7050 INVOLUNTARY COMMITMENT: MENTALLY ILL

(Insert Wis JI-Civil 100, Opening.)

A petition has been filed seeking the involuntary commitment of (respondent). The petition alleges that (respondent) is mentally ill; that (his) (her) mental illness is subject to treatment; and that (he) (she) is dangerous to (himself) (herself) or another person.

The fact that a petition has been filed is not evidence that (respondent) is mentally ill, dangerous, or a proper subject for treatment. Our law presumes that a person is not mentally ill until you are convinced that the person is mentally ill. The burden of proving the allegations in the petition is on (petitioner).

This is a civil, not a criminal, case. [The fact that the district attorney is present does not mean that (respondent) is accused of a crime. The district attorney and _____, the other attorney, are required to be here by the Wisconsin statutes.] While (respondent) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of (respondent)'s personal liberty. Therefore, you should approach this task with a sense of serious duty.

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: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

At the end of the trial, I will give you a special verdict consisting of three questions.

Wis JI-Civil 205, Middle Burden of Proof

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

Question 1 asks: Is (respondent) mentally ill? The term "mentally ill" means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs the judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.

Question 2 asks: Is (respondent) dangerous to (himself) (herself) or to others?

A person is dangerous to (himself) (herself) or to others if (he) (she):

[NOTE: SELECT THE BRACKETED PARAGRAPH(S) THAT (APPLIES) (APPLY).]

[Evidences a substantial probability of physical harm to (himself) (herself) as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.] [or]

[Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt, or threat to do serious physical harm.] [or]

[Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is substantial probability of physical impairment or injury to (himself) (herself) or other individuals. The probability of physical

impairment or injury is not substantial (if reasonable provision for (respondent)'s protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services) (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor: if (respondent) is appropriate for services or placement under § 48.13(4) or (11) or § 938.13(4)) (where the subject is a minor: (Respondent)'s status as a minor does not automatically establish a substantial probability of physical impairment or injury). Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for (himself) (herself), by a person other than a treatment facility, does not constitute reasonable provision for the individual's protection available in the community.]

[or]

[Evidences behavior manifested by recent acts or omissions that, due to mental illness, (he) (she) is unable to satisfy basic needs for nourishment, medical care, shelter, or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the (respondent) receives prompt and adequate treatment for this mental illness. No substantial probability of harm exists (if reasonable provision for (respondent)'s treatment and protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services), (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor; if the (respondent) is appropriate for services or placement

under § 48.13(4) or (11) or § 938.13(4).) (Respondent)'s status as a minor does not automatically establish a substantial probability of death, serious physical injury, serious physical debilitation or serious disease. Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by any person other than a treatment facility, does not constitute reasonable provision for the individual's treatment or protection available in the community.] [or]

[Has recently had explained to (him) (her) the advantages and disadvantages of and alternatives to accepting a particular medication or treatment and; (1) Due to mental illness, (respondent) is (incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives) (substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives of (his) (her) mental illness to make an informed choice as to whether to accept or refuse medication or treatment); and (2) There is a substantial probability, as demonstrated by both (respondent)'s treatment history and (his) (her) recent acts or omissions, that (he) (she) needs care or treatment to prevent further disability or deterioration, and further, there exists a substantial probability that, if left untreated, (he) (she) will lack the services necessary for (his) (her) health or safety, and will suffer severe mental, emotional, or physical harm that will result in (respondent)'s loss of ability to function independently in the community or loss of cognitive or volitional control over (his) (her) thoughts or actions; and (3) There is no reasonable probability that (respondent) will avail (himself) (herself) of services in the community for care or

treatment necessary to prevent (him) (her) from suffering severe mental, emotional, or physical harm.]

Question 3 asks: Is (respondent) a proper subject for treatment? A person who is mentally ill is a proper subject for treatment if (his) (her) mental illness is treatable. In determining if (respondent)'s mental illness is treatable, you should consider whether the administration of any, or a combination of, techniques may control, improve, or cure the substantial disordering of the person's thought, mood, perception, orientation, or memory.

Do not concern yourselves with the length of custody or nature of any treatment that I might order as a result of your answers to the questions of the Special Verdict.

[**Note**: Give Wis JI-Civil 180, Five-Sixths Verdict and Wis JI-Civil 190, Closing.]

SUGGESTED VERDICT

Question 1: Is _____ mentally ill?

Answer:_____

Yes or No

Question 2: If you answered question 1 "yes," then answer this question:

Is _____ dangerous to (himself) (herself) or to others?

Answer:_____

Yes or No

[**Note**: For a trial involving several of the statutory definitions of "dangerous," see the comment below on the "dangerous" standard for advice on subdividing verdict question 2.]

Question 3: If you answered questions 1 and 2 "yes," then answer this question:

Is _____ a proper subject for treatment?

Answer:_____

COMMENT

The instruction was revised in 1981, 1989, 1998, 2002, 2006, 2014, and 2018. The comment was updated in 2011, 2012, 2014, 2015, 2016, 2017, 2018, 2019, and 2020.

