

**314 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABANDONMENT: LEFT WITH ANOTHER PERSON AND FAILURE TO VISIT OR COMMUNICATE FOR SIX MONTHS [WIS. STAT. § 48.415(1)(a)3.]**

The petition in this case alleges that (child) has been abandoned, which is a ground for termination of parental rights. Your role as jurors in this case will be to complete the special verdict form which consists of seven questions.

Questions 1, 2, and 3 read as follows:

1. Was (child) left by (parent) with a relative or other person?

**Answer question 2 only if the answer to question 1 is "yes."**

2. Did (parent) know, or could (he) (she) have discovered, (child)'s whereabouts?

**Answer question 3 only if the answer to question 2 is "yes."**

3. Did (parent) fail to visit or communicate with (child) for a period of 6 months or longer?

As to these three questions, the petitioner, ( \_\_\_\_\_ ), must convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer to each of the three questions should be "yes."

Before you may answer question 1 "yes," the (petitioner) must prove that (child) has been left by (parent) with another person, including the other parent or another relative. The phrase "has been left by (parent) with another person" means any circumstance in which the child resides apart from (parent) and with the other person, (including instances in which the child resides there pursuant to a court order).<sup>1</sup>

Before you may answer question 2 "yes," (petitioner) must prove that (parent) knew or could have discovered the whereabouts of (child). A parent "could have discovered the whereabouts of the child" if, through reasonable efforts by that parent,

(he) (she) would have discovered the location where the child resided or could be contacted.

Before you may answer question 3 "yes," the petitioner must prove that (parent) failed to visit or communicate with (child) for a period of 6 months or longer. This means that (parent) did not visit and did not communicate with (child) for 6 months or longer. Incidental contact between (parent) and (child) does not prevent you from finding that (he) (she) failed to visit or communicate for the required period. "Incidental contact" means insignificant contact or contact which occurred merely by chance. In calculating the period during which visitation did not occur, you should not include any periods during which the (parent) was prohibited by judicial order from visiting with (child). In calculating any period during which communication did not occur, you should not include any period during which (parent) was prohibited by judicial order from communicating with (child).

If the answers to questions 1 through 3 are "yes," abandonment has been established unless (parent) proves certain facts. Questions 4 through 7 of the special verdict address these facts and read as follows:

**Questions 4-7 apply to the period of six months or longer as determined in question 3.**

**Answer question 4 only if the answer to question 3 is "yes."**

4. Did (parent) have good cause for having failed to visit with (child) during that period?

**Answer question 5 only if the answer to question 4 is "yes."**

5. Did (parent) have good cause for having failed to communicate with (child) during that period?

**Answer question 6 only if the answer to question 5 is "yes."**

6. Did (parent) communicate about (child) with the (person) (persons) who had physical custody of the child during that period?

**Answer question 7 only if the answer to question 6 is "no."**

7. Did (parent) have good cause for having failed to communicate about (child) with the (person) (persons) having physical custody during that period?

(Parent) has the burden of satisfying you by the greater weight of the credible evidence, to a reasonable certainty, that your answer to questions 4 through 7 should be "yes."<sup>2</sup>

In determining if good cause existed as stated in questions 4, 5, and 7, you may consider whether (child)'s age or condition would have rendered any communication meaningless; whether (parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (\_\_\_\_\_), who had physical custody of (child); attempts to contact (child); whether the person(s) with physical custody of (child) prevented or interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond the parents control which precluded or interfered with visitation or communication; and all other evidence presented at this trial on this issue.

#### BURDEN OF PROOF

I want to emphasize to you that as to questions 1 through 3, the burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer should be "yes." If it becomes necessary for you to answer questions 4 through 7, the burden is on (parent) to convince you by the greater weight of the credible evidence, to a reasonable certainty, that your answer should be "yes."

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence, but may be less than beyond a reasonable doubt.

The greater weight of the credible evidence means that the evidence in favor of a "yes" answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

### **SPECIAL VERDICT**

1. Was (child) left by (parent) with a relative or other person?

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

**Answer question 2 only if the answer to question 1 is "yes."**

2. Did (parent) know, or could (he) (she) have discovered, (child)'s whereabouts?

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

**Answer question 3 only if the answer to question 2 is "yes."**

3. Did (parent) fail to visit or communicate with (child) for a period of 6 months or longer?

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

**Questions 4-7 apply to the period of six months or longer as determined in question 3.**

**Answer question 4 only if the answer to question 3 is "yes."**

4. Did (parent) have good cause for having failed to visit with (child) during that period?

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

**Answer question 5 only if the answer to question 4 is "yes."**

5. Did (parent) have good cause for having failed to communicate with (child) during that period?

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

**Answer question 6 only if the answer to question 5 is "yes."**

6. Did (parent) communicate about (child) with the (person) (persons) who had physical custody of the child during that period?

