Stat. § 48.13(3) provides as follows:

> **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:
>
> **(3)** Who has been 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

Wis. Stat. § 48.02(1)(c) defines "abuse" by reference to § 948.05:

> **(1)** "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:
>
> (c) A violation of s. 948.05.

Wis. Stat. § 948.05 covers sexual exploitation of a child. See also Wis JI-Criminal 2120 and 2120A.

For an instruction on the identity of the alleged abuser of the child, see Wis JI-Children 220.

NOTES

1. While it might be appropriate to "direct a verdict" on the element of age, some finding needs to be made by the court or jury as to this element. See Special Materials, SM-2, at the end of this publication.

2. **Affirmative Defense**. Subsection 948.05(3) provides that it is an affirmative defense if the defendant had reasonable cause to believe that the child had attained the age of 18. It is unlikely that this will ever be an issue in a CHIPS case, but if the facts support this defense, the jury should be instructed as follows:

> The petitioner is not required to prove that the alleged abuser had knowledge of (child)'s age, and a mistake regarding (child)'s age is not, by itself, a defense. However, the law further provides that it is a defense to this crime if the alleged abuser had reasonable cause to believe that (child) had attained the age of 18 years. The burden is on (parent) to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that this defense is established.

While this defense raises a unique question as to where the burden lies in a CHIPS case, particularly if the alleged abuser is not the parent, the most reasonable choice is to assign the burden to the parent.

218A CHIPS: ABUSE BY SEXUAL EXPLOITATION: VIOLATION OF WIS. STAT. § 948.05(1)(b) [WIS. STAT. § 48.13(3) and § 48.02(1)(c)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, "abuse" means sexual exploitation. Sexual exploitation of a child occurs when a person records or displays in any way the child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.

The burden is on (petitioner) to establish that the following three elements were present:

First, that some person (photographed) (filmed) (videotaped) (recorded the sound of) (displayed in any way) (child) while (child) was engaged in sexually explicit conduct.

Second, that this person knew that (child) was engaged in sexually explicit conduct.

Third, that (child) had not attained the age of 18 years.[1]

"Sexually explicit conduct" means actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of intimate parts). [Emission of semen is not required.]

(Petitioner) is not required to prove that an alleged abuser had knowledge of (child)'s age, and any mistake regarding (child)'s age is not a defense.[2] Similarly, consent is not an issue, and any consent by (child) is not a defense.

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 218.1 and comment were approved in 1997 and revised in 2004. The instruction was renumbered JI-Children 218A in the 2005 edition. The instruction was revised in 2009 and 2010. An editorial change was made to the comment in 2005. The comment was revised in 2008 and 2009. The notes were revised in 2010.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(c), which define "abuse" by reference to the crime of sexual exploitation of a child. Wis. Stat. § 948.05.

Wis. Stat. § 48.13(3) provides as follows:

> **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:
>
> **(3)** Who has been 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

Wis. Stat. § 48.02(1)(c) defines "abuse" by reference to § 948.05:

> **(1)** "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:
>
> (c) A violation of s. 948.05.

Wis. Stat. § 948.05 covers sexual exploitation of a child. See also Wis JI-Criminal 2120 and 2120A.

NOTES

1. **Directed Verdict**. While it might be appropriate to "direct a verdict" on the element of age, some finding needs to be made by the court or jury as to this element. See Special Materials, SM-2, at the end of this publication.

2. **Affirmative Defense**. Subsection 948.05(3) provides that it is an affirmative defense if the defendant had reasonable cause to believe that the child had attained the age of 18. It is unlikely that this will ever be an issue in a CHIPS case, but if the facts support this defense, the jury should be instructed as follows:

> The petitioner is not required to prove that the alleged abuser had knowledge of (child)'s age, and a mistake regarding (child)'s age is not, by itself, a defense. However, the law further provides that it is a defense to this crime if the alleged abuser had reasonable cause to believe that (child) had attained the age of 18 years. The burden is on (parent) to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that this defense is established.

While this defense raises a unique question as to where the burden lies in a CHIPS case, particularly if the alleged abuser is not the parent, the most reasonable choice is to assign the burden to the parent.

See Wis JI-Criminal 2120A.

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218B CHIPS: ABUSE BY SEXUAL EXPLOITATION: VIOLATION OF WIS. STAT. § 948.05(2) [WIS. STAT. § 48.13(3) and § 48.02(1)(c)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, "abuse" means sexual exploitation. Sexual exploitation of a child occurs when a (parent) (person responsible for the child's welfare) permits, allows, or encourages the child to engage in sexually explicit conduct for the purpose of (insert purpose from Wis. Stat. § 948.05(1)(a),(b), or (c)).

The burden is on (petitioner) to establish that the following three elements were present:

First, that (parent) (person responsible for (child)'s welfare) permitted, allowed, or encouraged (child) to engage in sexually explicit conduct.

Second, the purpose for permitting, allowing, or encouraging (child) was to record or display in any way sexually explicit conduct involving the child.

Third, that (child) had not attained the age of 18 years.[1]

"Sexually explicit conduct" means actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of intimate parts). [Emission of semen is not required.]

(Petitioner) is not required to prove that an alleged abuser had knowledge of (child)'s age, and any mistake regarding (child)'s age is not a defense.[2] Similarly, consent is not an issue, and any consent by (child) is not a defense.

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 218.2 and comment were approved by the Committee in 1997 and revised in 2005. The instruction was renumbered JI-Children 218B in the 2005 edition and revised in 2009 and 2010. An editorial change was made to the comment in 2005. A statutory citation in the comment was updated in 2008. The notes were revised in 2010.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(c), which define "abuse" by reference to the crime of sexual exploitation of a child. Wis. Stat. § 948.05.

Wis. Stat. § 48.13(3) provides as follows:

> **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:
>
> **(3)** Who has been 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

Wis. Stat. § 48.02(1)(c) defines "abuse" by reference to § 948.05:

> **(1)** "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:
>
> (c) A violation of s. 948.05.

Wis. Stat. § 948.05 covers sexual exploitation of a child. See also Wis JI-Criminal 2120 and 2120A.

NOTES

1. **Directed Verdict**. While it might be appropriate to "direct a verdict" on the element of age, some finding needs to be made by the court or jury as to this element. See Special Materials, SM-2 at the end of this publication.

2. **Affirmative Defense**. Subsection 948.05(3) provides that it is an affirmative defense if the defendant had reasonable cause to believe that the child had attained the age of 18. It is unlikely that this will ever be an issue in a CHIPS case, but if the facts support this defense, the jury should be instructed as follows:

> The petitioner is not required to prove that the alleged abuser had knowledge of (child)'s age, and a mistake regarding (child)'s age is not, by itself, a defense. However, the law further provides that it is a defense to this crime if the alleged abuser had reasonable cause to believe that (child) had attained the age of 18 years. The burden is on (parent) to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that this defense is established.

While this defense raises a unique question as to where the burden lies in a CHIPS case, particularly if the alleged abuser is not the parent, the most reasonable choice is to assign the burden to the parent.

See Wis JI-Criminal 2120A.

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218C CHIPS: ABUSE BY CAUSING A CHILD TO VIEW OR LISTEN TO SEXUAL ACTIVITY: VIOLATION OF WIS. STAT. § 948.055 [WIS. STAT. § 48.13(3) and § 48.02(1)(e)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, (child) has been abused if someone has intentionally caused the child to view or listen to sexually explicit conduct if the viewing or listening was for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child.

The burden is on (petitioner) to establish that the following four elements were present:

First, that someone caused (child) to view or listen to sexually explicit conduct.

Second, that this person intentionally caused (child) to view or listen to sexually explicit conduct.

Third, that the person acted with the purpose of sexually arousing or gratifying (himself) (herself) or humiliating or degrading (child).

Fourth, that (child) had not attained the age of 18 years.[1]

"Sexually explicit conduct" means actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of intimate parts). [Emission of semen is not required.]

(Petitioner) is not required to prove that an alleged abuser had knowledge of (child)'s age, and any mistake regarding (child)'s age is not a defense. Similarly, consent is not an issue, and any consent by (child) is not a defense.

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 218.3 and comment were approved by the Committee in 1997. The instruction was renumbered JI-Children 218C in the 2005 edition and revised in 2009 and 2010. An editorial change was made to the comment in 2005. A statutory citation in the comment was updated in 2008 and 2009.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(e), which define "abuse" by reference to the crime of causing a child to view or listen to sexual activity. Wis. Stat. § 948.055.

The sexual abuse jurisdictional basis was substantially revised by 1995 Wisconsin Act 275. Wis. Stat. § 48.13(3) provides as follows:

> **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:
>
> **(3)** Who has been 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

Wis. Stat. § 48.02(1)(e) defines "abuse" by reference to § 948.055:

> **(1)** "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:
>
> (e) A violation of § 948.055.

Wis. Stat. § 948.055 states:

> **948.055 Causing a child to view or listen to sexual activity. (1)** Whoever intentionally causes a child who has not attained 18 years of age to view or listen to sexually explicit conduct may be penalized as provided in sub. (2) if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child.
>
> **(2)** Whoever violates sub. (1) is guilty of:
>
> (a) A Class F felony if the child has not attained the age of 13 years.
>
> (b) A Class H felony if the child has attained the age of 13 years but has not attained the age of 18 years.

NOTES

1. While it might be appropriate to "direct a verdict" on the element of age, some finding needs to be made by the court or jury as to this element. See Special Materials, SM-2, at the end of this publication.

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218D CHIPS: ABUSE: EXPOSING OR CAUSING A CHILD TO EXPOSE GENITALS OR PUBIC AREA: VIOLATION OF WIS. STAT. § 948.10 [WIS. STAT. § 48.13(3) and § 48.02(1)(f)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) 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 question should be answered "yes."

In this case, (child) has been abused if someone has (caused the child to expose genitals or pubic area) (exposed genitals or pubic area to (child)) for the purpose of the person's sexual arousal or sexual gratification.

The burden is on (petitioner) to establish that the following three elements were present:

First, that someone [caused (child) to expose (genitals) (pubic area)] [exhibited to view (his) (her) (genitals) (pubic area) to (child)].

Second, the person [caused the exposure by (child)] [exposed (genitals) (pubic area)] for the purpose of sexual arousal or sexual gratification.

Third, that (child) had not attained the age of 18 years.[1]

The petitioner is not required to prove that an alleged abuser had knowledge of (child)'s age, and any mistake regarding (child)'s age is not a defense. Similarly, consent is not an issue, and any consent by (child) is not a defense.

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 218.4 and comment were approved by the Committee in 1997 and revised in 2005 and 2010. The instruction was renumbered JI-Children 218D in the 2005 edition. An editorial change was made to the comment in 2005. The comment was updated in 2008 and 2009. The title was revised in 2009.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(f), which define "abuse" by reference the crime of exposing or causing a child to expose.

Wis. Stat. § 48.13(3) provides as follows:

> **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:
>
> **(3)** Who has been 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

Wis. Stat. § 48.02(1)(f) defines "abuse" by reference to § 948.10:

> **(1)** "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:
>
> (f) A violation of s. 948.10.

Wis. Stat. § 948.10 states:

> **948.10. Exposing genitals or pubic area.** (1) Whoever, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes genitals or pubic area to a child is guilty of a Class A misdemeanor.
>
> (2) Subsection (1) does not apply under any of the following circumstances:
>
> (a) The child is the defendant's spouse.
>
> (b) A mother's breast-feeding of her child.

NOTES

1. While it might be appropriate to "direct a verdict" on the element of age, some finding needs to be made by the court or jury as to this element. See Special Materials, SM-2, at the end of this publication for a discussion.

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219 CHIPS: ABUSE: PROSTITUTION: VIOLATION OF WIS. STAT. § 944.30 [WIS. STAT. § 48.13(3) and 48.02(1)(d)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) the victim of abuse?

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

In this case, "abuse" means that (child) had not yet attained the age of 18 years and was subjected to "prostitution," which means permitting, allowing, or encouraging a child to engage in an act of nonmarital sexual intercourse or sexual contact for anything of value.

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 219 and comment were approved in 1997 and revised in 2004. The instruction was revised in 2009. The comment was updated in 2008, 2009, and 2010.

Wis. Stat. § 48.13(3) provides:

> **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:
>
> (3) Who has been 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

For the definition of "abuse," see Wis. Stat. § 48.02(1). The term "abuse" in § 48.02(1)(d) includes "permitting, allowing, or encouraging a child to violate § 944.30," which defines "prostitution."

The Committee concluded that the jury should be instructed that the identity of the alleged abuser need not be proved based upon the language of the statute.

While this ground for CHIPS jurisdiction does not require proof of the identity of the alleged abuser, the court might wish to consider submitting an advisory verdict on this issue. Proposed language for an advisory verdict is found in Wis JI-Children 220. Its purpose is discussed in the comment to that instruction.

220 CHIPS: ABUSE: ADVISORY VERDICT AS TO AN ALLEGED ABUSER

It is not necessary for (petitioner) to establish the identity of the person (or persons) who committed the alleged abuse. However, it may be helpful to the court, if it is necessary to determine what protection or services to order, to know the identity of that person (or persons). Therefore, if you find that (child) was a victim of abuse, you should also answer the following question:

> Can the jury identify who committed the abuse by evidence that is clear, satisfactory, and convincing, to a reasonable certainty?

You should answer this question either "yes" or "no." If you answer this question "yes," you should write the name (or names) of the person(s) on the lines provided.

Please keep in mind that the question whether the child is a victim of abuse is completely independent of and unrelated to the question as to the identity of the person(s) who committed the abuse. A child can be found to be a victim of abuse even if the identity of (that person) (those persons) is unknown.

SPECIAL VERDICT

1. Can the jury identify who committed the abuse by evidence that is clear, satisfactory, and convincing, to a reasonable certainty?

Answer:_____
Yes or No

If you answered yes above, list name(s) here:

COMMENT

Wis JI-Children 220 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial correction was made in 2005 to the instruction. The title and comment were revised in 2010.

This instruction is for use in a CHIPS physical or sexual abuse case under Wis. Stat. § 48.13(3) if the court determines that it is appropriate to have an advisory verdict as to the identity of the alleged abuser or abusers. While CHIPS jurisdiction does not depend on identification of the alleged abuser in a subsequent termination of parental rights case, the identity of the person who committed the abuse may be critical in determining the appropriate disposition. While in some cases this identity may be uncertain or unknown, in others a finding of abuse may be indistinguishable from a finding that a particular person was responsible.

Advance notice of any such advisory verdict should be given to the parties, and the Committee recommends that this instruction only be used if the parties agree. This is not an issue on which parties are required to present evidence, and a party might reasonably object that it should not be required to present evidence on an advisory verdict which it does not wish to present otherwise. The identity of the alleged abuser is more logically an issue for disposition, and the Committee recommends that, whether or not there has been an advisory verdict, the court make a finding on this issue after jurisdiction is established and after the parties have been given the opportunity to present evidence at a dispositional hearing.

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."

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223 CHIPS: SUBSTANTIAL RISK OF ABUSE (MANUFACTURING AMPHETAMINE) [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 manufacturing methamphetamine in violation of § 961.41 (1) (e) under any of the following circumstances:

1. With a child physically present during the manufacture.
2. In a child's home, on the premises of a child's home, or in a motor vehicle located on the premises of a child's home.
3. Under any other circumstances in which a reasonable person should have known that the manufacture would be seen, smelled, or heard by a child.

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 223 and comment were approved in 2007 following the enactment of 2005 Wisconsin Act 293. The verdict was revised in 2009 and revised in 2010. Note 1 was revised in 2010.

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 by reason of the fact that 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.

224 CHIPS: SUBSTANTIAL RISK OF SEXUAL 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 perpetrator of the abuse of another child. In other words, you may be satisfied 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 as 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 sexual abuse exists. [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.

"Abuse" means [insert definition from Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219].

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 224 and comment were originally approved by the Committee in 1997 and revised in 2001, 2004, and 2010. The verdict was revised in 2009. Editorial corrections were made to paragraphs 6 and 7 in 2005. The comment was updated in 2005, 2007, and 2010.

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

This instruction is to be used where only evidence as to sexual abuse is presented. See Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219 for a definition of "sexual abuse."

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.

Substantial Risk. 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 by reason of the fact that 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.

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.

230 CHIPS: PARENT (GUARDIAN) UNABLE OR NEEDS ASSISTANCE TO CARE FOR [WIS. STAT. § 48.13(4)]

The petition in this case alleges that (parent) (guardian) is unable or in need of assistance to care for (child). Your role as jurors will be to answer the following question in the special verdict:

1. Is (parent) (guardian) unable or in need of assistance to care for (child)?

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

"Unable or in need of assistance to care for" means that (parent) (guardian) is unable to provide the level of care necessary to meet the needs of the child despite reasonable efforts of (parent) (guardian). In making this determination, you may consider all facts and circumstances bearing on the child's need for care and (parent)'s (guardian)'s ability to provide that care, including age, physical conditions, health, and special needs.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (parent) (guardian) is unable or in need of assistance to care for (child), you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (parent) (guardian) unable or in need of assistance to care for (child)?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 230 and comment were originally approved by the Committee in 1996 and revised in 1997, 2004, and 2010. The title was revised in 2009. The comment was updated in 2015.

This instruction was amended in 1997 to add "needs assistance" which was added by the legislature as a possible element. 1995 Wisconsin Act 275. Wis. Stat. § 48.13(4) provides for jurisdiction over a child:

> **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:
>
> (4) Whose parent or guardian signs the petition requesting jurisdiction under this subsection and is unable or needs assistance to care for or provide necessary special treatment or care for the child

This jurisdictional ground provides for two alternative allegations: (1) inability or needs assistance to care for and (2) inability or needs assistance to provide necessary special treatment or care. While the Committee has addressed these allegations separately in Wis JI-Children 230 and 232, parental petitions under this statute frequently allege both problems, and if the court permits both allegations to proceed to trial, the instructions should be combined as appropriate.

The explanation of "unable or in need of assistance to care for" in this instruction was cited with approval in an unpublished opinion in 2014; see *John M.S. v. Marcy J.S.*, Appeal No. 2013AP2644-FT (one-judge decision, March 12, 2014).

231 CHIPS: PARENTAL INABILITY TO CONTROL [FORMERLY WIS. STAT. § 48.13(4)] (AMENDED by 1995 WISCONSIN ACT 275)

INSTRUCTION WITHDRAWN.

COMMENT

Wis JI-Children 231 and comment were originally approved by the Committee in 1996 and withdrawn in 1997.

"Uncontrollable" is no longer a CHIPS issue. On July 1, 1996, this subsection of Wis. Stat. § 48.13 moved to Chapter 938 [1995 Wisconsin Act 275] and will not be subject to a jury determination.

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232 CHIPS: PARENT (GUARDIAN) UNABLE OR NEEDS ASSISTANCE TO PROVIDE NECESSARY SPECIAL TREATMENT OR CARE [WIS. STAT. § 48.13(4)]

The petition in this case alleges that (parent) (guardian) is unable or in need of assistance to provide necessary special treatment or care for (child). Your role as jurors will be to answer the following question in the special verdict:

1. Is (parent) (guardian) unable or in need of assistance to provide necessary special treatment or care for (child)?

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

(Petitioner) must prove that (child) is in need of special treatment or care and that the (parent) (guardian) is unable or needs assistance, despite reasonable efforts by the (parent) (guardian), to provide that special treatment or care. "Special treatment or care" means professional services which need to be provided to (child) or (child)'s family to protect the well-being of the child, to prevent placement of (child) outside of the home, or to meet the special needs of (child). This term includes, but is not limited to, medical, psychological, or psychiatric treatment; alcohol or other drug abuse treatment; or other services that are necessary and appropriate.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (parent) (guardian) is unable or needs assistance to provide necessary special treatment or care for (child), you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (parent) (guardian) unable or in need of assistance to provide necessary special treatment or care for (child)?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 232 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The title was revised in 2009. Editorial corrections were made in 2010. The comment was updated in 2008, 2009, 2011, and 2015.

Wis. Stat. § 48.13(4) 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:
>
> (4) Whose parent or guardian signs the petition requesting jurisdiction under this subsection and is unable or needs assistance to care for or provide necessary special treatment or care for the child

In the Committee's view, this section was not intended to allow a parent who has made insignificant or minimal effort to obtain jurisdiction by claiming "inability." The phrase "despite reasonable efforts" was included to make it clear that "unable to care for" means more than "unwilling" and presumes some reasonable effort by the parent.

Guardian Unwilling or Unable to Sign the Petition. For cases involving a guardian who is unwilling or unable to sign the petition requesting jurisdiction, see Wis JI-Children 234 and 234A.

> **Expectant Mother; Special Treatment or Care to Unborn Child and Child When Born**. The term "special treatment or care" also includes:
>
> professional services which need to be provided to the expectant mother of an unborn child to protect the physical health of the unborn child and of the child when born from the harmful effects resulting from the habitual lack of self-control of the expectant mother in the use of alcohol, controlled substances or controlled substance analogs, exhibited to a severe degree. Wis. Stat. § 48.02(17m).

Unable or Needs Assistance to Provide Necessary Special Treatment or Care. The explanation of "unable or in need of assistance" in this instruction was cited with approval in an unpublished opinion in 2014; see *John M.S. v. Marcy J.S.*, Appeal No. 2013AP2644-FT (one-judge decision, March 12, 2014).

233 CHIPS: PARENT FAILS TO PROVIDE CARE [WIS. STAT. § 48.13(9)]

The petition in this case alleges that (child who is the subject of the petition) is in need of special treatment or care and (parent) (guardian) (legal custodian) (is) (unwilling) (neglecting) (unable or in need of assistance) to provide that special treatment or care. Your role as jurors will be to answer the following questions in the special verdict:

1. Is (child who is the subject of the petition) in need of special treatment or care?

2. Is (parent) (guardian) (legal custodian) (unwilling) (neglecting) or (unable or in need of assistance) to provide that special treatment or care?

The burden of proof 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."

"Special treatment or care" means professional services which need to be provided to (child) or (child)'s family to protect the well-being of (child), to prevent placement of the child outside of the home, or to meet the special needs of (child). This term includes, but is not limited to, medical, psychological, or psychiatric treatment; alcohol or other drug abuse treatment; or other services that are necessary and appropriate.

"Unwilling" means a willful and intentional failure to provide. "Neglecting" means a failure to provide that is neither intentional nor due to incapacity but rather is due to an inattentive state of mind. "Unable or needs assistance to provide" means that (parent) (guardian) (legal custodian) is unable to provide the special treatment or care necessary to meet the needs of (child) despite reasonable efforts of (parent) (guardian) (legal custodian). In making this determination, you may consider all facts and circumstances bearing on (child)'s need for special treatment or care and (parent)'s (guardian)'s (legal custodian)'s ability to provide that care.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (parent) (guardian) (legal custodian) is (unwilling) (neglecting) (unable or in need of assistance) to provide special treatment or care for (child), you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (child who is the subject of the petition) in need of special treatment or care?

Answer:_____
Yes or No

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

2. Is (parent) (guardian) (legal custodian) (unwilling) (neglecting) or (unable or in need of assistance) to provide that special treatment or care?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 233 and comment were approved by the Committee in 1997 and revised in 2004 and 2009. The title was revised in 2009. Editorial corrections were made in 2010.

Wis. Stat. § 48.13(9) 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:
>
> (9) Who is at least age 12, signs the petition requesting jurisdiction under this subsection and is in need of special treatment or care which the parent, guardian or legal custodian is unwilling, neglecting, unable or needs assistance to provide

In the Committee's view, this section was not intended to allow a parent who has made insignificant or minimal effort to obtain jurisdiction by claiming "inability." The phrase "despite reasonable efforts" was included to make it clear that "unable to care for" means more than "unwilling" and presumes some reasonable effort by the parent.

234 CHIPS: GUARDIAN UNABLE OR NEEDS ASSISTANCE TO CARE FOR; UNWILLING OR UNABLE TO SIGN PETITION [WIS. STAT. § 48.13(4m)]

The petition in this case alleges that (guardian) is unable or in need of assistance to care for (child). Your role as jurors will be to answer the following questions in the special verdict:

1. Is (guardian) unable or in need of assistance to care for (child)?

2. Is (guardian) unwilling or unable to sign the petition requesting jurisdiction?

The burden of proof 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."

"Unable or in need of assistance to care for" means that (guardian) is unable to provide the level of care necessary to meet the needs of the child despite reasonable efforts of (guardian). In making this determination, you may consider all facts and circumstances bearing on the child's need for care and (guardian)'s ability to provide that care, including age, physical conditions, health, and special needs.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (guardian) is unable or in need of assistance to care for (child), you should answer question No. 1 "yes." If you are not so convinced, you must answer question No. 1 "no."

In answering question No. 2, "unwilling" means a willful and intentional failure to provide. If you are convinced by evidence that is clear, satisfactory, and convincing to a

reasonable certainty, that (guardian) is (unwilling) (unable) to sign the petition, you should answer the question "yes."

SPECIAL VERDICT

1. Is (guardian) unable or in need of assistance to care for (child)?

Answer:_____
Yes or No

If the answer to question No. 1 is yes, answer question No. 2:

2. Is (guardian) unwilling or unable to sign the petition requesting jurisdiction?

Answer:_____
Yes or No

COMMENT

This instruction and comment were approved in 2009.

