

**2167A INTERFERENCE WITH CUSTODY OF A NONMARITAL CHILD —
§ 948.31(2)¹****Statutory Definition of the Crime**

Interference with the custody of a child, as defined in § 948.31(2) of the Criminal Code of Wisconsin, is committed by one who (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours)² from the (mother of the child) (father of the child, if he has been granted legal custody) without the consent³ of the (mother) (father) where the child is a nonmarital child whose parents have not intermarried.

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.⁴
2. (Name of parent) was the (mother) (father who had been granted legal custody) of (name of child).
3. (Name of child) is a nonmarital child.

A nonmarital child is one who is neither conceived nor born while his or her parents are lawfully married to each other and whose parents have not subsequently married each other.⁵

4. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours)⁶ from (name of parent) without(his) (her) consent.⁷

"Without consent" means no consent in fact.⁸

The act need not be accompanied by force or violence.

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 2167A was originally published in 1989. This revision was approved by the Committee in April 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.31(2), 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 1835A which applied to what was essentially the same offense under § 946.71(4), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

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.

1. Wis JI-Criminal 2167A is drafted for a violation of § 948.31(2) which involves taking a child from the mother of a nonmarital child or from the father of the child, if he has been granted legal custody. For a case involving a taking of a marital child from the parents, see Wis JI-Criminal 2167.

In State v. Hill, 91 Wis.2d 446, 283 N.W.2d 451 (Ct. App. 1979), the court held that the then-existing version of the statute replaced by § 948.31(1) did not deny equal protection of the laws or due process to fathers of nonmarital children.

2. Section 948.31(2) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours . . ." The Committee interprets this statute as prohibiting any causing to leave, any taking away, and the withholding for more than 12 hours. That is, the "for more

than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking. [Note: the "withholding" alternative under this statute does not include a reference to "beyond the court-approved period" that is included in sub. (1)(b) of § 948.31(1).]

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 under § 948.31(1)(b). 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.

3. Section 948.31(2) (as amended by 1989 Wisconsin Act 31, section 2836ym) concludes with the statement: "This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding 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.

4. 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.

5. This definition of "nonmarital child" is based on the one provided in § 990.01(23m). Both the § 990.01(23m) definition and the statement of this offense in § 948.31(2) include the reference: "where parents do not intermarry under s. 767.60." Section 767.60 provides that a nonmarital child becomes a marital child "[i]n any case where the father and mother of any nonmarital child shall enter into a lawful marriage." Since the section apparently applies to any subsequent marriage of the parents of a nonmarital child, there appeared to be no reason to include it in the instruction.

6. Section 948.31(2) does not require that the acts be done "intentionally." (Compare § 948.31(1)(b) and § 946.71(4), 1985-86 Wis. Stats., which do include "intentionally.") The Committee assumed this was not an inadvertent omission and neither "intentionally" nor any knowledge requirement is included in the instruction. (Compare Wis JI-Criminal 2166 for violations of § 948.31(1)(b).)

7. Add "or consent of the court" if there is evidence of court consent in the case. See note 3, supra.

8. See § 939.22(48). Where a 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).