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

**Answer question 7 only if the answer to question 6 is "no."**

7. Did (parent) have good cause for having failed to communicate about (child) with the (person) (persons) having physical custody during that period?

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

#### COMMENT

Wis JI-Children 314 and comment were originally approved by the Committee in 1997. The section on burden of proof was revised in 2018. The comment was revised in 1999, 2004, 2005, 2011, 2012, 2013, 2014, 2015, and 2018. The verdict was revised in 2009.

Wis. Stat. § 48.415(1)(a)3 reads:

**(1) Abandonment.** (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:

3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.

(b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a)2 or 3. The time periods under par. (a)2 or 3 shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

(c) Abandonment is not established under par. (a)2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a)2. or 3., whichever is applicable, or, if par. (a)2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a)2.

- b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

This instruction is to be used where the petition was filed on January 1, 1997, or after.

In 1999, following the revision of Wis. Stat. § 48.415(1)(a)(3), the Committee withdrew Wis JI-Children 312 which applied to TPR petitions (based on abandonment) filed before January 1, 1997.

**Legislative Change.** Wis. Stat. § 48.415(1)(a)3 shortened the time period on a child who had been left by the parent from a period of one year to six months. This statute does not have as an element that there was any type of TPR warning. However, the legislature determined that this particular part of the act would not apply until six months after the effective date of the act. In other words, it applies to petitions filed on January 1, 1997, or thereafter.

**Effect of Court Order Prohibiting Visitation.** When a parent is prohibited from "visitation" by a court order, he or she may still communicate with the child by telephone and letters. *In re Termination of Parental Rights to Jessica N.*, 228 Wis.2d 695, 598 N.W.2d 924 (Ct. App. 1999). The court of appeals held that when a court prohibits visitation, but does not prohibit communication, periods in which there has been no contact will be counted when considering whether abandonment has been established.

**Condition Precedent in Court Order.** In *In re Jessica N.*, *supra*, the father challenged the trial court's termination for abandonment because he was prohibited by a family court order from visiting his daughter. In this case, the court order allowed the father to have supervised visitation if he saw a therapist and made progress sufficient so that in the therapist's opinion visitation would not be harmful to the daughter. The court of appeals said this "condition precedent" to visitation gave the father the "keys to the door."

Following *In re Jessica N.*, the court of appeals considered whether a father who was prohibited from having contact with his child unless he was either adjudicated as her father or sought third-party contact to facilitate visitation or childcare issues held the "keys to the door." *In re Z.J.E.*, 2018 AP 1206 (September 18, 2018). The court held that he did, and approved the trial court's addition of the following verbiage to the standard instruction:

"However, a court order which prohibits a parent from visiting and/or communicating until the parent meets certain conditions which the parent can meet through reasonably diligent efforts does not "prohibit" visitation and/or communication."

*Id.* at p. 7.

**"Communicate with the Child."** In an unpublished opinion, the court of appeals discussed the meaning of the statutory element "communicate with the child." *Dane County Dep't of Human Services v. Hershula B.*, Appeal No. 2014AP2076 (one-judge decision, February 26, 2015). The parent in this case argued that she had "communicated indirectly with" her child when she left messages with the foster

parents. The opinion concluded that the phrase "communicate with the child means more than just communicating; it means that the child shares in the action of communicating."

**Period of Abandonment; Different Intervals.** In a case involving a long period of alleged abandonment involving different 6-month intervals within that absence or separate alleged periods of abandonment, be alert to notice issues and separating the claims.

In an unpublished opinion in 2012, the court of appeals stated that "no clear law" exists to clarify whether separate instructions and separate verdicts are required when more than one period of abandonment is alleged. See *Heather T.C. v. Donald M.H.*, Appeal No. 2010AP467, Wisconsin Court of Appeals, District II, filed February 1, 2012. The court affirmed the trial court's decision to not submit separate jury instructions and separate verdicts related to two separate alleged periods of abandonment. The parent argued that "because there were two separate alleged periods, and the jury was not afforded the opportunity to consider and decide on a separate verdict for each period, the jurors could have reached their unanimous verdict with less than five-sixths of the jurors finding abandonment for any one period."

