

346A INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY: KNOWLEDGE OF PATERNITY [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), after knowing or having reason to believe that he was (child)'s father?

A man has a duty to assume parental responsibility for a child as of the time he knows or has reason to believe he is the father of the 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) once he knew, or had reason to believe, that he was (child)'s father.

In determining when a father had reason to believe he was the father of the child, you may consider the circumstances of and likelihood of conception; what efforts, if any, he did or reasonably should have undertaken to establish whether a child was conceived; his knowledge or lack of knowledge of the birth of the child; whether he did or did not file a declaration of paternal interest; his efforts or lack of efforts to establish paternity or assist authorities in establishing paternity; what efforts others, including the mother,

relatives, child support enforcement or child welfare authorities made to establish paternity or apprise him of his paternity; his knowledge or lack of knowledge of those efforts; his responsiveness or lack of responsiveness to those efforts; any information that would lead him to believe that he was not the father of the child; any efforts to preclude him from determining that status or of the existence of the child and all other evidence bearing on that issue.

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), after knowing or having reason to believe that he was (child)'s father?

Answer: _____

Yes or No

COMMENT

Wis JI-Children 346A and comment were approved by the Committee in 2010 and revised in 2011 and 2017. The comment was also revised in 2012, 2014, and 2019. The revision to the instruction in 2017 provides for a single verdict question. Previously, the instruction used a two-question format, *i.e.*

- “1. Did (parent) know or have reason to believe he was (child)'s father?
2. Has (parent) failed to assume parental responsibility for (child)?”

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.

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.

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

For an unpublished decision discussing this instruction, see *Dane County Dep't of Human Services*, Appeal No. 2013AP462 (not published; one-judge decision).

Statutory Factors for Evaluating Substantial Parental Relationship. The list of examples in Wis. Stat. § 48.415(6)(b), shown on page 3, of what a court may consider in evaluating whether the

person has had a substantial parental relationship with the 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 parent 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.

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.

For an unpublished decision discussing this instruction, see *Dane County Dep't of Human Services v. John L.-B.*, 2013AP462 (May 16, 2013) (not published; one-judge decision). This decision discusses whether the trial court should have directed a verdict and changed the jury's answer on whether the father had knowledge of paternity. See also *E.M.K. v. Z.T.R.*, 2018AP1896 (May 1, 2019) (not published; one-judge decision), affirming the trial court's decision to provide JI 346 rather than 346A. The court ruled that there was no dispute that the respondent had reason to believe he was the father before the child's birth, although another man had sexual relations with the child's mother during the conceptive period.

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.

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 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.