324 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: CONTINUING NEED OF PROTECTION OR SERVICES [WIS. STAT. § 48.415(2)(a)] (AS AMENDED BY 2017 WISCONSIN ACT 256) (SEE 324B FOR PREVIOUSLY NUMBERED JURY INSTRUCTION 324)

The petition in this case alleges that (child) is in continuing need of protection or services which is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

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

2. Did the _____ County Department of Social Services make a reasonable effort to provide the services ordered by the court?

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

3. Has (parent) failed to meet the conditions established for the safe return of (child) to (parent)'s home?

   [NOTE: If the child has been placed outside the home for less than 15 of the most recent 22 months, give the following:

   If the answer to question 3 is "yes," answer the following question:

4. Is there a substantial likelihood that (parent) will not meet these conditions by the date on which (child) will have been placed outside the home for 15 of the most

recent 22 months, not including any period during which the child was a runaway from the out of-home placement or was residing in a trial reunification home?]

Before (child) may be found to be in continuing need of protection or services, (petitioner) must prove the following (three) (four) elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (child) was adjudged to be a child (an unborn child) in need of protection or services and placed or continued in placement outside the home of (parent) for a cumulative period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law. **[Add the following language if there is no dispute as to this element:** Because there is no dispute in the evidence to this question, I have answered this question. My answer has no bearing whatsoever on what your answer should be to the other questions in the special verdict form.]

Second, that (agency) has made a reasonable effort to provide the services ordered by the court. "Reasonable effort" means an earnest and conscientious effort to take good faith steps to provide those services, taking into consideration the characteristics of the parent or child [or of the expectant mother or child], the level of cooperation of the parent [or expectant mother], and other relevant circumstances of the case. You may find the agency's effort was reasonable even though there were minor or insignificant deviations from the court's order. Question 2 of the special verdict addresses this element. **[Possible additional language:** In answering question 2, you may consider all evidence bearing on that question,

including evidence of events and efforts occurring since the filing of the petition on (_____). Your answer must reflect your finding as of today's date.][1]

Third, that (parent) has failed to meet the conditions established for the safe return of the child to the home. Question 3 of the special verdict addresses this element. In answering question 3, you must consider the facts and circumstances as they existed on (_____), which was the date on which this petition was filed. Your answer must reflect your finding as of that date.

[NOTE: Add the following paragraph, if the child has been placed outside the home for less than 15 of the most recent 22 months:

Fourth, that there is a substantial likelihood that (parent) will not meet the conditions for the safe return of (child) by the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home. (Note: If there is no dispute to this date, add: That date will be (_____).) "Substantial likelihood" means that there is a real and significant probability rather than a mere possibility that (parent) will not meet the conditions for the safe return by that date. Question 4 of the special verdict addresses this element. In answering question 4, 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.]

In determining whether (parent) failed to meet the conditions established for the safe return of (child) to the home or whether there is a substantial likelihood that (parent) will not meet the conditions for the safe return of (child) by (_____), you may consider the following: the length of time (child) has been in placement outside the home; the number of times (child) has been removed from the home; the parent's performance in meeting the conditions for return of the child; the parent's cooperation with the social service agency; parental conduct during periods in which (child) had contact with (parent); and all other evidence presented during this hearing which assists you in making these determinations.

Before you may answer any 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. Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

Answer:_____
Yes or No

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

2. Did the _____ County Department of Social Services make a reasonable effort to provide the services ordered by the court?

Answer:_____
Yes or No

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

3. Has (parent) failed to meet the conditions established for the safe return of (child) to (parent)'s home?

Answer:_____
Yes or No

[NOTE: Add the following verdict question if the child has been placed outside the home for less than 15 of the most recent 22 months:

If the answer to question 3 is "yes," answer the following question:

4. Is there a substantial likelihood that (parent) will not meet these conditions by the date on which (child) will have been placed outside the home for 15 of the most recent 22 months, not including any period during which (child) was a runaway from the out-of-home placement or was residing in a trial reunification home]?