Wis. Stat. § 48.13(4m) 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:
>
> (4m) Whose guardian is unable or needs assistance to care for or provide necessary special treatment or care for the child, but is unwilling or unable to sign the petition requesting jurisdiction under this subsection;

234A CHIPS: GUARDIAN UNABLE OR NEEDS ASSISTANCE TO PROVIDE SPECIAL TREATMENT OR CARE; UNWILLING OR UNABLE TO SIGN PETITION [WIS. STAT. § 48.13(4m)]

The petition in this case alleges that (guardian) is unable or in need of assistance to provide necessary special treatment or care for (child). Your role as jurors will be to answer the following questions in the special verdict:

1. Is (guardian) unable or in need of assistance to provide necessary special treatment or care for (child)?

2. Is (guardian) unwilling or unable to sign the petition requesting jurisdiction?

The burden of proof 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."

"Special treatment or care" means professional services which need to be provided to the child or the child's family to protect the well-being of the child, to prevent placement of the child outside of the home, or to meet the special needs of the child. This term includes, but is not limited to, medical, psychological, or psychiatric treatment; alcohol or other drug abuse treatment; or other services that are necessary and appropriate.

"Unable or in need of assistance to provide necessary special treatment or care for" means that (guardian) is unable to provide the treatment or care necessary to meet the special needs of the child despite reasonable efforts of (guardian). In making this determination, you may consider all facts and circumstances bearing on the child's need for care and the (guardian)'s ability to provide that care, including age, physical conditions, health, and special needs.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (guardian) is unable or in need of assistance to provide necessary special treatment or care for (child), you should answer question No. 1 "yes." If you are not so convinced, you must answer question No. 1 "no."

In answering question No. 2, "unwilling" means a willful and intentional failure to sign. The term "unable" means an inability to sign. If you are convinced by evidence that is clear, satisfactory, and convincing to a reasonable certainty, that (guardian) is (unwilling) (unable) to sign the petition, you should answer the question "yes."

SPECIAL VERDICT

1. Is (guardian) unable or in need of assistance to provide necessary special treatment or care for (child)?

Answer:_____
Yes or No

If the answer to question No. 1 is "yes," answer question No. 2:

2. Is (guardian) unwilling or unable to sign the petition requesting jurisdiction?

Answer:_____
Yes or No

COMMENT

This instruction and comment were approved in 2009.
Wis. Stat. § 48.13(4m) 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:
>
> (4m) Whose guardian is unable or needs assistance to care for or provide necessary special treatment or care for the child, but is unwilling or unable to sign the petition requesting jurisdiction under this subsection;

235 CHIPS: PLACED FOR CARE IN VIOLATION OF LAW [WIS. STAT. § 48.13(5)]

The petition in this case alleges that (child) has been placed for care in violation of law. Your role as jurors will be to answer the following question in the special verdict:

1. Has (child) been placed for care in violation of law?

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

(Petitioner) alleges that (child) was placed by (parent) for care with (insert placement) and that this placement violated Wisconsin (federal) law because _____.

Wisconsin (Federal) law provides (insert appropriate restriction on placement).

A child is placed for care when (he) (she) is left by a parent with (another person) (an agency) (a facility) (who) (which) accepts the responsibility for the care and support of the child] [provides the child's care and support on a temporary or permanent basis].

Before you may answer the special verdict question "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 this question "no."

SPECIAL VERDICT

1. Has (child) been placed for care in violation of law?

Answer:_____
Yes or No

COMMENT

Wis JI-Children and comment were approved by the Committee in 1999 and revised in 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(5) provides:

> **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:
>
> (5) Who has been placed for care or adoption in violation of law

The Committee believes this CHIPS statute, covers four situations: (1) where the court orders a placement and the order expires or for some other reason is procedurally deficient; (2) where a parent, realizing he or she cannot adequately care for his or her child places the child with a child care agency or facility; (3) where a parent, similar to the previous scenario, "gives" the child to a friend for care; (4) where the child is placed with another person or an agency for adoption and the placement or the adoptive process is flawed or violates state law. The Committee believes a jury instruction on the first scenario is not necessary since a defective court-ordered placement can be remedied by a new placement order. The second and third scenarios are covered by this instruction while the fourth scenario is covered by Wis JI-Children 236.

Elements. This instruction covers two elements. First, there must be a placement of a child by his or her parent. Second, this placement must violate law. The instruction must be adapted to allegations of the CHIPS petition in which the petitioner will indicate with whom the child has been placed and why the placement violates law.

Nature of Placement. The statutes lack any guidance on the nature of the placement envisioned by the drafters. The Committee believes that the niche this CHIPS ground fills is a situation in which the parent, realizing his or her inability to adequately provide care, gives the child to another person (or an agency) who can provide for the child's care. In this scenario, abandonment may not have occurred if the parent retains some involvement in the child's life. The child has not been abandoned, nor has the child been neglected under § 48.13(10), since the parent has arranged or agreed to have the child cared for and the child is not endangered from a lack of care.

Placement Violations. Wis. Stat. § 48.62 and § 48.63 impose licensing requirements and restrictions on placements. A relative who provides care and maintenance for a child is not required to obtain a license to operate a foster home.

236 CHIPS: PLACED FOR ADOPTION IN VIOLATION OF LAW [WIS. STAT. § 48.13(5)]

The petition in this case alleges that (child) has been placed for adoption in violation of law. Your role as jurors will be to answer the following question in the special verdict:

1. Has (child) been placed for adoption in violation of law?

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

(Petitioner) alleges that (child) was placed for adoption with (_____) and that this placement violated law because _____.

Wisconsin (Federal) law provides (insert appropriate requirement or restriction on a lawful adoption cited in the petition, see, *e.g.*, Wis. Stat. §§ 48.833 and 48.81 - 48.92.)

A placement for adoption means an arrangement, agreement, or understanding in which a child is placed with another person, an agency, or a facility for the purpose of adoption.

SPECIAL VERDICT

1. Has (child) been placed for adoption in violation of law?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 236 and comment were approved by the Committee in 1999 and revised in 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(5) 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:
>
> (5) Who has been placed for care or adoption in violation of law.

The Committee believes this CHIPS ground applies when state or federal laws controlling the adoption process are not followed.

Section 48.63 provides that adoptive placements may be made only as provided under Wis. Stat. §§ 48.833, 48.835, 48.837, and 48.839.

A parent with custody of a child may place the child for adoption in the home of a relative without a court order. Wis. Stat. § 48.835.

An unauthorized placement for adoption is a Class H felony. See Wis. Stat. § 948.24; see also Wis. Stat. § 48.76.

240 CHIPS: INADEQUATE CARE DURING PERIOD OF PARENTAL ABSENCE (MISSING) [WIS. STAT. § 48.13(8)]

The petition in this case alleges that (child) is receiving inadequate care during a period of time that a parent is missing. Your role as jurors will be to answer the following question in the special verdict:

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is missing?

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

"Inadequate care" means less care than is reasonably necessary to provide sufficient food, clothing, housing, medical and dental services, education, or to meet the special needs of (child). In determining what constitutes inadequate care, you may consider all the facts and circumstances bearing on (child)'s need for care, including age, physical condition, and special needs.

"Missing" means that the parent is unable to be located despite reasonable efforts.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) is receiving inadequate care during a period of time that a parent is missing, you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is missing?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 240 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(8) 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:
>
> (8) Who is receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized

The Committee believes this CHIPS ground does not apply to remove a child from a single parent's home.

The appropriate date for evaluating the care is the date of the petition.

241 CHIPS: INADEQUATE CARE DURING PERIOD OF PARENTAL ABSENCE (INCARCERATED) [WIS. STAT. § 48.13(8)]

The petition in this case alleges that (child) is receiving inadequate care during a period of time that a parent is incarcerated. Your role as jurors will be to answer the following question in the special verdict:

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is incarcerated?

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

"Inadequate care" means less care than is reasonably necessary to provide sufficient food, clothing, housing, medical and dental services, education, or to meet the special needs of (child). In determining what constitutes inadequate care, you may consider all the facts and circumstances bearing on (child)'s need for care, including age, physical condition, and special needs.

"Incarcerated" means that the parent is an inmate in a jail, Huber facility, house of correction, prison, or any other correctional facility located either in Wisconsin or elsewhere.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) is receiving inadequate care during a period of time that a parent is incarcerated, you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is incarcerated?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 241 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(8) 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:
>
> (8) Who is receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized

The Committee believes this CHIPS ground does not apply to remove a child from a single parent's home.

The appropriate date for evaluating the care is the date of the petition.

242 CHIPS: INADEQUATE CARE DURING PERIOD OF PARENTAL ABSENCE (HOSPITALIZED) [WIS. STAT. § 48.13(8)]

The petition in this case alleges that (child) is receiving inadequate care during a period of time that a parent is hospitalized. Your role as jurors will be to answer the following question in the special verdict:

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is hospitalized?

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

"Inadequate care" means less care than is reasonably necessary to provide sufficient food, clothing, housing, medical and dental services, education, or to meet the special needs of (child). In determining what constitutes inadequate care, you may consider all the facts and circumstances bearing on (child)'s need for care, including age, physical condition, and special needs.

"Hospitalized" means that the parent has been admitted as a patient into a hospital located either in Wisconsin or elsewhere.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) is receiving inadequate care during a period of time that a parent is hospitalized, you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is hospitalized?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 242 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(8) 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:
>
> (8) Who is receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized

The Committee believes this CHIPS ground does not apply to remove a child from a single parent's home.

The appropriate date for evaluating the care is the date of the petition.

243 CHIPS: INADEQUATE CARE DURING PERIOD OF PARENTAL ABSENCE (INSTITUTIONALIZED) [WIS. STAT. § 48.13(8)]

The petition in this case alleges that (child) is receiving inadequate care during a period of time that a parent is institutionalized. Your role as jurors will be to answer the following question in the special verdict:

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is institutionalized?

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

"Inadequate care" means less care than is reasonably necessary to provide sufficient food, clothing, housing, medical and dental services, education, or to meet the special needs of (child). In determining what constitutes inadequate care, you may consider all the facts and circumstances bearing on (child)'s need for care, including age, physical condition, and special needs.

"Institutionalized" means that the parent is in a facility on an inpatient basis relating to issues involving mental health, alcohol or other drug dependency, or developmental disability.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) is receiving inadequate care during a period of time that a parent is institutionalized, you should answer the question "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Is (child) receiving inadequate care during a period of time that a parent of (child) is institutionalized?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 243 and comment were originally approved by the Committee in 1996 and revised in 1997 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(8) 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:
>
> (8) Who is receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized

The Committee believes this CHIPS ground does not apply to remove a child from a single parent's home.

The appropriate date for evaluating the care is the date of the petition.

250 CHIPS: PARENTAL NEGLECT, REFUSAL, OR INABILITY TO PROVIDE [WIS. STAT. § 48.13(10)]

The petition in this case alleges that (parent) neglects, refuses, or is unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) so as to seriously endanger (child)'s physical health. Your role as jurors will be to answer the following question in the special verdict:

1. Did (parent) neglect, refuse, or was (he) (she) unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) so as to seriously endanger (child)'s physical health?

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

Before you may answer this question "yes," you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the following two elements have been proved:

First, that (parent) neglected, refused, or was unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child).

Second, that the failure to provide seriously endangered the (child)'s physical health.

The first element requires that you find that (parent)[1] failed to provide necessary [care, food, clothing, medical or dental care, or shelter] as a result of neglect, refusal, or inability, or some combination of those factors. "Neglect" means a failure to provide which is neither intentional nor due to parental incapacity but rather is due to an inattentive state of mind. "Refusal" is a willful and intentional failure to provide. "Inability" means an incapacity on

the part of the parent to perceive or to respond adequately to the needs of the child, but does not include an incapacity which is solely the result of poverty.[2]

["Necessary care" means that care which is vital to the needs and the physical health of the child. Parents have the right and duty to protect, train, and discipline their children and supervise their activities. In determining what constitutes necessary care, you may consider all of the facts and circumstances bearing on the child's need for care, including his or her age, physical condition, and special needs.]

The second element requires that the failure to provide [care, food, clothing, medical or dental care, or shelter] seriously endangered the (child)'s physical health. "Physical health" refers to bodily health and safety and does not include the mental or emotional health of the child. The physical health of the child is "seriously endangered" if the failure to provide creates a significant risk that the child will be seriously harmed or injured. However, actual harm or injury need not have occurred. In determining whether the physical health of the child was seriously endangered, you may consider the natural and probable consequences of the failure to provide. You may also consider the nature of any possible harm to the child and the level of risk that a particular harm will occur.

SPECIAL VERDICT

1. Did (parent) neglect, refuse, or was (he) (she) unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) so as to seriously endanger (child)'s physical health?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 250 and comment were originally approved by the Committee in 1996 and revised in 1997, 2001, 2004, and 2012. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial correction to the comment was made in 2008.

Wis. Stat.§ 48.13(10) 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:
>
> (10) Whose parent, guardian, or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child

Neglect; Refuse; Unable. This instruction combines the terms "neglect," "refuse," and "unable" in a single jury question. After extensive discussions regarding the intent of this section and the need for separate verdict questions as to each of these terms, the Committee decided that the essence of this section is a parental *failure* to provide and that there does not need to be jury agreement on the particular type of failure. The Committee could not conceive of any "failure" which would not qualify as either a neglect or refusal or inability and felt that it was not productive to require a jury to deliberate about the application of each of these three terms. Most often, a parental failure will result from some combination of these three factors. The fact that jurors cannot agree as to whether the parental failure can be characterized as "neglect" or "refusal" or "inability" should not defeat jurisdiction. Of course, the Committee does not believe that it would be error to submit these three terms as separate jury questions.

Necessary Care, Food, Clothing, Medical or Dental Care, or Shelter. In 2012, the Committee revised the instruction to clarify that the word "necessary" applies to each of the items listed in § 48.13(10), i.e. care, food, clothing, medical or dental care, or shelter.

NOTES

1. **Neglect Only by One Parent**. In State v. Gregory L.S., 2002 WI App 101, 253 Wis.2d 563, 643 N.W.2d 890, the court of appeals held "a court is not precluded from finding a child in need of protection and services even when only one parent has neglected the child." Although one parent may be fit, whether a child is in need of court intervention will depend on the particular facts of the case. If the child was neglected and seriously endangered by one parent, the child may be adjudicated in need of protection or services. 2002 WI App. 101, ¶ 42.

The court concluded that the "facts in existence on the date the petition was filed" controlled the determination whether the child was in need of protection and services. Changes subsequent to the filing, including the intervention of the fit parent, should be considered by the court at the dispositional hearing, but did not, necessarily, preclude the exercise of jurisdiction by the juvenile court.

2. **Inability**. The Committee recognizes that there may be considerable difficulty in determining whether an "inability" results from poverty or from other causes. To the extent that other causes of the inability might be identified, these circumstances may arguably be caused by or related to poverty. There is also a question as to whether "poverty" is intended to include a lack of money which is self-induced: If a parent cannot care for children because he or she spends all available money gambling, is that "poverty"? Does it matter whether the parent has been diagnosed as having a gambling addiction? The Committee was unable to agree on language which would resolve these questions as matters of law, and the instruction therefore leaves them to the

common sense of jurors.

255 CHIPS: SUBSTANTIAL RISK OF NEGLECT, REFUSAL, OR INABILITY TO PROVIDE [WIS. STAT. § 48.13(10m)]

The petition in this case alleges that (child) is in need of the protection or services of the court because (his) (her) parent is at substantial risk of neglecting, refusing, or being unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) so as to seriously endanger (his) (her) physical health.

Your role as jurors will be to answer the following questions in the special verdict:

1. Does reliable and credible information exist that (child)'s parent neglected, refused, or was unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for another child in the home so as to seriously endanger the physical health of that other child?

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

2. Is (child)'s parent at substantial risk of neglecting, refusing, or being unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) so as to seriously endanger (his) (her) physical health?

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 definitions for the terms and phrases in those questions.

Information is "reliable" if the nature, source, corroboration for, and other facts and circumstances relating to that information establish it as accurate and trustworthy. Information is "credible" if in the light of reason and common sense, it is worthy of belief.

A parent neglects, refuses, or is unable to provide necessary [care, food, clothing, medical or dental care, or shelter] for a child for reasons other than poverty when he or she fails to provide for any reason other than solely a lack of economic resources.

["Necessary care" means that care which is vital to the needs and the physical health and safety of the child. Parents have the right and duty to protect, train, and discipline their children and supervise their activities. In determining what constitutes necessary care, you may consider all of the facts and circumstances bearing on the child's need for care, including age, physical condition, and special needs, if any.]

"Another child in the home" means someone, under the age of 18, other than (child), who resides or resided in the home of (parent), either permanently or temporarily. The other child may, but need not necessarily, be related to (child). In this case, the petition alleges the other child to be _____. (The other child)'s physical health is seriously endangered if the failure to provide creates a significant risk that (the other child) will be seriously harmed or injured. Actual harm or injury need not have occurred. In determining whether the physical health of (child) was seriously endangered, you may consider the natural and probable consequences of the failure to provide. You may also consider the nature of any actual or possible harm to the child and the level of risk that a particular harm will occur. However, you may not consider actual or possible harm to the emotional health of the 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 a significant and appreciable threat exists that (parent) will fail to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) for reasons other than poverty so as to seriously endanger (his) (her) physical health. In determining the seriousness of the risk, among the things you may consider are: (1) the nature and severity of the failure to provide necessary [care, food, clothing, medical or dental care, or shelter] to the other child; (2) the similarity of the subject child to the other child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of the subject child to the other child by way of relationship or position of favor or disfavor; and (4) any changes which have occurred in the home since the prior (neglect) (insert other conduct) in terms of services having been provided, people having moved into or moved out of the home, and/or any monitoring or supervision which has been put into place. 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.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that reliable and credible information exists that (parent) failed for reasons other than poverty to provide for a child in (his) (her) home so as to endanger that child's physical health, you should answer question 1 of the special verdict "yes." If you are not so convinced, you must answer question 1 "no."

If the answer to question 1 is "yes," and you are further convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, based upon that information that (parent) is at substantial risk of failing to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) for reasons other than poverty, so as to seriously endanger (child)'s physical health, 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 (child)'s parent neglected, refused, or was unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for another child in the home so as to seriously endanger the physical health of that other child?

Answer:_____

Yes or No

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

2. Is (child)'s parent at substantial risk of neglecting, refusing, or being unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) so as to seriously endanger (his) (her) physical health?

Answer:_____

Yes or No

COMMENT

Wis JI-Children 255 and comment were originally approved by the Committee in 1996 and revised in 1999, 2001, 2004, 2008, 2009, and 2012. The verdict was revised in 2009 and 2012.

Wis. Stat. § 48.13(10m) 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:
>
> (10m) Whose parent, guardian or legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home

Substantial Risk. This instruction provides that "substantial risk" means "that a significant and appreciable threat 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 are: (1) the nature and severity of the failure to provide necessary [care, food, clothing, medical or dental care, or shelter] to the other child; (2) the similarity of the subject child to the other child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of the subject child to the other child by way of relationship or position of favor or disfavor; and (4) any changes which have occurred in the home since the prior (neglect) (insert other conduct) in terms of services having been provided, people having moved into or moved out of the home, and/or any monitoring or supervision which has been put into place. These factors were added to the instruction in 2001.

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.

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.

Necessary Care, Food, Clothing, Medical or Dental Care, or Shelter. In 2012, the Committee revised the instruction to clarify that the word "necessary" applies to each of the items listed in § 48.13(10), i.e. care, food, clothing, medical or dental care, or shelter.

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260 CHIPS: EMOTIONAL DAMAGE [WIS. STAT. § 48.13(11)]

The petition in this case alleges that (child) is suffering emotional damage for which (his) (her) (parent)[1] has neglected, refused, or been unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate (child)'s symptoms.[2] Your role as jurors will be to answer the following questions in the special verdict:

1. As of [the date the petition was filed], was (child) suffering emotional damage?

2. As of [the date the petition was filed], was (parent) failing,[3] for reasons other than poverty,[4] to obtain necessary treatment or to take necessary steps to ameliorate (child)'s symptoms.

The burden of proof 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."

"Emotional damage" means harm to a child's psychological or intellectual functioning. "Emotional damage" must be evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety, depression, withdrawal, outward aggressive behavior, or a substantial and observable change in behavior, emotional response, or cognition that is not within the normal range for the child's age and stage of development.[5]

In determining whether treatment or steps[6] would "ameliorate" the child's symptoms, you are to consider whether the treatment or steps would reduce or eliminate the child's symptoms.[7]

A parent failed, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate (his) (her) child's symptoms if the following are established:

1. that there was treatment or were steps that could have been taken to reduce or eliminate the child's symptoms;[8]
2. that the parent was aware of the treatment or the steps and the availability of the treatment or steps;
3. that the parent failed to provide the treatment or take the steps; and
4. that the parent's failure to provide the treatment or take the steps was unreasonable and was not due to the financial inability of the parent to afford the treatment or take the steps.

In determining whether a failure by (parent) was unreasonable, you may consider the circumstances surrounding a failure to obtain treatment or to take steps, including whether the treatment or steps are generally accepted in the practice of psychology or psychiatry; whether the treatment or the taking of these steps carry possible risks or side effects to (child);[9] and the reduction of symptoms likely to result from the treatment or the taking of the necessary steps.

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. As of [the date the petition was filed], was (child) suffering emotional damage?

Answer:_____
Yes or No

2. As of [the date the petition was filed], was (parent) failing, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate (child)'s symptoms.

Answer:_____
Yes or No

COMMENT

Wis JI-Children 260 and comment were approved by the Committee in 1999 and revised in 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial correction was made to Note No. 5 in 2005 and to Note No. 8 in 2008.

Wis. Stat. 48.13(11) reads:

> **48.13 Jurisdiction over children alleged to be in need of protection or services**. The court has exclusive jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:
>
> (11) Who is suffering emotional damage for which the parent, guardian or legal custodian has neglected, refused or been unable and is neglecting, refusing or unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate the symptoms;

NOTES

1. The statute also names the child's guardian or legal custodian as a responsible party.

2. Wis JI-Children 180 should be used to advise the jury that the "is" means as of the date of the filing of the petition. The phrase "has been" is interpreted as indicative of the need to show more than one instance, *i.e.*, some ongoing failure.

3. This instruction combines the terms "neglect," "refuse," and "unable" in a single jury question. After extensive discussions regarding the intent of this section and the need for separate verdict questions as to each of these terms, the Committee decided that the essence of this section is a parental failure to provide care and that there does not need to be jury agreement on the particular type of failure. The Committee could not conceive of any "failure" which would not qualify as either a neglect or refusal or inability and felt that it was not productive to require a jury to deliberate about the application of each of these three terms. Most often, a parental failure will result from some combination of these three factors. The fact that jurors cannot agree as to whether the parental failure can be characterized as "neglect" or "refusal" or "inability" should not defeat jurisdiction. Of course, the Committee does not believe that it would be error to submit these three terms as separate jury questions.

4. If parental poverty is a major issue in a case, a third question might be considered: "Was this failure due to reasons other than poverty?" See note 2 to Wis JI-Children 250.

5. The definition of "emotional damage" follows the definition in Wis. Stat. § 48.02.

6. In the Committee's view whether a refusal to place a child on psychotrophic drugs because of side effects is reasonable is a question of fact for the jury.

7. This instruction does not address the complex constitutional question of whether religious beliefs are a defense to a parental decision to withhold treatment. If at all possible, such a question should be addressed well in advance of a fact-finding hearing. See Wis. Stat. § 948.03(6) - Treatment Through Prayer.

8. Expert testimony will be required to establish this element as well as to show that the child is suffering emotional damage. Wis. Stat. § 48.31(4) provides in part: "In cases alleging a child to be in need of protection or services under s. 48.13(11), the court may not find that the child is suffering emotional damage unless a licensed physician specializing in psychiatry or a licensed psychologist appointed by the court to examine the child has testified at the hearing that in his or her opinion the condition exists, and adequate opportunity for the cross-examination of the physician or psychologist has been afforded. The judge may use the written reports if the right to have testimony presented is voluntarily, knowingly and intelligently waived by the guardian ad litem or legal counsel for the child and the parent or guardian."

9. Such a step could be something as basic as parental failure to cease inflicting emotional abuse on the child. What such steps are will change in each situation; they could be transportation, setting appointments, providing medication, or anything required of a parent to "ameliorate" the child's symptoms.

265 CHIPS: ALCOHOL AND OTHER DRUG ABUSE IMPAIRMENT [WIS. STAT. § 48.13 (11m)]

The petition in this case alleges that (child) is suffering from (an) (a) (alcohol) (or[1] other) (drug) abuse impairment and that (parent) has neglected, refused, or been unable to provide treatment for this impairment. Your role as jurors will be to answer the following questions in the special verdict:

1. As of (the date the petition was filed), was (child) suffering from (an) (a) (alcohol) (or other) (drug) abuse impairment?

2. As of (the date the petition was filed), was (parent) failing to provide treatment?

The burden of proof 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."

