

5001 PATERNITY: CHILD OF UNMARRIED WOMAN

It is undisputed in this case that the petitioner, _____, gave birth to a (male, female) child in the _____ of _____, County of _____, State of _____, on the _____ day of _____, 20____, and that at the time of the birth of that child, the petitioner was unmarried. The petition in this action alleges that (respondent) is the father of that child.

(Respondent) denies that he is the father of the petitioner's child, and it is for you, the jury, to determine from the evidence, under my instructions, whether (respondent) is the father of (child).

Wis JI Civil 110, Arguments of Counsel

Wis JI Civil 115, Objections of Counsel

Wis JI Civil 120, Judge's Demeanor

Wis JI Civil 130, Stricken Testimony

Wis JI Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI Civil 260, Expert Testimony

Wis JI Civil 265, Expert Testimony: Hypothetical Question

Wis JI-Civil 205, Burden of Proof: Middle

The verdict consists of only one question.

"Is the respondent, _____, the father of _____, born on the _____ day of _____, 20____?"

You must answer this question either "yes" or "no."

It is not necessary for (petitioner) to prove the exact date on which the child was conceived. It must be proved to have occurred on such a date as will satisfy you [by the degree of proof required] that (child) was the result of sexual intercourse with (respondent).

The testimony in this case established that the child, _____, was born on the ____ day of _____, 20____, and weighed _____ lbs. _____ ozs. at birth.

A section of the Wisconsin statutes provides that the mother is competent to testify as to the child's birth weight. Where such birth weight is 5 ½ pounds or more, the child is presumed to be full term (unless competent evidence to the contrary is present). The conception of the child shall be presumed to have occurred within a span of time extending from 240 to 300 days before birth (unless competent evidence to the contrary is presented to the court).

Therefore, petitioner's child is presumed to have been conceived between the day of _____, 20____, and the _____ day of _____, 20____.

(Previously the court ordered (child), (petitioner), and (respondent) to submit to genetic tests. Although so ordered, (respondent) refused to submit to the genetic test. You may consider the refusal along with all the other evidence in the case in determining whether he is the father.)

Previously, the court ordered the child, the petitioner, and the respondent to submit to genetic tests. The reports of those tests have been received in evidence as Exhibit _____. The genetic test establishes a statistical probability of paternity. You may give the test

results such weight as you deem appropriate on the issue of whether (respondent) is the father of (child).

(If the presumption of paternity applies, give the following instruction.)

In this case, the genetic test report establishes a statistical probability of _____% that (respondent) is the father of (child). From this genetic test, a presumption arises that (respondent) is the father of (child). But there is evidence in the case which may be believed by you that (respondent) is not the father. You must resolve the conflict. Unless you are convinced by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that he is not the father, you must consider this presumption as conclusive evidence of paternity and find that he is the father.

Wis JI-Civil 180, Five-Sixths Verdict.

Now, members of the jury, the duties of counsel and the court have been performed. The case has been argued by counsel. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors, selected for this important duty. You will not be swayed by sympathy, prejudice, or passion. You will be careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and, as upright citizens, to render a just and true verdict.

When you retire to the jury room, your first duty will be to elect one juror to preside over your deliberations and write in the answer you have agreed upon. His or her vote,

however, is entitled to no greater weight than the vote of any other juror. When your deliberations are concluded and your answer inserted in the verdict, the presiding juror will sign the verdict, fix the date on the verdict, and all of you will return with the verdict into the court.

The clerk may now swear the bailiffs.

SPECIAL VERDICT

Is the respondent, _____, the father of _____, born on the _____ day of _____, 20____?

Answer:
Yes or No

COMMENT

This instruction was originally approved in 1988 and revised in 1995, 1996, and 2002. The Comment was revised in 2021. The 2002 revision amended the language regarding the burden of proof to conform to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The 2021 revision amended the Comment to reflect statutory changes as provided in 2019 Wisconsin Act 95 concerning "paternity."

Wis. Stat. § 767.47(8) provides that the party bringing the action shall have the burden of proof by clear and satisfactory preponderance of the evidence. The Committee interprets that language to mean the middle burden as expressed in Wis JI Civil 205.

Wis. Stat. § 767.48(4). If any party refuses to submit to a genetic test, this fact shall be disclosed to the fact finder.

