

**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 the 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 jury.

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.