Answer:_____
Yes or No]

NOTES

1. In giving this instruction the Committee suggests that the court review the unpublished case of State v. Stacee P., in which the court of appeals affirmed the trial court's instruction that "[t]he Jury's determination whether the [agency] made a reasonable effort to provide the services ordered by the Court to assist the parents in meeting the conditions of safe return, is to be determined as of today's date, and you may consider all evidence relevant to that issue, including evidence of conduct occurring since the filing of the petition." The Committee notes the court's holding in Stacee P. that "whether the agency has, since the

petition's filing, continued to help the parent to meet the conditions of return is a factor that the jury must consider." However, the Committee was not able to reach a consensus on how best to incorporate this holding into Wis JI-Children 324, 324A, and 324B, in light of the additional statements in Stacee P. that Wis. Stat. 48.415(2)(a)3 "asks the jury to determine for two time periods a parent's compliance with court-ordered conditions: (1) the time before the petitions' filing date, and (2) the nine-month period following the trial" and that "the jury would not reach the post-trial nine-month period unless the jury first determined that (1) the parent did not . . . satisfy the conditions of return before the petition to terminate the parent's parental rights was filed, and concomitantly, (2) the agency fulfilled its 'reasonable effort' mandate as to that matter . . . ."

COMMENT

This instruction and comment were approved in 2018 following the enactment of 2017 Wisconsin Act 256. It replaced an earlier version of Wis JI-Children 324, which was based on Wis. Stats. § 48.415(2)(a) prior to a 2006 revision. The earlier version of Wisconsin JI-Children 324 was renumbered Wis JI-Children 324B. The comment was revised in 2020 and 2021. This revision was approved by the Committee in June 2022; it updated the Comment.

New Legislation. 2017 Wisconsin Act 256 removes the requirement of showing that there is a substantial likelihood that the parent will continue to fail for the next nine months to meet the conditions established for the safe return of the child to the home in a continuing CHIPS TPR proceeding. The act replaces this requirement with a requirement for the petitioner to show that, if the child has been placed outside the home under a CHIPS order for less than 15 of the past 22 months, there is a substantial likelihood that the parent will not meet the conditions established for the safe return of the child to the home at the time the child will have been placed outside of the home for 15 of the last 22 months. For the instruction to be used in cases predating the law change, see Wis JI-Children 324A and 324B.

Wis. Stat. § 48.415(2)(a) (as amended by 2017 Wis. Act 256) reads:

> **48.415. Grounds for involuntary termination of parental rights**. At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights. If the child is an Indian child, the court or jury shall also determine at the fact-finding hearing whether continued custody of the Indian child by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child under s. 48.028 (4) (e) 1. and whether active efforts under s. 48.028 (4) (e) 2. have been made to prevent the breakup of the Indian child's family and whether those efforts have proved unsuccessful, unless partial summary judgment on the grounds for termination of parental rights is granted, in which case the court shall make those determinations at the dispositional hearing. Grounds for termination of parental rights shall be one of the following:
>
> (2) Continuing need of protection or services. Continuing need of protection or

services, which shall be established by proving any of the following:

(a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).

2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.

3. That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to an order listed under subd. 1., not including time spent outside the home as an unborn child; that the parent has failed to meet the conditions established for the safe return of the child to the home; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

Applicability of this Instruction. 2017 Wis. Act 256 was effective as of April 6, 2018. The Supreme Court has affirmed the application of the revised Continuing CHIPS elements in a TPR case filed after the Act's effective date, although the underlying CHIPS case predated the revision. See Eau Claire County Department of Human Services v. S.E., 2021 WI 56, 397 Wis.2d 462.

Note that 2005 Wis. Act 293 previously modified the fourth element of Wis. Stat. § 48.415(2)(a) to shorten, from twelve months to nine months, the post-petition timeline for parents to meet conditions for the safe return of the child. That enactment specifically provided that it applied to cases where orders for out of home placement were granted on or after the effective date. 2017 Wis. Act 256 does not contain such a provision.

In a 2019 decision, the Court of Appeals affirmed the application of revised § 48.415(2) to a TPR case that was filed after April 6, 2018, even though the original underlying CHIPS order and several extensions were made prior to that date. See Dane County Department of Human Services v. J.R., 2020 WI App 5, 390 Wis.2d 326, 938 N.W.2d 614. In 2021, the Wisconsin Supreme Court affirmed a court of appeals' decision agreeing with the circuit court and held that the amended version of Wis. Stat. 48.415(2)(a)3 applied during a TPR proceeding, even though the underlying CHIPS order was entered in 2016. See Eau Claire County DHS v. S.E., 2021 WI 56, 960 N.W.2d 391.