Wis. Stat. § 767.50(1). The trial shall be by jury only if the respondent verbally requests a jury trial either at the initial appearance or pretrial hearing or requests a jury trial in writing prior to the pretrial hearing.

Wis. Stat. § 767.50(2). The jury shall consist of 6 persons with the verdict to be agreed upon by at least 5 jurors.

Wis. Stat. § 767.475(3). Evidence as to the time of conception may be offered as provided in Wis. Stat. § 891.395.

Wis. Stat. § 767.48(1m). If the statistical probability of the respondent being the father is 99.0% or higher, he shall be rebuttably presumed to be the child's parent.

Wis. Stat. § 891.395 provides:

In any paternity proceeding . . . , the mother shall be competent to testify as to the birth weight of the child whose paternity is at issue, and where the child whose paternity is at issue weighed 5 1/2 pounds or more at the time of its birth, the testimony of the mother as to the weight shall be presumptive evidence that the child was a full term child, unless competent evidence to the contrary is presented to the court. The conception of the child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented to the court.

The Committee revised the paternity instruction in 1988 in response to legislation and decisions of the court of appeals and supreme court. The Wisconsin Legislature in the 1987-89 budget bill (1987 Wisconsin Act 27) revised procedures in paternity actions.

The court of appeals in 1987 held that before the jury can consider the statistical probability of paternity as shown by blood tests as evidence of paternity, it must first find that the mother and the alleged father had intercourse during the conception period. In re Paternity of M.J.B., 137 Wis.2d 157, 404 N.W.2d 64 (Ct. App. 1987). See also In re Paternity of Taylor R.T., 199 Wis.2d 500, 544 N.W.2d 926 (Ct. App. 1996); T.A.T. v. R.E.B. 144 Wis.2d 638, 650, 425 N.W.2d 404 (1988). Therefore, the court of appeals found that the jury instruction should provide that if the evidence does not prove that the mother and alleged father had sexual intercourse at a time when the child could have been conceived, then the jury should find nonpaternity regardless of the probability of paternity results in the blood test reports. The supreme court reversed In re Paternity of M.J.B., 144 Wis.2d 638, 425 N.W.2d 404 (1988). The court stated:

We disagree with the court of appeals that an independent determination of sexual intercourse must be made by the jury before it can consider the statistical probability of paternity as evidence of paternity. Section 767.50 provides that "the main issue shall be whether the alleged . . . father is or is not the father of the mother's child." It is true that one of the elements in a paternity suit is sexual intercourse between the mother and alleged father occurring during the conceptive period. However, the occurrence of sexual intercourse during the time of possible conception is not an issue separate from the main issue. It does not require an independent determination by the jury; it is an element of the case. If the petitioner fails to introduce sufficient evidence of sexual intercourse to establish a prima facie case of paternity, the defendant can simply move for a dismissal of the case. Likewise, the petitioner is precluded from introducing the blood test results until evidence of sexual intercourse is received.

Effect of Statutory Presumption. The presumption of paternity only applies where each set of admissible blood tests is 99.0% or higher. In re Paternity of J.M.K., 160 Wis.2d 429, 465 N.W.2d 833 (Ct. App. 1991). In J.M.K., there was blood test data showing a 97.06% probability and additional blood tests showing a 99.45% probability. The trial court refused to instruct the jury on the rebuttable presumption of paternity as contained in this instruction and the court of appeals affirmed. The court of appeals noted that the record disclosed no request to instruct the jury on the presumption if it chose to accept the higher test result nor did the parties present evidence on the superiority of one test over the other. The court of appeals, therefore, did not address the propriety of a "modified presumption instruction in such cases. J.M.K., supra at 433.

2019 Wisconsin Act 95 [effective date: August 1, 2020] created a new legal presumption of paternity. Under the act, a man is presumed to be a child's father if no other man is presumed to be the father, and the man has been conclusively determined from genetic test results to be the father.

Under Wis. Stat. § 767.804, genetic test results constitute a conclusive determination of paternity if all of the following conditions apply:

1. Both the child's mother and the male are over the age of 18 years.
2. The genetic tests were required to be performed by a county child support agency under s. 59.53 (5) pursuant to s. 49.225.
3. The test results show that the male is not excluded as the father and that the statistical probability of the male's parentage is 99.0 percent or higher.
4. No other male is presumed to be the father under s. 891.405 or 891.41 (1).