While this verdict and jury instruction are designed for an alleged mentally ill case, they can, by substitution of the disability terms, be converted to a verdict and jury instruction for an alleged drug dependent case or developmentally disabled case.

Proper Subject for Treatment. The court of appeals approved the language of the instruction dealing with the determination of whether the individual is a proper subject for treatment in verdict question three. In Matter of Mental Condition of C.J., 120 Wis.2d 355, 354 N.W.2d 219 (Ct. App. 1984). A person with Alzheimer's disease is not a proper subject for treatment under Chapter 51. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179. See also Waukesha County v. J.W.J., Case No. 2016 AP 46-FT.

In Fond du Lac County v. Helen E.F., the supreme court said the court of appeals in C.J., supra, provided a "useful and well-constructed fact-based test for determining whether a subject individual is capable of rehabilitation, and therefore treatable under Wis. Stat. § 51.01(17)." The supreme court said the following test from C.J. accurately reflects the interests embodied in chs. 51 and 55.

> If treatment will "maximize[e] the [] individual functioning and maintenance" of the subject, but not "help [] in controlling or improving their disorder []," then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will "go beyond controlling . . . activity" and will "go to controlling [the] disorder and its symptoms," then the subject individual has rehabilitative potential, and is a proper subject for treatment. Fond du Lac County v. Helen E.F., supra, at ¶36.

Mental Illness. The definition of "mental illness" does not include alcoholism. Wis. Stat. § 51.20(13)(b).

Alzheimer's disease does not fall within the definition of a mental illness as it is a "degenerative brain disorder." An individual with Alzheimer's disease is not a proper subject for treatment. Ch. 51 provides for active treatment for those who are proper subjects for treatment, while Ch. 55 provides for residential care and custody of those persons with mental disabilities, such as Alzheimer's, that are likely to be permanent. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179.

"Dangerous" Standard. The history of the requirement of dangerousness was reviewed by the Wisconsin Supreme Court in Outagamie County v. Michael H., 2014 WI 127, 359 Wis.2w 272, 856 N.W.2d 603. In most cases, the trial judge would not give all five subsections of question 2, only the applicable ones based on the evidence. If a judge instructs using two or more of the different definitions of "dangerousness" and one of the definitions used in Wis. Stat. § 51.20(1)(a) 2.e. (the fifth paragraph under question (2), question 2 of the verdict should be broken into subdivisions which separately relates to the specific definition of dangerousness. This is because a person committed based on dangerousness under Wis. Stat. § 51.20(1)(a) 2.3. (the fifth bracketed paragraph under question 2) can only be treated on an inpatient basis for up to 30 days. See Wis. Stat. § 51.20(13)(g)2d.b.

The Wisconsin Supreme Court has upheld the fifth dangerousness standard against a constitutional challenge based on vagueness, overbreadth, equal protection, and due process. In re Commitment of Dennis H., 2002 WI 104, 255 Wis.2d 359, 647 N.W.2d 851.

The issue of dangerousness is an element in all commitment or recommitment proceedings concerning individuals not in prison, and the Committee urges the use of at least one or more of the five alternatives in the instruction as the evidence supports. For commitment or recommitment proceedings concerning individuals in prison, see Winnebago County v. Christopher S. (C.S. I), 2016 WI 1, 366 Wis.2d 1, 878 N.W.2d 109. See also, Matter of Commitment of C.S., 386 Wis.2d 612, 927 N.W.2d 576, 2019 WI App 16.

[REPORTER'S NOTE: On August 15, 2019, the Wisconsin Supreme Court accepted for review Winnebago County v. C.S., 388 Wis.2d 657, 933 N.W.2d 489 (Table), 2019 WI 90, on the following issue: Does Wis. Stat. § 51.61(1)(g) violate substantive due process because it does not require a finding of dangerousness to involuntarily medicate a prisoner? Oral argument was held on January 15, 2020.]

In 2014, 2013 Wisconsin Act 158 added the words "or other individuals" to Wis. Stat. § 51.20(1)(a)2c.

Threats. In Outagamie County v. Michael H., supra, the court concluded that in evaluating dangerousness, "an articulated plan is not a necessary component of a suicide threat." Paragraph 6. The court concluded that it did not need to adopt a precise definition for "threat" for purposes of Wis. Stat. § 51.20.

Showing of Dangerousness in Recommitment Proceedings Concerning Persons Not In Prison. If the individual has been the subject of inpatient treatment for mental illness immediately prior to commencement of the proceeding as a result of a voluntary admission, a commitment or protective placement or protective services ordered by a court, the requirements of a recent overt act, attempt, or threat to act or a pattern of recent acts, omissions, or behavior may be satisfied by a showing that there is a substantial likelihood, based on the individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn. Wis. Stat. § 51.20(1)(am). If the individual has been admitted voluntarily to an inpatient treatment facility for not more than 30 days prior to the commencement of these proceedings and remains under voluntary admission at the time of the commencement of these proceedings, the requirements of a specific recent overt act, attempt, or threat to act or pattern of recent acts or omissions may be satisfied by a showing of an act, attempt or threat to act, or a pattern of acts or omissions which took place immediately previous to the voluntary admission.

