

346B INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY: INCARCERATED PARENT [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 the 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.

The evidence in this case indicates that (parent) was incarcerated during some of the periods of time under consideration in this case. Incarceration of a parent does not in itself establish failure to assume parental responsibility.

In determining whether an incarcerated parent has or does not have a substantial parental relationship with the child, in addition to the considerations indicated in other parts of this instruction, you may consider the following factors and all other evidence bearing on this issue:

- The reasons for the incarceration; the nature of the underlying criminal behavior; whether the parent engaged in that behavior knowing that the resultant incarceration or potential incarceration would prevent or hinder the parent from assuming his or her parental responsibilities.
- Efforts to establish a substantial parental relationship despite incarceration, including but not limited to:
 - Whether the parent offered to pay child support and the parent's financial ability or inability to do so;
 - Requests for visitation with the child and, if permitted, the success and quality of those visits;
 - Appropriate efforts to communicate with the child or with those responsible for the care and welfare of the child; whether any such efforts were prohibited or impeded by other individuals;
 - Requests or absence of requests for information relating to the child's education, health and welfare;
 - Responsiveness or lack of responsiveness of the parent to efforts, if any, of others to involve the parent in the life of the child;

- Efforts, or lack of efforts, to enlist available, appropriate family members or friends in meeting the physical, financial and emotional needs of the child; the extent and success of any such efforts.

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

The instruction was approved in 2010 and revised in 2011. The comment was approved in 2010 and revised in 2011, 2012, 2013, 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.

This instruction was cited with approval in *State v. Delano W.*, Appeal No. 2013AP2445 (unpublished; one-judge decision, March 14, 2014).

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.

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For an unpublished decision discussing this instruction, see *Dane County Dep't of Human Services v. John L.-B.*, 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. If knowledge of paternity is also at issue by an incarcerated father, then JI-Children 346A and 346B should be merged and a verdict question on knowledge or belief of paternity should be added. 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

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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.*, Appeal No. 2013AP462 (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.

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.

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.