"Alcohol or other drug abuse impairment" means a condition which is exhibited to a severe degree by [characteristics of] habitual lack of self-control in using alcoholic beverages [or controlled substances] [or controlled substance analogs] to the extent that (child)'s health is substantially affected or endangered or (child)'s social or economic functioning is substantially disrupted.[2] This condition must be documented by [a qualified alcohol or other drug abuse diagnostician] [an approved treatment facility] in a written assessment.[3]

A parent is "failing to provide treatment" for (his) (her) child if each of the following is established:

1. that treatment for the child's (alcohol) (or other) (drug) abuse was available;

2. that the parent was aware of the treatment and its availability;

3. that the parent failed to provide the treatment as a result of neglect, refusal, or inability, or some combination of those factors;[4]

4. that the parent's failure to provide the treatment was unreasonable.

In determining whether a parent's failure to provide treatment was unreasonable, you may consider the circumstances surrounding the parent's failure to provide the treatment, including whether the treatment is generally accepted in the practice of psychology or psychiatry; the likely or possible benefits of the treatment; any likely or possible risks or side effects of the treatment; and the financial cost to the parent of the treatment.

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. As of (the date the petition was filed), was (child) suffering from (an) (a) (alcohol) (or other) (drug) abuse impairment?

Answer:_____
Yes or No

2. As of (the date the petition was filed), was (parent) failing to provide treatment?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 265 and comment were approved by the Committee in 1999 and revised in 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205.

Wis. Stat. § 48.13(11m) 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:
>
> (11m) Who is suffering from an alcohol and other drug abuse impairment, exhibited to a severe degree, for which the parent, guardian or legal custodian is neglecting, refusing, or unable to provide treatment.

NOTES

1. This statute requires the child to be suffering from an alcohol **and** other drug abuse impairment. The Committee assumes this was a drafting error and that the legislature did not intend to limit application of this subsection only to those children who are both alcoholic **and** dependant on some other illegal drug.

2. This definition is taken from Wis. Stat. § 48.02(1e).

3. This sentence refers to the mandates of Wis. Stat. § 48.31(4) which provides in part:

> In cases alleging a child to be in need of protection or services under § 48.13(11m). . ., the court may not find that the child . . . is in need of treatment and education for needs and problems related to the use or abuse of alcohol beverages, controlled substances or controlled substance analogs and its medical, personal, family or social effects unless an assessment for alcohol and other drug abuse that conforms to the criteria specified under § 48.547(4) has been conducted by an approved treatment facility.

4. If the jury needs additional explanation of "neglect," "refusal," or "inability," see Wis JI-Children 250, paragraph 7.

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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.

290 CHIPS: HABITUAL TRUANCY [FORMERLY WIS. STAT. § 48.13(6)]

INSTRUCTION WITHDRAWN.

COMMENT

Wis JI-Children 290 and comment were originally approved by the Committee in 1996 and withdrawn in 1997.

Truancy is no longer a CHIPS ground in Chapter 48. 1995 Wisconsin Act 77, effective July 1, 1996.

295 CHIPS: DELINQUENT ACT (UNDER AGE OF 12) [FORMERLY WIS. STAT. § 48.13(12)]

INSTRUCTION WITHDRAWN.

COMMENT

Wis JI-Children 295 and comment were originally approved by the Committee in 1996 and withdrawn in 1997.

Delinquency is no longer a CHIPS ground in Chapter 48. 1995 Wisconsin Act 77, effective July 1, 1996.

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300 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: PRELIMINARY INSTRUCTION (GENERAL)

This is a fact-finding proceeding on a petition to terminate parental rights. It is conducted pursuant to the Children's Code of this state. It is a civil, not a criminal, proceeding.

This hearing is a part of the process that was started by the filing of a petition by _____. The petition asks that the parental rights of (parent) to (child), a _____-year old (boy) (girl), be terminated. The petition alleges that the (child) (insert grounds under Wis. Stat. § 48.415).

I want to emphasize to you that this hearing is only one part of a process that may result in the termination of parental rights. You will not be asked to decide if _____'s parental rights should be terminated. Your responsibility is to determine whether the grounds for termination alleged in the petition have been proved. In doing so, you should not consider what the final result of this proceeding might be. If you determine that grounds for termination of (parent)'s parental rights have been proved, it is my responsibility to determine whether (her) (his) (their) parental rights should be terminated.[1]

The petitioner, _____, is represented in this proceeding by Attorney _____.

The mother of (child) is (_____). She is represented by Attorney _____. [The father of (child) is (_____). He is represented by Attorney _____.] [Use the following if one parent is not in the courtroom:

(Parent), the (mother) (father) of (child), is not in the courtroom because (her) (his) parental rights are not a part of this proceeding. [2]]

The interests of (child) will be represented by Attorney _____, who is the child's guardian ad litem.[3] [(Child) is not in the courtroom because the laws governing this proceeding do not require that (he) (she) attend.]

At the end of this hearing, you will be given a special verdict to answer. I will give you further instructions on the law that applies to the verdict questions.

I want to remind you that (child) and (his) (her) family have a statutory right to keep their identities confidential. This is why these proceedings are closed to the public. You must never disclose the identity of the child or family members to anyone.

COMMENT

Wis JI-Children 300 and comment were originally approved by the Committee in 1996. Editorial changes were made in 2004. Editorial corrections were made to paragraphs 2, 3, and 5 in 2005. Footnote 2 was added in 2018. Footnote 3 was added in 2009. The comment was updated in 2008, 2009, and 2018.

NOTES

1. With respect to the extent to which a jury should be advised about its role in a case involving the termination of parental rights, see the related discussion and case citations in the Comment and Note 1 to Wis JI-Children 200.

2. The unpublished decision in *In re. G.L.S.*, 2018AP177 (August 23, 2018) addressed a termination of parental rights case in which grounds were established as to one parent, after a default finding as to that parent, midway through the trial on grounds. The court of appeals approved the following instruction, which was provided to the jury on the second day of trial:

> There has been a development since we last met. The case involving [parent], who is the father, has now been resolved, and it will not be under consideration by you, so that part of the case is no longer before you. . . . [Father's] attorney, you will notice, no longer appears. There may be testimony that involves [Father] that's presented to you, but only as it affects the other parent . . . .

3. In jury trials under Chapter 48, the guardian ad litem (GAL) or the court may tell the jury that the GAL represents the interests of the person or unborn child for whom the GAL was appointed. Wis. Stat. § 48.235(6).

301 CONSIDERATION OF CHILD'S BEST INTERESTS IN TERMINATION PROCEEDINGS

I want to again emphasize that this hearing is only one part of a process that may result in termination of parental rights.

In this jury trial, the first phase of the proceedings, your responsibility is to determine what the facts are from all the evidence and answer the questions on the special verdict that will be submitted to you. Your answers will determine whether the State has proved that a ground or grounds for termination of parental rights exists. However, you are not being asked to decide if parental rights should be terminated. Based on your answers to the questions on the special verdict, it will be my responsibility to conduct further proceedings and hearings, and it is solely and ultimately my responsibility to determine if parental rights should be terminated based upon factors the law requires a court to consider if grounds for termination of parental rights are proven. You should not be concerned with what the final result of this jury proceeding might be, and you should not be concerned with what the final result of this entire lawsuit might be.

Consideration of the best interests of the child is a matter for the court in proceedings which will be conducted in the future; it is not a consideration for the jury.

COMMENT

This instruction and comment were approved in 2004. The instruction was revised in 2013. An editorial revision was made to the instruction in 2009. The comment was updated in 2008, 2014, and 2015.

Dual Purpose Evidence. The committee recommends giving this instruction at the end of the grounds hearing in cases where there is "dual purpose" evidence that goes to both grounds and disposition. Examples of this dual purpose evidence include, among other things: details of "unsuccessful" parental visits, that is, a child's negative reaction to the parent at the visit; foster parent testimony about the child's special needs and details of the foster parents' duties in meeting the child's special needs; foster parent testimony about the failure of the parent to contact the child, provide support for, or give gifts to the child; and details regarding the physical and mental health of the biological parent.

Since this type of evidence could shift the jury's focus away from the grounds testimony, the above limiting instruction may be appropriate after the specific testimony and again during the closing instructions.

See *In re Kristeena A.M.S.*, 230 Wis.2d 460 (Ct. App. 1999) citing *In re C.E.W.*, 124 Wis.2d 47, 54 (1985).

For an unpublished decision citing *In re C.E.W.* involving the giving of cautionary limiting instructions to the jury in the grounds-phase of TPR proceeding to not consider whether termination would be in the child's best interest, see *State v. Samantha S.*, 2013 AP 1503 (not published; one-judge decision).

For an unpublished decision discussing the ineffectiveness of counsel for failing to ask that the jury be instructed on Wis JI-Children 301, see *Manitowoc County Human Services Dep't v. Ralph B.*, Appeal No. 2014AP140 (one-judge decision, July 30, 2014).

302 SEPARATE PARENTS AND SEPARATE VERDICTS IN TERMINATION PROCEEDINGS

There are grounds alleged as to both parents in this case. You must consider the evidence against each parent separately and consider the evidence as to each ground separately. Each parent is entitled to separate consideration. Your verdict as to each ground should be based solely upon the evidence or lack of evidence as to that ground and should be made in accordance with my instructions on the law and without regard to whether grounds as to another parent has or has not been proved.

COMMENT

This instruction and comment were approved in 2004. The comment was updated in 2016.

For a discussion of the need for separate verdicts for each child, each parent, and each ground, see the Committee Commentary to Wis JI-Children 150.

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303 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: RELINQUISHMENT [WIS. STAT. § 48.415(1m)]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 303 comment was approved by the Committee in 2001 and revised in 2004.

Wis. Stat. § 48.415 (1m) 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:
>
> (1m) Relinquishment. Relinquishment, which shall be established by proving that a court of competent jurisdiction has found under § 48.13(2m) that the parent has relinquished custody of the child under § 48.195(1) when the child was 72 hours old or younger.

The CHIPS ground for relinquishment of custody is JI-Children 212.

Only the parent who has relinquished custody and was the subject of the CHIPS order may have his or her parental rights terminated on this ground.

The Committee concludes that a jury instruction for this ground is not necessary. The statute provides that a CHIPS finding of relinquishment, in combination with the fact that the child was 72 hours or younger at the time of relinquishment, is conclusive in establishing this ground for termination of the rights of the parent who relinquished custody. 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).

We recognize there is a difference in language between the CHIPS finding (reasonably believe the child was 72 hours or younger) and the TPR finding (child was 72 hours or younger). This difference could create a triable issue.

Summary Judgments and Directed Verdicts. See Special Materials, SM-2, at the end of this publication for a discussion of the use of summary judgments and directed verdicts in CHIPS and TPR proceedings.

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305 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT (60 DAYS) [WIS. STAT. § 48.415(1)(a)1.]

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

1. Was (child) left without provision for (his) (her) care or support?

2. Has (petitioner) investigated the circumstances surrounding the absence of (parent)?

3. Was (petitioner), despite reasonable efforts, unable to locate either of (child)'s parents for a period of at least 60 days prior to (date of filing petition)?

Before (child) may be found to have been abandoned, (petitioner) must prove the following three elements by evidence that is clear, satisfactory, and convincing to a reasonable certainty.

First, that (child) was left without provision for the child's care or support. Question 1 of the special verdict addresses this element.

Second, that (petitioner) has investigated the circumstances surrounding the absence of the parent(s). Question 2 of the special verdict addresses this element.

Third, that (petitioner), despite reasonable efforts, was unable to locate either of (child)'s parents for a period of at least 60 days prior to the filing of the petition. Question 3 of the special verdict addresses this element.

Before you may answer any 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. Was (child) left without provision for (his) (her) care or support?

Answer:_____
Yes or No

2. Has (petitioner) investigated the circumstances surrounding the absence of (parent)?

Answer:_____
Yes or No

3. Was (petitioner), despite reasonable efforts, unable to locate either of (child)'s parents for a period of at least 60 days prior to (date of filing petition)?

Answer:_____
Yes or No

COMMENT

Wis JI-Children and comment were originally approved by the Committee in 1997 and revised in 1999, 2001, and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. The comment was updated in 2005.

Wis. Stat. § 48.415(1)(a) 1. 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:
> 1. The child has been left without provision for the child's care or support, the petitioner has investigated the circumstances surrounding the matter and for 60 days the petitioner has been unable to find either parent

The Committee believes the statute requires an investigation of the whereabouts of the parents during a sixty-day period prior to the filing of a petition for termination on this ground. Reasonable investigative efforts must be undertaken; however, in the Committee's view, they need not be continuous throughout the sixty-day period. While investigative efforts to locate the parents will almost always commence immediately upon the discovery of an abandoned child, a trial court may encounter factual circumstances which require further explanation of this requirement.

The Committee believes the phrase "without provision for care or support" clearly means more than "without *any* provision" and requires provision for *sufficient and adequate* care. Otherwise, a parent who leaves a child in a dumpster might defeat jurisdiction by arguing that the child was wrapped in a blanket and had $20 tucked in the child's sleeper, and therefore *some* provision had been made. Similarly, "provision for care and support" requires that the parent has actively arranged for care and does not include the expectation that others will find and care for the child. Thus, where the parent otherwise abandons a child, jurisdiction is not defeated simply because parent makes an anonymous phone call to the Department of Social Services and advises them where to find the baby. If appropriate, the jury should be instructed on this matter.

Biological Parent; Periods of Abandonment Prior to Adjudication as Parent. See Comment, Wis. JI-Children 314.

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307 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT: LEFT WITHOUT PROVISION FOR CARE [WIS. STAT. § 48.415(1)(a)1m.]

The petition in this case alleges that on (date) (parent) abandoned (child) by leaving (him) (her) without providing for (his) (her) care or support in a place or manner that exposed the child to a substantial risk of either great bodily harm or death. This is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict:

1. On (_____), was (child) left by (parent) without provision for the child's care or support?

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

2. Was (child) left by (parent) in a (place) (manner) that exposed the child to a substantial risk of either great bodily harm or death?

Before (child) may be found to have been abandoned, (petitioner) must prove the following two elements by evidence that is clear, satisfactory, and convincing to a reasonable certainty.

First, that (child) was left by (parent) without provision for the child's care or support. This means that (parent) physically removed (himself) (herself) from the child under circumstances which demonstrated that (he) (she) was relinquishing parental responsibility for the child and that the parent failed to provide for the child's care and support. Question 1 of the special verdict addresses this element.

Second, that (child) was left by (parent) in a place or manner that exposed the child to a substantial risk of either great bodily harm or death. "Substantial risk" means a threat which is significant and appreciable. "Great bodily harm" means serious bodily injury. Question 2 of the special verdict addresses this element.

Before you may answer any 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. On (_____), was (child) left by (parent) without provision for the child's care or support?

Answer:_____
Yes or No

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

2. Was (child) left by (parent) in a (place) (manner) that exposed the child to a substantial risk of either great bodily harm or death?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 307 and comment were originally approved by the Committee in 1997 and revised in 2001 and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. Editorial corrections were made to the instruction and verdict in 2005. The comment was updated in 2005. The verdict was revised in 2009.

This instruction is intended for use in connection with § 48.415(1)(a)1m., which creates the following ground for the termination of parental rights:

> **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 . . . shall be established by proving that:
>
> 1m. The child has been left by the parent without provision for the child's care or support in a place or manner that exposes the child to substantial risk of great bodily harm, as defined in § 939.22 (14), or death

The Committee engaged in an extensive debate as to the scope of this ground. Read broadly, it applies to any physical "leaving" of a child, however momentary and regardless of any intent to return. The narrow reading assumes a legislative intent to include only the leaving of a child which is accompanied by a relinquishment of parental responsibility. This discussion focused both on the meaning of the word "left," as well the entire phrase "left without provision for care and support."

Under the broad view, many brief physical separations could become grounds for possible termination if the separation involved sufficient risk to the child, such as the parent who steps away from the infant child in the bathtub to answer the phone or leaves a child in a locked car on a hot day to run into the grocery store. Another example might be the parent who leaves young children alone and heads for the tavern. These have been traditional grounds for CHIPS jurisdiction but have not previously been considered grounds for termination.

Ultimately, the Committee concluded that the law intended to require some relinquishment of parental responsibility. The ground is, after all, a means of establishing "abandonment," a term which clearly involves more than brief physical separation. The parents in the examples above may have been terribly reckless but in no reasonable sense have they abandoned their children. Moreover, termination of parental rights requires more egregious actions or omissions by the parent than actions which allow for the exercise of CHIPS jurisdiction.

The Committee also felt that the phrase "without provision for care or support" clearly means more than "without *any* provision" and requires provision for *sufficient and adequate* care. Otherwise, a parent who leaves a child in a dumpster might defeat jurisdiction by arguing that the child was wrapped in a blanket and had $20 tucked in the child's sleeper, and therefore *some* provision had been made. Similarly, "provision for care and support" requires that the parent has actively arranged for care and does not include the expectation that others will find and care for the child. Thus, where the parent otherwise abandons a child, jurisdiction is not defeated simply because parent makes an anonymous phone call to the Department of Social Services and advises them where to find the baby. If appropriate, the jury should be instructed on this matter.

Biological Parent; Periods of Abandonment Prior to Adjudication as Parent. See Comment, Wis. JI-Children 314.

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308 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT: WHEN CHILD UNDER ONE YEAR: CHIPS ABANDONMENT OR CRIMINAL ABANDONMENT [WIS. STAT. § 48.415(1)(a)1r.]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 308 comment was approved by the Committee in 1999 and revised in 2004.

Wis. Stat. § 48.415(1)(a)1r 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:
> 1r. That a court of competent jurisdiction has found under s. 48.13 (2) or under a law of any other state or a federal law that is comparable to s. 48.13 (2) that the child was abandoned when the child was under one year of age or has found that the parent abandoned the child when the child was under one year of age in violation of s. 948.20 or in violation of the law of any other state or federal law, if that violation would be a violation of s. 948.20 if committed in this state.

The Committee concludes that a jury instruction for this ground is not necessary nor appropriate. The statute provides that a CHIPS finding based on abandonment or the fact of conviction in an underlying criminal proceeding, as evidenced by the final judgment of conviction, in combination with the fact that the child was under one year of age at the time of abandonment is conclusive in establishing this ground 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 conviction resulted from a trial, guilty plea, or no contest plea, the judgment of conviction is admissible and determinative. *Lee*, *supra* at 334-35; *Safran*, *supra* at 97.

Summary Judgments and Directed Verdicts. See Special Materials, SM-2, at the end of this publication for a discussion of the use of summary judgments and directed verdicts in CHIPS and TPR proceedings.

Time of Adjudication. The Committee does not believe that the adjudication must occur before the child's first birthday. Instead, the controlling issue is the conduct of the parent in relation to the child. There were three scenarios considered by the Committee: (1) where the adjudication occurs before the child's first birthday, (2) where the criteria for abandonment are met before the child is 1 years old, but the petition is filed after the first birthday, and (3) where the conduct establishing the abandonment straddles the child's first birthday. The Committee concludes that this TPR ground applies in the first two scenarios, but not the third.

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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."

314 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT: LEFT WITH ANOTHER PERSON AND FAILURE TO VISIT OR COMMUNICATE FOR SIX MONTHS [WIS. STAT. § 48.415(1)(a)3.]

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

Questions 1, 2, and 3 read as follows:

1. Was (child) left by (parent) with a relative or other person?

Answer question 2 only if the answer to question 1 is "yes."

2. Did (parent) know, or could (he) (she) have discovered, (child)'s whereabouts?

Answer question 3 only if the answer to question 2 is "yes."

3. Did (parent) fail to visit or communicate with (child) for a period of 6 months or longer?

As to these three 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 three questions should be "yes."

Before you may answer question 1 "yes," the (petitioner) must prove that (child) has been left by (parent) with another person, including the other parent or another relative. The phrase "has been left by (parent) with another person" means any circumstance in which the child resides apart from (parent) and with the other person, (including instances in which the child resides there pursuant to a court order).[1]

Before you may answer question 2 "yes," (petitioner) must prove that (parent) knew or could have discovered the whereabouts of (child). A parent "could have discovered the whereabouts of the child" if, through reasonable efforts by that parent,

(he) (she) would have discovered the location where the child resided or could be contacted.

Before you may answer question 3 "yes," the petitioner must prove that (parent) failed to visit or communicate with (child) for a period of 6 months or longer. This means that (parent) did not visit and did not communicate with (child) for 6 months or longer. Incidental contact between (parent) and (child) does not prevent you from finding that (he) (she) failed to visit or communicate for the required period. "Incidental contact" means insignificant contact or contact which occurred merely by chance. In calculating the period during which visitation did not occur, you should not include any periods during which the (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 the answers to questions 1 through 3 are "yes," abandonment has been established unless (parent) proves certain facts. Questions 4 through 7 of the special verdict address these facts and read as follows:

Questions 4-7 apply to the period of six months or longer as determined in question 3.

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

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

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

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

Answer question 6 only if the answer to question 5 is "yes."

6. Did (parent) communicate about (child) with the (person) (persons) who had physical custody of the child during that period?

Answer question 7 only if the answer to question 6 is "no."

7. Did (parent) have good cause for having failed to communicate about (child) with the (person) (persons) having physical custody 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 4 through 7 should be "yes."[2]

In determining if good cause existed as stated in questions 4, 5, and 7, you may consider whether (child)'s age or condition would have rendered any communication meaningless; whether (parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (_____), who had physical custody of (child); attempts to contact (child); whether the person(s) with physical custody of (child) prevented or interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond the parents control which precluded 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 through 3, 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 4 through 7, the burden is on (parent) to convince 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) left by (parent) with a relative or other person?

Answer:_____
Yes or No

Answer question 2 only if the answer to question 1 is "yes."

2. Did (parent) know, or could (he) (she) have discovered, (child)'s whereabouts?

Answer:_____
Yes or No

Answer question 3 only if the answer to question 2 is "yes."

3. Did (parent) fail to visit or communicate with (child) for a period of 6 months or longer?

Answer: _____
Yes or No

Questions 4-7 apply to the period of six months or longer as determined in question 3.

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

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

Answer:_____
Yes or No

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

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

Answer:_____
Yes or No

Answer question 6 only if the answer to question 5 is "yes."

6. Did (parent) communicate about (child) with the (person) (persons) who had physical custody of the child during that period?

Answer:_____
Yes or No

Answer question 7 only if the answer to question 6 is "no."

7. Did (parent) have good cause for having failed to communicate about (child) with the (person) (persons) having physical custody during that period?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 314 and comment were originally approved by the Committee in 1997. The section on burden of proof was revised in 2018. The comment was revised in 1999, 2004, 2005, 2011, 2012, 2013, 2014, 2015, and 2018. The verdict was revised in 2009.

Wis. Stat. § 48.415(1)(a)3 reads:

> **(1) Abandonment.** (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
> 3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 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 was filed on January 1, 1997, or after.

In 1999, following the revision of Wis. Stat. § 48.415(1)(a)(3), the Committee withdrew Wis JI-Children 312 which applied to TPR petitions (based on abandonment) filed before January 1, 1997.

Legislative Change. 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 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 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.*, 2018 AP 1206 (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.

"**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."

Period of Abandonment; Different Intervals. In a case involving a long period of alleged abandonment involving different 6-month intervals within that absence or separate alleged periods of abandonment, be alert to notice issues and separating the claims.

In an unpublished opinion in 2012, the court of appeals stated that "no clear law" exists to clarify whether separate instructions and separate verdicts are required when more than one period of abandonment is alleged. See *Heather T.C. v. Donald M.H.*, Appeal No. 2010AP467, Wisconsin Court of Appeals, District II, filed February 1, 2012. The court affirmed the trial court's decision to not submit separate jury instructions and separate verdicts related to two separate alleged periods of abandonment. The parent argued that "because there were two separate alleged periods, and the jury was not afforded the opportunity to consider and decide on a separate verdict for each period, the jurors could have reached their unanimous verdict with less than five-sixths of the jurors finding abandonment for any one period."

The issue of what six-month period is to be used for determining abandonment was raised, but not addressed in 2012 in an unpublished opinion, *Veronica K. v. Michael K.*, 2012 AP 197 (decided October 10, 2012). The court of appeals said it left "for another day the dispute over the requisite specificity required in a petition (as to the alleged period of abandonment) and what the jury should be told."

For a discussion of similar issues in a criminal context, see the majority and dissenting opinions in *State v. Johnson*, 2001 WI 52, 243 Wis.2d 365, 627 N.W.2d 455 (¶15-18).

Answering Special Verdict Questions. It has been suggested that the jury should be instructed to answer all questions (1-7) regardless of their answers to prior questions. This suggestion seeks to avoid a retrial in the event an appellate court reverses one of the jury's findings.

Because questions 4-7 of the special verdict relate to the parent's reasons for failing to visit or communicate, the committee believes it is incongruous to ask the jury to examine the parent's good faith for not visiting or communicating after the jury has already determined that the parent did not "fail to visit or communicate." The committee reviewed the language of this instruction and determined that no revision is necessary on this issue since the instruction explains what constitutes a "failure to visit or communicate." The committee believes that the statutory reference to "failure" by the parent means that the parent did not visit and did not communicate. Examination of the reason for a failure is addressed in the verdict questions dealing with good faith (questions no. 4-7).

Biological Parent; Periods of Abandonment Prior to Adjudication. The Wisconsin Supreme Court has held that:

> an individual who is in fact the biological father of a nonmarital child satisfies the definition of "parent" in § 48.02(13), as he is a "biological parent," notwithstanding that he has not officially been adjudicated as the child's biological father. Because such an individual satisfies the definition of "parent," he may have his parental rights terminated based on periods of abandonment that occurred prior to his official adjudication as the child's biological father, assuming he has failed to

> establish a "good cause" affirmative defense to the ground of abandonment. *State v. James P.*, 2005 WI 80, 274 Wis.2d 494, 684 N.W.2d 164.

