

**260 CHIPS: EMOTIONAL DAMAGE [WIS. STAT. § 48.13(11)]**

The petition in this case alleges that (child) is suffering emotional damage for which (his) (her) (parent)<sup>1</sup> has neglected, refused, or been unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate (child)'s symptoms.<sup>2</sup> Your role as jurors will be to answer the following questions in the special verdict:

1. As of [the date the petition was filed], was (child) suffering emotional damage?
2. As of [the date the petition was filed], was (parent) failing,<sup>3</sup> for reasons other than poverty,<sup>4</sup> to obtain necessary treatment or to take necessary steps to ameliorate (child)'s symptoms.

The burden of proof 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."

"Emotional damage" means harm to a child's psychological or intellectual functioning. "Emotional damage" must be evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety, depression, withdrawal, outward aggressive behavior, or a substantial and observable change in behavior, emotional response, or cognition that is not within the normal range for the child's age and stage of development.<sup>5</sup>

In determining whether treatment or steps<sup>6</sup> would "ameliorate" the child's symptoms, you are to consider whether the treatment or steps would reduce or eliminate the child's symptoms.<sup>7</sup>

A parent failed, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate (his) (her) child's symptoms if the following are established:

1. that there was treatment or were steps that could have been taken to reduce or eliminate the child's symptoms;<sup>8</sup>
2. that the parent was aware of the treatment or the steps and the availability of the treatment or steps;
3. that the parent failed to provide the treatment or take the steps; and
4. that the parent's failure to provide the treatment or take the steps was unreasonable and was not due to the financial inability of the parent to afford the treatment or take the steps.

In determining whether a failure by (parent) was unreasonable, you may consider the circumstances surrounding a failure to obtain treatment or to take steps, including whether the treatment or steps are generally accepted in the practice of psychology or psychiatry; whether the treatment or the taking of these steps carry possible risks or side effects to (child);<sup>9</sup> and the reduction of symptoms likely to result from the treatment or the taking of the necessary steps.

Before you may answer either question in the special verdict "yes," you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered "yes." If you are not so convinced, you must answer the question "no."

### **SPECIAL VERDICT**

1. As of [the date the petition was filed], was (child) suffering emotional damage?

Answer: \_\_\_\_\_  
Yes or No

2. As of [the date the petition was filed], was (parent) failing, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate (child)'s symptoms.

Answer: \_\_\_\_\_  
Yes or No

### COMMENT

Wis JI-Children 260 and comment were approved by the Committee in 1999 and revised in 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial correction was made to Note No. 5 in 2005 and to Note No. 8 in 2008.

Wis. Stat. 48.13(11) reads:

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

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

(11) Who is suffering emotional damage for which the parent, guardian or legal custodian has neglected, refused or been unable and is neglecting, refusing or unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate the symptoms;

### NOTES

1. The statute also names the child's guardian or legal custodian as a responsible party.
2. Wis JI-Children 180 should be used to advise the jury that the "is" means as of the date of the filing of the petition. The phrase "has been" is interpreted as indicative of the need to show more than one instance, *i.e.*, some ongoing failure.
3. 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 care 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.
4. If parental poverty is a major issue in a case, a third question might be considered: "Was this failure due to reasons other than poverty?" See note 2 to Wis JI-Children 250.

5. The definition of "emotional damage" follows the definition in Wis. Stat. § 48.02.
6. In the Committee's view whether a refusal to place a child on psychotropic drugs because of side effects is reasonable is a question of fact for the jury.
7. This instruction does not address the complex constitutional question of whether religious beliefs are a defense to a parental decision to withhold treatment. If at all possible, such a question should be addressed well in advance of a fact-finding hearing. See Wis. Stat. § 948.03(6) - Treatment Through Prayer.
8. Expert testimony will be required to establish this element as well as to show that the child is suffering emotional damage. Wis. Stat. § 48.31(4) provides in part: "In cases alleging a child to be in need of protection or services under s. 48.13(11), the court may not find that the child is suffering emotional damage unless a licensed physician specializing in psychiatry or a licensed psychologist appointed by the court to examine the child has testified at the hearing that in his or her opinion the condition exists, and adequate opportunity for the cross-examination of the physician or psychologist has been afforded. The judge may use the written reports if the right to have testimony presented is voluntarily, knowingly and intelligently waived by the guardian ad litem or legal counsel for the child and the parent or guardian."
9. Such a step could be something as basic as parental failure to cease inflicting emotional abuse on the child. What such steps are will change in each situation; they could be transportation, setting appointments, providing medication, or anything required of a parent to "ameliorate" the child's symptoms.