

**7050A INVOLUNTARY COMMITMENT: MENTALLY ILL:
RECOMMITMENT ALLEGING Wis. Stat. § 51.20(1)(am)**

(Insert Wis JI Civil 100, Opening.)

A petition has been filed seeking the involuntary recommitment 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.

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. If you find that (respondent) is mentally ill based on the evidence, that fact does not mean that you must find that (respondent) is also dangerous. The burden of proving each of 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.
 Wis JI-Civil 205, Middle Burden of Proof

Wis JI Civil 145, Special Verdict Questions: Interrelationship

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

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) 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.

Question 3 asks: Is (respondent) dangerous to [(himself) (herself)] or to others?

[NOTE: MORE THAN ONE STANDARD FOR DANGEROUSNESS MAY APPLY. SELECT THE STANDARD(S) ALLEGED AND SUPPORTED BY

SUFFICIENT EVIDENCE AS PUT FORTH BY THE PETITIONER]

[Under Standard A, a person is dangerous to (himself) (herself) if (he)(she) 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]

[Under Standard B, a person is dangerous to others if (he) (she) 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]

[Under Standard C, a person is dangerous to (himself) (herself) or others if (he) (she) 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]

[Under Standard D, a person is dangerous to (himself) (herself) if (he) (she) 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 (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 (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]

[Under Standard E, a person is dangerous to (himself) (herself) if (he) (she) 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.]

However, since this is a recommitment proceeding and therefore there may not be proof of recent acts or omissions demonstrating that (respondent) is dangerous, the law provides that you may find (respondent) to be dangerous to [(himself) (herself)] or to others if there is a substantial likelihood based on (respondent)'s treatment record that (respondent) would be a proper subject for commitment if treatment were withdrawn, meaning that (respondent) would meet one or more of the dangerousness standards described above, A through E, if treatment were withdrawn. This alternate avenue of showing dangerousness does not change the elements or quantum of proof required. It merely acknowledges that an individual may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness because they are currently receiving medication or treatment.¹ If you find that (respondent) is dangerous if treatment were withdrawn, you must state under which standard(s) (A, B, C, D, E) you came to this conclusion.

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 (respondent) mentally ill?

Answer: _____

Yes or No

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

Is (respondent) a proper subject for treatment?

Answer: _____

Yes or No

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

Is (respondent) dangerous to [(himself) (herself)] or to others?

Answer: _____

Yes or No

Question 3(a): If you answered question 3 “yes,” then answer this question: If you find

(respondent) dangerous if treatment were withdrawn, under which standard(s) has it been

proven by clear and convincing evidence that (respondent) is dangerous if treatment were

withdrawn? [SELECT THE STANDARD(S) ALLEGED AND SUPPORTED BY

SUFFICIENT EVIDENCE AS PUT FORTH BY THE PETITIONER and include:]

Standard A _____ Answer: Yes or No

Standard B _____ Answer: Yes or No

Standard C _____ Answer: Yes or No

Standard D _____ Answer: Yes or No

Standard E _____ Answer: Yes or No

[**Note:** For a trial involving several of the statutory definitions of “dangerous,” see the comment below on the “Dangerousness Standard in Recommitment Proceedings under Wis. Stat. 51.20(1)(am)” for advice on subdividing verdict question 3(a).]

NOTES

1. The language provided in the two sentences preceding the footnote is derived from the opinion in Matter of Commitment of C.J.A., 2022 WI App 36, ¶14, 404 Wis.2d 1978 N.W.2d 493 2022 WI App 36, citing Matter of Commitment of J.W.K., 2019 WI 54, ¶24, 386 Wis.2d 672, 927 N.W.2d 509.

COMMENT

This instructions and comment were approved by the Committee in September 2021. This revision was approved by the Committee in October 2022; it expanded on the note following question 3.

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., 2017 WI 57, 375 Wis.2d 542, 895 N.W.2d 783

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.

Dangerousness Standard in Recommitment Proceedings under Wis. Stat. 51.20(1)(am). If the individual has been the subject of inpatient or outpatient 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.

Specific factual findings must be made with reference to the subdivision of 51.20(1)(a)2. on which the recommitment is based. Langlade County v D.J.W., 2020 WI 41, 391 Wis.2d 231, 942 N.W.2d 277. The instructions and verdict must include any of the standard(s) that the evidence supports.

In addition to these considerations, specificity is also important in cases in which dangerousness is alleged under sec. 51.20(1)(a)2.e. ("Standard E"). That is because a person committed based on this standard may only be treated on an inpatient basis for up to 30 days. See Wis. Stat. sec. 51.20(13)(g)2d.b. Thus, knowing which standard forms the basis for a dangerousness finding will also affect disposition in the event both Standard E and another standard are alleged.

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.

Acceptance of Medication and Treatment. Medication is a "service" within the meaning of the community services exclusion of the Standard E (Wis. Stat. 51.20(1)(a)2.e.). In re Kelly M., 2011 WI App 69, 333 Wis.2d 719, 798 N.W.2d 697. 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 Standard E and Wis. Stats. § 55.14 should be utilized for the petition for the involuntary administration of medication. Commitment is available under Standard E 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., *supra*.

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 cooperate with the doctors, then this instruction should be included following the instruction on expert testimony:

There is testimony in this case that (respondent) was unresponsive to the doctors. You are advised that he/she has the constitutional right to remain unresponsive and to say nothing. He/She was so informed by the court and by the officials at the hospital. He/She also had then the right to refuse treatment. In answering question 1, you may consider his/her silent behavior only if you are convinced that his/her silence was related to his/her mental condition and was not an exercise of his/her 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., 2015 WI App 13, 359 Wis.2d 676, 859 N.W.2d 629.

Prisoner. When Wis. Stat. § 51.20(1)(ar) is pled, it governs the involuntary commitment of inmates of the Wisconsin state prison system. If a recommitment proceeding concerns a prisoner pursuant to § 51.20(1)(ar), the following elements must be proven: “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. While a finding of dangerousness is not required for commitment, it is required for an involuntary medication order in a Wis. Stat. sec. 51.20(1)(ar) proceeding. See Winnebago County v. Christopher S.(III), 2020 WI 33, 391 Wis.2d 35, 940 N.W.2d 875.

Psychotropic Medication Order. Where a psychotropic medication order is sought related to a commitment proceeding, a court, not a jury, makes the determination. Wis. Stat. § 51.61(1)(g)3.