

340 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABUSE: PATTERN OF ABUSIVE BEHAVIOR AND FELONY CONVICTION [WIS. STAT. § 48.415(5)(a)]

Child abuse is a ground for the termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (parent) caused the (death) (injury) of a child, as a result of which, (parent) was convicted of a felony?
2. Has (parent) exhibited a pattern of (physically) (sexually) abusive behavior which is a substantial threat to the health of (child)?

Before this ground may be established, (petitioner) must prove the following two elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (parent) has caused (the death) (the injury) of a child, and as a result of that (death) (injury), (parent) was convicted of a felony.¹ Question 1 of the special verdict addresses this element. [I have answered this question in the special verdict. The fact that I have answered question 1 "yes" should have no bearing on what your answer should be to question 2.]

Second, that (parent) has exhibited a pattern of (physically) (or) (sexually) abusive behavior which is a substantial threat to the health of (child). Question 2 of the special verdict addresses this element.

"Abusive behavior," as that term is used in the second element, means any conduct by (parent) which causes abuse to another person. A "pattern of abusive behavior" requires more than a single instance of abusive behavior. In determining whether a pattern has been shown, you may consider the number and frequency of incidents, the nature of the parent's behavior, the nature and seriousness of any injuries, and all of the circumstances surrounding any incidents of abusive behavior.

While it is not required that the abusive behavior be directed at (child), it is required that the pattern of abusive behavior constitutes a substantial threat to the health of (child). "Health" includes physical, emotional, or mental health.

[For cases involving allegations of physical abuse to a child, give the following:

"Abuse" means physical injury which is intentionally or recklessly caused by another person. "Intentionally" means that the person who causes the physical abuse has the purpose to cause physical abuse or is aware that his or her conduct is practically certain to cause that result. "Recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of another. "Abuse" does not include injury which is inflicted by accident.

"Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising. It also includes bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.]²

[For cases involving allegations of sexual abuse to a child, give the following:

"Abuse" means that a child has been subjected to (sexual intercourse) (sexual contact) (exploitation) (exposure of genitals) (forced viewing of sexual activity) (prostitution).

(Add relevant definition(s) from Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219.)]³

Before you may answer either of the questions 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 (parent) caused the (death) (injury) of a child, as a result of which, (parent) was convicted of a felony?

Answer: _____
Yes or No

2. Has (parent) exhibited a pattern of (physically) (sexually) abusive behavior which is a substantial threat to the health of (child)?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 340 and comment were originally approved by the Committee in 1996 and revised in 1997, 1999, and 2004. The change in 2004 conformed the burden of proof language to Wis JI-Civil 205. An editorial correction was made to Note No. 1 in 2005. The comment was revised in 2008, 2011, 2014, and 2016.

Wis. Stat. § 48.415(5)(a) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(5) Child abuse. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:

(a) That the parent has caused death or injury to a child or children resulting in a felony conviction.

Cases brought under this ground for termination of parental rights will be rare. Subsection (5)(a) requires the circumstance that a parent have a felony conviction relating to the death or injury of a child.

In an unpublished opinion, the court of appeals said that, "in addition to a felony conviction, this specific statutory ground for termination requires the showing of a pattern of abusive behavior that poses an ongoing substantial threat to the child." *K.C. v. B.S.-S.*, Appeal No. 2015AP1702 (unpublished; one-judge). In this same decision, the court emphasized that "a single conviction does not demonstrate a pattern of abusive behavior under Wis. Stat. § 48.415(5)." Citing *Monroe County v. Jennifer V.*, 200 Wis.2d 678, 683-84, 548 N.W.2d 837 (Ct. App. 1996).

Because of the absence of any clear definitions for the terms "pattern of abusive behavior" and "health," the scope of this ground is uncertain. Does this ground allow for proof of emotional abuse? If it is limited to physical and sexual abuse, does it include physical abuse harmful to the emotional health of the child? Some Committee members believe the section intended to address only physical and sexual abuse,

pointing to the terms of the alternative second elements. Others feel it should be read broadly. Other ambiguities include whether this ground for termination includes a parent who allows or encourages abuse by others, abusive conduct by a parent towards a spouse or other adult which emotionally harms a child, or abuse of property or animals that arguably harms a child.

The Committee has drafted the instruction to address cases involving physical or sexual abuse to a child. As drafted, this instruction also covers physical abuse by the parent to another adult. However, the definition of "abuse" needs to be modified where the pattern of abuse involves sexual abuse to an adult. See note 3, below. The Committee also agreed that "health" necessarily includes emotional and mental health. If a court permits proof on other "child abuse" theories, the instruction will need to be altered.

Summary Judgment and Directed Verdict. The Committee believes it is appropriate for the trial judge to answer question 1 where evidence of the conviction is received. See SM-2 following the instructions in this publication regarding the use of summary judgment and directed verdict in a TPR case.

For an unpublished decision involving summary judgment on "pattern of behavior" that is a substantial threat to the child, see *Racine County v. Renee D.*, Appeal No. 2012AP1974 (not published; one-judge decision).

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

NOTES

1. In most cases, it should not be necessary to define "caused" or "causes." If a definition is needed, the Committee suggests the following:

("Caused")("Causes") means that parent's behavior was a substantial factor in producing the bodily harm. It is not required that the parent's behavior was the sole cause or the only factor causing the death.

2. This definition of "abuse" is the same as in Wis JI-Children 215.

3. If the court has received evidence of "sexual abuse" which includes exploitation, exposure, or other matters discussed in Wis JI-Children 217, 218, 218A, 218B, 218C, 218D, or 219, the definitions used in those instructions should be included as appropriate. However, where the pattern of abuse involves allegations of sexual abuse to an adult, the definition of "sexual abuse" will need to be modified, because the definitions in the listed instructions (JI-Children 217 to 219) relate to sexual abuse to a child and not an adult.