

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

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

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

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

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

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

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

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

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

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

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

SPECIAL VERDICT

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

Answer: _____
Yes or No

COMMENT

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

Wis. Stat. § 48.13(10) reads:

48.13. Jurisdiction over children alleged to be in need of protection or services.

The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

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

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

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

NOTES

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

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

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

common sense of jurors.