OFFICE OF JUDICIAL EDUCATION
2024

January 2024

TO: Consumers of Wisconsin Jury Instructions – Children

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 2 of Wis JI-Children. The release contains material approved by the Wisconsin Juvenile Jury Instructions Committee through January 2024.

The following material is included in Release No. 2:

New Instructions	Revised Instructions
149	313
	324
	346B
	372

Content. The 2024 supplement updates the publication on legislative actions and judicial decisions through November 2023.

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

Wis JI-Children

(Release No. 2 – January 2024)

Filing Instructions

Remove Old Pages Titled	Insert New Pages Titled
Title Page (1/2023)	Title Page (1/2024) Supplement
1/2023 Supplement with (Release No. 1) in the right corner	(Release No. 2) in the right corner
Committee List (1/2023)	Committee List (1/2024)
Summary of Contents (1/2023)	Summary of Contents (1/2024)
Introduction (1/2023)	Introduction (1/2024)
Table of Contents (1/2023)	Table of Contents (1/2024)
Comparative Table of Statutes (1/2023)	Comparative Table of Statutes (1/2024)
_____	AFTER (JI-145) 149 (1/2024)
313 (2018)	313 (1/2024)
324 (1/2023)	324 (1/2024)
346B (2018)	346B (1/2024)
372 (2016)	372 (1/2024)
Table of Cases Cited (1/2023)	Table of Cases Cited (1/2024)
Index (1/2023)	Index (1/2024)

1/2024 Supplement filed by _____, _____.

initials date

FOR QUESTIONS:

If you have any questions about these filing instructions or the civil jury instructions, please contact the Committee's reporter, Bryce Pierson at Bryce.pierson@wicourts.gov.

OFFICE OF JUDICIAL EDUCATION
2024

WISCONSIN JURY INSTRUCTIONS

CHILDREN

VOLUME I

Wisconsin Juvenile Jury Instructions Committee

[Cite as Wis JI-Children]

- Includes 1/2024 Supplement (Release No. 2)

[This page is intentionally left blank]

WISCONSIN JURY INSTRUCTIONS
JUVENILE

Prepared for the Wisconsin Judicial Conference by its Juvenile Jury Instructions Committee, consisting of Hon. Wynne Laufenberg (Chair); Hon. David Wilk; Hon. Brittany Grayson; Hon. Tammy Jo Hock; Hon. Maria Lazar; Hon. Mark Schroeder; Hon. Kristine Snow; Hon. Galen Bayne-Allison.

Reporter:
Bryce Pierson
Office of Judicial Education

Published by
Wisconsin Court System
Office of Judicial Education

[This page is intentionally left blank]

WIS JI-CHILDREN

SUMMARY OF CONTENTS

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.

WISCONSIN JUVENILE JURY INSTRUCTIONS COMMITTEE (1992-2024)

Current Members:

Hon. Wynne Laufenberg, Racine County (Chair)
Hon. David Wilk, Kenosha County
Hon. Brittany Grayson, Milwaukee County
Hon. Tammy Jo Hock, Brown County
Hon. Maria Lazar, Court of Appeals District II
Hon. Mark Schroeder, Outagamie County
Hon. Kristine Snow, Dodge County
Hon. Galen Bayne-Allison, Lincoln County

Former Members:

Hon. Jeffery L. Anderson, Polk County
Hon. Carl Ashley, Milwaukee County
Hon. Marianne Becker, Waukesha County
Hon. Andrew Bissonnette, Dodge County
Hon. J. M. Bitney, Barron County
Hon. Edward Brunner, Court of Appeals, District III
Hon. Rebecca Bradley, Milwaukee County
Hon. Karen Christenson, Milwaukee County
Hon. Dennis Cimpl, Milwaukee County
Hon. Juan Colas, Dane County
Hon. James Czajkowski, Chair, Crawford County
Hon. T. Christopher Dee, Milwaukee County
Hon. Richard J. Dietz, Brown County
Hon. Lee S. Dreyfus, Jr., Waukesha County
Hon. Guy Dutcher, Waushara County
Hon. Michael Dwyer, Milwaukee County
Hon. David Flanagan, Dane County
Hon. Christopher R. Foley, Milwaukee County
Hon. John A. Franke, Milwaukee County
Hon. Shelley Gaylord, Dane County
Hon. Julie Genovese, Dane County
Hon. Lindsey Grady, Milwaukee County
Hon. Laura Gramling Perez, Milwaukee County
Hon. Fred H. Hazlewood, Manitowoc County
Hon. Frederick A. Henderson, Rusk County
Hon. Duane M. Jorgenson, Lafayette County
Hon. John A. Jorgensen, Winnebago County
Hon. John Jude, Racine County
Hon. Robert J. Kennedy, Walworth County
Hon. Ann N. Knox-Bauer, Taylor County
Hon. Moria G. Krueger, Dane County
Hon. James Mason, Wood County
Hon. J. D. McKay, Brown County
Hon. Dale Pasell, LaCrosse County
Hon. Robert H. Rasmussen, Polk County
Hon. Mary Triggiano, Milwaukee County
Hon. Robert VanDeHey, Grant County
Hon. Linda M. Van De Water, Waukesha County
Hon. Mary Wagner, Kenosha County
Hon. Joseph Wall, Milwaukee County
Hon. Thomas John Walsh, Brown County
Hon. Todd Ziegler, Monroe County

