

301 CONSIDERATION OF CHILD'S BEST INTERESTS IN TERMINATION PROCEEDINGS

I want to again emphasize that this hearing is only one part of a process that may result in termination of parental rights.

In this jury trial, the first phase of the proceedings, your responsibility is to determine what the facts are from all the evidence and answer the questions on the special verdict that will be submitted to you. Your answers will determine whether the State has proved that a ground or grounds for termination of parental rights exists. However, you are not being asked to decide if parental rights should be terminated. Based on your answers to the questions on the special verdict, it will be my responsibility to conduct further proceedings and hearings, and it is solely and ultimately my responsibility to determine if parental rights should be terminated based upon factors the law requires a court to consider if grounds for termination of parental rights are proven. You should not be concerned with what the final result of this jury proceeding might be, and you should not be concerned with what the final result of this entire lawsuit might be.

Consideration of the best interests of the child is a matter for the court in proceedings which will be conducted in the future; it is not a consideration for the jury.

COMMENT

This instruction and comment were approved in 2004. The instruction was revised in 2013. An editorial revision was made to the instruction in 2009. The comment was updated in 2008, 2014, and 2015.

Dual Purpose Evidence. The committee recommends giving this instruction at the end of the grounds hearing in cases where there is "dual purpose" evidence that goes to both grounds and disposition. Examples of this dual purpose evidence include, among other things: details of "unsuccessful" parental visits, that is, a child's negative reaction to the parent at the visit; foster parent testimony about the child's special needs and details of the foster parents' duties in meeting the child's special needs; foster parent testimony about the failure of the parent to contact the child, provide support for, or give gifts to the child; and details regarding the physical and mental health of the biological parent.

Since this type of evidence could shift the jury's focus away from the grounds testimony, the above limiting instruction may be appropriate after the specific testimony and again during the closing instructions.

See *In re Kristeena A.M.S.*, 230 Wis.2d 460 (Ct. App. 1999) citing *In re C.E.W.*, 124 Wis.2d 47, 54 (1985).

For an unpublished decision citing *In re C.E.W.* involving the giving of cautionary limiting instructions to the jury in the grounds-phase of TPR proceeding to not consider whether termination would be in the child's best interest, see *State v. Samantha S.*, 2013 AP 1503 (not published; one-judge decision).

For an unpublished decision discussing the ineffectiveness of counsel for failing to ask that the jury be instructed on Wis JI-Children 301, see *Manitowoc County Human Services Dep't v. Ralph B.*, Appeal No. 2014AP140 (one-judge decision, July 30, 2014).