Failure of Prior Order to Contain Warning. In 2016, the Wisconsin Supreme Court reviewed an earlier decision Waukesha County v. Steven H., 2000 WI 28, 233 Wis.2d 344, 607 N.W.2d 607, which involved whether the parent was given a proper warning of possible termination. The Wisconsin Supreme

Court in St. Croix County Dep't of Health and Human Services v. Michael D., 2016 WI 35, 368 Wis.2d 170, 880 N.W.2d 107, said the plain language of § 48.415(2) does not require that the written notice must be in the last order or that six months must pass after the last order before the petition to terminate parental rights may be filed.

The Court held that the notice the mother received satisfied the statutory notice element of a TPR action grounded in continuing CHIPS set forth in Wis. Stat. § 48.415(2). The notice required under Wis. Stat. § 48.356(2)(a)1. was satisfied. Specifically, the Court said:

> In a TPR case based on the continuing CHIPS ground, Wisconsin Stat. §
>
> 48.415(2) does not require proof that notice was given in every CHIPS order removing a child from the home or extension thereof; it also does not require proof that notice was in the last CHIPS order. Rather, it requires proof that one or more of the CHIPS orders removing a child from the home, or extension thereof, contain the written notice required under § 48.356(2).

The court further held that Steven H. did not establish an unequivocal "last order, plus six-months rule." It said:

> Wisconsin Stat. § 48.415(2) does not use the term last order; rather, the legislature chose to use the phrase "one or more." Accordingly, if "one or more" of the CHIPS orders in a TPR case contains the statutorily prescribed written notice, regardless of whether it was the first, last, or any order in between, the notice satisfies the phrase "one or more." Likewise, the statutes do not require that six months must pass after the last CHIPS order before a TPR petition can be filed. Rather, the relevant statute requires proof that a child was "outside the home for a cumulative total period of 6 months or longer." Wis. Stat. § 48.415(2)(a)3.

Relevancy of Post-Petition Evidence on Substantial Likelihood of Not Meeting Conditions. The Committee believes that evidence of post-petition conduct may be relevant to the allegation that there is a substantial likelihood that the parent will not meet the conditions for the return of the child in the future. A sentence was added to the instruction on the fourth element to allow the jury to consider events and conduct since the petition was filed. See In re T.M.S., 152 Wis.2d 345, 448 N.W.2d 282 (Ct. App. 1989). For a decision discussing a parent's argument that the court erred in not admitting post-petition efforts of a parent, see the unpublished opinion Jefferson County Dep't of Human Services v. J.V., Appeal No. 2622. In another unpublished opinion, the court said it was error to instruct the jury with both Wis JI-Children 180 and 324A. In the case, the court said it was harmless error to give Wis JI-Children 180 because the jury was not asked to answer any question "comporting with Wis JI-Children 180." Portage County Dep't of Health and Human Services v. Tanya G., Appeal No. 2014AP86.

In Utero. The time while the child is in utero should not be counted when calculating the duration of a placement outside the parent's home.

Post-Petition Efforts of County Agency. For a discussion of the jury's consideration of post-petition efforts by the county agency in a TPR based on continuing need, see the unpublished opinion, State v. Stacee P., Appeal No. 2012AP169. The parent argued that the trial court erred in holding that the

"reasonable effort" obligation encompassed things that the agency did after the date the petition was filed and up to the date of trial. The court of appeals considered whether the trial court should not have allowed the jury to consider what the county agency did after the petition for termination was filed and up to the date of trial. The parent argued that the agency responsible for helping her meet the court-ordered conditions for the return of her children had to make the "reasonable effort" before the petition was filed and what the agency did after that was not material to the agency's "reasonable effort" obligation. The court of appeals disagreed, finding that the agency's duty to help the parent continues past the petition's filing date.

Relevancy of Pre-CHIPS Disposition Events. Pre-CHIPS disposition events may be admissible as relevant to the element of the likelihood that a parent will meet the conditions of return within the requisite period following the TPR hearing. LaCrosse Cty. v. Tara P., 2002 WI App 84, 252 Wis.2d 179, 643 N.W.2d 194. The court rejected the argument that this type of evidence is barred as "other acts" evidence. The court of appeals also noted that "events predating dispositional orders may be relevant to another issue at termination proceedings: whether a county department of social services made 'reasonable' efforts to provide services ordered by a court." 2002 WI App. 84, fn.4.

