

**2166 INTERFERENCE WITH CUSTODY OF A CHILD — § 948.31(1)(b)****Statutory Definition of the Crime**

Interference with the custody of a child, as defined in § 948.31(1)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period)<sup>1</sup> from a legal custodian with intent to deprive the custodian of custody rights without the consent of the custodian.<sup>2</sup>

**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 four elements were present.

**Elements of the Crime That the State Must Prove**

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.<sup>3</sup>
2. (Name of custodian) had legal custody<sup>4</sup> of (name of child) under a (court order)<sup>5</sup> (judgment) in an action for (specify the type of action).<sup>6</sup>
3. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours beyond the court-approved period of physical placement or visitation period) from (name of custodian) without the consent of (name of custodian).<sup>7</sup>

"Without consent" means no consent in fact.<sup>8</sup>

The act need not be accompanied by force or violence.

4. The defendant acted intentionally.

"Intentionally" means that the defendant acted with the mental purpose to (cause (name of child) to leave) (take (name of child) away) (withhold (name of child) for more than 12 hours beyond the court-approved period of physical placement or visitation period).

"Intentionally" also requires that the defendant knew that (name of custodian) had legal custody of (name of child) under a (court order (judgment))<sup>9</sup> and knew that (name of custodian) did not give consent to (cause (name of child) to leave) (take (name of child) away) (withhold (name of child)).

### **Deciding About Intent**

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four 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 2166 was originally published in 1989 and revised in 1994, 1997 and 2009. This revision was approved by the Committee in October 2014; it revised the Comment and footnotes.

This instruction is for a violation of § 948.31(1)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1834 which applied to what was essentially the same offense under § 946.71(3), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.31(1)(b), and this instruction, apply to situations where a person interferes with the rights of a child's legal custodian. The Committee concluded that the statute does not apply to a situation where a legal custodian allegedly interferes with rights that a non-legal custodian may have.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

Section 948.31(1)(b) begins with the statement: "Except as provided under chs. 48 and 938. . ." A similar statement preceded the definition of substantive offenses in § 946.71, 1985-86 Wis. Stats. That exclusion is believed to be intended to make it clear that legally authorized placements and interventions under chapters 48 and 938 are not to be considered to be violations of § 948.31(1)(b).

1. Section 948.31(1)(b) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period. . ." The Committee interprets this statute as prohibiting any causing to leave, any taking away, and the withholding for more than 12 hours beyond the court-approved period. That is, the "for more than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking.

The 2009 revision added all the statutory alternatives, in parentheses, to the text of the instruction. This was done to avoid the problem that arose in State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999), where the trial court may have inadvertently failed to completely revise the standard instruction for a "withholding" case. The error was not prejudicial because the court of appeals found the evidence was sufficient to support conviction for "taking away." See note 8, below.

"A defendant causes a child to leave a parent if the defendant is responsible for or brings about an abandoning, departing or going away from the parent. 'Causes to leave' suggests the defendant engages in some sort of mental, rather than physical, manipulation by doing things to persuade the child to leave the parent. Force or violence is unnecessary and the conduct need not be intentional." State v. Bowden, 2007 WI App 234, ¶16, 306 Wis.2d 393, 742 N.W.2d 332. Also see, State v. Samuel, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565.

Section 948.31(1)(b) was amended by 1989 Wisconsin Act 31, section 2836ym, to apply to a "period of physical placement" as well as to visitation periods. The same Act (at section 2836ap) created § 948.01(3m) to provide: "'Physical placement' has the meaning given in § 767.001(5)."

2. The statutory definition of this offense includes the statement: "This paragraph is not applicable if the court has entered an order authorizing the person to so take or withhold the child." The Committee assumes that court consent is usually a matter of record and can be clearly resolved. In a case where court consent is a factual issue, the Committee concluded that the matter should be treated in the same manner as other statutory exceptions. That is, the matter of court consent need not be included in the criminal complaint and only becomes an issue when it is raised by the evidence. If the issue is raised by the evidence, the state must prove beyond a reasonable doubt that there was no consent by the court. The phrase "or consent of the court" could simply be added at this point and to the third element.