The issue of what six-month period is to be used for determining abandonment was raised, but not addressed in 2012 in an unpublished opinion, *Veronica K. v. Michael K.*, 2012 AP 197 (decided October 10, 2012). The court of appeals said it left "for another day the dispute over the requisite specificity required in a petition (as to the alleged period of abandonment) and what the jury should be told."

For a discussion of similar issues in a criminal context, see the majority and dissenting opinions in *State v. Johnson*, 2001 WI 52, 243 Wis.2d 365, 627 N.W.2d 455 (¶15-18).

**Answering Special Verdict Questions.** It has been suggested that the jury should be instructed to answer all questions (1-7) regardless of their answers to prior questions. This suggestion seeks to avoid a retrial in the event an appellate court reverses one of the jury's findings.

Because questions 4-7 of the special verdict relate to the parent's reasons for failing to visit or communicate, the committee believes it is incongruous to ask the jury to examine the parent's good faith for not visiting or communicating after the jury has already determined that the parent did not "fail to visit or communicate." The committee reviewed the language of this instruction and determined that no revision is necessary on this issue since the instruction explains what constitutes a "failure to visit or communicate." The committee believes that the statutory reference to "failure" by the parent means that the parent did not visit and did not communicate. Examination of the reason for a failure is addressed in the verdict questions dealing with good faith (questions no. 4-7).

**Biological Parent; Periods of Abandonment Prior to Adjudication.** The Wisconsin Supreme Court has held that:

an individual who is in fact the biological father of a nonmarital child satisfies the definition of "parent" in § 48.02(13), as he is a "biological parent," notwithstanding that he has not officially been adjudicated as the child's biological father. Because such an individual satisfies the definition of "parent," he may have his parental rights terminated based on periods of abandonment that occurred prior to his official adjudication as the child's biological father, assuming he has failed to

establish a "good cause" affirmative defense to the ground of abandonment. *State v. James P.*, 2005 WI 80, 274 Wis.2d 494, 684 N.W.2d 164.

The court in *James P.* emphasized, however, that it did not address "whether an adjudication subsequent to acts that comprise grounds for the termination of a person's parental rights subjects the adjudicated person to the termination of parental rights based on those acts[.]" *James P.*, 2005 WI 80, ¶ 5. That is, we do not decide whether an individual who is legally adjudicated to be the biological parent of a nonmarital child, but is not in fact the biological father, may have his parental rights terminated based on conduct that occurred prior to the adjudication.

Elsewhere in its decision (Paragraph 48), the court also emphasized:

we do not hold, as did the circuit court, that "a man adjudicated as the biological father has always been the biological father and, therefore, that man has always been a 'parent' under § 48.02(13)." We merely hold that James P. satisfies the definition of "parent" in the first sentence of § 48.02(13) because he is and always was, in fact, Chezron's "biological parent."

**Summary Judgment.** For two cases involving the use of summary judgment when the issue to be resolved is abandonment, see *Dane County Dep't of Human Services v. Wesley J.* Appeal No. 2013AP1226 (not published; one judge) and *Racine County Dep't of Human Services*, Appeal No. 2012AP1974 (not published; one judge). The decision in *Wesley J.* notes that the burden of proof as to good cause for failing to visit or communicate rests with the parent, not the department.

**Indian Child Welfare Act.** For a termination case involving an Indian child, see Wis JI-Children 420-424.

## NOTES

1. *In re Christopher D.*, 191 Wis. 2d 681, 530 N.W. 2d 34 (Ct. App. 1995).
2. The Wisconsin Supreme Court held in *In re Kyle S.-G.*, 194 Wis.2d 366, 533 N.W.2d 794 (1995), that if the petitioner proves the "basic facts" of abandonment, the burden of proof shifts to the respondent-parent to rebut the presumption of abandonment. This presumption is rebutted if the parent proves by the greater weight of the credible evidence, to a reasonable certainty, that they had good cause for having failed to visit and having failed to communicate with the child during the period in issue **and** they communicated about the child with the person or persons who had physical custody of the child **or** had good cause for having failed to communicate with that person or persons about the child during that period.

Pursuant to Wis. Stat. § 903.01, and *Kyle S.-G.*, the respondent-parent must meet the ordinary, or lowest, burden of proof to rebut the presumption. Civil Jury Instruction 200 is therefore incorporated into this instruction with respect to the respondent-parent's duty to rebut the presumption.