

2152 FAILURE TO SUPPORT — § 948.22¹**Statutory Definition of the Crime**

Failure to support, as defined in § 948.22 of the Criminal Code of Wisconsin, is committed by one who intentionally fails for 120 or more consecutive days² to provide spousal or child support³ which the person knows or reasonably should know the person is legally obligated to provide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally failed to provide (spousal) (child) support.⁴

"Intentionally" means that the defendant had the mental purpose to fail to pay support or was aware that his conduct was practically certain to cause that result.⁵

IF THERE IS EVIDENCE THAT THE DEFENDANT FAILED TO PAY SUPPORT REQUIRED UNDER A COURT ORDER,⁶ ADD THE FOLLOWING:⁷

[Evidence has been received that the defendant failed to pay support payments required by a court order.

If you are satisfied beyond a reasonable doubt that the defendant knew or reasonably should have known that (he) (she) was required to pay support under a court order and failed to pay support payments as required, you may find that the failure to provide support was intentional, but you are not required to do so. You must not find that the failure to support was intentional unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not a defense that support was provided wholly or partially by any other person.]⁸

2. The failure to provide support continued for 120 or more consecutive days.⁹
3. The defendant (knew) (reasonably should have known) that (he) (she) was legally obligated to provide the (spousal) (child) support.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2152 was originally published in 1989 and revised in 1993 and 2001. This revision was approved by the Committee in August 2005 and involved updating footnotes 4 and 6.

This instruction is drafted for violations of § 948.22 that do not involve evidence of the affirmative defense provided by sub. (6). For offenses involving the affirmative defense, see Wis JI-Criminal 2152A.

"... [U]nder § 948.22, Stats., it does not matter that the support owed is an arrearage, when that arrearage accrued or what the current age of the child is. The crime is the intentional failure to pay child support during a 120-day consecutive-day period. Child support is 'an amount which a person is ordered to pay for the support of a child,' and its character is not changed by the passage of time or the name it is given. The crime is complete after each 120-day period during which the defendant intentionally fails to pay child support and continues until he or she no longer intentionally fails to pay child support. The statute of limitations begins to run from the end of each 120-day period." State v. Monarch, 230 Wis.2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999).

"... § 948.22, Stats., criminalizes the failure to pay arrearages even after the child for whom support is ordered attains majority. . . . [I]f a defendant's tax refunds are intercepted and are allocated to a given period, the defendant cannot be said to have failed to provide support for that period." State v. Lenz, 230 Wis.2d 529, 541, 602 N.W.2d 172 (Ct. App. 1999).

1. Failure to support under § 948.22 is a Class E felony if the failure continues for 120 or more consecutive days. (§ 948.22(2).) If the failure is for less than 120 consecutive days, the offense is punished as a Class A misdemeanor. (§ 948.22(3).) Wis JI-Criminal 2152 is drafted for the felony offense. It can be modified for a misdemeanor charge simply by dropping the phrase "for 120 or more consecutive days" wherever it appears and reducing the elements from three to two.

Subsection 948.22(2) has been interpreted to permit "a prosecutor to charge one count of felony nonsupport for each 120-day term a person fails to pay child support, even if that person failed to pay over one continuous period." State v. Grayson, 172 Wis.2d 156, 158 493 N.W.2d 23 (1992). Thus, "if a person fails to pay child support for 360 consecutive days, a prosecutor could charge him with three counts of felony nonsupport." Ibid., at note 1.

2. If the misdemeanor offense is charged, delete the phrase "for 120 or more consecutive days" from this paragraph and in the other places it appears. See discussion in note 1.

3. 1985 Wisconsin Act 56 added "grandchild support" to the statute. "'Grandchild support' means an amount which a person is legally obligated to provide under s. 49.90(1)(a)2 and (11)." Subsec. 948.22(1)(b). In a case involving a grandparent's failure to support, the suggested instruction needs to be modified by substituting "grandchild support" throughout the instruction.

4. The statute uses the terms "spousal" or "child" support and defines them by reference to other statutes using the terms. See subsecs. (1)(a) and (c) of § 948.22. For the purposes of instructing the jury, the Committee concluded that definition of "support" would rarely be necessary in the usual case. Should the facts present an issue, the statutes referenced in subs. (1)(a) and (c) may offer some guidance. But see State v. Smith, 2005 WI 104, 283 Wis.2d 57, 699 N.W.2d 508, quoted in note 6, below. Also see note 3, regarding the revision of the statute to include "grandchild support."

5. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct was practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally." The unusual composition of § 948.22 makes unclear the mental state that is required. With offenses involving the failure to do something, "intentionally" is usually interpreted to require a showing that the defendant be able to do what is required: a failure to do X cannot be "intentionally" done unless the person knew he was supposed to do X and had the ability to do it.

Two provisions of § 948.22 are inconsistent with this definition of "intentionally." Subsec. (4) provides that failure to pay the amount required by court order or an amount equal to that derived from the AFDC standards (§ 49.19(11)(a)1) is "prima facie" evidence of intentional failure to provide support. The Committee concluded that the "prima facie" case should be implemented as described in note 6, below.

The second problematical subsection is subsec. (6) which provides that ". . . affirmative defenses include but are not limited to inability to provide child or spousal support." As explained above, the usual definition of "intentionally" requires that there be ability to do that which is required. For a case involving the "affirmative defense," use Wis JI-Criminal 2152A.

6. In State v. Smith, 2005 WI 104, ¶34, 283 Wis.2d 57, 699 N.W.2d 508, the Wisconsin Supreme Court held that "whether a court of competent jurisdiction issued the child support underlying a prosecution for the crime of failure to pay child support is not an element of that crime."

7. Subsection (4) of § 948.22 recognizes two facts as "prima facie evidence" of intentional failure to provide support: failure to make payments required by court order, when the person knows or reasonably should have known that he or she is required to pay support under an order; or, in a situation where there is no court order, failure to pay an amount equal to the AFDC level set forth in § 49.19(11)(a)1, when the person knows or reasonably should have known that he or she has a dependent. The "knows or reasonably should have known" requirements were added to the statute by 1989 Wisconsin Act 212. (The instruction suggests an addition for a case involving a court order. For a case involving the AFDC formula, a similar addition would be necessary.)

The suggested paragraphs attempt to instruct on the effect of a prima facie case in the way required by § 903.03: if the jury finds that the basic fact (failure to pay as required by a court order) exists, it may find that the presumed fact (intentional failure to provide support) exists, but it is not required to do so. Before finding the defendant guilty, the jury must be satisfied beyond a reasonable doubt, from all the evidence, that the failure to support was intentional. See Wis JI-Criminal 225.

An instruction in these terms was approved in State v. Schleusner, 154 Wis.2d 821, 825, 454 N.W.2d 51 (Ct. App. 1990).

8. See § 948.22(5). A comparable provision in the previous version of this statute, § 940.27(6), was discussed in State v. Schleusner, note 7, *supra*.

Support payments made as a result of the state's interception of tax refunds count as support payments. See State v. Lenz, cited in the Comment preceding note 1, *supra*.

9. The basic offense is punished as a Class A misdemeanor. The penalty increases to that of a Class E felony if a person fails to provide support "for 120 or more consecutive days." In State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989), the court of appeals interpreted this part of the statute as it applies to an order requiring payment of 25% of income as child support. The court held that the state is not required to prove that the defendant in fact had income for 120 consecutive days where the amount of the support obligation is determined on a percentage basis.