Section 948.31(1)(b) was amended by 1989 Wisconsin Act 31 section 2836ym, to provide a new concluding sentence: "The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this paragraph." The same Act (at section 2836ag) created § 948.01(1g) to provide: "'Joint legal custody' has the meaning given in § 767.001(1)."

3. The statute applies to interfering with the custody of any "child," defined in § 948.01(1) as "any person who has not attained the age of 18 years." This is a change from the counterpart offense under prior law, which applied only to children under the age of 14. See § 946.71(4), 1985-86 Wis. Stats.

4. "Legal custodian" is defined as follows in § 948.31(1)(a) (as amended by 1989 Wisconsin Act 31, section 2836(1m):

(a) In this subsection, "legal custodian of a child" means:

1. A parent or other person having legal custody of the child under an order or judgment in an action for divorce, legal separation, annulment, child custody, paternity, guardianship or habeas corpus.
2. The department of children and families or the department of corrections or any person, county department under s. 46.215, 46.22 or 46.23 or licensed child welfare agency, if custody or supervision of the child has been transferred under ch. 48 or 938 to that department, person or agency.

Under former § 946.71, interference with custody transferred under chapter 48 was defined as a separate offense. Section 946.71(1), 1985-86 Wis. Stats.

Wis JI-Criminal 2166 is drafted for a case involving a legal custodian under subsec. (1)(a)1. of the above definition. The Committee interprets that definition as applying to a parent or other person having legal custody under a court order or judgment in one of the specified types of actions. That is, both the "parent" and the "other person" must have custody as a result of court order or judgment.

1989 Wisconsin Act 31, section 2836am, created § 948.01(1r) to provide: "'Legal custody' has the meaning given in § 767.001(2)."

5. In State v. Campbell, 2006 WI 99, 294 Wis.2d 100, 718N.W.2d 649, the court rejected the defendant's claim that the trial court erred when it prevented him from collaterally attacking the custody order on the ground that his wife obtained the order by fraud. The supreme court concluded that "a court

may permit a collateral attack on a judgment or order procured by fraud if the fraud is jurisdictional, making the judgment or order void, thereby negating an element of a crime, or if the fraud raises an affirmative defense to the crime. Because Campbell's allegations of fraud do not tend to negate any element of a crime and do not constitute an affirmative defense, the circuit court properly excluded evidence of the alleged fraud and prevented Campbell from collaterally attacking the custody order." 2006 WI 99, ¶4.

6. Section 948.31(1) applies to orders resulting from several types of legal proceedings: divorce, legal separation, annulment, custody, paternity, guardianship, or habeas corpus. The applicable term should be specified in the blank provided.

7. Add "or consent of the court" if court consent is raised by the evidence. See discussion in note 2, supra.

8. See § 939.22(48). Where the custodial parent consents to the taking of the child based on the defendant's misrepresentation about the nature of the taking, "public policy calls for treatment of the consent . . . as a nullity." State v. Inglin, 224 Wis.2d 764, 773, 592 N.W.2d 666 (Ct. App. 1999), citing § 939.48(22)(c).

9. The source of the knowledge requirement is § 939.23(3), which provides that whenever the word "intentionally" is used in a criminal statute, "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'."

In State v. Britzke, 108 Wis.2d 675, 683, 324 N.W.2d 289 (Ct. App. 1982), the court of appeals interpreted the prior version of the statute defining this offense. The court held that knowledge of the existence of the court order is sufficient; it is not necessary to prove that the defendant knew the order had the effect of granting "legal custody." [Affirmed on other grounds, 110 Wis. 728, 329 N.W.2d 207 (1983), per curiam.]

The Committee concluded that this means that knowledge of what "legal custody" means is not required. The intent element is satisfied if the defendant knew that the court order existed and knew that it had the effect of transferring the custody of the child. This is consistent with the court's definition of "legal custody" as any custody transferred under a court order (even if that order affects only the "physical custody" of the child).