The court in *James P.* emphasized, however, that it did not address "whether an adjudication subsequent to acts that comprise grounds for the termination of a person's parental rights subjects the adjudicated person to the termination of parental rights based on those acts[.]" *James P.*, 2005 WI 80, ¶ 5. That is, we do not decide whether an individual who is legally adjudicated to be the biological parent of a nonmarital child, but is not in fact the biological father, may have his parental rights terminated based on conduct that occurred prior to the adjudication.

Elsewhere in its decision (Paragraph 48), the court also emphasized:

> we do not hold, as did the circuit court, that "a man adjudicated as the biological father has always been the biological father and, therefore, that man has always been a 'parent' under § 48.02(13)." We merely hold that James P. satisfies the definition of "parent" in the first sentence of § 48.02(13) because he is and always was, in fact, Chezron's "biological parent."

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.

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

NOTES

1. *In re Christopher D.*, 191 Wis. 2d 681, 530 N.W. 2d 34 (Ct. App. 1995).

2. The Wisconsin Supreme Court held in *In re Kyle S.-G.*, 194 Wis.2d 366, 533 N.W.2d 794 (1995), that if the petitioner proves the "basic facts" of abandonment, the burden of proof shifts to the respondent-parent to rebut the presumption of abandonment. This presumption is rebutted if the parent proves by the greater weight of the credible evidence, to a reasonable certainty, that they had good cause for having failed to visit and having failed to communicate with the child during the period in issue **and** they communicated about the child with the person or persons who had physical custody of the child **or** had good cause for having failed to communicate with that person or persons about the child during that period.

Pursuant to Wis. Stat. § 903.01, and *Kyle S.-G.*, the respondent-parent must meet the ordinary, or lowest, burden of proof to rebut the presumption. Civil Jury Instruction 200 is therefore incorporated into this instruction with respect to the respondent-parent's duty to rebut the presumption.

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323 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES [WIS. STAT. § 48.415(2)] (AS AMENDED BY 1993 WISCONSIN ACT 395 AND 1995 WISCONSIN ACT 275) (FOR PETITIONS FILED BEFORE APRIL 28, 1998)

INSTRUCTION WITHDRAWN.

COMMENT

Wis JI-Children 323 was approved in 1997 and withdrawn in 1999.

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324 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES [WIS. STAT. § 48.415(2)(a)] (AS AMENDED BY 2017 WISCONSIN ACT 256) (SEE 324B FOR PREVIOUSLY NUMBERED JURY INSTRUCTION 324)

The petition in this case alleges that (child) is in continuing need of protection or services which is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

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

2. Did the _____ County Department of Social Services make a reasonable effort to provide the services ordered by the court?

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

3. Has (parent) failed to meet the conditions established for the safe return of (child) to (parent)'s home?

   [NOTE: If the child has been placed outside the home for less than 15 of the most recent 22 months, give the following:

   If the answer to question 3 is "yes," answer the following question:

4. Is there a substantial likelihood that (parent) will not meet these conditions by the date on which (child) will have been placed outside the home for 15 of the most

recent 22 months, not including any period during which the child was a runaway from the out of-home placement or was residing in a trial reunification home?]

Before (child) may be found to be in continuing need of protection or services, (petitioner) must prove the following (three) (four) elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (child) was adjudged to be a child (an unborn child) in need of protection or services and placed or continued in placement outside the home of (parent) for a cumulative period of six months or longer pursuant to one or more court orders containing 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 to this question, I have answered this question. My answer has no bearing whatsoever on what your answer should be to the other questions in the special verdict form.]

Second, that (agency) has made a reasonable effort to provide the services ordered by the court. "Reasonable effort" means an earnest and conscientious effort to take good faith steps to provide those services, taking into consideration the characteristics of the parent or child [or of the expectant mother or child], the level of cooperation of the parent [or expectant mother], and other relevant circumstances of the case. You may find the agency's effort was reasonable even though there were minor or insignificant deviations from the court's order. Question 2 of the special verdict addresses this element. **[Possible additional language:** In answering question 2, you may consider all evidence bearing on that question,

including evidence of events and efforts occurring since the filing of the petition on (_____). Your answer must reflect your finding as of today's date.][1]

Third, that (parent) has failed to meet the conditions established for the safe return of the child to the home. Question 3 of the special verdict addresses this element. In answering question 3, 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.

[NOTE: Add the following paragraph, if the child has been placed outside the home for less than 15 of the most recent 22 months:

Fourth, that there is a substantial likelihood that (parent) will not meet the conditions for the safe return of (child) by the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home. (Note: If there is no dispute to this date, add: That date will be (_____).) "Substantial likelihood" means that there is a real and significant probability rather than a mere possibility that (parent) will not meet the conditions for the safe return by that date. Question 4 of the special verdict addresses this element. In answering question 4, 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.]

In determining whether (parent) failed to meet the conditions established for the safe return of (child) to the home or whether there is a substantial likelihood that (parent) will not meet the conditions for the safe return of (child) by (_____), you may consider the following: the length of time (child) has been in placement outside the home; the number of times (child) has been removed from the home; the parent's performance in meeting the conditions for return of the child; the parent's cooperation with the social service agency; parental conduct during periods in which (child) had contact with (parent); and all other evidence presented during this hearing which assists you in making these determinations.

Before you may answer any 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. Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

Answer:_____
Yes or No

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

2. Did the _____ County Department of Social Services make a reasonable effort to provide the services ordered by the court?

Answer:_____
Yes or No

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

3. Has (parent) failed to meet the conditions established for the safe return of (child) to (parent)'s home?

Answer:_____
Yes or No

[NOTE: Add the following verdict question if the child has been placed outside the home for less than 15 of the most recent 22 months:

If the answer to question 3 is "yes," answer the following question:

4. Is there a substantial likelihood that (parent) will not meet these conditions by the date on which (child) will have been placed outside the home for 15 of the most recent 22 months, not including any period during which (child) was a runaway from the out-of-home placement or was residing in a trial reunification home]?

Answer:_____
Yes or No]

NOTES

1. In giving this instruction the Committee suggests that the court review the unpublished case of State v. Stacee P., in which the court of appeals affirmed the trial court's instruction that "[t]he Jury's determination whether the [agency] made a reasonable effort to provide the services ordered by the Court to assist the parents in meeting the conditions of safe return, is to be determined as of today's date, and you may consider all evidence relevant to that issue, including evidence of conduct occurring since the filing of the petition." The Committee notes the court's holding in Stacee P. that "whether the agency has, since the

petition's filing, continued to help the parent to meet the conditions of return is a factor that the jury must consider." However, the Committee was not able to reach a consensus on how best to incorporate this holding into Wis JI-Children 324, 324A, and 324B, in light of the additional statements in Stacee P. that Wis. Stat. 48.415(2)(a)3 "asks the jury to determine for two time periods a parent's compliance with court-ordered conditions: (1) the time before the petitions' filing date, and (2) the nine-month period following the trial" and that "the jury would not reach the post-trial nine-month period unless the jury first determined that (1) the parent did not . . . satisfy the conditions of return before the petition to terminate the parent's parental rights was filed, and concomitantly, (2) the agency fulfilled its 'reasonable effort' mandate as to that matter . . . ."

COMMENT

This instruction and comment were approved in 2018 following the enactment of 2017 Wisconsin Act 256. It replaced an earlier version of Wis JI-Children 324, which was based on Wis. Stats. § 48.415(2)(a) prior to a 2006 revision. The earlier version of Wisconsin JI-Children 324 was renumbered Wis JI-Children 324B. The comment was revised in 2020 and 2021. This revision was approved by the Committee in June 2022; it updated the Comment.

New Legislation. 2017 Wisconsin Act 256 removes the requirement of showing that there is a substantial likelihood that the parent will continue to fail for the next nine months to meet the conditions established for the safe return of the child to the home in a continuing CHIPS TPR proceeding. The act replaces this requirement with a requirement for the petitioner to show that, if the child has been placed outside the home under a CHIPS order for less than 15 of the past 22 months, there is a substantial likelihood that the parent will not meet the conditions established for the safe return of the child to the home at the time the child will have been placed outside of the home for 15 of the last 22 months. For the instruction to be used in cases predating the law change, see Wis JI-Children 324A and 324B.

Wis. Stat. § 48.415(2)(a) (as amended by 2017 Wis. Act 256) reads:

> **48.415. Grounds for involuntary termination of parental rights**. At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights. If the child is an Indian child, the court or jury shall also determine at the fact-finding hearing whether continued custody of the Indian child by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child under s. 48.028 (4) (e) 1. and whether active efforts under s. 48.028 (4) (e) 2. have been made to prevent the breakup of the Indian child's family and whether those efforts have proved unsuccessful, unless partial summary judgment on the grounds for termination of parental rights is granted, in which case the court shall make those determinations at the dispositional hearing. Grounds for termination of parental rights shall be one of the following:
>
> (2) Continuing need of protection or services. Continuing need of protection or

services, which shall be established by proving any of the following:

(a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).

2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.

3. That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to an order listed under subd. 1., not including time spent outside the home as an unborn child; that the parent has failed to meet the conditions established for the safe return of the child to the home; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

Applicability of this Instruction. 2017 Wis. Act 256 was effective as of April 6, 2018. The Supreme Court has affirmed the application of the revised Continuing CHIPS elements in a TPR case filed after the Act's effective date, although the underlying CHIPS case predated the revision. See Eau Claire County Department of Human Services v. S.E., 2021 WI 56, 397 Wis.2d 462.

Note that 2005 Wis. Act 293 previously modified the fourth element of Wis. Stat. § 48.415(2)(a) to shorten, from twelve months to nine months, the post-petition timeline for parents to meet conditions for the safe return of the child. That enactment specifically provided that it applied to cases where orders for out of home placement were granted on or after the effective date. 2017 Wis. Act 256 does not contain such a provision.

In a 2019 decision, the Court of Appeals affirmed the application of revised § 48.415(2) to a TPR case that was filed after April 6, 2018, even though the original underlying CHIPS order and several extensions were made prior to that date. See Dane County Department of Human Services v. J.R., 2020 WI App 5, 390 Wis.2d 326, 938 N.W.2d 614. In 2021, the Wisconsin Supreme Court affirmed a court of appeals' decision agreeing with the circuit court and held that the amended version of Wis. Stat. 48.415(2)(a)3 applied during a TPR proceeding, even though the underlying CHIPS order was entered in 2016. See Eau Claire County DHS v. S.E., 2021 WI 56, 960 N.W.2d 391.

Failure of Prior Order to Contain Warning. In 2016, the Wisconsin Supreme Court reviewed an earlier decision Waukesha County v. Steven H., 2000 WI 28, 233 Wis.2d 344, 607 N.W.2d 607, which involved whether the parent was given a proper warning of possible termination. The Wisconsin Supreme

Court in St. Croix County Dep't of Health and Human Services v. Michael D., 2016 WI 35, 368 Wis.2d 170, 880 N.W.2d 107, said the plain language of § 48.415(2) does not require that the written notice must be in the last order or that six months must pass after the last order before the petition to terminate parental rights may be filed.

The Court held that the notice the mother received satisfied the statutory notice element of a TPR action grounded in continuing CHIPS set forth in Wis. Stat. § 48.415(2). The notice required under Wis. Stat. § 48.356(2)(a)1. was satisfied. Specifically, the Court said:

> In a TPR case based on the continuing CHIPS ground, Wisconsin Stat. §
>
> 48.415(2) does not require proof that notice was given in every CHIPS order removing a child from the home or extension thereof; it also does not require proof that notice was in the last CHIPS order. Rather, it requires proof that one or more of the CHIPS orders removing a child from the home, or extension thereof, contain the written notice required under § 48.356(2).

The court further held that Steven H. did not establish an unequivocal "last order, plus six-months rule." It said:

> Wisconsin Stat. § 48.415(2) does not use the term last order; rather, the legislature chose to use the phrase "one or more." Accordingly, if "one or more" of the CHIPS orders in a TPR case contains the statutorily prescribed written notice, regardless of whether it was the first, last, or any order in between, the notice satisfies the phrase "one or more." Likewise, the statutes do not require that six months must pass after the last CHIPS order before a TPR petition can be filed. Rather, the relevant statute requires proof that a child was "outside the home for a cumulative total period of 6 months or longer." Wis. Stat. § 48.415(2)(a)3.

Relevancy of Post-Petition Evidence on Substantial Likelihood of Not Meeting Conditions. The Committee believes that evidence of post-petition conduct may be relevant to the allegation that there is a substantial likelihood that the parent will not meet the conditions for the return of the child in the future. A sentence was added to the instruction on the fourth element to allow the jury to consider events and conduct since the petition was filed. See In re T.M.S., 152 Wis.2d 345, 448 N.W.2d 282 (Ct. App. 1989). For a decision discussing a parent's argument that the court erred in not admitting post-petition efforts of a parent, see the unpublished opinion Jefferson County Dep't of Human Services v. J.V., Appeal No. 2622. In another unpublished opinion, the court said it was error to instruct the jury with both Wis JI-Children 180 and 324A. In the case, the court said it was harmless error to give Wis JI-Children 180 because the jury was not asked to answer any question "comporting with Wis JI-Children 180." Portage County Dep't of Health and Human Services v. Tanya G., Appeal No. 2014AP86.

In Utero. The time while the child is in utero should not be counted when calculating the duration of a placement outside the parent's home.

Post-Petition Efforts of County Agency. For a discussion of the jury's consideration of post-petition efforts by the county agency in a TPR based on continuing need, see the unpublished opinion, State v. Stacee P., Appeal No. 2012AP169. The parent argued that the trial court erred in holding that the

"reasonable effort" obligation encompassed things that the agency did after the date the petition was filed and up to the date of trial. The court of appeals considered whether the trial court should not have allowed the jury to consider what the county agency did after the petition for termination was filed and up to the date of trial. The parent argued that the agency responsible for helping her meet the court-ordered conditions for the return of her children had to make the "reasonable effort" before the petition was filed and what the agency did after that was not material to the agency's "reasonable effort" obligation. The court of appeals disagreed, finding that the agency's duty to help the parent continues past the petition's filing date.

Relevancy of Pre-CHIPS Disposition Events. Pre-CHIPS disposition events may be admissible as relevant to the element of the likelihood that a parent will meet the conditions of return within the requisite period following the TPR hearing. LaCrosse Cty. v. Tara P., 2002 WI App 84, 252 Wis.2d 179, 643 N.W.2d 194. The court rejected the argument that this type of evidence is barred as "other acts" evidence. The court of appeals also noted that "events predating dispositional orders may be relevant to another issue at termination proceedings: whether a county department of social services made 'reasonable' efforts to provide services ordered by a court." 2002 WI App. 84, fn.4.

For a decision discussing Tara P. and involving the admissibility of "historical information" about the parent pre-dating the CHIPS order, see State v. Roberta W., Appeal No. 2013AP936 (not published; one-judge decision).

Indian Child Welfare Cases. For the use of this instruction and verdict in a TPR case involving the Indian Child Welfare Act 25 U.S.C. §§ 1901-1963 and Wis. Stat. § 48.028(e), see Wis JI-Children 420-424.

Impossibility to Perform. The trial judge must decide on a case-by-case basis whether to ask the jury about impossibility to perform where the parent alleges impossibility to meet the conditions of the dispositional order. See Kenosha County v. Jodie W., 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845, where the supreme court examined whether a court may constitutionally find a parent unfit based solely on the parent's failure to meet an impossible condition of return. If the jury is asked to make a finding on impossibility, then the following special verdict question could be asked:

> 5. Was it impossible for (parent) to meet all the conditions established for the safe return of (child) to (parent)'s home?

For a decision discussing Jodie W. and whether the ground for termination was based on conditions for return that were impossible for the parent to meet, see Portage County Department of Health and Human Services v. Julie G., Appeal No. 2014AP1057 (one-judge decision, July 31, 2014). See also State v. Kiwana L., Appeal No. 2014AP2306 (one-judge decision, January 13, 2015). In Kiwana L., the parent argued that the circuit court violated her substantive due process rights when it found grounds for termination because she believed that the conditions of return were not narrowly tailored to address her mental health needs and financial hardships.

Verdict Question Answered by the Court. In most cases, there will be a determination by the trial judge as to question 1. It is recommended that the phrase "Answered Yes by the Court" be typed on the line. See SM-2 for a discussion of partial summary judgments, directed verdicts, and jury waivers/stipulations.

Judicial Notice of Underlying CHIPS Procedure. In some cases, it may be helpful to the jury and reduce the need for trial testimony to have the judge explain to the jury what CHIPS procedures have occurred leading up to the TPR proceeding. An optional explanation that could be used for this purpose is presented in SM-2 (Section No. 4). The committee recommends that the parties stipulate to its use.

Stating the Specific Services to be Provided. In Sheboygan County DHHS v. Tanya M.B., 2010 WI 55, 325 Wis.2d 524, 785 N.W.2d 369, the parents argued that the CHIPS dispositional orders were insufficient because they did not separately list the "specific services" to be provided by the department. The supreme court disagreed. Wisconsin Stat. § 48.355(2)(b)1. provides that the dispositional order be in writing and contain the following:

> 1. The specific services to be provided to the child and family, to the child expectant mother and family, or to the adult expectant mother and, if custody of the child is to be transferred
>
> to effect the treatment plan, the identity of the legal custodian.

The Wisconsin Supreme Court concluded:

> As stated, we conclude that the dispositional orders contained "specific services," as required by Wis. Stat. § 48.355(2)(b)1. We so conclude because § 48.355(2)(b)1. does not require a CHIPS dispositional order to separately list each individual service that the Department is ordered to provide so long as the Department is ordered to provide "supervision," "services" and "case management" and the order also provides detailed conditions that the parents must complete in compliance with the dispositional order.

The court said the dispositional order's conditions "implicitly" required the county department to provide services necessary to assist the parents in meeting the court-ordered conditions for the return of their children. The supreme court reasoned that the apparent purpose of § 48.355(2)(b)1. is to assure that the department will arrange services that are necessary to assist parents in meeting court-ordered conditions for the return of their children. However, the court recognized that how best to assist parents in meeting those conditions may change as parents make progress or encounter difficulty in changing their behavior. The court said that allowing the department flexibility in the manner in which it provides services to parents, permits the department to accommodate a parent's changing needs.

The decision in Tanya M.B. has been applied in several recent unpublished appellate decisions. Dane County DHS v. Samuel W., Appeal No. 2009 AP 2606 (decided October 14, 2010); Ozaukee County DHS v. Sarah H., Appeal No. 2010 AP 416 (decided August 18, 2010); Dane County DHS v. Tierra M., Appeal No. 2010 AP 1646 (decided September 23, 2010).

In Sarah H., supra, the court applied Tanya M.B. to the parent's claim that the dispositional order did not specify the services to be provided. The parent contended that the order was defective because it did not require the department to provide "supervision," "services," or "case management." The court of appeals disagreed with the parent's position stating:

> ¶5 We disagree. What this comes down to is an argument that the dispositional order must contain a magical phrase—"supervision, services and case management" and that

> the order specifically be directed, in the same breath, with a named social service department. We reject that argument. What the supreme court pointedly held was that "specific services" need not be listed in the order—all that is needed is a command by the trial court that the named social services department *do* services, *do* supervise the parent and *do* manage the parent and that the parent knows and the department knows that this is what needs to be done. The order in this case did just that. It orders services to be provided by the department and it orders the Department to take "responsibility" for the care of the parent-child relationship.

Opinions of Case Manager on Parenting Skills as Expert Testimony. For a discussion characterizing the testimony of a case manager that the parent would not be able to meet conditions necessary for the return of children in the future, see an unpublished decision (decided by one judge), State v. Gloria C., Appeal No. 2012AP1693. This decision considered whether expert testimony was required on this element in TPR case, based on continuing need. The trial court held that there is no requirement that an expert testify as to the fourth prong of a continuing CHIPS TPR case. The appellate decision held that a social worker with proper experience may testify as an expert witness as to a party's parenting skills. The court also noted that the legislation enacted on expert witness testimony (Wis. Stat. § 907.01, 907.02, and 907.03) was not effective when this action was commenced, 2011 Wisconsin Act 2, § 45.

Criminal History of Parent. In a 2012 case, a parent argued that the trial court should not have let the jury know about "his criminal history in its entirety." The trial court ruled that the parent's criminal history was relevant to whether the parent had met court-ordered conditions for the return of his children, and, if not, whether the parent would be able to meet those conditions. The appellate court said the trial court was correct in permitting the jury to see how the parent lived and how that affected where he placed his children on the spectrum of what he deemed important and where he would likely place them in the future. State v. Stacee P., 2012 AP167 (unpublished); decided June 12, 2012.

Cognitive Limitations of Parent. For a case involving a parent's argument that her cognitive limitations made it impossible for her to fulfill the conditions of return, see State v. Ebony, Appeal No. 2013AP613 (not published; one-judge decision). The parent argued that the conditions for return were not narrowly tailored to the children's safety needs and to her cognitive limitations.

For a case involving a parent's request that this instruction be modified to require the jury to first separately answer whether the county's services took into account the parent's characteristics ("specifically her learning disability") before answering whether the county had made a "reasonable effort to provide the parent the necessary services," see the unpublished opinion Barron County Dep't of Health and Human Services v. J.H., Appeal No. 2015AP1529 (one-judge). The decision said that modification of the verdict form to require the jury to separately answer whether the services the county provided considered the parent's characteristics was not legally required and was unnecessary given the circuit court's instruction to the jury and the parent's counsel's closing argument and questioning on the issue.

Parental Failures Prior to Incarceration. For a case examining whether the jury should have received a special instruction that an incarcerated parent's rights may not be terminated based solely upon conditions that were impossible to perform while incarcerated, see Ozaukee County Dep't of Human Services v. Callen D.M. Appeal No. 2013AP1157 (not published; one-judge decision). The court noted that the parent's inability to fulfill the conditions of return was due to her own failures prior to incarceration, not after. The decision differentiated the facts of the case from those in Kenosha Cty. DHS v. Jodie W.,

2006 WI 93 ¶19, 293 Wis.2d 530, 716 N.W.2d 845. There were 14 conditions in the dispositional order, several of which the parent failed to meet long before her incarceration. The court in Callen D.M. noted that the parent had over two and one-half years to comply with the CHIPS conditions before she entered custody.

For another decision discussing *Jodie W.* and a parent's conduct prior to incarceration, see Portage County Department of Health and Human Services v. Julie G., Appeal No. 2014AP1057 (one-judge decision, July 31, 2014).

324A INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES [WIS. STAT. § 48.415(2)(a)] (AS AMENDED BY 2005 WISCONSIN ACT 293) (FOR PETITIONS INVOLVING COURT ORDERS GRANTED ON OR AFTER APRIL 21, 2006 AND WHERE 2017 WISCONSIN ACT 256 DOES NOT APPLY)

INSTRUCTION WITHDRAWN

Comment

Wis JI-Children 324A and comment were originally approved by the Committee in 2007 and withdrawn in June 2022.

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324B INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES [WIS. STAT. § 48.415(2)(a)1] (AS AMENDED BY 1997 WISCONSIN ACTS 80, 237, 292, and 294) (FOR PETITIONS INVOLVING COURT ORDERS GRANTED BEFORE APRIL 21, 2006 AND WHERE 2017 WISCONSIN ACT 256 DOES NOT APPLY) (THIS INSTRUCTION WAS PREVIOUSLY NUMBERED 324)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Children 324B and comment were originally approved as Wis JI-Children 324 by the Committee in 1999 and revised in 2001 and 2004. The instruction was renumbered to 324B in 2018 and withdrawn in June 2022.

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325 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES: THREE OR MORE CHIPS ORDERS [WIS. STAT. § 48.415 (2)(am)]

The petition in this case alleges that (child) is in continuing need of protection or services which is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (child) on three or more occasions been adjudged to be in need of protection or services and placed outside (his) (her) home pursuant to court orders containing the termination of parental rights notice required by law?

2. Were the conditions that led to (child)'s placement in each of these occasions outside (his) (her) home caused by (parent)?

Before (child) may be found to be in continuing need of protection or services, (petitioner) must prove the following elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (child) on three or more occasions was adjudged in need of protection or services[1] and placed outside (his) (her) home pursuant to court orders containing 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 to this question, I have answered this question. My answer has no bearing whatsoever on what your answer should be to the other questions in the special verdict form.]

Second, that the conditions that led to (child)'s placement outside (his) (her) home under each of these orders were caused by (parent). [2] This question asks whether there was a causal connection between the parent's acts or the parent's failure to act and the conditions

that led to each of the orders placing (child) outside (his) (her) home. The question does not require you to find that the parent was "the cause" but rather "a cause." The reason for this is that there may be more than one cause producing the conditions. Before you answer this question "yes," you must find that the parent's acts or failure to act was a substantial factor in producing the conditions.

Before you may answer a 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. Has (child) on three or more occasions been adjudged to be in need of protection or services and placed outside (his) (her) home pursuant to court orders containing the termination of parental rights notice required by law?

