

371A INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: PARENTHOOD AS A RESULT OF A SEXUAL ASSAULT [WIS. STAT. § 48.415(9)] (WHERE NO 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)?

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 1, a sexual assault occurs when [describe the elements of the appropriate sexual assault statute; see the appropriate jury instruction from **Wisconsin Jury Instructions-Criminal** for Wis. Stat. § 940.225(1), (2), or (3); § 948.02(1) or (2); or § 948.025.]

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)?

Answer: _____
Yes or No

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 371.1 and comment were approved in 2001. The instruction was renumbered in 2005. An editorial correction was made to paragraph 4 of the instruction in 2005. The comment was revised in 2007 and 2011.

Wis. Stat. § 48.415(9m) 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.

[Note: 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; and 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. For commentary on using this instruction, see Wis JI-Children 371. In cases where no judgment of conviction or delinquency adjudication exist, the petitioner must establish that a sexual assault in violation of specific sections of the criminal code occurred. In such cases, the instruction needs to be tailored to the specific statutory ground. The Committee recommends using the appropriate sexual assault instructions from **Wisconsin Jury Instructions-Criminal** to explain the elements of the crime of sexual assault.

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.