

372 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: COMMISSION OF A FELONY AGAINST A CHILD [WIS. STAT. § 48.415(9m)]

NO INSTRUCTION IS RECOMMENDED.

COMMENT

Wis JI-Children 372 comment was approved by the Committee in 1997 and revised in 1999, 2005, 2008, 2009, 2011, 2012, and 2016.

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:

(9m) Commission of a felony against a child. (a) Commission of a serious felony against one of the person's children, which shall be established by proving that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and that the person whose parental rights are sought to be terminated has been convicted of that serious felony as evidenced by a final judgment of conviction.

(am) Commission of a violation of s. 948.051 involving any child or a violation of the law of any other state or federal laws, if that violation would be a violation of s. 948.051 involving any child if committed in this state.

(b) In this subsection, "serious felony" means any of the following:

1. The commission of, the aiding or abetting of, or the solicitation, conspiracy or attempt to commit, a violation of s. 940.01, 940.02, 940.03 or 940.05 or a violation of the law of any other state or federal law, if that violation would be a violation of s. 940.01, 940.02, 940.03 or 940.05 if committed in this state.

2. a. The commission of a violation of s. 940.19 (3), 1999 stats., a violation of s. 940.19 (2), (4) or (5), 940.225 (1) or (2), 948.02 (1) or (2), 948.025, 948.03 (2) (a), (3) (a), or (5) (a) 1., 2., or 3., 948.05, 948.051, 948.06 or 948.08, or a violation of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies.

b. A violation of the law of any other state or federal law, if that violation would be a violation listed under subd. 2. a. if committed in this state.

3. The commission of a violation of s. 948.21 or a violation of the law of any other state or federal law, if that violation would be a violation of s. 948.21 if committed in this state, that resulted in the death of the victim.

The Committee concluded that a jury instruction for this ground was neither necessary nor appropriate except in the rare case where parenthood is in question. In a case based on § 48.415(9m)(a), there will be a question of whether the child was the respondent's child. The statute provides that the fact of conviction in the underlying criminal proceeding, as evidenced by the final judgment of conviction, is conclusive in establishing this ground for termination. See *Lee v. State Board of Dental Examiners*, 29 Wis.2d 330, 139 N.W.2d 61 (1966); *In re Estate of Safran*, 102 Wis.2d 79, 306 N.W.2d 27 (1981). Whether the conviction resulted from a trial, guilty plea, or no contest plea, the judgment of conviction is admissible and determinative. *Lee, supra* at 334-35; *Safran, supra* at 97.

Child Trafficking. In April, 2012, the governor signed SB536 which allows courts to terminate parental rights in cases involving child trafficking. Under existing law, the parental rights of a parent to his or her child may be terminated involuntarily if the person commits a serious felony against one of his or her children. Under SB536, a parent's parental rights may also be terminated involuntarily if the parent commits the offense of trafficking of a child. The legislation amended the title to Wis. Stat. § 48.415(9m).

Use of Summary Judgment and Directed Verdicts. The Wisconsin Supreme Court has held that summary judgment is available in the first phase of a TPR proceeding at which parental unfitness is determined. *In re Termination of Parental Rights to Alexander V.*, 2004 WI 47, 271 Wis.2d 1, 678 N.W.2d 856. See Wis JI-Children SM-2 which discusses this decision and the use of summary judgments and directed verdicts.

Conviction. Trial courts need also be aware that the Wisconsin Court of Appeals held that the term "conviction," as used in Wis. Stat. § 48.415(5)(a) (child abuse), means a "conviction after the appeal as of right has been exhausted. The appeal as of right is limited to the right to appeal to the court of appeals under sec. 808.03, Stats." *Monroe County v. Jennifer V.*, 200 Wis.2d 678, 690, 548 N.W.2d 837 (Ct. App. 1996).

Attempts. The Committee believes that attempts to commit a serious felony are within the statute's language.

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

In 2016, the Wisconsin legislature passed 2015 Wisconsin Act 366 which created the crime of engaging in repeated acts of physical abuse of the same child. The act requires that, to be found guilty, the defendant engaged in at least three acts of physical abuse against the child within a specified period.