Therefore, if the proceeding is a recommitment proceeding, the following sentence should be added after the bracketed paragraph on page 5 of the instruction:

> This is a recommitment proceeding. Therefore, the law provides that you may also find that _____ is dangerous to himself) (herself) or others if you find that there is a substantial likelihood, based on _____'s treatment record, that _____ would be a proper subject for commitment if treatment were withdrawn.

Acceptance of Medication and Treatment. A petition under the fifth bracketed paragraph must be approved by the attorney general. Wis. Stat. § 51.20(1)(a)2.e. The probability of suffering severe

mental, emotional or physical harm is not substantial under this subd.2.e. if reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services or if the individual may be provided protective placement or protective services under § 55.06. See Wis. Stat. § 51.20 (1) (a)2.e.

Commitment is available under this fifth standard for individuals who have dual diagnoses; i.e. a diagnosis of mental illness and also a diagnosis of drug dependency or developmental disability. In re Kelly M., 2011 WI App 69, 333 Wis.2d 719, 798 N.W.2d 697.

Medication is a "service" within the meaning of the community services exclusion of the fifth standard. In re Kelly M., supra. Individuals who are under a Ch. 55 protective placement or who are a proper subject for a Ch. 55 protective placement come within the Ch. 55 exclusion within the fifth standard and Wis. Stats. § 55.14 should be utilized for the petition for the involuntary administration of medication.

Right to Remain Silent. Under Wis. Stat § 51.20(5), the subject individual has the right to remain silent at the commitment hearing. If requested by the individual, the trial court should instruct the jury on the individual's failure to testify. See Wis JI-Criminal 315.

Cooperation with Doctors. If there is evidence that the patient did not properly cooperation with the doctors, then this instruction should be included following the instruction on expert testimony:

> There is testimony in this case that _____ was unresponsive to the doctors. You are advised that he has the constitutional right to remain unresponsive and to say nothing. He was so informed by the court and by the officials at the hospital. He also had then the right to refuse treatment. In answering question 1, you may consider his silent behavior only if you are convinced that his silence was related to his mental condition and was not an exercise of his constitutional right to remain silent.

Temporary Protective Placement. If the jury returns a verdict finding that the individual is mentally ill and dangerous but not a "proper subject for treatment," the trial judge may consider ordering temporary protective placement for the individual pursuant to Wis. Stat. § 51.67 which states:

> **51.67 Alternate procedure; protective services.** (intro.) If, after a hearing under § 51.13(4) or 51.20, the court finds that commitment under this chapter is not warranted and that the subject individual is a fit subject for guardianship and protective placement or services, the court may, without further notice, appoint a temporary guardian for the subject individual and order temporary protective placement or services under ch. 55 for a period not to exceed 30 days. Temporary protective placement for an individual in a center for the developmentally disabled is subject to § 51.06(3). Any interested party may then file a petition for permanent guardianship or protective placement or services, including medication, under ch. 55. If the individual is in a treatment facility, the individual may remain in the facility during the period of temporary protective placement if no other appropriate facility is available. The court may order psychotropic medication as a temporary protective service under this section if it finds that there is probable cause to believe

> the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for an participate in subsequent legal proceedings. An individual is not competent to refuse psychotropic medication if, because of serious and persistent mental illness, and after the advantages of and alternatives to accepting the particular psychotropic medication have been explained to the individual ….

Definition of a Drug. In a case involving drug-dependency and the definition of the term "drug," see Wis. Stat. § 450.01(10) and § 961.01(11). See also an unpublished decision (one-judge) which discusses the court's jury instruction allowing the jury to consider multiple definitions of the term "drug." Marathon County v. Zachary W., Appeal No. 2014AP955.

Prisoner. Wis. Stat. § 51.20(1)(ar) governs the involuntary commitment of inmates of the Wisconsin state prison system. If a commitment or recommitment proceeding concerns a prisoner, § 51.20(1)(ar) replaces the third element of "dangerousness" with four additional elements. Specifically, under sec. 51.20(1)(ar), "a county must show that (1) the individual is an inmate of the Wisconsin state prison system; (2) the inmate is mentally ill; (3) the inmate is a proper subject for treatment and is in need of treatment; (4) appropriate less restrictive forms of treatment were attempted with the inmate, and they were unsuccessful; (5) the inmate was fully informed about his treatment needs, the mental health services available, and his rights; and (6) the inmate had an opportunity to discuss his treatment needs, the services available, and his rights with a psychologist or a licensed physician." For the involuntary commitment of a mentally ill prisoner, see Winnebago County v. Christopher S., 2016 WI 1, ¶27, 366 Wis.2d 1, 878 N.W.2d 109.