Answer: (Answered by the Court)
Yes or No

2. Were the conditions that led to (child)'s placement in each of these occasions outside (his) (her) home caused by (parent)?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 325 and comment were approved by the Committee in 1999 and revised in 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. The comment was revised in 2007 and 2011.

This instruction covers the elements of a TPR based on Wis. Stat. § 48.415 (2)(am)1. 1997 Wisconsin Act 294.

Wis. Stat. § 48.415(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:
>
> (2) Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (am)1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).
> 2. That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

If you have three or more orders with the proper warnings, they do not have to be consecutive.

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

NOTES

1. The CHIPS orders must be based on Wis. Stat. § 48.13(3), (3m), (10), or (10m).

2. The parent's conduct must have caused each of the orders.

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330 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING PARENTAL DISABILITY [WIS. STAT. § 48.415(3)]

Continuing parental disability is a ground for termination of parental rights. Your role as jurors will be to answer the following special verdict questions:

1. Was (parent), as of (date petition was filed), an inpatient at a (hospital) (licensed treatment facility) (state treatment facility) on account of mental illness, developmental disability, or other like incapacities?

2. Has (parent) for a cumulative total period of at least two years within the time period from (date five years prior to filing) to (date of filing) been an inpatient at one or more hospitals, licensed treatment facilities, or state treatment facilities on account of mental illness, developmental disability, or other like incapacities?

3. Is the condition of (parent) likely to continue indefinitely?

4. Has (petitioner) proved that (child) is not being provided adequate care by a relative who has legal custody, by a parent, or by a guardian?

To establish continuing parental disability, the petitioner, _____, must prove the following four elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (parent) was, as of (date of filing), the date the petition was filed, an inpatient at a (hospital) (licensed treatment facility) (state treatment facility) on account of mental illness, developmental disability, or other like incapacities. Question 1 of the special verdict addresses this element.

Second, that (parent) for a cumulative total period of at least two years within the time period from (date five years prior to filing) to (date of filing) has been an inpatient at one or more hospitals, licensed treatment facilities, or state treatment facilities on account of mental illness, developmental disability, or other like incapacities. Question 2 of the special verdict addresses this element.

Third, that the condition of (parent) is likely to continue indefinitely. Question 3 of the special verdict addresses this element.

Fourth, that (child) is not being provided adequate care by a relative who has legal custody, by a parent, or by a guardian. "Adequate care" means the provision of necessary food, clothing, medical care, dental care, shelter, protection, and training. Question 4 of the special verdict addresses this element.

"Mental illness" means mental disease to such extent that a person so afflicted requires care and treatment for his or her own welfare, or the welfare of others, or of the community. It also means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.

"Developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, autism or another neurological condition closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation, which has continued or can be expected to continue indefinitely, substantially impairs an individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.

"Other like incapacities" means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability or continued consumption or absorption of substances, producing a condition which substantially impairs an individual from adequately providing for his or her care or custody.

Before you may answer any 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. Was (parent) as of (date petition was filed) an inpatient at a (hospital) (licensed treatment facility) (state treatment facility) on account of mental illness, developmental disability, or other like incapacities?

Answer:_____
Yes or No

2. Has (parent) for a cumulative total period of at least two years within the time period from (date five years prior to filing) to (date of filing) been an inpatient at one or more hospitals, licensed treatment facilities, or state treatment facilities on account of mental illness, developmental disability, or other like incapacities?

Answer:_____
Yes or No

3. Is the condition of (parent) likely to continue indefinitely?

Answer:_____
Yes or No

4. Has (petitioner) proved that (child) is not being provided adequate care by a relative who has legal custody, by a parent, or by a guardian?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 330 and comment were originally approved by the Committee in 1996 and revised in 1997, 2008, and 2011. The revision in 2008 was based on 2007 Wisconsin Act 45, effective February 1, 2008.

Wis. Stat. § 48.415(3) (2008) 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:
>
> **(3)** CONTINUING PARENTAL DISABILITY. Continuing parental disability, which shall be established by proving that:
> (a) The parent is presently, and for a cumulative total period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals as defined in s. 50.33 (2) (a), (b) or (c), licensed treatment facilities as defined in s. 51.01 (2) or state treatment facilities as defined in s. 51.01 (15) on account of mental illness as defined in s. 51.01 (13) (a) or (b), developmental disability as defined in s. 55.01 (2), or other like incapacities, as defined in s. 55.01(5);
> (b) The condition of the parent is likely to continue indefinitely; and
> (c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or a guardian.

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

335 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION [WIS. STAT. § 48.415(4)]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 335 comment was approved in 1996 and revised in 1997, 1999, 2005, 2010, 2011, 2016, and 2019.

Wis. Stat. § 48.415(4) 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:
>
> **(4)** CONTINUING DENIAL OF PERIODS OF PHYSICAL PLACEMENT OR VISITATION. Continuing denial of periods of physical placement or visitation, which shall be established by proving all of the following:
> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. 48.345, 48.363, 48.365, 938.345, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

To establish this ground for termination, a petitioner must prove the following two elements:

1. that (parent) has been denied periods of physical placement by a court order in an action affecting the family under Chapter 767 or has been denied visitation under an order pursuant to §§ 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363, or 938.365 containing the notice required by § 48.356(2) or 938.356(2).

2. that at least one year has elapsed since the order denying periods of physical placement *or visitation* to (parent) was issued and the court has not subsequently modified its order to permit periods of physical placement or visitation.

Use of Summary Judgment. 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.

See also *Dane County DHS v. Ponn P.*, 2005 WI 32, 279 Wis.2d 169, 694 N.W.2d 344 and an unpublished opinion in *Dane County Dep't of Human Services v. J.D.*, 2015AP1800 (one-judge).

If a parent contests a petition alleging this ground, a trial court may be best advised to convene a fact-finding hearing, receive evidence establishing the prior order and the lack of a modification to that order for at least one year, and direct a verdict in favor of the petitioner.

Required Contents of Order Denying Visitation. Writing in two unpublished decisions, the Court of Appeals has held that grounds can only exist under Wis. Stat. § 48.415(4) if there is a single order that (1) denies periods of physical placement or visitation pursuant to the relevant statutes, (2) states the conditions the parent must meet to resume placement or visitation, and (3) contains a written warning regarding grounds for termination of parental rights. In *Jackson County Dept. of Human Services v. R.H.H. Jr.*, 2018AP2440-43 (April 4, 2019) (unpublished one-judge opinion), the trial court entered an order suspending contact between the parent and children that contained a written notice concerning grounds to terminate parental rights, but did not contain a written notice of the conditions necessary for the parent to resume visitation. Later, the trial court issued a separate order containing the conditions necessary for visitation to be reinstated, but that order lacked a written TPR warning. The court reversed the grant of summary judgment for the petitioner and directed that summary judgment be entered in favor of the defendant, because no single order contained all three of the necessary elements. The court of appeals issued a similar ruling under similar circumstances in *Brown County Dept. of Health and Human Services v. L.F.H., Sr.*, 2019AP145 (April 23, 2019) (unpublished one-judge opinion), holding that an earlier order suspending visitation was not implicitly incorporated into the dispositional order. "Wisconsin Stat. § 48.415(4)(a)'s plain language does not permit the Department to rely on two separate orders to create one that satisfies § 48.415(4)(a)'s requirements." Id. at ¶ 16.

Directed Verdicts. See Special Materials, SM-2, at the end of this publication for a discussion of the use of summary judgments and directed verdicts in CHIPS and TPR proceedings.

Substantive Due Process; Individualized Finding of Unfitness. In 2006, the supreme court in *Kenosha County v. Jodie W.*, 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845, addressed whether a finding of unfitness pursuant to the failure to meet the conditions of return in a continuing need of protection and services (CHIPS) order violated the parent's right to substantive due process under Wis. Stat. § 48.415(2)(a), where the fact of the parent's incarceration was the sole reason for the determination of unfitness. *Id.*, ¶ 40. Other grounds for termination including denial of periods of physical placement present the same constitutional issue: whether a finding of unfitness impermissibly burdens the substantive due process rights of an incarcerated parent where the parent in unable to change the underlying circumstances used as a basis for the termination.

In *Jodie W.*, the court held that "a parent's incarceration is not itself a sufficient basis to terminate parental rights." Instead, the *Jodie W.* court stated that the substantive due process provisions of the Wisconsin and United States Constitutions preclude the state from terminating parental rights without "an individualized determination of unfitness." To make such a determination, the court must consider factors in addition to incarceration, which include the following: (1) "the parent's relationship with the child and any other child both prior to and while the parent is incarcerated"; (2) "the nature of the crime committed by the parent"; (3) "the length and type of sentence imposed"; (4) "the parent's level of cooperation with the responsible agency and the Department of Corrections"; and (5) "the best interests of the child." Applying this test to the termination order, the *Jodie W.* court reversed, concluding that the

order was based solely on the parent's incarceration without regard to her actual parenting activities. See also *Dane County DHS v. Ponn P.*, 2005 WI 32, 279 Wis.2d 169, 694 N.W.2d 344; and an unpublished opinion *Dane County Dep't of Human Services v. J.D.*, Appeal No. 2015AP1800 (one-judge).

Impossibility. See Wis JI-Children 324A (comment); Wis JI-Children 346 and 346B; *Kenosha County v. Jodie W.*, 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845.

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

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340 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABUSE: PATTERN OF ABUSIVE BEHAVIOR AND FELONY CONVICTION [WIS. STAT. § 48.415(5)(a)]

Child abuse is a ground for the termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (parent) caused the (death) (injury) of a child, as a result of which, (parent) was convicted of a felony?

2. Has (parent) exhibited a pattern of (physically) (sexually) abusive behavior which is a substantial threat to the health of (child)?

Before this ground may be established, (petitioner) must prove the following two elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (parent) has caused (the death) (the injury) of a child, and as a result of that (death) (injury), (parent) was convicted of a felony.[1] Question 1 of the special verdict addresses this element. [I have answered this question in the special verdict. The fact that I have answered question 1 "yes" should have no bearing on what your answer should be to question 2.]

Second, that (parent) has exhibited a pattern of (physically) (or) (sexually) abusive behavior which is a substantial threat to the health of (child). Question 2 of the special verdict addresses this element.

"Abusive behavior," as that term is used in the second element, means any conduct by (parent) which causes abuse to another person. A "pattern of abusive behavior" requires more than a single instance of abusive behavior. In determining whether a pattern has been shown, you may consider the number and frequency of incidents, the nature of the parent's behavior, the nature and seriousness of any injuries, and all of the circumstances surrounding any incidents of abusive behavior.

While it is not required that the abusive behavior be directed at (child), it is required that the pattern of abusive behavior constitutes a substantial threat to the health of (child). "Health" includes physical, emotional, or mental health.

[For cases involving allegations of physical abuse to a child, give the following:

"Abuse" means physical injury which is intentionally or recklessly caused by another person. "Intentionally" means that the person who causes the physical abuse has the purpose to cause physical abuse or is aware that his or her conduct is practically certain to cause that result. "Recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of another. "Abuse" does not include injury which is inflicted by accident.

"Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, 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.][2]

[For cases involving allegations of sexual abuse to a child, give the following:

"Abuse" means that a child has been subjected to (sexual intercourse) (sexual contact) (exploitation) (exposure of genitals) (forced viewing of sexual activity) (prostitution).

(Add relevant definition(s) from Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219.)][3]

Before you may answer either of the questions 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. Has (parent) caused the (death) (injury) of a child, as a result of which, (parent) was convicted of a felony?

Answer:_____
Yes or No

2. Has (parent) exhibited a pattern of (physically) (sexually) abusive behavior which is a substantial threat to the health of (child)?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 340 and comment were originally approved by the Committee in 1996 and revised in 1997, 1999, and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial correction was made to Note No. 1 in 2005. The comment was revised in 2008, 2011, 2014, and 2016.

Wis. Stat. § 48.415(5)(a) 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:
>
> (5) Child abuse. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:
> (a) That the parent has caused death or injury to a child or children resulting in a felony conviction.

Cases brought under this ground for termination of parental rights will be rare. Subsection (5)(a) requires the circumstance that a parent have a felony conviction relating to the death or injury of a child.

In an unpublished opinion, the court of appeals said that, "in addition to a felony conviction, this specific statutory ground for termination requires the showing of a pattern of abusive behavior that poses an ongoing substantial threat to the child." *K.C. v. B.S.-S.*, Appeal No. 2015AP1702 (unpublished; one-judge). In this same decision, the court emphasized that "a single conviction does not demonstrate a pattern of abusive behavior under Wis. Stat. § 48.415(5)." Citing *Monroe County v. Jennifer V.*, 200 Wis.2d 678, 683-84, 548 N.W.2d 837 (Ct. App. 1996).

Because of the absence of any clear definitions for the terms "pattern of abusive behavior" and "health," the scope of this ground is uncertain. Does this ground allow for proof of emotional abuse? If it is limited to physical and sexual abuse, does it include physical abuse harmful to the emotional health of the child? Some Committee members believe the section intended to address only physical and sexual abuse,

pointing to the terms of the alternative second elements. Others feel it should be read broadly. Other ambiguities include whether this ground for termination includes a parent who allows or encourages abuse by others, abusive conduct by a parent towards a spouse or other adult which emotionally harms a child, or abuse of property or animals that arguably harms a child.

The Committee has drafted the instruction to address cases involving physical or sexual abuse to a child. As drafted, this instruction also covers physical abuse by the parent to another adult. However, the definition of "abuse" needs to be modified where the pattern of abuse involves sexual abuse to an adult. See note 3, below. The Committee also agreed that "health" necessarily includes emotional and mental health. If a court permits proof on other "child abuse" theories, the instruction will need to be altered.

Summary Judgment and Directed Verdict. The Committee believes it is appropriate for the trial judge to answer question 1 where evidence of the conviction is received. See SM-2 following the instructions in this publication regarding the use of summary judgment and directed verdict in a TPR case.

For an unpublished decision involving summary judgment on "pattern of behavior" that is a substantial threat to the child, see *Racine County v. Renee D.*, Appeal No. 2012AP1974 (not published; one-judge decision).

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

NOTES

1. In most cases, it should not be necessary to define "caused" or "causes." If a definition is needed, the Committee suggests the following:

> ("Caused")("Causes") means that parent's behavior was a substantial factor in producing the bodily harm. It is not required that the parent's behavior was the sole cause or the only factor causing the death.

2. This definition of "abuse" is the same as in Wis JI-Children 215.

3. If the court has received evidence of "sexual abuse" which includes exploitation, exposure, or other matters discussed in Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219, the definitions used in those instructions should be included as appropriate. However, where the pattern of abuse involves allegations of sexual abuse to an adult, the definition of "sexual abuse" will need to be modified, because the definitions in the listed instructions (JI-Children 217 to 219) relate to sexual abuse to a child and not an adult.

342 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABUSE: PATTERN OF ABUSIVE BEHAVIOR AND PRIOR REMOVAL BY COURT ORDER [WIS. STAT. § 48.415(5)(b)] (REMOVAL OF ABUSED CHILD FROM PARENT'S HOME)

Child abuse is a ground for the termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (parent) exhibited a pattern of abusive behavior which is a substantial threat to the health of (child)?

2. Has a child been removed from (parent)'s home pursuant to a court order, after an adjudication that the child is in need of protection or services because (he) (she) (has been the victim of abuse) (is at substantial risk of becoming the victim of abuse).

Before this ground may be established, (petitioner) must prove the following two elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (parent) has exhibited a pattern of abusive behavior which is a substantial threat to the health of (child). Question 1 of the special verdict addresses this element.

Second, that a child has previously been removed from (parent)'s home pursuant to a court order after an adjudication that the child is in need of protection or services because (he) (she) (has been the victim of abuse) (is at substantial risk of becoming the victim of abuse). The child referred to in this element need not be the same child referred to in the first element. **[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.]

"Abusive behavior," as that term is used in the first element, means any conduct by (parent) which causes abuse to another person. A "pattern of abusive behavior" requires more than a single instance of abusive behavior. In determining whether a pattern has been shown, you may consider the number and frequency of incidents, the nature of the parent's behavior, the nature and seriousness of any injuries, and all of the circumstances surrounding any incident of abusive behavior.

While it is not required that the abusive behavior be directed at (child), it is required that the pattern of abusive behavior constitutes a substantial threat to the health of (child). Health includes physical, emotional, or mental health.

[For cases involving allegations of physical abuse, give the following:

"Abuse" means physical injury which is intentionally or recklessly caused by another person. "Intentionally" means that the person who causes the physical abuse has the purpose to cause physical abuse or is aware that his or her conduct is practically certain to cause that result. "Recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of another. "Abuse" does not include injury which is inflicted by accident.]

"Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, 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.

[For cases involving allegations of sexual abuse, give the following: "Abuse" means that a child has been subjected to (sexual intercourse) (sexual contact) (exploitation) (exposure of genitals) (forced viewing of sexual activity) (prostitution).

(Add relevant definition(s) from Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219.)][1]

Before you may answer either of the questions on 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. Has (parent) exhibited a pattern of abusive behavior which is a substantial threat to the health of (child)?

Answer:_____
Yes or No

2. Has a child been removed from (parent)'s home pursuant to a court order, after an adjudication that the child is in need of protection or services because (he) (she) (has been the victim of abuse) (is at substantial risk of becoming the victim of abuse)?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 342 and comment were originally approved by the Committee in 1996 and revised in 1997, 1999, 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. The comment was revised in 2011.

Wis. Stat. § 48.415(5)(b) 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:
>
> (5) Child abuse. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:
>
> (b) That a child has previously been removed from the parent's home pursuant to a court order under s. 48.345 after an adjudication that the child is in need of protection or services under s. 48.13(3) or (3m).

See also Comment to JI-Children 340.

Summary Judgments and Directed Verdicts. See Special Materials, SM-2, at the end of this publication for a discussion of the use of summary judgments and directed verdicts in CHIPS and TPR proceedings.

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

NOTES

1. If the court has received evidence of "sexual abuse" which includes exploitation, exposure, or other matters discussed in Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219, the definitions used in those instructions should be included as appropriate. However, where the pattern of abuse involves allegations of sexual abuse to an adult, the definition of sexual abuse will need to be modified, because the definitions in the listed instructions (JI-Children 217 to 219) relate to sexual abuse to a *child* and not an adult.

345 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY [FORMERLY WIS. STAT. § 48.415(6)(a)2.] (WHERE PATERNITY DETERMINED SINCE PETITION WAS FILED)

INSTRUCTION WITHDRAWN.

COMMENT

Wis JI-Children 345 and comment were originally approved by the Committee in 1996 and withdrawn in 1997. The comment was revised in 2011.

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

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346 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY [WIS. STAT. § 48.415(6)(a)]

The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict:

1. Has (parent) failed to assume parental responsibility for (child)?

To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child.)

The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). Substantial parental relationship is assessed based on the totality of the circumstances throughout the child's entire life. In evaluating whether (parent) has had a substantial parental relationship with (child), you may consider factors, including, but not limited to, whether (parent) has expressed concern for or interest in the support, care, or well-being of (child), whether (parent) has neglected or refused to provide care or support for the child, whether (parent) exposed the child to a hazardous living environment, whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life.

Before you may answer the special verdict question "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. Has (parent) failed to assume parental responsibility for (child)?

Answer:_____

Yes or No

COMMENT

Wis JI-Children 346 and comment were originally approved in 1996 and revised in 1997, 2001, 2004, 2005, 2007, and 2012. The comment was revised in 2008, 2010, 2011, 2012, 2014, 2015, and 2017.

Wis. Stat. § 48.415(6)(a) and (b) 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:
>
> (6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well- being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Amendments. This ground for involuntary termination of parental rights was substantially amended in 1996 and 2006. Provisions in 1995 Wisconsin Act 275 expanded the former statutory language to include: (1) mothers as well as fathers; (2) marital children as well as nonmarital children; and (3) fathers for whom paternity was adjudicated prior to the filing of the TPR petition. 2005 Wisconsin Act 293 amended the language in (6)(a) from "have never had a substantial parental relationship" to "have not had a substantial parental relationship."

Totality-of-the-Circumstances Analysis. In reviewing a termination of parental rights based on this statutory ground, the supreme court in *Tammy W-G. v. Jacob T.*, 2011 WI 30, 333 Wis.2d 273, 797 N. W.2d 854 adopted a totality-of-the-circumstances test. It said:

> ¶ 3 We conclude that Wis. Stat. § 48.415(6) (2007-08) prescribes a totality-of-the-circumstances test. When applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment.

For an unpublished decision applying the "totality-of-the-circumstances" analysis from *Tammy W-G*, *supra*, see *Patrick J.T. v. Shelly S.*, Appeal No. 2013AP778 (not published; one -judge decision). The parent in this case had a substantial parental relationship with her children during the first half of their lives, but had sporadic contact and failed to accept significant responsibility for them during the second half of their lives.

This instruction was cited in *State v. Michelle M.*, Appeal No. 2014AP1539 (unpublished; one-judge decision, January 27, 2015). This decision discussed the exposure of the child to "a hazardous living environment."

Lack of Opportunity. The court in *Tammy W-G.*, at ¶ 38, held that "although a parent's lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent's lack of involvement still may be considered in the totality-of-the-circumstances analysis.

Previously, this instruction contained the following sentence: "A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility." In 2011, the committee withdrew this sentence when it revised this instruction to reflect the holding in *Tammy W-G. v. Jacob T.*, *supra*. The revisions to the instruction replaced the withdrawn sentence with language instructing the jury to consider "reasons for the parent's lack of involvement" when assessing the circumstances. In deciding to withdraw the sentence, the Committee noted that: (1) the case law supporting this withdrawn sentence was dicta in *Ann M.M. v. Rob S.*, 176 Wis.2d 673, 683, 500 N.W.2d 649 (1993); and (2) was unanimously overruled *sub silentio* in *State v. Bobby G.*, 2007 WI 77, 301 Wis.2d 531, 734 N.W.2d 81. In *Bobby G.*, the court ruled:

> Were the court or any member thereof to interpret the statute as not requiring that an unmarried biological father have the opportunity to develop a relationship with his child after he learns of the child, the constitutional issue that parties address at length would have to be decided. 2007 WI 77, at par. 3

Statutory Factors for Evaluating Substantial Parental Relationship. The list of examples in Wis. Stat. § 48.415(6)(b) of what a court may consider in evaluating whether a person has had a substantial parental relationship with a child is "non-exclusive." *State v. Bobby G.*, 2007 WI 77, ¶ 46.

Father's Knowledge of Paternity. In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the father did not know of the child's existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father until the TPR petition was filed, and therefore he had no opportunity to assume parental responsibility. *State v. Bobby G.*, 2007 WI 77. The supreme court held that the circuit court must consider the biological father's efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding. Wis JI-Children 346A should be used in a case involving the issue of whether the father knew or had reason to know that he was the parent.

In establishing the procedure to be used in termination of parental rights actions, Wis. Stat. § 48.42(2m) directs that notice is not required to a parent as a result of sexual assault or a parent of a nonmarital child. Section 48.42(2m)(b) provides that "by virtue of the fact that [a person] has engaged in sexual intercourse with the mother of the child, [the person] is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests.

Neglect or Refusal to Provide. The court in *Bobby G.*, *supra*, said the words "willful" and "refused" in § 48.415(6)(b) carry with them "the sense that the father knew or had reason to believe he was the father but . . . did not provide care or support." *State v. Bobby G.*, 2007 WI 77, ¶ 49.

Incarcerated Parent. See Wis JI-Children 346B in cases involving an incarcerated parent.

Mother's Pre-Birth Behavior. The Committee believes this ground allows the introduction of evidence as to the mother's pre-birth behavior. For a discussion of the issues on prebirth behavior, see the unpublished decision, *In re Termination of Parental Rights to Gabriella M.*, Case No. 00-3207.

Parent's Marital Status. In a case where the effect of the marital status of the parent is argued, the following sentence can be added to the instruction:

> A parent's marital status, in and of itself, has no bearing on whether the parent has or has not failed to assume parental responsibility.

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

346A INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY: KNOWLEDGE OF PATERNITY [WIS. STAT. § 48.415(6)(a)]

The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict:

1. Has (parent) failed to assume parental responsibility for (child), after knowing or having reason to believe that he was (child)'s father?

A man has a duty to assume parental responsibility for a child as of the time he knows or has reason to believe he is the father of the child. To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child) once he knew, or had reason to believe, that he was (child)'s father.

In determining when a father had reason to believe he was the father of the child, you may consider the circumstances of and likelihood of conception; what efforts, if any, he did or reasonably should have undertaken to establish whether a child was conceived; his knowledge or lack of knowledge of the birth of the child; whether he did or did not file a declaration of paternal interest; his efforts or lack of efforts to establish paternity or assist authorities in establishing paternity; what efforts others, including the mother,

relatives, child support enforcement or child welfare authorities made to establish paternity or apprise him of his paternity; his knowledge or lack of knowledge of those efforts; his responsiveness or lack of responsiveness to those efforts; any information that would lead him to believe that he was not the father of the child; any efforts to preclude him from determining that status or of the existence of the child and all other evidence bearing on that issue.

The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). Substantial parental relationship is assessed based on the totality of the circumstances throughout the child's entire life. In evaluating whether (parent) has had a substantial parental relationship with (child), you may consider factors, including, but not limited to, whether (parent) has expressed concern for or interest in the support, care, or well-being of (child), whether (parent) has neglected or refused to provide care or support for the child, whether (parent) exposed the child to a hazardous living environment, whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life.