Reporter:

Bryce Pierson, Office of Judicial Education

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 2024

Bryce Pierson
Committee Reporter
Office of Judicial Education

INTRODUCTION TO RELEASE NO. 2

Release No. 2 updates Release No 1. In preparing this release, the Committee reviewed appellate decisions and legislative changes between November 2022, and December 2023.

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 2024 **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**

TABLE OF CONTENTS

VOLUME I

GENERAL INSTRUCTIONS

Jurors' Duties

Child or unborn child in need of protection or services (CHIPS) (UCHIPS)

Involuntary termination of parental rights (TPR)

Indian child welfare cases: CHIPS and involuntary termination of parental rights

Special materials

WIS JI-CHILDREN

COMPARATIVE TABLE

STATUTE-INSTRUCTION NUMBERS

The jury instruction in the right-hand column in most cases defines the offense proscribed by the statute in the left-hand column. Where the cited statutes do not define an offense, the instruction deals with the statute in a substantive way. This is not a list of all statutes cited in the instructions.

Wis. Stat. §	Wis JI-Children
48.02(1)(a)	215
48.02(1)(b)	217
48.02(1)(c)	218, 218A, 218B
48.02(1)(e)	218C
48.02(1)(f)	218D
48.02(1)(g)	216
48.02(5j)	412, 422
48.02(14g)	412, 422
48.028(4)d1.	410, 412, 414
48.028(4)(d)(2)	410
48.028(4)(e)	420
48.028(4)(e)1.	422
48.028(4)(e)2.	424
48.13	SM-1
48.13(1)	205
48.13(2)	210
48.13(2m)	212
48.13(3)	215, 216, 217, 218, 218A, 218B, 218C, 218D, 219
48.13(3m)	222, 223, 224
48.13(4)	230, 223, 231, 232
48.13(4m)	234
48.13(5)	235, 236
48.13(6)	290
48.13(8)	240, 241, 242, 243
48.13(9)	233
48.13(10)	250
48.13(10m)	255
48.13(11)	260
48.13(11m)	265
48.13(12)	295
48.133	202, 280
48.235(6)	200, 202, 300
48.299(1)	100
48.415	SM-1, 300
48.415(1)(a)1	305
48.415(1m)	303
48.415(1)(a)1m	307
48.415(1)(a)1r	308
48.415(1)(a)2	313
48.415(1)(a)3	314, 313
48.415(2)(a)	324, 324A
48.415(2)(a)1	324B
48.415(2)(am)1	325
48.415(3)	330
48.415(4)	335
48.415(5)(a)	340
48.415(5)(b)	342
48.415(6)(a)	346, 346A, 346B
48.415(6)(a)2	345
48.415(7)	350
48.415(8)	370
48.415(9)	371, 371A
48.415(9m)	372
48.415(10)	375
48.42(2m)	346, 346A, 346B
48.81	236
48.833	236
48.92	236
903.01	314
938.13	SM-1
944.30	219
948.01	217
948.02	217
948.05(1)(a)	218
948.05(1)(b)	218A
948.05(2)	218B
948.05(3)	218, 218B
948.055	218C
948.085	217
948.10	218D
961.41(1)	223

[This page is intentionally left blank]

149 WITNESS EXERCISING PRIVILEGE AGAINST SELF-INCRIMINATION: TERMINATION OF PARENTAL RIGHTS PROCEEDING

(Respondent parent), exercised (his) (her) constitutional right not to answer (a question) (questions) on the ground that the answer(s) could potentially lead to (his) (her) self-incrimination. You may, but are not required to, infer that this refusal to answer suggests that the answer(s) would have been detrimental to the interest of (Respondent parent).

COMMENT

This instruction was approved in December 2023.

Wisconsin has long recognized that a person may invoke the Fifth Amendment privilege against self-incrimination as protection from the adverse use of such evidence in a subsequent criminal action. Grognet v. Fox Valley Trucking Serv., 45 Wis.2d 235, 239, 172 N.W.2d 812 (1969); S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19. However, in a civil case, as distinguished from a criminal case, an inference of guilt or against the interest of the witness may be drawn from the witness invoking the Fifth Amendment. Id. For comparison, see Wis JI-Criminal 317. See also Wis JI-Civil 425.

