

371 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: PARENTHOOD AS A RESULT OF A SEXUAL ASSAULT [WIS. STAT. § 48.415(9)] (WHERE A JUDGMENT OF CONVICTION OR ADJUDICATION OF DELINQUENCY EXISTS)

Parenthood as a result of a sexual assault is a ground for termination of parental rights.

Your role as jurors will be to answer the following questions in the special verdict:

1. Did (respondent) sexually assault (child's mother)? Because there is [a final judgment of conviction] [an adjudication of delinquency] indicating that (respondent) sexually assaulted (child's mother) on (date), there is no dispute on this question and I have answered the question.

If the answer to question 1 is "yes," answer question 2:

2. Did this sexual assault result in the conception of (child)?

In answering question 2, you should consider all the evidence regarding the possible time of conception. Wisconsin law allows (petitioner) to prove that (respondent) is the parent of (child) as a result of a sexual assault by proving that (respondent) sexually assaulted (child)'s mother during a time (child) could have been conceived.

[Where evidence is presented that the child weighed 5 2 pounds or more at birth give the following: If you find that (child) weighed 5 pounds, 8 ounces or more at birth, (he) (she) is presumed to have been conceived within a time period extending from 240 to 300 days before birth. Therefore, you may find the conceptive period for (child) to have been between the ____ day of ____, 20 __, and the ____ day of ____, 20 __, unless you are persuaded to the contrary by other evidence.]

SPECIAL VERDICT

1. Did (respondent) sexually assault (child's mother)? Because there is [a final judgment of conviction] [an adjudication of delinquency] indicating that (respondent) sexually assaulted (child's mother) on (date), there is no dispute on this question and I have answered the question.

Answer: Yes

If the answer to question 1 is "yes," answer question 2:

2. Did this sexual assault result in the conception of (child)?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 371 and comment were approved by the Committee in 2001. An editorial correction was made to paragraph 3 of the instruction in 2005. The comment was revised in 2007, 2008, and 2011.

Wis. Stat. § 48.415(9) 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:

(9) PARENTHOOD AS A RESULT OF SEXUAL ASSAULT. (a) Parenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of sexual assault in violation of s. 940.225(1), (2) or (3), 948.02 (1) or (2), 948.025, or 948.085. Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgment of conviction or other evidence produced at a fact-finding hearing under § 48.424 indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the mother of the child.

Wis. Stat. § 940.225(1), (2), and (3) apply to sexual assaults; Wis. Stat. § 948.02(1) and (2) apply to a sexual assault of a child. Wis. Stat. § 948.025 applies to repeated acts of sexual assault to a child.

Conceptive Period. The bracketed paragraph is adapted from Wis JI-5001 (paternity) and Wis. Stat. § 891.395 which establishes a presumption as to the conceptive period. According to the presumption, there is a 60-day period of conception if the child's birth weight is 5 2 pounds or more. A court may limit the period of conception to less than 60 days when a child is full term and competent evidence of a conceptive period contrary to the 60-day period is presented. See *State ex rel. J.A.S. v. M.E.S.*, 142 Wis.2d 300, 418 N.W.2d 32 (Ct. App. 1987) (a paternity proceeding).

Use of This Instruction. The language of this TPR statutory ground is of concern to the Committee. The heading to the subsection, "Parenthood as a Result of Sexual Assault," suggests that petitioner must prove that the assault of the mother by the respondent resulted in the conception of the child. This interpretation is bolstered by the subsection's language which requires the petitioner to prove that the child was conceived as a result of sexual assault in violation of designated provisions of the criminal code.

The statutory framework for this TPR ground is best understood and applied where the only contact between the respondent and the child's mother during the conceptive period was in the context of a sexual assault that biologically could cause a pregnancy. The petitioner, under these facts, must only establish: (1) the sexual assault (through the final judgment of conviction or other evidence) and (2) the possible time of conception. A paternity test is not required because paternity is not challenged by the respondent.

This statutory ground is not so easily understood and applied, however, in scenarios involving incidents between the respondent and the mother of **both** consensual intercourse and one or more sexual assaults during the conceptive period. Paternity tests are obviously not yet sophisticated enough to identify the specific physical event "causing" or "resulting" in a child's conception. In these scenarios, the statutory framework is problematic, seemingly requiring the petitioner to prove what is scientifically impossible to prove.

In attempting to resolve this statutory conundrum, some believe the legislature recognized this proof problem and eased the petitioner's burden by allowing "conception as a result of sexual assault" to be proved by a conviction of a sexual assault committed during a possible time of conception. This language in effect establishing a statutory presumption seems to permit termination of a father's rights for sexually assaulting the mother during her conceptive period. This interpretation conflicts, however, with the clear language of the subsection's title and first sentence which requires that the assaultive behavior resulted in conception.

Notice and Standing Issues. See Wis. Stat. § 48.42(2m). According to this subsection, a person who under the subsection is not given notice does not have standing to appear and contest a TPR petition. This limitation on notice, and therefore standing, does not apply to a male who is under 18 years of age at the time of the sexual assault.

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