

255 CHIPS: SUBSTANTIAL RISK OF NEGLECT, REFUSAL, OR INABILITY TO PROVIDE [WIS. STAT. § 48.13(10m)]

The petition in this case alleges that (child) is in need of the protection or services of the court because (his) (her) parent is at substantial risk of neglecting, refusing, or being 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 (his) (her) physical health.

Your role as jurors will be to answer the following questions in the special verdict:

1. Does reliable and credible information exist that (child)'s parent neglected, refused, or was unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for another child in the home so as to seriously endanger the physical health of that other child?

If the answer to question 1 is "yes," answer question 2:

2. Is (child)'s parent at substantial risk of neglecting, refusing, or being 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 (his) (her) physical health?

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

In answering the questions in the special verdict, you should apply the following definitions for the terms and phrases in those questions.

Information is "reliable" if the nature, source, corroboration for, and other facts and circumstances relating to that information establish it as accurate and trustworthy. Information is "credible" if in the light of reason and common sense, it is worthy of belief.

A parent neglects, refuses, or is unable to provide necessary [care, food, clothing, medical or dental care, or shelter] for a child for reasons other than poverty when he or she fails to provide for any reason other than solely a lack of economic resources.

["Necessary care" means that care which is vital to the needs and the physical health and safety 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 age, physical condition, and special needs, if any.]

"Another child in the home" means someone, under the age of 18, other than (child), who resides or resided in the home of (parent), either permanently or temporarily. The other child may, but need not necessarily, be related to (child). In this case, the petition alleges the other child to be _____ . (The other child)'s physical health is seriously endangered if the failure to provide creates a significant risk that (the other child) will be seriously harmed or injured. Actual harm or injury need not have occurred. In determining whether the physical health of (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 actual or possible harm to the child and the level of risk that a particular harm will occur. However, you may not consider actual or possible harm to the emotional health of the child. In answering question 1, you must consider the facts and

circumstances at they existed on _____, which was the date on which this petition was filed. Your answer must reflect your finding as of that date.

"Substantial risk" means a significant and appreciable threat exists that (parent) will fail to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) for reasons other than poverty so as to seriously endanger (his) (her) physical health. In determining the seriousness of the risk, among the things you may consider are: (1) the nature and severity of the failure to provide necessary [care, food, clothing, medical or dental care, or shelter] to the other child; (2) the similarity of the subject child to the other child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of the subject child to the other child by way of relationship or position of favor or disfavor; and (4) any changes which have occurred in the home since the prior (neglect) (insert other conduct) in terms of services having been provided, people having moved into or moved out of the home, and/or any monitoring or supervision which has been put into place. In answering question 2, 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.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that reliable and credible information exists that (parent) failed for reasons other than poverty to provide for a child in (his) (her) home so as to endanger that child's physical health, you should answer question 1 of the special verdict "yes." If you are not so convinced, you must answer question 1 "no."

If the answer to question 1 is "yes," and you are further convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, based upon that information that (parent) is at substantial risk of failing to provide necessary [care, food, clothing, medical or dental care, or shelter] for (child) for reasons other than poverty, so as to seriously endanger (child)'s physical health, you should answer question 2 of the special verdict "yes." If you are not so convinced, you must answer question 2 "no."

SPECIAL VERDICT

1. Does reliable and credible information exist that (child)'s parent neglected, refused, or was unable for reasons other than poverty to provide necessary [care, food, clothing, medical or dental care, or shelter] for another child in the home so as to seriously endanger the physical health of that other child?

Answer: _____

Yes or No

If the answer to question 1 is "yes," answer question 2:

2. Is (child)'s parent at substantial risk of neglecting, refusing, or being 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 (his) (her) physical health?

Answer: _____

Yes or No

COMMENT

Wis JI-Children 255 and comment were originally approved by the Committee in 1996 and revised in 1999, 2001, 2004, 2008, 2009, and 2012. The verdict was revised in 2009 and 2012.

Wis. Stat. § 48.13(10m) 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:

(10m) Whose parent, guardian or legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home

Substantial Risk. This instruction provides that "substantial risk" means "that a significant and appreciable threat exists." The statutory language does not advise how to assess that risk, but in thinking about the statute, this Committee has identified a number of factors which a fact finder might consider in trying to assess the seriousness of that risk. Those factors are: (1) the nature and severity of the failure to provide necessary [care, food, clothing, medical or dental care, or shelter] to the other child; (2) the similarity of the subject child to the other child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of the subject child to the other child by way of relationship or position of favor or disfavor; and (4) any changes which have occurred in the home since the prior (neglect) (insert other conduct) in terms of services having been provided, people having moved into or moved out of the home, and/or any monitoring or supervision which has been put into place. These factors were added to the instruction in 2001.

Postpetition Evidence. The Committee believes that evidence of postpetition conduct is relevant to the petition's allegations of "substantial risk" to the child. A sentence was added in 2001 to the instruction on the second element to allow the jury to consider events and conduct occurring since the petition was filed.

Summary Judgment. The Committee believes that summary judgment is not available for this ground if the parent disputes the allegation of substantial risk. It has been contended by some that this statutory ground limits the fact finder's role so that if the parent has been the subject of previous court findings, no defense is possible and summary judgment is appropriate. The Committee disagrees.

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.