For a decision discussing Tara P. and involving the admissibility of "historical information" about the parent pre-dating the CHIPS order, see State v. Roberta W., Appeal No. 2013AP936 (not published; one-judge decision).

Indian Child Welfare Cases. For the use of this instruction and verdict in a TPR case involving the Indian Child Welfare Act 25 U.S.C. §§ 1901-1963 and Wis. Stat. § 48.028(e), see Wis JI-Children 420-424.

Impossibility to Perform. The trial judge must decide on a case-by-case basis whether to ask the jury about impossibility to perform where the parent alleges impossibility to meet the conditions of the dispositional order. See Kenosha County v. Jodie W., 2006 WI 93, 293 Wis.2d 530, 716 N.W.2d 845, where the supreme court examined whether a court may constitutionally find a parent unfit based solely on the parent's failure to meet an impossible condition of return. If the jury is asked to make a finding on impossibility, then the following special verdict question could be asked:

> 5. Was it impossible for (parent) to meet all the conditions established for the safe return of (child) to (parent)'s home?

For a decision discussing Jodie W. and whether the ground for termination was based on conditions for return that were impossible for the parent to meet, see Portage County Department of Health and Human Services v. Julie G., Appeal No. 2014AP1057 (one-judge decision, July 31, 2014). See also State v. Kiwana L., Appeal No. 2014AP2306 (one-judge decision, January 13, 2015). In Kiwana L., the parent argued that the circuit court violated her substantive due process rights when it found grounds for termination because she believed that the conditions of return were not narrowly tailored to address her mental health needs and financial hardships.

Verdict Question Answered by the Court. In most cases, there will be a determination by the trial judge as to question 1. It is recommended that the phrase "Answered Yes by the Court" be typed on the line. See SM-2 for a discussion of partial summary judgments, directed verdicts, and jury waivers/stipulations.

Judicial Notice of Underlying CHIPS Procedure. In some cases, it may be helpful to the jury and reduce the need for trial testimony to have the judge explain to the jury what CHIPS procedures have occurred leading up to the TPR proceeding. An optional explanation that could be used for this purpose is presented in SM-2 (Section No. 4). The committee recommends that the parties stipulate to its use.

Stating the Specific Services to be Provided. In Sheboygan County DHHS v. Tanya M.B., 2010 WI 55, 325 Wis.2d 524, 785 N.W.2d 369, the parents argued that the CHIPS dispositional orders were insufficient because they did not separately list the "specific services" to be provided by the department. The supreme court disagreed. Wisconsin Stat. § 48.355(2)(b)1. provides that the dispositional order be in writing and contain the following:

> 1. The specific services to be provided to the child and family, to the child expectant mother and family, or to the adult expectant mother and, if custody of the child is to be transferred
>
> to effect the treatment plan, the identity of the legal custodian.

The Wisconsin Supreme Court concluded:

> As stated, we conclude that the dispositional orders contained "specific services," as required by Wis. Stat. § 48.355(2)(b)1. We so conclude because § 48.355(2)(b)1. does not require a CHIPS dispositional order to separately list each individual service that the Department is ordered to provide so long as the Department is ordered to provide "supervision," "services" and "case management" and the order also provides detailed conditions that the parents must complete in compliance with the dispositional order.

The court said the dispositional order's conditions "implicitly" required the county department to provide services necessary to assist the parents in meeting the court-ordered conditions for the return of their children. The supreme court reasoned that the apparent purpose of § 48.355(2)(b)1. is to assure that the department will arrange services that are necessary to assist parents in meeting court-ordered conditions for the return of their children. However, the court recognized that how best to assist parents in meeting those conditions may change as parents make progress or encounter difficulty in changing their behavior. The court said that allowing the department flexibility in the manner in which it provides services to parents, permits the department to accommodate a parent's changing needs.

