

**346 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY [WIS. STAT. § 48.415(6)(a)]**

The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict:

1. Has (parent) failed to assume parental responsibility for (child)?

To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child.)

The term "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). Substantial parental relationship is assessed based on the totality of the circumstances throughout the child's entire life. In evaluating whether (parent) has had a substantial parental relationship with (child), you may consider factors, including, but not limited to, whether (parent) has expressed concern for or interest in the support, care, or well-being of (child), whether (parent) has neglected or refused to provide care or support for the child, whether (parent) exposed the child to a hazardous living environment, whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life.

Before you may answer the special verdict question "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) failed to assume parental responsibility for (child)?

Answer: \_\_\_\_\_

Yes or No

### COMMENT

Wis JI-Children 346 and comment were originally approved in 1996 and revised in 1997, 2001, 2004, 2005, 2007, and 2012. The comment was revised in 2008, 2010, 2011, 2012, 2014, 2015, and 2017.

Wis. Stat. § 48.415(6)(a) and (b) 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:

(6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

**Amendments.** This ground for involuntary termination of parental rights was substantially amended in 1996 and 2006. Provisions in 1995 Wisconsin Act 275 expanded the former statutory language to include: (1) mothers as well as fathers; (2) marital children as well as nonmarital children; and (3) fathers for whom paternity was adjudicated prior to the filing of the TPR petition. 2005 Wisconsin Act 293 amended the language in (6)(a) from "have never had a substantial parental relationship" to "have not had a substantial parental relationship."

**Totality-of-the-Circumstances Analysis.** In reviewing a termination of parental rights based on this statutory ground, the supreme court in *Tammy W-G. v. Jacob T.*, 2011 WI 30, 333 Wis.2d 273, 797 N. W.2d 854 adopted a totality-of-the-circumstances test. It said:

¶ 3 We conclude that Wis. Stat. § 48.415(6) (2007-08) prescribes a totality-of-the-circumstances test. When applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment.

For an unpublished decision applying the "totality-of-the-circumstances" analysis from *Tammy W-G*, *supra*, see *Patrick J.T. v. Shelly S.*, Appeal No. 2013AP778 (not published; one-judge decision). The parent in this case had a substantial parental relationship with her children during the first half of their lives, but had sporadic contact and failed to accept significant responsibility for them during the second half of their lives.

This instruction was cited in *State v. Michelle M.*, Appeal No. 2014AP1539 (unpublished; one-judge decision, January 27, 2015). This decision discussed the exposure of the child to "a hazardous living environment."

**Lack of Opportunity.** The court in *Tammy W-G.*, at ¶ 38, held that "although a parent's lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent's lack of involvement still may be considered in the totality-of-the-circumstances analysis.

Previously, this instruction contained the following sentence: "A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility." In 2011, the committee withdrew this sentence when it revised this instruction to reflect the holding in *Tammy W-G. v. Jacob T.*, *supra*. The revisions to the instruction replaced the withdrawn sentence with language instructing the jury to consider "reasons for the parent's lack of involvement" when assessing the circumstances. In deciding to withdraw the sentence, the Committee noted that: (1) the case law supporting this withdrawn sentence was dicta in *Ann M.M. v. Rob S.*, 176 Wis.2d 673, 683, 500 N.W.2d 649 (1993); and (2) was unanimously overruled *sub silentio* in *State v. Bobby G.*, 2007 WI 77, 301 Wis.2d 531, 734 N.W.2d 81. In *Bobby G.*, the court ruled:

Were the court or any member thereof to interpret the statute as not requiring that an unmarried biological father have the opportunity to develop a relationship with his child after he learns of the child, the constitutional issue that parties address at length would have to be decided. 2007 WI 77, at par. 3

**Statutory Factors for Evaluating Substantial Parental Relationship.** The list of examples in Wis. Stat. § 48.415(6)(b) of what a court may consider in evaluating whether a person has had a substantial parental relationship with a child is "non-exclusive." *State v. Bobby G.*, 2007 WI 77, ¶ 46.

**Father's Knowledge of Paternity.** In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the father did not know of the child's existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father until the TPR petition was filed, and therefore he had no opportunity to assume parental responsibility. *State v. Bobby G.*, 2007 WI 77. The supreme court held that the circuit court must consider the biological father's efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding. Wis JI-Children 346A should be used in a case involving the issue of whether the father knew or had reason to know that he was the parent.

In establishing the procedure to be used in termination of parental rights actions, Wis. Stat. § 48.42(2m) directs that notice is not required to a parent as a result of sexual assault or a parent of a nonmarital child. Section 48.42(2m)(b) provides that "by virtue of the fact that [a person] has engaged in sexual intercourse with the mother of the child, [the person] is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests.

**Neglect or Refusal to Provide.** The court in *Bobby G.*, *supra*, said the words "willful" and "refused" in § 48.415(6)(b) carry with them "the sense that the father knew or had reason to believe he was the father but . . . did not provide care or support." *State v. Bobby G.*, 2007 WI 77, ¶ 49.

**Incarcerated Parent.** See Wis JI-Children 346B in cases involving an incarcerated parent.

**Mother's Pre-Birth Behavior.** The Committee believes this ground allows the introduction of evidence as to the mother's pre-birth behavior. For a discussion of the issues on prebirth behavior, see the unpublished decision, *In re Termination of Parental Rights to Gabriella M.*, Case No. 00-3207.

**Parent's Marital Status.** In a case where the effect of the marital status of the parent is argued, the following sentence can be added to the instruction:

A parent's marital status, in and of itself, has no bearing on whether the parent has or has not failed to assume parental responsibility.

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