Before you may answer the special verdict question "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. Has (parent) failed to assume parental responsibility for (child), after knowing or having reason to believe that he was (child)'s father?

Answer:_____

Yes or No

COMMENT

Wis JI-Children 346A and comment were approved by the Committee in 2010 and revised in 2011 and 2017. The comment was also revised in 2012, 2014, and 2019. The revision to the instruction in 2017 provides for a single verdict question. Previously, the instruction used a two-question format, *i.e.*

> "1. Did (parent) know or have reason to believe he was (child)'s father?
> 2. Has (parent) failed to assume parental responsibility for (child)?"

Wis. Stat. § 48.415(6)(a) and (b) 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:
>
> (6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating

> whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well- being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Totality-of-the-Circumstances Analysis. In reviewing a termination of parental rights based on this statutory ground, the supreme court in *Tammy W-G. v. Jacob T.*, 2011 WI 30, 333 Wis.2d 273, 797 N. W.2d 854 adopted a totality-of-the-circumstances test. It said:

> ¶ 3 We conclude that Wis. Stat. § 48.415(6) (2007-08) prescribes a totality-of-the-circumstances test. When applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment.

Lack of Opportunity. The court in *Tammy W-G.*, at ¶ 38, held that "although a parent's lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent's lack of involvement still may be considered in the totality-of-the-circumstances analysis.

Previously, this instruction contained the following sentence: "A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility." In 2011, the committee withdrew this sentence when it revised this instruction to reflect the holding in *Tammy W-G. v. Jacob T.*, *supra*. The revisions to the instruction replaced the withdrawn sentence with language instructing the jury to consider "reasons for the parent's lack of involvement" when assessing the circumstances. In deciding to withdraw the sentence, the Committee noted that: (1) the case law supporting this withdrawn sentence was dicta in *Ann M.M. v. Rob S.*, 176 Wis.2d 673, 683, 500 N.W.2d 649 (1993); and (2) was unanimously overruled *sub silentio* in *State v. Bobby G.*, 2007 WI 77, 301 Wis.2d 531, 734 N.W.2d 81. In *Bobby G.*, the court ruled:

> Were the court or any member thereof to interpret the statute as not requiring that an unmarried biological father have the opportunity to develop a relationship with his child after he learns of the child, the constitutional issue that parties address at length would have to be decided. 2007 WI 77, at par. 3

For an unpublished decision discussing this instruction, see *Dane County Dep't of Human Services*, Appeal No. 2013AP462 (not published; one-judge decision).

Statutory Factors for Evaluating Substantial Parental Relationship. The list of examples in Wis. Stat. § 48.415(6)(b), shown on page 3, of what a court may consider in evaluating whether the

person has had a substantial parental relationship with the child is "non-exclusive." *State v. Bobby G.*, 2007 WI 77, ¶ 46.

Father's Knowledge of Paternity. In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the parent did not know of the child's existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father until the TPR petition was filed, and therefore he had no opportunity to assume parental responsibility. *State v. Bobby G.*, 2007 WI 77. The supreme court held that the circuit court must consider the biological father's efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding.

In establishing the procedure to be used in termination of parental rights actions, Wis. Stat. § 48.42(2m) directs that notice is not required to a parent as a result of sexual assault or a parent of a nonmarital child. Section 48.42(2m)(b) provides that "by virtue of the fact that [a person] has engaged in sexual intercourse with the mother of the child, [the person] is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests.

For an unpublished decision discussing this instruction, see *Dane County Dep't of Human Services v. John L.-B.*, 2013AP462 (May 16, 2013) (not published; one-judge decision). This decision discusses whether the trial court should have directed a verdict and changed the jury's answer on whether the father had knowledge of paternity. *See also E.M.K. v. Z.T.R.*, 2018AP1896 (May 1, 2019) (not published; one-judge decision), affirming the trial court's decision to provide JI 346 rather than 346A. The court ruled that there was no dispute that the respondent had reason to believe he was the father before the child's birth, although another man had sexual relations with the child's mother during the conceptive period.

Neglect or Refusal to Provide. The court in *Bobby G.*, *supra*, said the words "willful" and "refused" in § 48.415(6)(b) carry with them "the sense that the father knew or had reason to believe he was the father but . . . did not provide care or support." *State v. Bobby G.*, 2007 WI 77, ¶ 49.

Mother's Pre-Birth Behavior. The Committee believes this ground allows the introduction of evidence as to the mother's pre-birth behavior. For a discussion of the issues on prebirth behavior, see the unpublished decision, *In re Termination of Parental Rights to Gabriella M.*, Case No. 00-3207.

Parent's Marital Status. In a case where the marital status of the parent is argued, the following sentence can be added to the instruction:

> A parent's marital status, in and of itself, has no bearing on whether the parent has or has not failed to assume parental responsibility.

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

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346B INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY: INCARCERATED PARENT [WIS. STAT. § 48.415(6)(a)]

The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict:

1. Has (parent) failed to assume parental responsibility for (child)?

To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child.)

The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). Substantial parental relationship is assessed based on the totality of the circumstances throughout the child's entire life. In evaluating whether (parent) has had a substantial parental relationship with the child, you may consider factors, including, but not limited to, whether (parent) has expressed concern for or interest in the support, care, or well-being of (child), whether (parent) has neglected or refused to provide care or support for the child, whether (parent) exposed the child to a hazardous living environment, whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life.

The evidence in this case indicates that (parent) was incarcerated during some of the periods of time under consideration in this case. Incarceration of a parent does not in itself establish failure to assume parental responsibility.

In determining whether an incarcerated parent has or does not have a substantial parental relationship with the child, in addition to the considerations indicated in other parts of this instruction, you may consider the following factors and all other evidence bearing on this issue:

- The reasons for the incarceration; the nature of the underlying criminal behavior; whether the parent engaged in that behavior knowing that the resultant incarceration or potential incarceration would prevent or hinder the parent from assuming his or her parental responsibilities.
- Efforts to establish a substantial parental relationship despite incarceration, including but not limited to:
  - Whether the parent offered to pay child support and the parent's financial ability or inability to do so;
  - Requests for visitation with the child and, if permitted, the success and quality of those visits;
  - Appropriate efforts to communicate with the child or with those responsible for the care and welfare of the child; whether any such efforts were prohibited or impeded by other individuals;
  - Requests or absence of requests for information relating to the child's education, health and welfare;
  - Responsiveness or lack of responsiveness of the parent to efforts, if any, of others to involve the parent in the life of the child;

- Efforts, or lack of efforts, to enlist available, appropriate family members or friends in meeting the physical, financial and emotional needs of the child; the extent and success of any such efforts.

Before you may answer the special verdict question "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. Has (parent) failed to assume parental responsibility for (child)?

Answer:_____

Yes or No

COMMENT

The instruction was approved in 2010 and revised in 2011. The comment was approved in 2010 and revised in 2011, 2012, 2013, 2014, 2015, and 2017.

Wis. Stat. § 48.415(6)(a) and (b) 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:
>
> (6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well- being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

This instruction was cited with approval in *State v. Delano W.*, Appeal No. 2013AP2445 (unpublished; one-judge decision, March 14, 2014).

Totality-of-the-Circumstances Analysis. In reviewing a termination of parental rights based on this statutory ground, the supreme court in *Tammy W-G. v. Jacob T.*, 2011 WI 30, 333 Wis.2d 273, 797 N. W.2d 854 adopted a totality-of-the-circumstances test. It said:

> ¶ 3 We conclude that Wis. Stat. § 48.415(6) (2007-08) prescribes a totality-of-the-circumstances test. When applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment.

Lack of Opportunity. The court in *Tammy W-G.*, at ¶ 38, held that "although a parent's lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent's lack of involvement still may be considered in the totality-of-the-circumstances analysis.

Previously, this instruction contained the following sentence: "A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility." In 2011, the committee withdrew this sentence when it revised this instruction to reflect the holding in *Tammy W-G. v. Jacob T.*, *supra*. The revisions to the instruction replaced the withdrawn sentence with language instructing the jury to consider "reasons for the parent's lack of involvement" when assessing the circumstances. In deciding to withdraw the sentence, the Committee noted that: (1) the case law supporting this withdrawn sentence was dicta in *Ann M.M. v. Rob S.*, 176 Wis.2d 673, 683, 500 N.W.2d 649 (1993); and (2) was unanimously overruled *sub silentio* in *State v. Bobby G.*, 2007 WI 77, 301 Wis.2d 531, 734 N.W.2d 81. In *Bobby G.*, the court ruled:

> Were the court or any member thereof to interpret the statute as not requiring that an unmarried biological father have the opportunity to develop a relationship with his child after he learns of the child, the constitutional issue that parties address at length would have to be decided. 2007 WI 77, at par. 3

For an unpublished decision discussing this instruction, see *Dane County Dep't of Human Services v. John L.-B.*, Appeal No. 2013AP462 (not published; one-judge decision).

Statutory Factors for Evaluating Substantial Parental Relationship. The list of examples in Wis. Stat. § 48.415(6)(b), shown on page 3, of what a court may consider in evaluating whether the person has had a substantial parental relationship with the child is "non-exclusive." *State v. Bobby G.*, 2007 WI 77, ¶ 46.

Father's Knowledge of Paternity. If knowledge of paternity is also at issue by an incarcerated father, then JI-Children 346A and 346B should be merged and a verdict question on knowledge or belief of paternity should be added. In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the parent did not know of the child's existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father until the TPR petition was filed, and therefore he had no opportunity to assume parental responsibility. *State v. Bobby G.*, 2007 WI 77. The

supreme court held that the circuit court must consider the biological father's efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding.

In establishing the procedure to be used in termination of parental rights actions, Wis. Stat. § 48.42(2m) directs that notice is not required to a parent as a result of sexual assault or a parent of a nonmarital child. Section 48.42(2m)(b) provides that "by virtue of the fact that [a person] has engaged in sexual intercourse with the mother of the child, [the person] is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests.

For an unpublished decision discussing this instruction, see *Dane County Dep't of Human Services v. John L.-B.*, Appeal No. 2013AP462 (not published; one-judge decision). This decision discusses whether the trial court should have directed a verdict and changed the jury's answer on whether the father had knowledge of paternity.

Neglect or Refusal to Provide. The court in *Bobby G.*, *supra*, said the words "willful" and "refused" in § 48.415(6)(b) carry with them "the sense that the father knew or had reason to believe he was the father but . . . did not provide care or support." *State v. Bobby G.*, 2007 WI 77, ¶ 49.

Parent's Marital Status. In a case where the marital status of the parent is argued, the following sentence can be added to the instruction:

> A parent's marital status, in and of itself, has no bearing on whether the parent has or has not failed to assume parental responsibility.

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

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350 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: INCESTUOUS PARENTHOOD [WIS. STAT. § 48.415(7)]

Incestuous parenthood is a ground for termination of parental rights. Your role as jurors will be to answer the following special verdict question:

1. Are (mother) and (father) of (child) related by (blood) (adoption) in a degree of kinship closer than second cousin?

Before you may answer this question "yes," (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the (mother) (father) of (child) is related, either by blood or adoption, to (child)'s (father) (mother) in a degree of kinship closer than second cousin.

"Degree of kinship" means the distance or degree which separates two persons who are descended from a common ancestor. [(If appropriate) add: Under the law governing this ground for termination of parental rights, a person who is adopted is considered to have the same degree of kinship to related persons as if that person had been a natural child.] (Insert specific kinship from list in the comment) is a degree of kinship closer than second cousin.

If you find that the parents of (child) are related to each other by (blood) (adoption) in a degree of kinship closer than second cousin, you should answer the question "yes." Otherwise, you must answer the question "no."

SPECIAL VERDICT

1. Are (mother) and (father) of (child) related by (blood) (adoption) in a degree of kinship closer than second cousin?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 350 and comment were originally approved by the Committee in 1996 and revised in 1997. The comment was revised in 2004, 2005, and 2011.

Wis. Stat. § 48.415(7) 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:
>
> (7) Incestuous parenthood. Incestuous parenthood, which shall be established by proving that the person whose parental rights are sought to be terminated is also related, either by blood or adoption, to the child's other parent in a degree of kinship closer than 2nd cousin.

Degrees of Kinship. "Second cousin" is defined in *Black's Law Dictionary* (4th edition) as: "Persons who are related to each other by descending from the same great-grandfather or great-grandmother."

Some degrees of kinship closer than second cousin are (see Wis. Stat. § 990.001(16) and Wis. JI-Criminal 2130):

Parent	Grandparent	Grandparent	Grandchild
Child	Uncle, Aunt	Great Uncle, Aunt	Great Grandchild
Brother	Nephew, Niece	First Cousin Once Removed	Grand Nephew, Niece
Sister	First Cousin	Great Grandparent	Great Grand Nephew, Niece

Paternity. There may be circumstances in which paternity is an issue. If so, add the following question to the special verdict and give Wis JI-Civil 5001, Paternity.

Is (respondent) the father of (child) born on _____, 20___?

Constitutionality. In *Monroe County Department of Human Services v. Kelli B.*, 2004 WI 48, 271 Wis.2d 51, 678 N.W.2d 831, the supreme court ruled that the application of this ground to a parent who was "victimized" in an incestuous relationship was unconstitutional.

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

370 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: HOMICIDE OR SOLICITATION TO COMMIT HOMICIDE OF PARENT [WIS. STAT. § 48.415(8)]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 370 comment was approved by the Committee in 1997 and revised in 1999, 2001, and 2004. The comment was revised in 2011.

Wis. Stat. § 48.415(8) 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:
>
> (8) Homicide or solicitation to commit homicide of parent. Homicide or solicitation to commit homicide of a parent, which shall be established by proving that a parent of the child has been a victim of first-degree intentional homicide in violation of s. 940.01, first-degree reckless homicide in violation of s. 940.02 or 2nd-degree intentional homicide in violation of s. 940.05 or a crime under federal law or the law of any other state that is comparable to any of those crimes, or has been the intended victim of a solicitation to commit first-degree intentional homicide in violation of s. 939.30 or a crime under federal law or the law of any other state that is comparable to that crime, and that the person whose parental rights are sought to be terminated has been convicted of that intentional or reckless homicide, solicitation or crime under federal law or the law of any other state as evidenced by a final judgment of conviction.

The Committee concluded that a jury instruction for this ground is neither necessary nor appropriate. The statute provides that the fact of conviction in the underlying criminal proceeding, as evidenced by the final judgment of conviction, is conclusive in establishing this ground 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 conviction resulted from a trial, guilty plea, or no contest plea, the judgment of conviction is admissible and determinative. *Lee*, *supra* at 334-35; *Safran*, *supra* at 97.

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. 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).

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

371 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: PARENTHOOD AS A RESULT OF A SEXUAL ASSAULT [WIS. STAT. § 48.415(9)] (WHERE A JUDGMENT OF CONVICTION OR ADJUDICATION OF DELINQUENCY EXISTS)

Parenthood as a result of a sexual assault is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict:

1. Did (respondent) sexually assault (child's mother)? Because there is [a final judgment of conviction] [an adjudication of delinquency] indicating that (respondent) sexually assaulted (child's mother) on (date), there is no dispute on this question and I have answered the question.

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

2. Did this sexual assault result in the conception of (child)?

In answering question 2, you should consider all the evidence regarding the possible time of conception. Wisconsin law allows (petitioner) to prove that (respondent) is the parent of (child) as a result of a sexual assault by proving that (respondent) sexually assaulted (child)'s mother during a time (child) could have been conceived.

[Where evidence is presented that the child weighed 5 2 pounds or more at birth give the following: If you find that (child) weighed 5 pounds, 8 ounces or more at birth, (he) (she) is presumed to have been conceived within a time period extending from 240 to 300 days before birth. Therefore, you may find the conceptive period for (child) to have been between the _____ day of _____, 20 __, and the _____ day of _____, 20__, unless you are persuaded to the contrary by other evidence.]

SPECIAL VERDICT

1. Did (respondent) sexually assault (child's mother)? Because there is [a final judgment of conviction] [an adjudication of delinquency] indicating that (respondent) sexually assaulted (child's mother) on (date), there is no dispute on this question and I have answered the question.

Answer: Yes

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

2. Did this sexual assault result in the conception of (child)?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 371 and comment were approved by the Committee in 2001. An editorial correction was made to paragraph 3 of the instruction in 2005. The comment was revised in 2007, 2008, and 2011.

Wis. Stat. § 48.415(9) 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:
>
> **(9)** PARENTHOOD AS A RESULT OF SEXUAL ASSAULT. (a) Parenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of sexual assault in violation of s. 940.225(1), (2) or (3), 948.02 (1) or (2), 948.025, or 948.085. Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgment of conviction or other evidence produced at a fact-finding hearing under § 48.424 indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the mother of the child.

Wis. Stat. § 940.225(1), (2), and (3) apply to sexual assaults; Wis. Stat. § 948.02(1) and (2) apply to a sexual assault of a child. Wis. Stat. § 948.025 applies to repeated acts of sexual assault to a child.

Conceptive Period. The bracketed paragraph is adapted from Wis JI-5001 (paternity) and Wis. Stat. § 891.395 which establishes a presumption as to the conceptive period. According to the presumption, there is a 60-day period of conception if the child's birth weight is 5 2 pounds or more. A court may limit the period of conception to less than 60 days when a child is full term and competent evidence of a conceptive period contrary to the 60-day period is presented. See *State ex rel. J.A.S. v. M.E.S.*, 142 Wis.2d 300, 418 N.W.2d 32 (Ct. App. 1987) (a paternity proceeding).

Use of This Instruction. The language of this TPR statutory ground is of concern to the Committee. The heading to the subsection, "Parenthood as a Result of Sexual Assault," suggests that petitioner must prove that the assault of the mother by the respondent resulted in the conception of the child. This interpretation is bolstered by the subsection's language which requires the petitioner to prove that the child was conceived as a result of sexual assault in violation of designated provisions of the criminal code.

The statutory framework for this TPR ground is best understood and applied where the only contact between the respondent and the child's mother during the conceptive period was in the context of a sexual assault that biologically could cause a pregnancy. The petitioner, under these facts, must only establish: (1) the sexual assault (through the final judgment of conviction or other evidence) and (2) the possible time of conception. A paternity test is not required because paternity is not challenged by the respondent.

This statutory ground is not so easily understood and applied, however, in scenarios involving incidents between the respondent and the mother of **both** consensual intercourse and one or more sexual assaults during the conceptive period. Paternity tests are obviously not yet sophisticated enough to identify the specific physical event "causing" or "resulting" in a child's conception. In these scenarios, the statutory framework is problematic, seemingly requiring the petitioner to prove what is scientifically impossible to prove.

In attempting to resolve this statutory conundrum, some believe the legislature recognized this proof problem and eased the petitioner's burden by allowing "conception as a result of sexual assault" to be proved by a conviction of a sexual assault committed during a possible time of conception. This language in effect establishing a statutory presumption seems to permit termination of a father's rights for sexually assaulting the mother during her conceptive period. This interpretation conflicts, however, with the clear language of the subsection's title and first sentence which requires that the assaultive behavior resulted in conception.

Notice and Standing Issues. See Wis. Stat. § 48.42(2m). According to this subsection, a person who under the subsection is not given notice does not have standing to appear and contest a TPR petition. This limitation on notice, and therefore standing, does not apply to a male who is under 18 years of age at the time of the sexual assault.

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

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371A INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: PARENTHOOD AS A RESULT OF A SEXUAL ASSAULT [WIS. STAT. § 48.415(9)] (WHERE NO JUDGMENT OF CONVICTION OR ADJUDICATION OF DELINQUENCY EXISTS)

Parenthood as a result of a sexual assault is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict:

1. Did (respondent) sexually assault (child=s mother)?

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

2. Did this sexual assault result in the conception of (child)?

In answering question 1, a sexual assault occurs when [describe the elements of the appropriate sexual assault statute; see the appropriate jury instruction from **Wisconsin Jury Instructions-Criminal** for Wis. Stat. § 940.225(1), (2), or (3); § 948.02(1) or (2); or § 948.025.]

In answering question 2, you should consider all the evidence regarding the possible time of conception. Wisconsin law allows (petitioner) to prove that (respondent) is the parent of (child) as a result of a sexual assault by proving that (respondent) sexually assaulted (child)=s mother during a time (child) could have been conceived.

[Where evidence is presented that the child weighed 5 2 pounds or more at birth give the following: If you find that (child) weighed 5 pounds, 8 ounces or more at birth, (he) (she) is presumed to have been conceived within a time period extending from 240 to 300 days before birth. Therefore, you may find the conceptive period for (child) to have been between the _____ day of _____, 20__, and the _____ day of _____, 20__, unless you are persuaded to the contrary by other evidence.]

SPECIAL VERDICT

1. Did (respondent) sexually assault (child=s mother)?

Answer:_____
Yes or No

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

2. Did this sexual assault result in the conception of (child)?

Answer:_____
Yes or No

COMMENT

Wis JI-Children 371.1 and comment were approved in 2001. The instruction was renumbered in 2005. An editorial correction was made to paragraph 4 of the instruction in 2005. The comment was revised in 2007 and 2011.

Wis. Stat. § 48.415(9m) 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:
>
> **(9)** PARENTHOOD AS A RESULT OF SEXUAL ASSAULT. (a) Parenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of sexual assault in violation of s. 940.225(1), (2) or (3), 948.02 (1) or (2), 948.025 or 948.085. Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgment of conviction or other evidence produced at a fact-finding hearing under § 48.424 indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the mother of the child.

[Note: Wis. Stat. § 940.225(1), (2), and (3) apply to sexual assaults; Wis. Stat. § 948.02(1) and (2) apply to a sexual assault of a child; and Wis. Stat. § 948.025 applies to repeated acts of sexual assault to a child.]

Conceptive Period. The bracketed paragraph is adapted from Wis JI-5001 (paternity) and Wis. Stat. § 891.395 which establishes a presumption as to the conceptive period. According to the presumption, there is a 60-day period of conception if the child=s birth weight is 5 2 pounds or more. A court may limit the period of conception to less than 60 days when a child is full term and competent evidence of a conceptive period contrary to the 60-day period is presented. See *State ex rel. J.A.S. v. M.E.S.*, 142 Wis.2d 300, 418 N.W.2d 32 (Ct. App. 1987) (a paternity proceeding).

Use of This Instruction. For commentary on using this instruction, see Wis JI-Children 371. In cases were no judgment of conviction or delinquency adjudication exist, the petitioner must establish that a sexual assault in violation of specific sections of the criminal code occurred. In such cases, the instruction needs to be tailored to the specific statutory ground. The Committee recommends using the appropriate sexual assault instructions from **Wisconsin Jury Instructions-Criminal** to explain the elements of the crime of sexual assault.

Notice and Standing Issues. See Wis. Stat. § 48.42(2m). According to this subsection, a person who under the subsection is not given notice does not have standing to appear and contest a TPR petition. This limitation on notice, and therefore standing, does not apply to a male who is under 18 years of age at the time of the sexual assault.

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

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372 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: COMMISSION OF A FELONY AGAINST A CHILD [WIS. STAT. § 48.415(9m)]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 372 comment was approved by the Committee in 1997 and revised in 1999, 2005, 2008, 2009, 2011, 2012, and 2016.

Wis. Stat. § 48.415(9m) 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:
>
> (9m) Commission of a felony against a child. (a) Commission of a serious felony against one of the person's children, which shall be established by proving that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and that the person whose parental rights are sought to be terminated has been convicted of that serious felony as evidenced by a final judgment of conviction.
>
> (am) Commission of a violation of s. 948.051 involving any child or a violation of the law of any other state or federal laws, if that violation would be a violation of s. 948.051 involving any child if committed in this state.
>
> (b) In this subsection, "serious felony" means any of the following:
>
> 1. The commission of, the aiding or abetting of, or the solicitation, conspiracy or attempt to commit, a violation of s. 940.01, 940.02, 940.03 or 940.05 or a violation of the law of any other state or federal law, if that violation would be a violation of s. 940.01, 940.02, 940.03 or 940.05 if committed in this state.
>
> 2. a. The commission of a violation of s. 940.19 (3), 1999 stats., a violation of s. 940.19 (2), (4) or (5), 940.225 (1) or (2), 948.02 (1) or (2), 948.025, 948.03 (2) (a), (3) (a), or (5) (a) 1., 2., or 3., 948.05, 948.051, 948.06 or 948.08, or a violation of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies.
>
> b. A violation of the law of any other state or federal law, if that violation would be a violation listed under subd. 2. a. if committed in this state.

> 3. The commission of a violation of s. 948.21 or a violation of the law of any other state or federal law, if that violation would be a violation of s. 948.21 if committed in this state, that resulted in the death of the victim.

The Committee concluded that a jury instruction for this ground was neither necessary nor appropriate except in the rare case where parenthood is in question. In a case based on § 48.415(9m)(a), there will be a question of whether the child was the respondent's child. The statute provides that the fact of conviction in the underlying criminal proceeding, as evidenced by the final judgment of conviction, is conclusive in establishing this ground 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 conviction resulted from a trial, guilty plea, or no contest plea, the judgment of conviction is admissible and determinative. *Lee*, *supra* at 334-35; *Safran*, *supra* at 97.