The decision in Tanya M.B. has been applied in several recent unpublished appellate decisions. Dane County DHS v. Samuel W., Appeal No. 2009 AP 2606 (decided October 14, 2010); Ozaukee County DHS v. Sarah H., Appeal No. 2010 AP 416 (decided August 18, 2010); Dane County DHS v. Tierra M., Appeal No. 2010 AP 1646 (decided September 23, 2010).

In Sarah H., supra, the court applied Tanya M.B. to the parent's claim that the dispositional order did not specify the services to be provided. The parent contended that the order was defective because it did not require the department to provide "supervision," "services," or "case management." The court of appeals disagreed with the parent's position stating:

> ¶5 We disagree. What this comes down to is an argument that the dispositional order must contain a magical phrase—"supervision, services and case management" and that

> the order specifically be directed, in the same breath, with a named social service department. We reject that argument. What the supreme court pointedly held was that "specific services" need not be listed in the order—all that is needed is a command by the trial court that the named social services department *do* services, *do* supervise the parent and *do* manage the parent and that the parent knows and the department knows that this is what needs to be done. The order in this case did just that. It orders services to be provided by the department and it orders the Department to take "responsibility" for the care of the parent-child relationship.

Opinions of Case Manager on Parenting Skills as Expert Testimony. For a discussion characterizing the testimony of a case manager that the parent would not be able to meet conditions necessary for the return of children in the future, see an unpublished decision (decided by one judge), State v. Gloria C., Appeal No. 2012AP1693. This decision considered whether expert testimony was required on this element in TPR case, based on continuing need. The trial court held that there is no requirement that an expert testify as to the fourth prong of a continuing CHIPS TPR case. The appellate decision held that a social worker with proper experience may testify as an expert witness as to a party's parenting skills. The court also noted that the legislation enacted on expert witness testimony (Wis. Stat. § 907.01, 907.02, and 907.03) was not effective when this action was commenced, 2011 Wisconsin Act 2, § 45.

Criminal History of Parent. In a 2012 case, a parent argued that the trial court should not have let the jury know about "his criminal history in its entirety." The trial court ruled that the parent's criminal history was relevant to whether the parent had met court-ordered conditions for the return of his children, and, if not, whether the parent would be able to meet those conditions. The appellate court said the trial court was correct in permitting the jury to see how the parent lived and how that affected where he placed his children on the spectrum of what he deemed important and where he would likely place them in the future. State v. Stacee P., 2012 AP167 (unpublished); decided June 12, 2012.

Cognitive Limitations of Parent. For a case involving a parent's argument that her cognitive limitations made it impossible for her to fulfill the conditions of return, see State v. Ebony, Appeal No. 2013AP613 (not published; one-judge decision). The parent argued that the conditions for return were not narrowly tailored to the children's safety needs and to her cognitive limitations.

For a case involving a parent's request that this instruction be modified to require the jury to first separately answer whether the county's services took into account the parent's characteristics ("specifically her learning disability") before answering whether the county had made a "reasonable effort to provide the parent the necessary services," see the unpublished opinion Barron County Dep't of Health and Human Services v. J.H., Appeal No. 2015AP1529 (one-judge). The decision said that modification of the verdict form to require the jury to separately answer whether the services the county provided considered the parent's characteristics was not legally required and was unnecessary given the circuit court's instruction to the jury and the parent's counsel's closing argument and questioning on the issue.

Parental Failures Prior to Incarceration. For a case examining whether the jury should have received a special instruction that an incarcerated parent's rights may not be terminated based solely upon conditions that were impossible to perform while incarcerated, see Ozaukee County Dep't of Human Services v. Callen D.M. Appeal No. 2013AP1157 (not published; one-judge decision). The court noted that the parent's inability to fulfill the conditions of return was due to her own failures prior to incarceration, not after. The decision differentiated the facts of the case from those in Kenosha Cty. DHS v. Jodie W.,

2006 WI 93 ¶19, 293 Wis.2d 530, 716 N.W.2d 845. There were 14 conditions in the dispositional order, several of which the parent failed to meet long before her incarceration. The court in Callen D.M. noted that the parent had over two and one-half years to comply with the CHIPS conditions before she entered custody.

For another decision discussing *Jodie W.* and a parent's conduct prior to incarceration, see Portage County Department of Health and Human Services v. Julie G., Appeal No. 2014AP1057 (one-judge decision, July 31, 2014).