The rules of civil procedure apply to CHIPS and TPR cases unless Ch. 48 requires a different procedure. See In Interest of F.Q., 162 Wis. 2d 607, 470 N.W.2d 1 (Ct. App. 1991) and Door County DHFS v. Scott S., 230 Wis. 2d 460, 602 N.W.2d 167 (Ct. App. 1999).

[This page is intentionally left blank]

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 that 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 or 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 that 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 4 through 7, 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 that 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 that 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 6 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 was originally approved by the Committee in 1997 and revised in 1999, 2001, 2004, 2011 and 2019. 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. This revision was approved by the Committee in December 2023; it amended language in the main text of the instruction to accurately reflect the language provided in Wisconsin Statute § 48.415(4)(a)(a)2.

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."

324 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES [WIS. STAT. § 48.415(2)(a)][1] (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 applicable only in cases where the child has been placed outside the home**

less than 15 of the past 22 months, and post-petition evidence has been admitted: 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.][2]

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]

NOTE

1. This instruction was drafted in accordance with 2017 Wisconsin Act 256. Refer to Children's JI-324B for the instructions that were formerly numbered as Children's JI-324.

2. Earlier versions of this instruction recommended consulting the unpublished case State v. Stacee P., 2012AP167-169, for guidance if the user intended to incorporate the optional bracketed language into the instruction. In that matter, the court held 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, since the Stacee P. decision, there has been a significant amendment to Wis. Stat. 48.415(2)(a)3.

Prior to April 2018, the statute provided:

> …there is a substantial likelihood that the parent will not meet these conditions with the 9-month period following the fact-finding hearing under s. 48.424.

Thus, under the previous version of the statute, at the grounds hearing, the fact finder was required to look to the future nine months from the date of the grounds hearing to determine whether the parent had a substantial likelihood of meeting the conditions established by the court for the safe return of the child.

However, when Wis. Stat. 48.415(2)(a)3 was amended in April 2018, it replaced the forward-looking nine-month period with a 15 of the most recent 22 months timeframe. As the court of appeals clarified in the unpublished decision In re Z.Y., 2021AP1729, "Only if the child has been placed outside the home for less than 15 of the most recent 22 months may the factfinder consider whether there 'is a substantial likelihood that the parent will not meet the conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months.' If the child has been placed outside the home for more that 15 of the most recent 22 months, the third subpart is satisfied by evidence proving that the parent failed to meet the conditions established for the safe return of the child." Id., citing In re T.L.E.-C., 2021 WI 56, ¶19, 397 Wis.2d 462, 960 N.W.2d 391.

The amendment eliminated the petitioner's obligation to show a substantial likelihood that the parent will not meet the conditions of return within the nine months following the fact-finding hearing in cases where the child has been in out-of-home care for over 15 months. In cases like these, the fact finder should not be asked if there is a substantial likelihood that the parent will not meet the conditions by some future date. Therefore, the court should refrain from incorporating the optional bracketed language in situations where the child has been in out-of-home care for more than 15 months.

COMMENT

This instruction was 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, 2021, and 2022. This revision was approved by the Committee in December 2023. This entailed updating footnote one and providing additional clarification in the "possible additional language" section of the second element, specifying that it does not apply in situations where a child has been placed outside the home for fifteen out of the most recent twenty-two months.

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.

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 the 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).

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.[1] 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:[2]

- 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

NOTES

1. The factors listed for consideration in evaluating whether a substantial parental relationship exists are provided in Wis. Stat. § 48.415(6)(b). This statutory list is "non-exclusive." State v. Bobby G., 2007 WI 77, ¶ 46, 301 Wis.2d 531, 734 N.W.2d 81.

2. The additional factors listed for consideration in evaluating whether an incarcerated parent has

or does not have a substantial parental relationship with the child are not codified. As a result, a trial court is not required to take into account every factor listed in the jury instruction. These factors may be considered in addition to the statutory requirements. However, the primary focus must remain on the statutory requirement of establishing a substantial parental relationship as provided in Wis. Stat. § 48.415(6).

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. This revision was approved by the Committee in December 2023; it added footnotes 1 and 2.

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).

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.

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. This revision was approved by the Committee in December 2023; it added to the comment.

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).

Child neglect resulting in death, as a party to a crime. The court of appeals has held that a conviction for neglect resulting in death, as party to a crime, qualifies as a serious felony if the individual in question directly committed the offense. In the Matter of Termination of Parental Rights to R.M., 2023 WI App 27, 407 Wis.2d 893.

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 must have engaged in at least three acts of physical abuse against the child within a specified period.

WIS JI-CHILDREN

TABLE OF CASES CITED

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

Y

Z

WIS JI-CHILDREN INDEX

(References are to Instruction Numbers.)

A

B

C

D

E

F