Child Trafficking. In April, 2012, the governor signed SB536 which allows courts to terminate parental rights in cases involving child trafficking. Under existing law, the parental rights of a parent to his or her child may be terminated involuntarily if the person commits a serious felony against one of his or her children. Under SB536, a parent's parental rights may also be terminated involuntarily if the parent commits the offense of trafficking of a child. The legislation amended the title to Wis. Stat. § 48.415(9m).

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. Trial courts need also be aware that the Wisconsin Court of Appeals 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).

Attempts. The Committee believes that attempts to commit a serious felony are within the statute's language.

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

In 2016, the Wisconsin legislature passed 2015 Wisconsin Act 366 which created the crime of engaging in repeated acts of physical abuse of the same child. The act requires that, to be found guilty, the defendant engaged in at least three acts of physical abuse against the child within a specified period.

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.

410 INDIAN CHILD WELFARE: CHIPS (OUT-OF-HOME CARE PLACEMENT): VERDICT [WIS. STAT. § 48.028(4)(d)]

[NOTE: INSERT VERDICT QUESTION(S) COVERING THE CHIPS GROUND(S)]

If the answer to question ____ is "yes," answer the following question:

___. Is continued custody of (child) by (parent or Indian custodian)] likely to result in serious emotional damage or serious physical damage to (child)?

Answer:_____
Yes or No

If the answer to question ____ is "yes," answer the following question:

___. Have active efforts been made to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family?

Answer:_____
Yes or No

___. Have the efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

Answer:_____
Yes or No

COMMENT

The verdict and comment were approved in 2010. The comment was updated in 2015.

Wis. Stat. § 48.028(4)(d) provides:

> *Out-of-home care placement; serious damage and active efforts*. The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in an out-of-home care placement unless all of the following occur:
>
> 1. The court or jury finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> 2. The court or jury finds by clear and convincing evidence that active efforts, as described in par. (g) 1., have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful. The court or jury shall make that finding notwithstanding that a circumstance specified in Wis. Stat. § 48.355(2d)(b)1. to 5. applies.

Burden of Proof. The middle civil burden (by clear and convincing evidence, to a reasonable certainty) applies to the question or questions establishing CHIPS grounds under state law, *i.e.* Wis. Stat. § 48.13.

In 2009, the Wisconsin Legislature created Wis. Stat. § 48.028(4) for court proceedings dealing with out-of-home care placements to Indian children. The statute requires that, in addition to the question or questions necessary to establish the state CHIPS ground(s), the jury answer three additional questions if the child is an Indian child. The burden of proof for these three questions, shown on the suggested verdict, is the middle civil burden. Wis. Stat. § 48.028(4)(d).

Verdict. In CHIPS cases involving an Indian child, agreement by ten (five) of twelve (six) or more jurors is sufficient on all questions in the verdict.

412 INDIAN CHILD WELFARE: CHIPS (OUT-OF-HOME CARE PLACEMENT): SERIOUS EMOTIONAL DAMAGE OR SERIOUS PHYSICAL DAMAGE [WIS. STAT. § 48.028 (4)(d)1.]

Question _____ of the special verdict asks:

Is continued custody of (child) by (parent) (Indian custodian) likely to result in serious emotional damage or serious physical damage to (child)?

"Serious emotional damage" means severe harm to a child's psychological or intellectual functioning. The term "serious emotional damage" includes one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; a substantial and observable change in behavior; emotional response or cognition that is not within the normal range for the child's age and stage of development.

"Serious physical damage" means severe harm to a child's bodily health or functioning. The term "serious physical damage" includes injuries which create a substantial risk of death or which cause serious permanent disfigurement or permanent or protracted loss or impairment of the function of any bodily member or organ. It also includes frequent bruising or one or more of the following injuries exhibited to a severe degree: laceration, fractured bone, burns, internal injury, or bruising.

COMMENT

Wis. Stat. § 48.028(4)(d)1 states:

> 1. The court or jury finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Burden of Proof Verdict. The burden of proof on this finding in a CHIP case under Wis. Stat. § 48.028(4)(d)1 is the middle civil burden. The committee believes that at least five-sixths of the jury must agree on the answer to this question.

"Serious Emotional or Physical Damage." The term "serious emotional or physical damage" in Wis. Stat. § 48.028(4)(d)1. is not defined in Chapter 48 or in the federal Indian Child Welfare Act. The Children's Code, Wis. Stats. Ch. 48, defines the terms "emotional damage" and "physical injury."

In drafting this instruction, the Committee considered whether the term "serious" in § 48.028(4)(d)1. modifies both "emotional" and "physical" or whether the legislation calls for physical damage and serious emotional damage. The Committee concluded that because "emotional or physical" is embedded between the words "serious" and "damage," the word "serious" modifies both "emotional damage" and "physical damage."

The instruction's definition of "serious emotional damage" is taken from the definition of "emotional damages" in Wis. Stat. § 48.02(5j) which requires characteristics "exhibited to a severe degree."

The instruction's definition of "serious physical damage" is adapted from the Children's Code definition of "physical injury" (Wis. Stat. § 48.02(14g)). which reads:

> "Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

Expert Testimony. Wis. Stat. § 48.028(4)(d)1 requires that the jury find likelihood of serious emotional damage or physical damage by the middle burden "including the testimony of one or more qualified expert witnesses." Determination of what will be permitted as expert testimony will be a matter of pretrial rulings. The general civil jury instruction on expert testimony, Wis JI-Civil 260, can be added.

414 INDIAN CHILD WELFARE: CHIPS (OUT-OF-HOME CARE PLACEMENT): ACTIVE EFFORTS [WIS. STAT. § 48.028 (4)(d)2.]

Question _____ asks:

Have active efforts been made to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family[1]?

If the answer to Question ___ is "yes," answer the following question:

Have the efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

["Remedial services and rehabilitation programs" are services to give support to families to help them become safe placements for a child.[2] These services are intended to provide support to a family to prevent the removal of a child by "rehabilitating" or strengthening the family in their parenting and other related skills, and to provide support that assists in "remediating" or correcting the situation in a home that led to the removal of a child.]

To find that "active efforts" have been made, you must determine that there has been an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers.[3]

Your consideration of whether active efforts were made shall include whether all of the following activities were conducted[4]:

1. Representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the tribe and of the Indian community, including traditional and customary support, actions, and services, to address those circumstances.

2. A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

3. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and their advice was actively solicited throughout the proceeding.

4. Extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, were notified and consulted with to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

5. Arrangements were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.

6. All available family preservation strategies were offered or employed and the involvement of the Indian child's tribe was requested to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

7. Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about those resources was provided to the Indian child's family, and the Indian child's family was actively assisted or offered active assistance in accessing those resources.

8. Monitoring of client progress and client participation in services was provided.

9. A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.

[**If one or more of the listed activities were not accomplished, give the following:** In your consideration of whether active efforts were made to provide services and programs designed to prevent the breakup of the family, you may take into consideration that some of the nine activities were not accomplished and the reasons they were not accomplished. You may still find that active efforts were made after considering all evidence bearing on the question, including whether you are satisfied with the reasons given as to why some activities were not accomplished.][5]

COMMENT

This instruction and comment were approved in 2010. A format revision was made in 2013.

The "active efforts" standard is set forth in Wis. Stat. § 48.028(4)(g). Wis. Stat. § 48.028(4)(g)2. provides that if any of the nine activities listed in the instruction were not conducted, the person seeking the out-of-home care placement or involuntary termination of parental rights must submit documentation to the court explaining why the activity was not conducted. The final bracketed paragraph instructs the jury to consider any failure to conduct an activity and the reasons given for that failure. The Committee concludes that proof for active efforts requires consideration of the activities listed, but a failure to prove that a particular activity was provided is not determinative of "active efforts."

Wis. Stat. § 48.028(4)(g)1. does not designate a particular person or agency as responsible for making active efforts.

NOTES

1. In appropriate cases, language may be added to the instruction to clarify for the jury to which "family" the verdict question is referring.

2. This paragraph is adapted from instructional material prepared by the National Indian Child Welfare Association. The paragraph is optional and should be tailored to the facts.

3. Wis. Stat. § 48.028(4)(g)1.

4. Wis. Stat. § 48.028(4)(g)1. In determining if active efforts to provide services and programs have been made, the jury must "consider" whether nine activities were "conducted." The Committee believes that the word "consider" means that if some activities are not proven, the jury may still determine that active efforts were made. Thus, the list is not a mandatory checklist of what must be found, but instead only includes factors to guide the jury in determining if an "active effort" to provide services and programs was conducted.

5. This paragraph can be revised based on the evidence presented on the accomplishment of, or failure to accomplish the listed activities.

420 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: VERDICT [WIS. STAT. § 48.028(4)(e)]

[NOTE: INSERT VERDICT QUESTION(S) COVERING THE INVOLUNTARY TERMINATION OF PARENTAL RIGHTS GROUND(S)]

If the answer to question ____ is "yes," answer the following question:

____. Is continued custody of (Indian child) by (parent or Indian custodian)] likely to result in serious emotional damage or serious physical damage to (Indian child)?

Answer:_____

Yes or No

If the answer to question ____ is "yes," answer the following question:

____. Have active efforts been made to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family?

Answer:_____

Yes or No

If the answer to question ____ is "yes," answer the following question:

____. Have the efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

Answer:_____

Yes or No

COMMENT

This verdict and comment were approved in 2010. The comment was updated in 2014 and 2019.

Wis. Stat. § 48.028(4)(e) provides:

> *Involuntary termination of parental rights; serious damage and active efforts*. The court may not order an involuntary termination of parental rights to an Indian child unless all of the following occur:
>
> 1. The court or jury finds beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> 2. The court or jury finds by clear and convincing evidence that active efforts, as described in par. (g) 1., have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

Burden of Proof. The middle civil burden (by clear and convincing evidence, to a reasonable certainty) applies to the questions establishing grounds for involuntary termination of parental rights under state law, *i.e.* Wis. Stat. § 48.415.

In 2009, the Wisconsin Legislature created Wis. Stat. § 48.028(4) for court proceedings dealing with involuntary termination of parental rights to Indian children. The statute requires that in addition to answering the question or questions on the TPR grounds, the jury answer three additional questions if the child is an Indian child. The burden of proof for each of these three questions is stated in § 48.028(4)(e). A finding of serious emotional damage or serious physical damage must be beyond a reasonable doubt. The explanation of "beyond a reasonable doubt" in the instruction is taken from Wis JI-Criminal 140. The question inquiring whether active efforts have been provided and the question whether the efforts have been unsuccessful must be proven by the middle civil burden.

Verdict. Agreement by ten (five) of twelve (six) or more jurors on the verdict question(s) establishing the TPR ground(s) and the verdict questions on active efforts is sufficient.

Indian Child Welfare Act. For a summary of the Indian Child Welfare Act by the Wisconsin Legislative Council, see the Legislative Council's Information Memorandum (IM-2013-08) at (www.legis.wisconsin.gov/lc/publications/im/IM2013_08.pdf). The memorandum also includes an analysis of the decision of the United States Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court's decision interpreted portions of the act barring an involuntary TPR absent a showing that serious physical or emotional damage to the Indian child will likely result from the parent's continued custody of the child; and requiring a showing of remedial efforts to prevent the breakup of an Indian family before a TPR may be ordered. The Court held that the ICWA did not require a finding of harm in continuing the child's custody with her Indian parent because the father never had custody of the child. The opinion also held that Baby Girl's placement with the adoptive couple did not constitute a breakup of an Indian family because there was no existing Indian family that could be broken up since the father had abandoned the child before her birth.

The Wisconsin Court of Appeals applied *Baby Girl* to the Wisconsin Indian Child Welfare Act in *Kewaunee County Dept. of Human Services v. R.I.*, 397 Wis.2d 750, (Wis. App. 2017). In that case, the Court held that fact-finding regarding the serious physical or emotional damage and active efforts elements are not required under WICWA in order to terminate the parental rights of a parent who never had custody of the

Indian Child. The Court further held that WICWA provided a greater level of protection than ICWA for parents who never had custody of their children, stating that "[w]e also reject R.I.'s argument that Wis. Stat. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.'s parental rights than ICWA." Id. at 754.

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422 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: SERIOUS EMOTIONAL DAMAGE OR SERIOUS PHYSICAL DAMAGE [WIS. STAT. § 48.028 (4)(e)1.]

Question _____ of the special verdict asks:

Is continued custody of (Indian child) by (parent) (Indian custodian) likely to result in serious emotional damage or serious physical damage to (Indian child)?

"Serious emotional damage" means severe harm to a child's psychological or intellectual functioning. The term "serious emotional damage" includes one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; a substantial and observable change in behavior; emotional response or cognition that is not within the normal range for the child's age and stage of development.

"Serious physical damage" means severe harm to a child's bodily health or functioning. The term "serious physical damage" includes injuries which create: a substantial risk of death or which cause serious permanent disfigurement or permanent or protracted loss or impairment of the function of any bodily member or organ. It also includes frequent bruising or one or more of the following exhibited to a severe degree: laceration, fractured bone, burns, internal injury, or bruising.

BURDEN OF PROOF

As to Question _____ only, the burden is on (_____) to prove beyond a reasonable doubt that the answer should be "yes." The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as

would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give (parent) (each parent) the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

As to Question _____, all 12 (6) jurors must agree to arrive at a verdict.

COMMENT

This instruction and comment were approved in 2010. The comment was updated in 2014 and 2018.

Wis. Stat. § 48.028(4)(e) provides:

> 1. The court or jury finds beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Burden of Proof; Unanimous Verdict on Damage. The burden of proof on this finding in a TPR case under Wis. Stat. § 48.028(4)e1 is beyond a reasonable doubt. The explanation of "beyond a reasonable doubt" is taken from Wis JI-Criminal 140. The committee believes that the jury must unanimously agree on the answer to this question.

"Serious Emotional or Physical Damage." The term "serious emotional or physical damage" in Wis. Stat. § 48.028(4)(e)1. is not defined in Chapter 48 or in the federal Indian Child Welfare Act. The Children's Code, Wis. Stats. Ch. 48, defines the terms "emotional damage" and "physical injury."

In drafting this instruction, the Committee considered whether the term "serious" in § 48.028(4)(e)1. modifies both "emotional" and "physical" or whether the legislation calls for physical damage and serious emotional damage. The Committee concluded that because "emotional or physical" is embedded between the words "serious" and "damage," the word "serious" modifies both "emotional damage" and "physical damage."

The instruction's definition of "serious emotional damage" is taken from the definition of "emotional damages" in Wis. Stat. § 48.02(5j) which requires characteristics "exhibited to a severe degree."

The instruction's definition of "serious physical damage" is adapted from the Children's Code definition of "physical injury" (Wis. Stat. § 48.02(14g)) which reads:

> "Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

Expert Testimony. Wis. Stat. § 48.028(4)(e)1 requires that the jury find beyond a reasonable doubt "including the testimony of one or more qualified expert witnesses." Determination of what will be permitted as expert testimony will be a matter of pretrial rulings. The general civil jury instruction on expert testimony, Wis JI-Civil 260, can be added.

Indian Child Welfare Act. For a summary of the Indian Child Welfare Act by the Wisconsin Legislative Council, see the Legislative Council's Information Memorandum (IM-2013-08) at (www.legis.wisconsin.gov/lc/publications/im/IM2013_08.pdf). The memorandum also includes an analysis of the decision of the United States Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court's decision interpreted portions of the act barring an involuntary TPR absent a showing that serious physical or emotional damage to the Indian child will likely result from the parent's continued custody of the child; and requiring a showing of remedial efforts to prevent the breakup of an Indian family before a TPR may be ordered. The Court held that the ICWA did not require a finding of harm in continuing the child's custody with her Indian parent because the father never had custody of the child. The opinion also held that Baby Girl's placement with the adoptive couple did not constitute a breakup of an Indian family because there was no existing Indian family that could be broken up since the father had abandoned the child before her birth.

The Wisconsin Court of Appeals applied *Baby Girl* to the Wisconsin Indian Child Welfare Act in *Kewaunee County Dept. of Human Services v. R.I.*, 397 Wis.2d 750, (Wis. App. 2017). In that case, the Court held that fact-finding regarding the serious physical or emotional damage and active efforts elements are not required under WICWA in order to terminate the parental rights of a parent who never had custody of the Indian Child. The Court further held that WICWA provided a greater level of protection than ICWA for parents who never had custody of their children, stating that "[w]e also reject R.I.'s argument that Wis. Stat. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.'s parental rights than ICWA." Id. at 754.

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424 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: "ACTIVE EFFORTS" [WIS. STAT. § 48.028 (4)(e)2.]

Question ____ asks:

Have active efforts been made to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family[1]?

If the answer to Question ___ is "yes," answer the following question:

Have the efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

["Remedial services and rehabilitation programs" are services to give support to families to help them become safe placements for a child.[2] The intention of these services is to provide support to a family to prevent the removal of a child by "rehabilitating" or strengthening the family in their parenting and other related skills, and to provide support that assists in "remediating" or correcting the situation in a home that led to the removal of a child.]

To find that "active efforts" have been made, you must determine that there has been an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers.[3]

Your consideration of whether active efforts were made shall include whether all of the following activities were conducted[4]:

1. Representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the tribe and of the Indian community, including traditional and customary support, actions, and services, to address those circumstances.

2. A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

3. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and their advice was actively solicited throughout the proceeding.

4. Extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, were notified and consulted with to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

5. Arrangements were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.

6. All available family preservation strategies were offered or employed and the involvement of the Indian child's tribe was requested to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

7. Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about those resources was provided to the Indian child's family, and the Indian child's family was actively assisted or offered active assistance in accessing those resources.

8. Monitoring of client progress and client participation in services was provided.

9. A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.

[**If one or more of the listed activities were not accomplished, give the following**: In your consideration of whether active efforts were made to provide services and programs designed to prevent the breakup of the family, you may take into consideration that some of the nine activities were not accomplished and the reasons they were not accomplished. You may still find that active efforts were made after considering all evidence bearing on the question, including whether you are satisfied with the reasons given as to why some activities were not accomplished.][5]

COMMENT

The instruction and comment were approved in 2010. A format change was made in 2013. The comment was updated in 2014 and 2018.

The "active efforts" standard is set forth in Wis. Stat. § 48.028(4)(g). Wis. Stat. § 48.028(4)(g)2. provides that if any of the nine activities listed in the instruction were not conducted, the person seeking the

out-of-home care placement or involuntary termination of parental rights must submit documentation to the court explaining why the activity was not conducted. The final bracketed paragraph instructs the jury to consider any failure to conduct an activity and the reasons given for that failure. The Committee concludes that proof for active efforts requires consideration of the activities listed, but a failure to prove that a particular activity was provided is not determinative of "active efforts."

Wis. Stat. § 48.028(4)(g)1. does not designate a particular person or agency as responsible for making active efforts.

Indian Child Welfare Act. For a summary of the Indian Child Welfare Act by the Wisconsin Legislative Council, see the Legislative Council's Information Memorandum (IM-2013-08) at (www.legis.wisconsin.gov/lc/publications/im/IM2013_08.pdf). The memorandum also includes an analysis of the decision of the United States Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court's decision interpreted portions of the act barring an involuntary TPR absent a showing that serious physical or emotional damage to the Indian child will likely result from the parent's continued custody of the child; and requiring a showing of remedial efforts to prevent the breakup of an Indian family before a TPR may be ordered. The Court held that the ICWA did not require a finding of harm in continuing the child's custody with her Indian parent because the father never had custody of the child. The opinion also held that Baby Girl's placement with the adoptive couple did not constitute a breakup of an Indian family because there was no existing Indian family that could be broken up since the father had abandoned the child before her birth.

The Wisconsin Court of Appeals applied *Baby Girl* to the Wisconsin Indian Child Welfare Act in *Kewaunee County Dept. of Human Services v. R.I.*, 397 Wis.2d 750, (Wis. App. 2017). In that case, the Court held that fact-finding regarding the serious physical or emotional damage and active efforts elements are not required under WICWA in order to terminate the parental rights of a parent who never had custody of the Indian Child. The Court further held that WICWA provided a greater level of protection than ICWA for parents who never had custody of their children, stating that "[w]e also reject R.I.'s argument that Wis. Stat. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.'s parental rights than ICWA." Id. at 754.

NOTES

1. In appropriate cases, language may be added to the instruction to clarify for the jury to which "family" the verdict question is referring.

2. This paragraph is adapted from instructional material prepared by the National Indian Child Welfare Association. The paragraph is optional and should be tailored to the facts.

3. Wis. Stat. § 48.028(4)(g)1.

4. Wis. Stat. § 48.028(4)(g)1. In determining if active efforts to provide services and programs have been made, the jury must "consider" whether a list of nine activities were "conducted." The Committee believes that the word "consider" means that if some activities are not proven, the jury may still determine that active efforts were made. Thus, the list is not a mandatory checklist of what must be found, but instead only includes factors to guide the jury in determining if an "active effort" to provide services and programs was conducted.

5. This paragraph can be revised based on the evidence presented on the accomplishment of, or failure to accomplish, the listed activities.

424 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: "ACTIVE EFFORTS" [WIS. STAT. § 48.028 (4)(e)2.][1]

Question ____ asks:

Have active efforts been made to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family[2]?

If the answer to Question ___ is "yes," answer the following question:

Have the efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

["Remedial services and rehabilitation programs" are services to give support to families to help them become safe placements for a child.[3] The intention of these services is to provide support to a family to prevent the removal of a child by "rehabilitating" or strengthening the family in their parenting and other related skills, and to provide support that assists in "remediating" or correcting the situation in a home that led to the removal of a child.]

To find that "active efforts" have been made, you must determine that there has been an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally

appropriate service providers.[4]

Your consideration of whether active efforts were made shall include whether all of the following activities were conducted[5]:

1. Representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the tribe and of the Indian community, including traditional and customary support, actions, and services, to address those circumstances.

2. A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

3. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and their advice was actively solicited throughout the proceeding.

4. Extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, were notified and consulted with to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

5. Arrangements were made to provide natural and unsupervised family interaction

in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.

6. All available family preservation strategies were offered or employed and the involvement of the Indian child's tribe was requested to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

7. Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about those resources was provided to the Indian child's family, and the Indian child's family was actively assisted or offered active assistance in accessing those resources.

8. Monitoring of client progress and client participation in services was provided.

9. A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.

[If one or more of the listed activities were not accomplished, give the following:

In your consideration of whether active efforts were made to provide services and programs designed to prevent the breakup of the family, you may take into consideration that some of the nine activities were not accomplished and the reasons they were not

accomplished. You may still find that active efforts were made after considering all evidence bearing on the question, including whether you are satisfied with the reasons given as to why some activities were not accomplished.][6]

NOTES

1. In the opinion of this Committee, this special verdict question and instruction should not be used in lieu of the special verdict question and instruction for Question No. 2 in JI-Children 324. These questions and instructions, while there may be some overlap in the facts presented, fundamentally pertain to differing situations. For example, active efforts to prevent the breakup of the Indian family would predate orders contained in a CHIPS Dispositional Order. Additionally, there would be a different standard of proof for Question No. 2 in JI-Children 324 (beyond a reasonable doubt) than for the other questions (clear, satisfying, and convincing), which may lead to juror confusion. This special verdict question should stand alone and be answered only after a jury has found one or more grounds for termination of parental rights contained in Sec. 48.415, Wis. Stats.

2. In appropriate cases, language may be added to the instruction to clarify for the jury to which "family" the verdict question is referring.

3. This paragraph is adapted from instructional material prepared by the National Indian Child Welfare Association. The paragraph is optional and should be tailored to the facts.

4. Wis. Stat. § 48.028(4)(g)1.

5. Wis. Stat. § 48.028(4)(g)1. In determining if active efforts to provide services and programs have been made, the jury must "consider" whether a list of nine activities were "conducted." The Committee believes that the word "consider" means that if some activities are not proven, the jury may still determine that active efforts were made. Thus, the list is not a mandatory checklist of what must be found, but instead only includes factors to guide the jury in determining if an "active effort" to provide services and programs was conducted.

6. This paragraph can be revised based on the evidence presented on the accomplishment of, or failure to accomplish, the listed activities.

COMMENT

The instruction and comment were approved in 2010. A format change was made in 2013. The comment was updated in 2014 and 2018. This revision was approved by the Committee in November 2022; it added Note No.1, supra.

The "active efforts" standard is set forth in Wis. Stat. § 48.028(4)(g). Wis. Stat. § 48.028(4)(g)2. provides that if any of the nine activities listed in the instruction were not conducted, the person seeking the out-of-home care placement or involuntary termination of parental rights must submit documentation to the court explaining why the activity was not conducted. The final bracketed paragraph instructs the jury

to consider any failure to conduct an activity and the reasons given for that failure. The Committee concludes that proof for active efforts requires consideration of the activities listed, but a failure to prove that a particular activity was provided is not determinative of "active efforts."

Wis. Stat. § 48.028(4)(g)1. does not designate a particular person or agency as responsible for making active efforts.

