

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*.