

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:

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| 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. Stacey 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.