

**2114 PHYSICAL ABUSE OR SEXUAL ASSAULT OF A CHILD BY A
PERSON RESPONSIBLE FOR THE WELFARE OF THE CHILD — §§
948.02(3m), 948.025(2m), and 948.03(5)**

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES
COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY
AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

ADD THE FOLLOWING TO WIS JI-CRIMINAL 2102-2105, 2107, or 2108-2113:¹

The information alleges not only that the defendant committed the crime of (name of offense)² of a child but also that the defendant was responsible for the welfare of the child who is alleged to be the victim of that crime.

If you find the defendant guilty, you must answer the following question:

"At the time of the (name of offense),³ was the defendant responsible for the welfare of (name of victim)?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant was responsible for the welfare of (name of victim) at the time of the (name of offense).⁴

A "person responsible for the welfare of a child" includes _____.⁵

If you are satisfied beyond a reasonable doubt that the defendant was responsible for the welfare of (name of victim) at the time of the (name of offense),⁶ you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2114 was originally published in 1990 and revised in 1995 and 1996. This revision was approved by the Committee in February 2003.

Sections 948.02(3m), 948.025(2m), and 948.03(5) were repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by §§ 948.02(3m), 948.025(2m), and 948.03(5) have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(6).

This instruction is drafted for use in cases involving any one of three provisions that enhance the penalty for offenses against children when those offenses are committed by a "person responsible for the welfare of the child." Each of the following statutes allows for increasing the maximum term of imprisonment by not more than 5 years: § 948.02(3m) for sexual assault of a child; § 948.025(2m) for repeated acts of sexual assault of a child; and § 948.03(5) for physical abuse of a child.

Sections 948.02(3m) and 948.025(2m) were created by 1995 Wisconsin Act 14 and apply to offenses committed on or after May 31, 1995.

The Committee has concluded that penalty enhancement provisions are best handled by submitting them to the jury as a special question. For other examples, see Wis JI-Criminal 990, 994, and 996. The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of physical abuse of a child, under Wis. Stat. § 948.03____, at the time and place charged in the information.

If you find the defendant guilty, answer the following question "yes" or "no":

"At the time of the physical abuse, was the defendant responsible for the welfare of (name of victim)?"

1. The penalty enhancement provision found in § 948.02(3m) applies to offenses defined in § 948.02(1) and (2). Wis JI-Criminal 2102 and 2104 are the instructions for those offenses.

The penalty enhancement provision in § 948.025(2m) applies to the offense defined in § 948.025. See Wis JI-Criminal 2107.

Sections 948.02(3m) and 948.025(2m) were created by 1995 Wisconsin Act 14 and apply to offenses committed on or after May 31, 1995.

The penalty enhancement provision in § 948.03(5) applies to offenses defined in § 948.03(2) and (3). Wis JI-Criminal 2108, 2109, and 2110 are the instructions for the three types of intentional physical abuse defined in sub. (2). Wis JI-Criminal 2111, 2112, and 2113 are the instructions for the three types of reckless physical abuse defined in sub. (3).

2. Use the name of the offense: "sexual assault" if the case involves § 948.02(3m); "repeated acts of sexual assault" if the case involves § 948.025(2m); "physical abuse" if the case involves § 948.03(5).

3. See note 2, supra.

4. See note 2, supra.

5. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; an employee of a public or private residential home, institution, or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child. [NOTE: "Stepparent" was added to the definition by 1995 Wisconsin Act 214 (effective date: May 1, 1996).]

The Committee concluded that the § 948.01(3) definition applies even though there is a slight difference in the wording of the phrase in § 948.03(5). Compare ". . . the person is responsible for the welfare of the child" in § 948.03(5) with "person responsible for the child's welfare" in § 948.01(3).

[NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).]

In State v. Sostre, 198 Wis.2d 409, N.W.2d (1996), the Wisconsin Supreme Court held that a live-in boyfriend, who is a volunteer caretaker of a child, is a "person . . . responsible for the welfare of [a] child" under § 948.01(3). The defendant had lived with the mother of the victim for about three years. During this time the defendant did everything the mother did with regard to taking care of the children, including feeding and bathing them. The child considered the defendant his father or stepfather, called him "Poppy," and had a father-son relationship with the defendant. The definition of "person responsible . . ." includes those who are "employed by one legally responsible for the child's welfare to exercise temporary control or care for the child." The court held:

A common meaning of the word "employed" is to "engage the service of" or "to make use of." Under these facts, it seems clear that the mother made use of the services of the defendant, or engaged the services of the defendant, in order to take care of her child when it was necessary for her to be away. In other words, the defendant was clearly "employed" by a person "legally responsible" for a child to "care for that child."

The fact that the word "employed" is usually equated with economic payment for services does not require a different result. Nor does the fact that a person in this defendant's position may not qualify as a "person responsible" for purposes of the privilege of parental discipline defined in § 939.45(5). That definition does not include the phrase "employed by one legally responsible . . ." that was at issue in this case. [State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), held that a live-in boyfriend was not covered by the privilege.] The court concluded the legislature specifically and deliberately defined the same term differently in the two statutes.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21, Neglecting a Child. State v. Evans, 171 Wis.2d 471,

492 N.W.2d 141 (1992). The definition of "person responsible . . ." in § 948.01(3) applies to § 948.21 and to the offenses covered by this instruction.

6. See note 2, supra.