Indian Child Welfare Act. For a summary of the Indian Child Welfare Act by the Wisconsin Legislative Council, see the Legislative Council's Information Memorandum (IM-2013-08) at (www.legis.wisconsin.gov/lc/publications/im/IM2013_08.pdf). The memorandum also includes an analysis of the decision of the United States Supreme Court in Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013). The Court's decision interpreted portions of the act barring an involuntary TPR absent a showing that serious physical or emotional damage to the Indian child will likely result from the parent's continued custody of the child; and requiring a showing of remedial efforts to prevent the breakup of an Indian family before a TPR may be ordered. The Court held that the ICWA did not require a finding of harm in continuing the child's custody with her Indian parent because the father never had custody of the child. The opinion also held that Baby Girl's placement with the adoptive couple did not constitute a breakup of an Indian family because there was no existing Indian family that could be broken up since the father had abandoned the child before her birth.

The Wisconsin Court of Appeals applied Baby Girl to the Wisconsin Indian Child Welfare Act in Kewaunee County Dept. of Human Services v. R.I., 397 Wis.2d 750, (Wis. App. 2017). In that case, the Court held that fact-finding regarding the serious physical or emotional damage and active efforts elements are not required under WICWA in order to terminate the parental rights of a parent who never had custody of the Indian Child. The Court further held that WICWA provided a greater level of protection than ICWA for parents who never had custody of their children, stating that "[w]e also reject R.I.'s argument that Wis. Stat. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.'s parental rights than ICWA." Id. at 754.

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SPECIAL MATERIALS: ANALYSIS OF EFFECTIVE DATES OF JUVENILE LEGISLATION AND JURY INSTRUCTIONS ON THE NEW ELEMENTS

Contents

I. TPR Jurisdiction B ' 48.415

The majority of the current grounds for termination of parental rights under ' 48.415 were either amended or created by 1995 Wisconsin Act 275, enacted in spring 1996.

A. Relevant case law on statutory changes in TPR grounds and trial

While considering Act 275, the legislature was aware of the published decision of the Wisconsin Court of Appeals in the case *In re Jason P.S.*, 195 Wis.2d 855, 537 N.W.2d 47 (Ct. App. 1995). The court of appeals indicated that there are constitutional issues insofar as determining which law the jury should be instructed on when one of the elements is a TPR warning and where that warning advised the parent of statutory grounds which have since been amended.

In that case, Jason's mother had been given a TPR warning under an earlier version of ' 48.415(2)(c) which described one of the elements for continuing need of protection or services as that the "parent has substantially neglected, willfully refused, or been unable to meet the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions in the future." Subsequent to that warning, and prior to the TPR action, the legislature enacted 1993 Wisconsin Act 395 which, effective May 5, 1994, amended the relevant part of ' 48.415(2)(c) to read that: "The parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under ' 48.425."

The trial court denied the motion filed by the parent to dismiss on grounds that the petition alleged grounds other than those on which the mother had received the TPR warning. The trial court was reversed by the court of appeals. In relevant part, the court of appeals indicated that:

> When the State warned the parent that his or her rights to a child may be lost because of the parent's future conduct, if the State substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure. *Jason P.S.*, *supra* at 863.

The court of appeals determined that the parent had been deprived of her parental rights without due process of law and the order was reversed.

Jason P.S. was followed by an unpublished court of appeals case *In re Termination of Parental Rights of Matthew A.H.*, Case No. 96-1224, decided June 21, 1996. The court of appeals acknowledged the law as established in *Jason P.S.* and attempted to go further in

answering the question as to whether or not a termination of parental rights could go forward where the parent is advised under a given statute and the statute is subsequently amended by the legislature. The court of appeals answered that question in the affirmative but seemed to indicate that the jury should be instructed under both the old and new grounds in the particular statute. The court gave directions as follows:

> The petition should allege as conduct supporting termination that the parent has failed to demonstrate substantial progress toward meeting the conditions established for returning the child to the home . . . because the parent either substantially neglected, willfully refused or was unable to meet the conditions established for the return of the child to the home. . . . The jury should be instructed about the conduct required for termination under the former version of ' 48.415(2)(c), Stats. 1991-92. Then, the jury should be instructed that if it finds the conduct described in the former statute has been established, it may find the conduct supporting termination has been established under the new statute. Using this procedure, the jury will have found the parent satisfied both the conduct about which he or she was warned, and the conduct described in the new statute which was implicitly present in the former statute. *Id.* at 1996 WL 339817, *4(Wis. App.).

With these things in mind, let's take a look at how the legislature dealt with the implementation of the various amendments and additions to ' 48.415, all of which are otherwise in effect as of July 1, 1996.

B. Abandonment on court ordered placement B TPR ' 48.415(1)(a)2

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 ' 48.415(1)(a)2, 1993 Stats., 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.

C. Continuing need of protection or services B TPR ' 48.415(2)(c)

This ground was amended by shortening the time period from 12 months to 6 months. An appropriate TPR warning is an element under this subsection. This is generally effective July 1, 1996. However, '' 9110(2) and 9310(5)(b) of Act 275 indicate that with regard to this revised TPR ground, "no person may file a petition" under such section, as affected by this act, unless the parent has received appropriate notice (TPR warning) under ' 48.356(2) or ' 938.356(2) of the revised statute with the shortened time period. Notwithstanding this provision, ' 9110(2)(c) goes on to indicate "this subsection does not preclude a person from filing a petition under" ' 48.415(2)(c), 1993 Stats., against a parent who has received appropriate notice under ' 48.356(2) or ' 938.356(2) of the grounds for termination under the previous statute and if one year or longer has elapsed since the date of that notice. (This last provision only applies to children who had attained the age of 3 at the time of the initial order. For children under the age of 3, the old law already provided a time period of only 6 months.)

D. Child left by parent B TPR ' 48.415(1)(a)3

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 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.

E. Revised TPR for continued denial of visitation B TPR ' 48.415(4)

Wis. Stat. ' 48.415(4) provided a ground for termination of rights in cases where there has been a continual denial of periods of physical placement. Act 275 amended that to add continuing denial of periods of "*visitation*." One of the elements is that one year has elapsed from the date of the order denying visitation. Section 9310(5)(d) of Act 275 indicates that the revised language of ' 48.415(4) as well as the revisions in the language and treatment of '' 48.356 and 938.356 shall first apply to court orders denying a parent visitation under '' 48.345, 48.357, 48.363, or 48.365 entered on or after July 1, 1996. Therefore, TPR petitions based on a continued denial of *visitation* cannot be filed until at least July 1, 1997.

F. Reckless homicide of other parent, ' 48.415(8), and commission of serious felony against another child B TPR ' 48.415(9m)

Wis. Stat. ' 48.415(8) was amended to indicate that termination of rights may occur not only where a parent has committed a first or second degree intentional homicide of the other parent but may also be established by evidence that the parent committed *first degree reckless homicide* of the other parent in violation of ' 940.02. Wis. Stat. ' 48.415(9m) creates a new ground of termination of parental rights for *commission of a serious felony against one of the person's children*. Under ' 9310(5)(e) and (f) of Act 275, the new provisions for termination of rights for reason of first degree reckless homicide of a parent and commission of a serious felony against one of the person's children both apply as of July 1, 1996, but both statutes preclude consideration of a conviction obtained prior to that date. In other words, the conviction for first degree reckless homicide and/or the serious

felony against the child must be obtained on or after July 1, 1996, in order for the statute to be used as a TPR ground. *Note* that based on the wording of ' 9310 of Act 275, the incident giving rise to the conviction may occur prior to July 1, 1996.

G. Prior involuntary TPR as to another child B TPR ' 48.415(10)

Wis. Stat. ' 48.415(10) is a new ground for termination of parental rights. What must be established is that the child who is the subject of the current TPR petition has been found to be in need of protection under ' 48.13(2), (3), or (10), and that within three years previous to the CHIPS determination, that there was an involuntary TPR as to another child. Section 9310(5)(g) of Act 275 indicates that this new ground first applies to petitions filed on or after July 1, 1996. Section 9310(5)(g) of Act 275 goes on to indicate that this "does not preclude consideration of prior orders of a court terminating parental rights." However, it is required that the previous order be entered within three years prior to the date that the court adjudged the other child to be CHIPS under Wis. Stat. ' 48.13(2), (3), or (10). Please note that ' 9310 of Act 275 is silent as to whether the court is precluded from considering orders entered prior to the effective date of the act finding the second child to be in need of protection or services under ' 48.13(2), (3), or (10).

H. Other TPR provisions effective on July 1, 1996

The following subsections of ' 48.415 first apply to petitions filed on or after July 1, 1996:

(1)(a)1m	(child left without care that exposes child to substantial risk of great bodily harm or death)
(1)(c)	(language changing the standards to rebut presumption of abandonment. Does away with "did not disassociate" and establishes "good cause" standards)
(5)	(revised child abuse TPR statute)
(6)	(revised failure to assume parental responsibility TPR statute)

For these new or revised sections, it would not matter generally when the events occurred giving rise to the petition as long as it is filed on or after July 1, 1996. Please note, however, that if an element includes a warning as to TPR for abandonment, and if all of the warnings were using the old "did not disassociate" language of ' 48.415(1)(c), the jury should presumably be instructed using the old standard.

II. CHIPS Jurisdiction B ' 48.13

In 1995 Wisconsin Act 275, the legislature amended the following grounds for CHIPS jurisdiction under ' 48.13:

(3)	(a victim of abuse)
(3m)	(at substantial risk of becoming a victim of abuse)
(4)	(parent unable to provide care or special treatment)
(9)	(child signs petition for special treatment or care)
(11)	(child suffering emotional damage)
(11m)	(child suffering from alcohol and other drug abuse in family)

Subsection 9310(6) of 1995 Wisconsin Act 275 indicates that as to these amended grounds for CHIPS, they first apply to a petition under ' 48.255 filed on the effective date of the act, which was July 1, 1996.

III. JIPS (juveniles in need of protection or services) Jurisdiction B ' 938.13

In 1995 Wisconsin Act 77, the new juvenile justice code legislation, the legislature transferred the following CHIPS grounds out of ' 48.13 and moved them into the following subsections of ' 938.13:

(6)	(habitually truant from school)
(6m)	(a school dropout)
(7)	(habitually truant from home)
(12)	(juvenile under age 10 alleged to have committed a delinquent act)

(14) (juvenile not responsible by reason of mental disease or defect)

The Juvenile Justice Act and trailer bill contain no specific provisions as to the effective date for the grounds under Wis. Stat. ' 938.13. Therefore, the general effective date provision of ' 9300(1g) would apply. The act reads that "this act first applies to violations committed on the effective date of this subsection." The effective date of the subsection is July 1, 1996. Note, however, that no jury trials are available to juveniles alleged to be JIPS under ' 938.13.

In 1995 Wisconsin Act 275, the legislature amended JIPS jurisdiction under ' 938.13(4), which allows for jurisdiction where a parent is unable or needs assistance to control the juvenile. Section 9310(6) of 1995 Wisconsin Act 275 indicates that this amended ground first applies to a petition filed on the effective date of the act, which is July 1, 1996.

SM-2 SPECIAL MATERIALS: USE OF SUMMARY JUDGMENTS, JURY WAIVERS, STIPULATIONS, AND DIRECTED VERDICTS IN TERMINATION AND CHIPS PROCEEDINGS

NO INSTRUCTION IS RECOMMENDED

1. **Summary Judgment in TPR Cases**

The Wisconsin Supreme Court has held that summary judgment is available in the first phase of a TPR case at which parental unfitness is determined. Steven V. v. Kelly H., 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856. The court in Steven V. overruled Walworth County Dep't of Human Services v. Elizabeth W., 189 Wis.2d 432, 525 N.W.2d 384 (Ct. App. 1994) to the extent that the decision prohibited use of summary judgment in TPR proceedings. Elizabeth W. involved a petition to terminate on grounds of abandonment and continuing need of protection or services. In Steven V., the court said the holding in Elizabeth W. was "overbroad" and "statutorily and constitutionally unwarranted." The supreme court held in Steven V.:

> Neither due process nor the TPR statutes require an absolute prohibition on summary judgment in the grounds or unfitness phase of a TPR proceeding. That a parent has contested the termination of his or her parental rights does not automatically mean there are material facts in dispute regarding the grounds for unfitness. 2004 WI 47, ¶ 31.

The court also concluded that "although the private interest at stake is fundamental, . . .due process does not mandate a jury trial in the unfitness phase of a TPR case." According to the court, the jury trial right of the parent is statutory only, and is subject to the provisions of the civil procedure code, including summary judgment. The court reasoned that "due process requires a hearing . . .and clear and convincing proof of unfitness . . .and the summary procedure under Wis. Stat. § 802.08 accommodates both."

In Steven V., the mother argued that summary judgment was inappropriate because she was entitled to present evidence regarding her reasons for having failed to comply with

the conditions for re-establishing visitation in the order denying placement and visitation. The parent cited State v. Frederick H., 2001 WI App 141, 246 Wis.2d 215, 630 N.W.2d 734, in which the court of appeals held that such evidence is relevant at the grounds phase of a TPR proceeding, and, that a circuit court's refusal to allow such evidence at the grounds phase deprived the parents of the right "to meaningfully participate in the TPR proceedings." The supreme court in Steven V. overruled Frederick H., noting that it was inconsistent with Sheboygan County DHSS v. Julie A.B., 2002 WI 95, 255 Wis.2d 170, 648 N.W.2d 402, in which the court withdrew language on which Frederick H. was based.

A concurrence in Steven V. noted that "in certain cases, a parent will be able to raise his or her legitimate explanation about why his or her conduct does not constitute unfitness by means of a constitutional challenge. In those cases where the legislative scheme seems to bypass any meaningful determination of unfitness, the petitioner can assert that the statutory ground for unfitness is not sufficiently narrowly tailored to meet the constitutional standards (citing Monroe Dep't of Human Services v. Kelli B., 2004 WI 43, 271 Wis.2d 51, 678 N.W.2d 831)." See also commentary to JI-Children 350.

A number of grounds for termination of parental rights in Wis. Stat. § 48.415 are subject to motions for summary judgment. The supreme court in Steven V. 2004 WI 47, listed grounds capable of proof by "official documentary evidences" such as court orders or judgments of conviction (§ 48.415(1m), (4), (9), and (9m) and (10). The court referred to these as "paper grounds." A dissent suggested other grounds which may also be proved by "official documentary evidence," citing Wis. Stat. § 48.415(5) (child abuse) and § 48.415(7) (incestuous parenthood).

The court noted that in many termination cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds involve the adjudication of parental conduct vis-a-vis the child. (Specifically, the court cited § 48.415(2), (3), (5), (6) and (7). For these fact-intensive grounds, the court said summary judgment will "ordinarily" be inappropriate.

Summary Judgment. For two cases discussing Steven V. involving 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.

Partial Summary Judgment. In Bobby G., 2007 WI 77, ¶ 39-40, 301 Wis.2d 531, 734 N.W.2d 81, the supreme court said that partial summary judgment at the grounds phase of a termination proceeding is permitted. The court acknowledged that not all TPR cases are "suited for partial summary judgment." It noted that the grounds for unfitness most likely to form the basis of a successful motion for partial summary judgment are those that are sustainable on proof of a court order or judgment of conviction (sometimes referred to as "paper grounds," see Steven V.) The court in Bobby G. also said that summary judgment will ordinarily be inappropriate in TPR's premised on these "fact-intensive grounds." Nevertheless, Wisconsin appellate courts have never said that a "fact-intensive ground" could never form the basis for partial summary judgment; instead the supreme court has said that "the propriety of summary judgment is determined case-by-case." Bobby G., 2007 WI 77, ¶ 39-40.

See also Wisconsin Judicial Benchbooks, Volume IV (Juvenile), Chapter 13.

2. **Summary Judgment in CHIPS Proceedings**

A circuit court may use summary judgment in CHIPS fact-finding hearings. N.Q. v. Milwaukee County Dep't of Social Services, 162 Wis.2d 607, 611-12, 470 N.W.2d 1 (1991).

3. **Jury Waivers; No-Contest Pleas**

Wisconsin appellate courts have addressed appeals from parents who have argued: (1) that a stipulation entered into by the parent with respect to one element of a TPR ground deprived the parent of the right to a jury trial and (2) that he or she did not knowingly and voluntarily waive that right.

The right to a jury trial in a Wisconsin TPR proceeding is statutory, not constitutional. Steven V. v. Kelly H., 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856; Wis. Stat. § 48.422. See also Walworth County DHHS v. Andrea L.O., 2008 WI 46, 309 Wis.2d 161, 749 N.W.2d 168; Racine County Human Services Department v. Latanya D.K., 2013 WI App 28, 346 Wis.2d 75, 828 N.W.2d 251 . When a parent stipulates to an element of an unfitness ground, Wisconsin courts have said this waiver of the parent's right to a jury trial on the element must be made knowingly and voluntarily. Andrea L.O., supra; Manitowoc County HSD v. Allen J., 2008 WI App. 137, 314 Wis.2d 100, 757 N.W.2d 842; and Racine County Human Services Department v. Latanya D.K., 2013 WI App 28, 346 Wis.2d 75, 828 N.W.2d 251. See also Wis. Stat. § 48.422(7) and State v. Connie P., Appeal No. 2013AP2854 (one-judge decision, July 1, 2014). When a parent enters a no-contest plea that a ground exists to terminate his or her parental rights at the grounds phase, Wis. Stat. § 48.422(7) requires the trial court to:

(a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.

(b) Establish whether any promises or threats were made to elicit an admission . . .

(bm) Establish whether a proposed adoptive parent of the child has been identified . . .

(br) Establish whether any person has coerced a birth parent [into making an admission].

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

Additionally, the parent must have knowledge of the constitutional rights given up by the plea. Kenosha Cnty. DHS v. Jodie W., 2006 WI 93, ¶25, 293 Wis.2d 530, 716 N.W.2d 845.

For a decision involving a parent's jury waiver and her stipulation to two of the four elements needed to prove unfitness, see Walworth County DHHS v. Roberta J.W., 2013 WI App 102, 349 Wis.2d 691, 836 N.W.2d 860. In this decision, the parent claimed the trial court erred when it held that her jury waiver and stipulation, prior to her second fact-finding hearing, were still effective on remand for a third fact-finding hearing. The court of appeals agreed with the parent and reversed.

4. **Withdrawal of Jury Demand**. In a 2014 termination of parental rights case, the court denied a parent's request to withdraw her jury demand. Racine County v. Latasia D.M., Appeal No. 2014 AP1672 (one-judge decision, December 23, 2014). The county refused to consent to the withdrawal. The parent argued that the county had forfeited its right to a jury trial when it failed to submit its own demand at the initial hearing. The trial court disagreed, finding that once the parent demanded a jury trial, the county did not need to file a separate demand to preserve its right to a jury trial. The parent argued on appeal that the court erred in requiring the consent of a party that had not demanded a jury trial before she could withdraw her own request and that Wis. Stat. § 805.01(3) was not applicable to TPR proceedings. The court of appeals disagreed stating:

> TPR proceedings are civil in nature, Door Cnty. DHFS v. Scott S., 230 Wis.2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999), and thus the procedures and practice of such proceedings are governed by Wis. Stat. chs. 801 to 847 "except where different procedure is prescribed by statute or rule," Wis. Stat. § 801.01(2). "The TPR statute allows a parent to demand a jury trial but does not provide a means to withdraw such a demand." Manitowoc Cnty. HSD v. Allen J., 2008 WI App 137, ¶16, 314 Wis.2d 100, 757 N.W.2d 842. We therefore look to Wis. Stat. § 805.01(3), which provides the procedure for withdrawing a jury demand in civil proceedings and requires "the consent of the parties." The circuit court properly applied § 805.01(3) to deny Latasia's

request to withdraw her jury demand when the Department refused to consent to the withdrawal.

5. **Evidentiary Stipulations; Judicial Notice**

In some cases, it will be helpful to the jury and will reduce the need for trial testimony to have the judge explain to the jury what CHIPS procedures have occurred prior to the TPR proceeding.

An example of an explanation used in Milwaukee County for this purpose follows:

JUDICIAL NOTICE OF UNDERLYING CHIPS PROCEEDINGS

When allegations of child abuse or neglect are made, it is the responsibility of the Bureau of Milwaukee Child Welfare (BMCW) to investigate those allegations. If in the view of BMCW, there is probable cause to believe that the parent is neglecting, refusing, unable or is unavailable to provide adequate supervision and care and that services to ensure the child's safety and well being are unavailable or would be inadequate, the children are held in a foster home, relative home or other appropriate placement.

A hearing must be held before a judge within 48 hours at which the judge must determine if the children should remain in that placement. A Child in Need of Protection and Services (CHIPS) petition is filed and court proceedings—often referred to as CHIPS proceedings—are conducted.

If the children are found to be in need of protection and services by agreement of the parties or trial (or default), a court order is entered governing the custody and placement of the children. If the children are placed in the parent's home, the court sets conditions the parent must comply with and BMCW must monitor to reasonably assure the safety of the child in the home.

If the child is placed outside of the parental home (in foster or relative care), the court order sets conditions the parent must meet to have a child safely returned to his/her care ("conditions of safe return") and services BMCW must provide to assist the parent in meeting the conditions of safe return. BMCW is legally obligated to make reasonable efforts to provide those services to the parents. An order placing a child outside the parental home must also warn the parents of any grounds for termination of parental rights which may be applicable.

In this case, the child was taken into custody on:

The child was found to be in need of protection and services of the court on:

> The court order containing the termination of parental rights warnings established the following conditions for the parent to meet in order to have the child safely returned to the parent's care:
>
> The order directed BMCW to make reasonable efforts to provide the following services to assist the parent in meeting the conditions of safe return to the home:
>
> [The order governing the custody and placement of the child was extended on . . . .]

The explanation must be tailored to the facts of the case. Use of this type of explanation is optional. The Committee recommends that the court have the parties stipulate to its use.

See also Walworth County DHHS v. Roberta J.W., supra.

6. **Directed Verdict on an Element**

In 1999, the court of appeals addressed the use of directed verdicts in TPR proceedings. In Door County DHFS v. Scott S., 230 Wis.2d 460, 602 N.W.2d 167 (Ct. App. 1999), the trial court directed a verdict on the question whether the daughter had been adjudged to be in need of protection or services and placed outside the home pursuant to one or more court orders. After the jury found the remaining elements necessary to terminate parental rights, the court terminated the father's rights. The father appealed, arguing that by removing one of the requisite elements under the TPR statute from the jury's consideration, his due process right to a jury trial was violated. The court of appeals disagreed. The court of appeals distinguished several decisions cited by the father, including In re Philip W., 189 Wis.2d 432, 436, 525 N.W.2d 384 (Ct. App. 1994) and concluded:

> In this case, the verdict was directed as to only one undisputed element of the TPR statute, after a full jury trial in which (the father) had ample opportunity to secure discovery and introduce evidence to refute the department's contentions that (the daughter) had been in CHIPS custody. When no contrary evidence was provided, the circuit court was justified in directing a verdict as to the first element. (The father's) due process rights were not violated; he enjoyed the benefits of all of

the procedural devices and safeguards that attend a full trial.

In an unpublished opinion in 2014, State v. Queentesta H., Appeal No. 2014AP761, the court of appeals considered a parent's argument that the trial court should have let the jury determine whether the court orders, in a TPR based on continuing need, had the termination of parental rights required by law. The parent contended that the Wisconsin Supreme Court "has not sanctioned the granting of a directed verdict on an element in a termination of parental rights case." The court of appeals said a trial court may grant a directed verdict in a termination-of-parental-rights case '"where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion."' Door Cnty. DHFS v. Scott S., 230 Wis.2d 460, 465, 602 N.W.2d 167, 170 (Ct. App. 1999). Moreover, the court noted "[s]ummary judgment on the existence of grounds for termination is proper, in appropriate cases, where there is no genuine issue of material fact in dispute regarding the grounds and the moving party is entitled to judgment as a matter of law." Racine County Human Services Department v. Latanya D.K., 2013 WI App 28, ¶17, 346 Wis.2d 75, 91, 828 N.W.2d 251, 258-259. The court also addressed the parent's contention that the Wisconsin Supreme Court has not sanctioned the procedure. It said:

> [The mother] relies on Walworth County DHHS v. Andrea L.O., 2008 WI 46, 309 Wis.2d 161, 749 N.W.2d 168, which upheld a jury's verdict underlying the termination of Andrea L.O.'s parental rights. There, the lawyers stipulated in open court that she had received the requisite notices under Wis. Stat. §§ 48.356(2) and 48.415(1), but the trial court submitted the question to the jury anyway. Andrea L.O., 2008 WI 46, ¶¶2-3, 309 Wis.2d at 163-164, 749 N.W.2d at 170. Significantly, Andrea L.O. not only approved of Scott S., see Andrea L.O., 2008 WI 46, ¶37, 309 Wis.2d at 175-176, 749 N.W.2d at 176, but also opined that where an element is "expressly provable by

> the official documentary evidence" that element may be taken from the jury, *id.*, 2008 WI 46, ¶¶40-41, 309 Wis.2d at 176-177, 749 N.W.2d at 176. Thus, [the mother]'s representation that the supreme court "has not sanctioned the granting of a directed verdict on an element" in a termination-of-parental-rights case unless the parties have so stipulated, seeks a bridge too far.

The court of appeals concluded that Scott S. is still good law, and the trial court did not err in following Scott S.

If there is a dispute on a factual element, *e.g.* the child's age at the time of relinquishment, then a trial on that issue is necessary. If a parent contests a petition alleging such a ground, a trial court may be best advised to convene a fact-finding hearing and receive documentary and other evidence establishing the element. See In re J.A.B., 153 Wis.2d 761, 451 N.W.2d 799 (1989).

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